Federal Court Cour fédérale

Date: 20230918

Docket: IMM-6608-22

Citation: 2023 FC 1249

Ottawa, Ontario, September 18, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DEEPARANI HARISHKUMAR DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Deeparani Harishkumar Dhaliwal, seeks judicial review of a decision of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board of Canada, dated June 23, 2022, denying the Applicant's application to sponsor her husband to come to Canada as a member of the family class.

[2] The doctrine of *res judicata* entails that an appeal may not be heard if a matter has already been decided by the decision-maker on the same facts. The IAD found that the preconditions for *res judicata* are met in this case, that the evidence proffered after the IAD's 2016 decision in the Applicant's case does not justify an exception, and that the Applicant did not establish that it would be interests of justice to allow a new hearing to assess credibility.

[3] The Applicant submits that the IAD failed to meaningfully grapple with the Applicant's evidence, rendered unreasonable findings, and breached procedural fairness in failing to provide the Applicant with an oral hearing.

[4] For the reasons that follow, I find that the IAD's decision is reasonable. This application for judicial review is dismissed.

II. Facts

A. *The Applicant*

[5] The Applicant is a 38-year old Canadian citizen. She obtained permanent residence in Canada in 2010 after landing with her ex-husband under the Skilled Worker Class. She separated from her ex-husband in October 2011 due to his abusive behaviour.

[6] This is the Applicant's fourth attempt to sponsor her current husband to come to Canada. The Applicant first met her husband, a 35-year-old citizen of India, on November 21, 2011.

Following the wishes of her then-sick mother, the Applicant and her husband got married on December 9, 2011, in a Sikh religious ceremony.

[7] The Applicant first attempted to sponsor her husband in 2012, shortly after their marriage. The application was refused because the Applicant's separation from her ex-husband was not legally recognized in Canada and her current marriage was thus considered invalid.

[8] The Applicant obtained a divorce in Canada on February 1, 2013. She and her husband had a second wedding on March 10, 2013, in accordance with Hindu religious tradition. The Applicant submitted her second sponsorship application for her husband in July 2013.

[9] During the processing of this application, the Applicant gave birth to her son on July 4, 2014. The Applicant's son is a Canadian citizen but resides in India with the Applicant's husband and her husband's parents.

[10] The second sponsorship was refused in August 2014, based on concerns about the genuineness of the marriage. The Applicant appealed the decision to the IAD, which upheld the decision, noting various concerns, including inconsistencies in the evidence, the genuine nature of the relationship and communications, and a lack of DNA evidence to prove the Applicant's husband was her son's father ("2016 IAD Decision"). The Applicant sought judicial review of the IAD's decision but this Court denied her request for leave.

[11] The Applicant and her husband submitted a third sponsorship application in September 2016, which was also refused based on concerns regarding the genuineness of the relationship. The Applicant appealed the refusal to the IAD. The IAD upheld the refusal without holding a hearing based on the application of the doctrine of *res judicata*, despite the Applicant and her husband providing DNA evidence establishing their son's paternity ("2018 IAD Decision"). The Applicant again sought judicial review, but her request for leave was denied.

[12] For her fourth sponsorship application, the Applicant requested consideration on humanitarian and compassionate grounds, noting in particular the Applicant's fragile emotional state and the best interests of their child ("BIOC"). The visa officer (the "Officer") interviewed the Applicant, noted discrepancies in the statements of the Applicant and her husband, and refused the application. The Applicant appealed this decision to the IAD.

B. *Decision under Review*

[13] In a decision dated June 23, 2022, the IAD dismissed the Applicant's appeal. The determinative issue before the IAD was whether it should exercise its discretion not to apply the doctrine of *res judicata*.

[14] The IAD noted the evidence that there was a child of the marriage and that the Applicant and her husband continue to jointly raise the child. The IAD considered two decisions of this Court regarding the probative value of a child of a marriage as evidence of the genuineness of a marriage: *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122 ("*Gill*") and *Dhaliwal v Canada (Citizenship and Immigration)*, 2012 FC 1182 ("*Dhaliwal*").

[15] In *Gill*, Justice Barnes found that great weight must be attributed to the birth of a child in assessing the genuineness of a marriage. In *Dhaliwal*, Justice Hughes held that the birth of a child is not conclusive evidence of the genuineness of a marriage but that where there is no question of paternity, it must be viewed as weighing in favour of genuineness. Justice Hughes also noted that a lack of credible evidence from the parties could overwhelm the evidence that there is a child of a marriage. The IAD preferred the reasoning in *Dhaliwal* and adopted Justice Hughes's reasoning, finding that the existence of a child of marriage favours its genuineness but is not determinative of the issue.

[16] The IAD further noted that the test under the two prongs of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*") is disjunctive, citing *Sidhu v Canada (Citizenship and Immigration)*, 2020 FC 443 at paragraphs 24-28 ("*Sidhu*"). When assessing whether the marriage was entered into primarily for immigration purposes under subsection 4(1)(a) of the *IRPR*, the focus is on the intentions of the parties at the time of the marriage. By contrast, evidence of a continuing relationship is more relevant when assessing the genuineness of the marriage under subsection 4(1)(b).

[17] The IAD noted that in *Sidhu*, my colleague Justice Favel found that the new evidence presented spoke mostly of a continuing relationship and not of the couple's initial intent when getting married. The IAD found this applicable to the present appeal.

[18] The IAD then considered the BIOC and found that in the Applicant's case, it has already been found that the existence of a child does not establish that her marriage is genuine or that it

was not entered into primarily for immigration purposes. The IAD found that in light of the Applicant's failure to establish that the marriage is not fraudulent, the BIOC does not favour holding another IAD hearing on the matter.

[19] The IAD concluded the Applicant had not established it would be in the interests of justice to allow the Applicant and her husband to have their credibility reassessed in a new hearing. The IAD determined it was not prepared to exercise its discretion to allow the appeal to proceed, noting the conditions for the application of *res judicata* were met and that the new evidence was not sufficiently compelling to merit an exception, particularly given the first prong under subsection 4(1) of the *IRPR*.

III. Issues and Standard of Review

[20] This application for judicial review raises the following issues:

A. *Whether the IAD's decision is reasonable.*

B. *Whether there was a breach of procedural fairness.*

[21] The parties agree that the first issue is to be reviewed on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[22] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[23] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[24] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[25] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. Analysis

[26] The Applicant submits that the IAD failed to meaningfully grapple with the submissions, rendered unreasonable findings, and breached procedural fairness in failing to hold an oral hearing for concerns relating to credibility.

A. *Reasonableness*

[27] The Applicant submits that while the conclusion in the 2016 IAD Decision was that the marriage was not genuine or was entered into for an improper purpose, the bulk of the IAD's analysis was focused only on the genuineness of the marriage, and not on its improper purpose. The Applicant relies on and attempts to distinguish *Sandhu v Canada (Citizenship and Immigration)*, 2014 FC 834 (at para 15) ("*Sandhu*"), where the Court found that if a previous IAD decision was based largely on a finding of improper purpose, new evidence is likely not able to overcome such a finding. The Applicant submits that there is no indication in the IAD's reasons that it actually grappled with these submissions or listened to the Applicant (*Vavilov* at paras 127-128; *Shubar v Canada (Citizenship and Immigration)*, 2022 FC 186 at paras 12–13).

[28] Further, the Applicant submits that the IAD's error is compounded by the fact that the Minister made submissions in response to the Applicant's argument, which the IAD did not address, and this is unreasonable given that the focus of the 2016 IAD Decision was one of two central issues raised by the Applicant, regarding why *res judicata* should not apply.

[29] Similarly, the Applicant submits that the IAD failed to grapple with the Applicant's submissions regarding the fact that the 2016 IAD Decision was decided based on the absence of any DNA evidence of paternity or evidence of the parents' ongoing caregiving for their child. The Applicant's evidence that was not before the IAD in the 2016 IAD Decision, and that was not considered in the 2018 IAD Decision because the case was decided on *res judicata*, was directly relevant to the conclusions reached in the 2016 IAD Decision. The Applicant's submissions in this regard were central to their arguments for why *res judicata* ought not to apply and the IAD gave them no consideration.

[30] The Applicant submits that the IAD also failed to grapple with the Applicant's submission that the Officer in this case had appeared to accept the genuineness of the marriage. This was an important submission for the IAD to have considered, as the Court in *Sandhu* found that a finding that a marriage is genuine is a significant factor in determining whether to apply *res judicata* (*Sandhu* at paras 13, 15).

[31] The Applicant further submits the IAD did not properly justify its conclusions. First, the IAD simply stated that it adopted the Court's reasoning in *Dhaliwal*, without applying it to the facts of the Applicant's case. In *Dhaliwal*, the Court noted that the IAD's previous decisions had

considered the birth of the child as evidence of the genuineness of the marriage but found it was not conclusive. In the present case, as the Applicant argued, the IAD in the 2016 IAD Decision did not have evidence confirming the child's paternity and so did not consider the birth as evidence of the genuineness of the marriage. The IAD in the 2018 IAD Decision also did not make any findings regarding the birth of the child despite having evidence of paternity before it.

[32] The IAD also found that the situation in the present case is the same as in *Sidhu*, despite the Court's caution in *Sandhu* that no two *res judicata* cases are alike and each must be decided on its own facts (*Sandhu* at para 14). According to the Applicant, the IAD committed the same error identified in *Sandhu*.

[33] The Applicant argues the IAD unreasonably stated that while the Applicant's new evidence was probative of some of the issues in the 2016 IAD Decision, it was clearly not probative of them all, without any elaboration or justification. The IAD does not specify what concerns from the 2016 IAD Decision remained unaddressed and the reviewing court is not able to follow its reasoning (*Vavilov* at para 102).

[34] Finally, the Applicant argues that the IAD unreasonably assessed the BIOC. The IAD found the BIOC did not justify granting an oral hearing, but this reflects the wrong consideration. The question was, in light of the BIOC, whether applying the *res judicata* doctrine would work an injustice (*Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321 at para 20; *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 67). The Applicant submits that the IAD failed to consider that preventing family reunification and denying the child's right

to be with both his parents through the application of *res judicata* would be unjust. The Applicant submits this Court has found that preventing family reunification is a potential injustice the IAD should consider and give great weight to in considering its discretion to hear a second appeal (*Sami v Canada (Citizenship and Immigration)*, 2012 FC 539 at para 42; *Kamara v Canada (Citizenship and Immigration)*, 2021 FC 1117 ("*Kamara*") at para 23).

[35] The Respondent submits that the decision is reasonable and the Applicant is merely dissatisfied with the result. The Respondent submits the 2016 IAD Decision was clearly based on both the genuineness of the marriage and the primary purpose of the marriage when it was entered into. The Respondent points to the fact that the 2016 IAD Decision and the 2018 IAD Decision both state that the appeal in the 2016 IAD Decision was dismissed on both grounds. Further, the Respondent argues the IAD in this case considered the Applicant's arguments regarding the 2016 IAD Decision, given that the IAD noted that the decision was decided on both grounds, as well the fact that the IAD noted the distinction in the two-pronged test under subsection 4(1) of *IRPR*. The fact that the IAD did not refer to all the Applicant's submissions does not raise an arguable issue (*Vavilov* at para 91).

[36] The Respondent submits that the Applicant's submission that the IAD did not grapple with her submissions regarding the paternity of her child or the couple's ongoing care of the child does not give rise to an arguable issue because the IAD addressed those submissions at paragraphs 18-19 and 23-24 of the decision. The Applicant's submission is also immaterial because her appeal was dismissed based on the primary purpose of the marriage.

[37] The Respondent argues that the Applicant's argument that the Officer appeared to accept the marriage is genuine is incorrect, as demonstrated by the Officer's conclusion that they were not satisfied the marriage was genuine or not entered into for an improper purpose. The argument is immaterial because the IAD based its decision on the marriage's improper purpose.

[38] The Respondent argues the Applicant's submissions regarding the IAD's failure to provide transparent, intelligible and justified reasons are merely a restatement of her arguments regarding the IAD's failure to grapple with her submissions. The Applicant's complaint is simply that she wanted more reasons, but the IAD's decision is reasonable when read as an organic whole. Further, the Respondent contends that the IAD was entitled to rely on *Sidhu* as it did, because the case was sufficiently similar to the present case.

[39] I agree with the Respondent that the 2016 IAD Decision was clearly based on two determinative issues: the genuineness of the Applicant's marriage and the primary purpose of the marriage when entered into, as required under the *IRPR*. Contrary to the Applicant's submissions that the 2016 IAD Decision deals squarely with the issue of the genuineness of the marriage and not the intent to enter into the marriage, the IAD in the present decision summarized the 2016 IAD Decision as follows:

> Of note from this 2016 decision is the finding that not only had the Appellant failed to establish that the marriage is genuine, <u>but she also failed to establish that it had not been entered into primarily for immigration purposes</u>.
>
> [Emphasis added]

[40] In the same vein, the 2016 IAD Decision raised numerous credibility concerns regarding the Applicant's evidence, and found the following regarding the effect of these concerns:

> The inconsistency in evidence from interview to interview and even before the Panel is remarkable. It permeated every area of the relationship development and undermined the genuineness of the intentions of both parties. […]

[41] This finding clearly reflects the IAD's attention to, and engagement with, both prongs of the test outlined under subsection 4(1) of the *IRPR*, which relate to the genuineness of the marriage and the intentions of the parties at the time the marriage was entered into.

[42] These two bases for the 2016 IAD Decision are also reflected in the 2018 IAD Decision, and the fact that the IAD did not specifically outline or restate all of the Applicant's submissions does not equate to the finding that they were not grappled with or addressed. Regarding the 2016 IAD Decision, the 2018 IAD Decision states that the "appellant and the applicant did not establish with clear, convincing and credible evidence that their marriage was not entered into for immigration purposes and that it is a genuine relationship" [emphasis added].

[43] The Applicant appears to want more reasons for the IAD's determinations, but a global review of the reasons reveals that they are reasonable in light of the factual and legal constraints bearing upon it (*Vavilov* at para 99). I agree with the Respondent that the Applicant has not raised a reviewable error in the IAD's decision and that, in large part, the Applicant requests that

this Court reweigh the evidence that was before the IAD, which is not this Court's role on reasonableness review (*Vavilov* at para 125).

B. *Procedural Fairness*

[44] The Applicant submits the IAD breached procedural fairness, as its reasons demonstrate concerns with the credibility of the Applicant's marriage but, despite her request that the IAD hold an oral hearing if it had concerns with the credibility of the evidence, the IAD failed to do so. In reply to the Respondent's submission that the Applicant only requested a hearing if the IAD had concerns with her *new* evidence, the Applicant submits the substance of her submissions remains that the IAD clearly expressed credibility concerns but failed to provide her and her husband an opportunity to respond through *viva voce* evidence.

[45] The Applicant submits that the IAD's statement that the Applicant has previously failed to establish she is not in a fraudulent immigration marriage, coupled with its conclusion that it would not be in the interests of justice to allow the Applicant and her husband to have their credibility reassessed at an oral hearing, demonstrates that the IAD had credibility concerns. The Applicant relies on *Kamara*, where the Court found the IAD's decision unreasonable but noted that given the IAD's determination regarding the genuineness of the marriage was based largely on credibility, the IAD may have been assisted by hearing *viva voce* evidence (*Kamara* at paras 30-33).

[46] The Applicant distinguishes the present case from *Singh v Canada (Citizenship and Immigration)*, 2015 FC 1055 ("*Singh*"), where the Court found the IAD did not breach

procedural fairness by refusing to hold an oral hearing. In that case, the Court specifically noted the IAD had told the applicant it would not hold an oral hearing if it decided to dismiss the appeal on the basis of *res judicata* (*Singh* at para 20). In the present case, the IAD made no such statement and suggested a hearing may occur if more information was needed to decide the case.

[47] The Respondent submits the IAD was not required to hold an oral hearing. The Respondent notes that the Applicant did not request the IAD to hold an oral hearing if it had concerns with the credibility of her evidence, but rather her request was with respect to concerns related to her new evidence specifically. The Respondent submits that in any event, the question is whether the procedure was fair with regard to all the circumstances and specifically whether the Applicant knew the case to be meet and had an opportunity to respond (*Canadian Pacific Railway Company* at paras 33-56; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25).

[48] The Respondent argues that the Applicant knew the case to meet because her previous appeal before the IAD was dismissed on the basis of *res judicata* and she knew the present appeal concerned the same issue. Further, the Applicant and her husband had been interviewed in all four sponsorship applications and provided oral testimony in the 2016 IAD Decision. They provided sworn statements in the previous proceedings as well as in the present case.

[49] I agree with the Respondent. While the underlying issues concerned credibility and the IAD may have been assisted by *viva voce* evidence, the Applicant has already been interviewed several times and the IAD did not make any new credibility findings of which the Applicant was

unaware. The IAD's findings concerned the sufficiency of the Applicant's new evidence in the context of its discretionary decision whether or not to apply the doctrine of *res judicata.* For this reason, I find that the IAD's decision is procedurally fair.

V. Conclusion

[50] This application for judicial review is dismissed. The IAD's decision bears all the hallmarks of reasonableness, as per *Vavilov,* and is procedurally fair. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6608-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
Amy King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT