Federal Court Cour fédérale

Date: 20130704

Docket: IMM-9999-12

Citation: 2013 FC 748

Ottawa, Ontario, July 4, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SON HUYNH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of a member of the Immigration Appeal Division of the Immigration and Refugee Protection Board [the Board], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The Board dismissed the Applicant's appeal of a visa officer's decision to refuse permanent residency status for the Applicant's wife, by concluding that she was not a spouse within the meaning of the Act, pursuant to subsection 4(1) of the Act Regulations [the Regulations].

I. Issues

[3] The issues raised in the present application are as follows:

A. Can the Board make a finding that a foreign national shall not be considered a spouse if the primary purpose was to acquire any status or privilege under the Act under section 4(1)(a) of the Regulations, without making a finding on the genuineness of the marriage?

B. Did the Board err by failing to apply the presumption of legitimacy and by failing to give evidentiary weight to the existence of a child of the marriage?

C. Did the Board commit a legal error by considering the facts at the time of the visa office interview, rather than at the time of the appeal to the Board?

D. Did the Board have to consider and apply the Convention on the Rights of the Child?

II. Standard of review

[4] At paragraph 2 of its reply to the Respondent's memorandum of argument, the Applicant asserts that the applicable standard of review is correctness.

[5] While the Respondent does not address the standard of review separately, it does refer to "the reasonableness" of the Board's decision on several occasions in its memorandum of argument.

[6] All four issues raised are reviewable on the standard of reasonableness (*Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 at para 18; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54). Moreover, even if the standard of correctness could arguably be applied to

the first question, as to whether a finding of genuineness must be made before making a finding that the primary purpose of the marriage is immigration, my decision below would not be different.

III. Background

[7] The Applicant, Son Huynh, is a 49-year-old Canadian citizen. He has two children from a previous relationship, aged 19 and 21.

[8] On February 16, 2009, the Applicant married To Hung Tran, a 37-year-old Vietnamese citizen. After Ms. Tran was introduced to the Applicant by her brother, the Applicant visited Ms. Tran in Vietnam about one month later. During that visit, the Applicant and Ms. Tran were engaged.

[9] Ms. Tran was previously married from 2001 to 2004 to Ngoc Chau Nguyen, a Canadian citizen. She met Nguyen in December 2000 and married him in October 2001. Nguyen sponsored an application for permanent residency by Tran shortly after they were married. This application was denied in August 2002. An appeal was abandoned in 2003, shortly before they were divorced. Ms. Tran stated that their relationship broke down because they did not understand each other very well and that the denial of her permanent residency application caused difficulty in their relationship.

[10] On March 20, 2009, Ms. Tran applied for permanent residency status in Canada, sponsored by the Applicant. On February 23, 2011, the application was refused by a visa officer. The Applicant appealed this decision to the Board.

[11] On December 7, 2011, Ms. Tran gave birth to a son, allegedly fathered by the Applicant.

IV. Analysis

A. *Can the Board Make a Finding that a Foreign National Shall not be Considered a Spouse if the Primary Purpose Was to Acquire any Status or Privilege Under the Act Under Section 4(1)(A) of the Regulations, Without Making a Finding on the Genuineness of the Marriage?*

[12] Simply put, the Board can. The Applicant argues that the Board cannot find that the primary purpose of the marriage was immigration to Canada, without making a finding of genuineness. He argues that a proper interpretation of section 4(1) of the Regulations, in view of the Act as a whole, supports this view.

[13] The wording of subsection 4(1) of the Regulations is unambiguous; a finding of bad faith can involve <u>either</u> a finding that the marriage was entered into primarily for the purpose of immigration <u>or</u> that the marriage is not genuine. It is a disjunctive test. This interpretation was recently confirmed by Chief Justice Paul Crampton in *Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522, at paras 28-31.

[14] Further, the Regulatory Impact Analysis Statement issued with the change to Section 4, is instructive and specifically states at pp. 1943 and 1944:

> Under the previous provision, it was difficult to properly identify relationships of convenience…However, a "bad faith" relationship is present when either of these related factors [a relationship is not genuine, or it was entered into primarily for the purpose of acquiring any status or privilege under the *Act*] is apparent…
> (1) Create a disjunctive relationship between the "genuineness" of the element and the "purpose" element of the bad faith assessment. This clarifies that a finding of bad faith can be made if either of these elements is present.

B. *Did the Board Err by Failing to Apply the Presumption of Legitimacy and by Failing to Give Any Evidentiary Weight to the Existence of a Child of the Marriage?*

[15] The Applicant argues that the Board's finding that there is no evidence of the paternity of the Applicant's son violates the presumption of paternity and inappropriately clouds the reasoning process of the Board. However, as the Applicant's wife Ms. Tran was not yet pregnant when she married the Applicant, her son's birth and the issue of paternity were subsequent to the finding by the Board of primary purpose being immigration at the time the marriage happened. As well, the Board specifically did not address the genuineness of the marriage, and correctly found that it did not have the discretion to consider humanitarian and compassionate factors if the marriage was entered into primarily for the purpose of immigration. Nevertheless, the Board did take into account both the best interests of the child and the paternity issue as factors in reaching its decision. The Board did not err by failing to explicitly discuss these issues that post-dated the marriage. Moreover, while evidence about matters that occurred subsequent to a marriage can be relevant to considering whether the marriage was entered into primarily for the proposed acquiring any status or privilege under the Act, it is not determinative.

[16] In my view, it was reasonable for the Board to conclude that at the time Ms. Tran entered the marriage, she did so for the primary purpose of acquiring a status or privilege under the Act.

C. *Did the Board Commit a Legal Error by Considering the Facts at the Time of the Visa Office Interview, Rather Than at the Time of the Appeal to the Board?*

[17] The Board did not commit any error. The Applicant argues that by stating Ms. Tran was not pregnant at the time of the interview, the Board ignored her pregnancy at the time of the Appeal.

[18] While the Board is required to consider all the evidence before it, it did so here. The Board acknowledged the birth of the child, and also properly considered the circumstances of the marriage and credibility issues. Subsection 4(1) of the Act clearly specifies that the focus should be in the intentions of the parties when they entered into the marriage, in deciding whether the primary purpose is to acquire any status or privilege under the Act. The Board considered a number of factors in reaching its conclusions:

i. the inconsistency between Ms. Tran's explanation for the breakdown of her first marriage (lack of understanding each other before marriage) and the pace at which Ms. Tran and the Applicant became engaged, within one to two months of meeting each other;
ii. the gap in their ages and difference in personal circumstances, given the Applicant had two previous adult children from a previous relationship;
iii. no evidence of common interests;
iv. other concerns relating to contradictions on the evidence and the fact Ms. Tran's brother introduced Ms. Tran to both her spouses.

These are relevant factors to be considered (*Keo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1456, at para 25).

D. *Did the Board Have to Consider and Apply the Convention on the Rights of the Child?*

[19] The Board did consider the Convention on the Right of the Child, but gave it little weight in this case. The Board correctly considered the Convention and its application. There is no ambiguity as to the meaning of Section 4(1) of the Regulations and application of the Convention on the

Rights of the Child is not a factor in this case *(Bell Express Vu Limited Partnership v Rex,* 2002 SCC 42 at paras 28-29).

[20] Moreover, Section 67(1)(c) and Section 65 of the Act, when read in conjunction, clearly indicate that where a foreign national is found not to be a member of the family class, humanitarian and compassionate considerations do not need to be considered.

[21] The Board's decision was reasonable, transparent and intelligible and ought not to be reconsidered. The decision was "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick,* 2008 SCC 9).

[22] The Applicant's counsel has proposed two questions for certification:

a) When the Immigration Appeal Division of the Immigration and Refugee Board applies Section 4 of the Act Regulations, does the Board need, in order to address properly the question whether the primary purpose of a marriage was gaining admission to Canada,

   i. either to assume that the marriage was genuine at the time of marriage or to determine whether the marriage was genuine at the time of marriage, and

   ii. either to assume that a child of the mother who may be a child of the marriage was a child of the marriage or to determine whether the child was a child of the marriage?

[23] I have considered the Respondent's objection and the Applicant's reply to whether either question should be certified. On the basis that these questions do not concern the proper

interpretation of Subsection 4(1) of the Regulations and do not require any clarification or consideration by the Federal Court of Appeal in this regard, I agree with the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed and no question is to be certified.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Son Huynh v. MCI
PLACE OF HEARING:	Winnipeg, Manitoba
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