Federal Court  Cour fédérale

Date: 20100224

Docket: IMM-2996-09

Citation: 2010 FC 219

Ottawa, Ontario, February 24, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HUNG VAN NGUYEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated May 21, 2009 (Decision), in which the IAD allowed the Respondent's sponsorship appeal and determined that the prior refusal of his sponsorship application was not valid in law.

BACKGROUND

[2] The Respondent is a Canadian citizen who attempted to sponsor a spouse he married in 2004 (sponsored spouse) and with whom he had a child in 2005.

[3] Prior to a decision being made on the Respondent's application, Citizenship and Immigration Canada (CIC) received a letter stating that the Respondent was married to another woman (Ms. Nguyen), and was the father of her child. Ms. Nguyen claimed to have had been in a common-law relationship with the Respondent since 1996. Attached to this letter was a copy of the marriage certificate between the Respondent and Ms. Nguyen and a statutory declaration which was sworn by Ms. Nguyen in January, 2006. A further statutory declaration was received by CIC from Ms. Nguyen in November, 2006. In January, 2007, Ms. Nguyen sent further correspondence to immigration officials in which she claimed that the Respondent is a bigamist who is committing an illegal offence.

[4] The Respondent's application was rejected pursuant to section 117(9)(*c*) of the Act. He filed a notice of appeal for this decision in August, 2007.

[5] The Respondent provided submissions in which he denied living in a common-law relationship with, and being married to, Ms. Nguyen.

[6] In November of 2007, Ms. Nguyen provided another statutory declaration in which she recanted that she and the Respondent had lived in a common-law relationship. Rather, she stated that she and the Respondent had lived as roommates from 2003-2007.

DECISION UNDER REVIEW

[7] The IAD found that the Respondent was "persuasive in describing living with [Ms. Nguyen] as a roommate." However, the IAD noted that "the evidence became more confusing as the appellant had difficulty giving evidence about an alleged marriage to which he adamantly denied." Nonetheless, the IAD believed that, although the Respondent did not have many details, this was due to a "genuine lack of knowledge rather than an attempt to deceive the panel."

[8] The Respondent's marriage to the sponsored spouse was determined to be his second marriage. While the Respondent had tried to sponsor his sponsored spouse in May, 2006, he was unable to do so because "the three-year financial undertaking had not passed since the landing of his former spouse on May 22, 2003." The Respondent and his former spouse separated shortly thereafter.

[9] The IAD was satisfied with the Respondent's evidence that he was not in a common-law relationship with Ms. Nguyen. It accepted the Respondent's evidence that he had asked Ms. Nguyen to provide a birth certificate for the child and had offered to take a paternity test. The IAD also noted that the month-long delay by her counsel in forwarding the first complaint from 2006 to CIC

was cause for concern as to the veracity of the documentation. The IAD held that "the voracity (*sic*) of [Ms. Nguyen] in threatening criminal charges for bigamy and fraud, as set out in her documentation … gives the documentation little weight."

[10] Moreover, the IAD determined that the Respondent was credible "in describing his lack of contact with [Ms. Nguyen] once he moved from her residence."

[11] The IAD was satisfied that the Respondent was not legally married to, and had not lived in a common-law relationship with Ms. Nguyen. The Respondent also denied knowledge of how she obtained the marriage certificate, and has not taken any action to have the marriage certificate voided because he believed the marriage to be false.

[12] The IAD found the totality of the evidence persuasive. Furthermore, it determined that the family photographs taken during the Respondent's visit to his wife and daughter were "one indicia of a genuine relationship, especially with his daughter." Thus, the IAD was satisfied that the Respondent "has established that he was not the spouse of [Ms. Nguyen] when his marriage to the applicant took place on May 5, 2004."

ISSUES

[13] The Applicant submits the following issues on this application:

1. Whether the IAD committed a reviewable error in ignoring or misconstruing evidence in its finding of facts;
2. Whether the IAD failed to provide adequate reasons for its findings of fact;
3. Whether the IAD acted without jurisdiction by considering factors that were irrelevant to the determination of the issue.

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable in these proceedings:

Family reunification	Regroupement familial
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

[15] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are also applicable in these proceedings:

117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	**117(9)** Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

…	…
(*c*) the foreign national is the sponsor's spouse and	*c*) l'époux du répondant, si, selon le cas :
(i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or	(i) le répondant ou cet époux étaient, au moment de leur mariage, l'époux d'un tiers,
(ii) the sponsor has lived separate and apart from the foreign national for at least one year and	(ii) le répondant a vécu séparément de cet époux pendant au moins un an et, selon le cas :
(A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or	(A) le répondant est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre étranger,
(B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor;	(B) cet époux est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre répondant;

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[17] The issue of whether the IAD erred in its assessment of the evidence before it is a factual issue. Accordingly, it will be reviewed on a standard of reasonableness. See *Dunsmuir*, above, at paragraph 64. The Applicant has alleged that the IAD exceeded its jurisdiction by considering irrelevant factors. However, precedent jurisprudence makes it clear that the determination of whether or not a decision maker relied on irrelevant factors in making a discretionary decision is reviewable on a standard of reasonableness. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. No. 39 at paragraph 53 (QL); *Dunsmuir* at paragraph 14.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[19] Whether the IAD failed to provide adequate reasons for its conclusion is an issue of procedural fairness, which is to be reviewed on a standard of correctness. See *Weekes (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 293, 71 Imm. L.R. (3d) 4.

ARGUMENTS

The Applicant

IAD Ignored Evidence

[20] The Applicant submits that the IAD failed to consider the existence of the Marriage Certificate and Marriage License dated 2005 which showed the Respondent as groom and Ms. Nguyen as bride.

[21] The IAD clearly erred in failing to consider the marriage certificate provided by Ms. Nguyen. The IAD found that the "voracity of [Ms. Nguyen] in threatening criminal charges for bigamy and fraud, as set out in her documentation, unfounded for appeal purposes and gave the documentation little weight." Nonetheless, the IAD erred in not considering the documents, since jurisprudence has held that government documents are presumed to be valid unless proven otherwise. See, for example, *Nika v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 656, [2001] F.C.J. No. 977 at paragraph 12. The IAD erred in ignoring these documents in its analysis and its finding that the Respondent was never married to, or lived in a common-law relationship with, Ms. Nguyen.

[22] No evidence was presented with regard to the validity of the documents. Rather, the Respondent simply denied the marriage and denied living with Ms. Nguyen, even though their driver's licenses had the same address.

[23] The Respondent failed to provide any evidence such as a handwriting sample or a letter from the Minister who performed the ceremony to show that the certificate was invalid. The Respondent provided only “his vehement denial and a Recantation from [Ms. Nguyen] which does not even mention the marriage certificate which she had earlier provided to CIC.”

[24] The IAD further erred by ignoring the inconsistencies and inadequate testimony of the Respondent. The Respondent could not remember significant details with regard to his situation, and also failed to provide any reasons for his inability to do so. Furthermore, he provided inconsistent evidence with regard to whether or not he knew Ms. Nguyen.

Inadequate Reasons

[25] The IAD failed to provide adequate reasons to support its conclusion against valid documentary evidence which demonstrated the contrary. The IAD did not explain why it placed no weight on this documentary evidence, especially in light of its earlier description of this evidence as persuasive, and given the fact that the evidence included official government documents whose validity has not been challenged. See, for example, *Hilo v. Canada (Minister of Employment and Immigration)*(1991), 130 N.R. 236, 15 Imm. L.R. (2d) 199.

Consideration of Irrelevant Factors

[26] The IAD erred by considering material that was irrelevant to the purpose of the appeal. The IAD relied on photographs provided by the Respondent as a positive factor to establish the veracity of the relationship between the Respondent and his spousal sponsor. The Applicant contends that section 25 of the Act cannot appropriately be used in this appeal to support the claim and make the spousal sponsor a member of the family class. Rather, the provision can only be used where the decision was made independent of the factors enumerated in section 25. See sections 25 and 65 of the Act.

The Respondent

[27] The Respondent has not filed a memorandum of arguments or a notice of appearance for this hearing.

ANALYSIS

[28] The Respondent has made no submissions on this application and no one appeared on his behalf at the hearing.

[29] I have examined the Applicant's written submissions and heard counsel on behalf of the Applicant.

[30] My review of the record confirms that the issues raised by the Applicant are justified and supported by the record. The Decision contains the reviewable errors outlined in the Applicant's submissions which I hereby adopt as the reasons in this decision.

[31] In addition, immediately prior to the hearing, the Respondent, Mr. Van Nguyen, faxed the Court and provided his consent to this application. The reason he gave was that "there has been a breakdown in my relationship with my spouse. I am not going to pursue the sponsorship application any further."

[32] In dealing with this matter upon return for reconsideration the IAD should take note of this advice from the Respondent and proceed accordingly.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The decision is set aside and the matter is referred back to a differently constituted panel of the Appeal Division for re-determination.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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