Federal Court  Cour fédérale

Date: 20131105

Docket: IMM-849-13

Citation: 2013 FC 1121

Ottawa, Ontario, November 5, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

HAITIAN PING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr Ping, a Canadian citizen, married Ms Zhou, a citizen of China, on April 28, 2007. He has applied twice to sponsor Ms Zhou for immigration to Canada. The applicant now seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of the decision of the Immigration Appeal Division [the "IAD"] of the Immigration and Refugee Board made on December 5, 2012. In its decision, the IAD dismissed the spousal sponsorship application on the basis that it was *res judicata*.

[2] For the reasons that follow, the application is dismissed.

Background

[3] The applicant was born in China in 1952. He married his first wife in December 1979. They divorced on January 7, 2007.

[4] The applicant's second wife, Ms Zhou, was born in January 1975, married her first husband in May 1999, had one daughter, and divorced on March 6, 2006.

[5] The applicant met Ms Zhou via the internet. He later travelled to China, and three weeks after meeting Ms Zhou in person, they married on April 28, 2007.

[6] The first sponsorship application for Ms Zhou and her daughter was denied on May 26, 2008. The IAD dismissed the applicant's appeal on May 31, 2010 (*Ping v Canada (Minister of Citizenship and Immigration)*, [2010] IADD No 2209 [First Decision]) following a hearing. The IAD found that the applicant and his wife had not established that their marriage was genuine for several reasons, including the significant discrepancies and inconsistencies in their evidence without satisfactory explanation. The IAD upheld the decision of the visa officer that the marriage fell within section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, i.e., the marriage was not genuine and was entered into primarily for the purpose of acquiring status under the Act.

[7] The applicant applied a second time to sponsor his wife and her daughter in July 2011. On January 9, 2012, the visa officer refused the application on the same grounds that the marriage was not genuine and was for the purpose of acquiring status under the Act. The applicant appealed the decision to the IAD and the IAD then invited submissions on the issue of *res judicata* and abuse of process.

[8] The applicant's submissions asserted that special circumstances existed to permit a new hearing because he did not have legal representation at his first hearing due to a lack of financial resources and because he lacked proficiency in English.

[9] On December 5, 2012 the IAD dismissed the appeal (the "Second Decision") finding that the doctrine of *res judicata* applied and that no special circumstances existed to warrant an exception to the doctrine.

[10] This application is for judicial review of the Second Decision.

The decision under review

[11] The IAD found that the second application was *res judicata* as the three preconditions established in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25, [2001] SCJ No 46 [*Danyluk*] had been met:

> (1) the same question has been decided in earlier proceedings;
>
> (2) the judicial decision which is said to create the estoppel was final; and

> (3) the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.

[12] The IAD noted that the doctrine of *res judicata* would not prevent an applicant from launching a second application based on a change of circumstances. It also noted that an exception to *res judicata* exists where "fresh, new evidence, previously unavailable, conclusively impeaches the original results" (*Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63 at para 52, [2003] 3 SCR 77 [*CUPE*]).

[13] However, the IAD found that the applicant had not provided new evidence sufficient to overcome the concerns identified in the earlier decisions regarding the purpose of the couple's marriage, including the differences in their age, incompatibility, their on-line meeting while the applicant was still married and residing with his first wife, that they married within three weeks of their first face-to-face meeting and that they had only superficial knowledge of each other and had not learned, shared or remembered basic information about each other because, as the IAD concluded, they did not intend their relationship to be lasting.

[14] The IAD found that the new evidence was more of the same type of evidence provided at the first application. Although the applicant provided evidence of ongoing communication with Ms Zhou, visits to China, and financial transactions, the IAD found that this did not address or overcome the earlier findings of the First Decision. The IAD also found that letters provided by the applicant's son and his step-daughter, although new evidence, could not address the earlier findings regarding the genuineness of the marriage because the son and step-daughter had little knowledge of the relationship, nor would permitting them to testify in person address these concerns.

[15] The applicant does not take issue with the IAD's finding that the three conditions for *res judicata* were satisfied, but only with its determination that an exception to the doctrine was not warranted.

[16] The applicant submits that the decision is unreasonable because the IAD erred: in its application of the *res judicata* doctrine; by misstating facts; and, by denying the applicant natural justice and procedural fairness.

Standard of Review

[17] As noted in *Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321 at paras 11-12, [2006] FCJ No 1661 [*Rahman*], each step of the *res judicata* analysis attracts a different standard of review. However, the only issue in this application is whether special circumstances exist to justify an exception. As this involves the exercise of discretion, it is reviewed on the standard of reasonableness.

[18] Where the standard of reasonableness applies, the role of the Court on judicial review is to determine whether the Board's decision "falls within a 'range of possible, acceptable outcomes which are defensible in respect of the facts and law'" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2009] 1 SCR 339). There may be several reasonable outcomes and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada*

(Minister of Citizenship and Immigration) v Khosa, 2009 SCC 12, [2009] 1 SCR 339 at para 59). The Court will not re-weigh the evidence or substitute any decision it would have made.

Did the IAD err in its application of res judicata?

[19] The applicant submits that the IAD failed to analyze the totality of the evidence and failed to consider that an injustice would result from the application of *res judicata,* including that the family could not be reunified. Although the IAD acknowledged his new evidence, such as photographs, recent trips to China, phone and Skype records demonstrating daily contact, pictures and money transfer receipts, the applicant submits that it did not analyze this new evidence which, in his view, addresses the earlier findings that the marriage was not intended to last.

[20] The applicant relied on *Sami v Canada (Minister of Citizenship and Immigration),* 2012 FC 539, [2012] FCJ No 552 [*Sami*], to support his position that evidence of commitment over time between the sponsor and the spouse can constitute special circumstances to overcome *res judicata* and to warrant hearing the case on its merits.

[21] The applicant submits that the IAD did not consider, or did not understand, the evidence that his wife attended at the hospital during his mother's dying days and regularly visits his mother's grave; that he pays for his step-daughter's private school fees; that the couple had jointly purchased an investment property in British Columbia; and that his ex-wife had retracted her previous statements indicating that his current marriage was fraudulent.

[22] The respondent notes that *CUPE* sets the bar very high and that while compelling new evidence of a genuine marriage could give rise to special circumstances capable of overriding *res judicata*, that evidence must do more than simply bolster the genuineness of the marriage (*Gharu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 237 at para 18, [2003] FCJ No 320 [*Gharu*]; *Anttal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 30 at para 19, [2008] FCJ No 180 [*Anttal*]).

[23] I agree that the jurisprudence has set a high bar for new evidence that could be considered as constituting special circumstances capable of overriding *res judicata*. As noted in *CUPE*, the new evidence must be practically conclusive of the matter.

[24] Although the applicant has pointed to jurisprudence where similar evidence to that offered by him has been found to constitute special circumstances, no two cases are exactly the same and it is not the nature of the evidence that is determinative but how that evidence addresses or overcomes the earlier findings.

[25] In *Sami*, the Court found that subsequent proof of a continuing relationship may overcome *res judicata* of a previous decision finding the relationship to be not genuine. In *Sami*, Justice Russell remarked at paras 78-79:

> 78 I agree with the Applicant that there is considerable jurisprudence to support the notion that proof of subsequent commitment can represent proof a marriage was genuine when it was entered into. The Applicant and Dhindsa adduced evidence to show that they have strengthened their marriage over the past seven years, and that they continue to be committed to their relationship. They provided substantial documentation to the IAD to show their commitment towards one another. There is also jurisprudence that

> new evidence can be relevant, even if the same type of evidence was submitted at the first appeal.
>
> 79 If a relationship is genuine and continues over time, it stands to reason that more photographs, cards, letters, and telephone bills will become available. Although evidence of the same kind may have been introduced before, it speaks to an aspect of the marriage which was not previously present: the commitment over time. Also, in this case, the IAD appears to have completely disregarded the evidence of the Applicant's most recent trip to India. I accept the Applicant's position that the IAD unreasonably erred in its assessment of the facts and ignored the existence of fresh and decisive evidence.

[26] Justice Russell concluded that the IAD failed to consider the evidence as a whole and noted how the new evidence responded to the key concerns of the IAD in the first appeal with respect to the applicant's knowledge of and relationship with her husband's family and their intent at the time of marriage.

[27] The Court has also reached the opposite conclusion, noting that new evidence to overcome the original intent of the marriage is not easily created after the marriage, even if the marriage endures over time. In *Gharu*, after numerous attempts at re-litigating her failed sponsorship applications, the applicant tried to overcome *res judicata* by introducing evidence revealing the genuine intentions of her husband at the time of the marriage. In dismissing the judicial review, Justice Gibson wrote, at paras 17-18:

> 17 With great respect, I am satisfied that an applicant seeking to relitigate on facts such as those now before the Court must present more than simply "...new evidence pertaining to a spouse's intent at the time of marriage." In a quotation from the reasons of the Tribunal for the decision here under review that appears earlier in these reasons, the Tribunal speaks of "relevant and permissible new evidence" that can be described as "decisive new evidence demonstrably capable of altering the result of the first hearing." The Tribunal continued:

> Decisive new evidence must be probative of the intention fixed in time by the relevant definition of the Act such as the intention of the applicant at the time of marriage, and must be fresh evidence which genuinely affect an evaluation of the intention rather than merely additional evidence that tries to bolster or create the intention.
>
> On the unique facts of this matter, including as they do four (4) sponsorships and related applications for landing in Canada, each rejected by a different Visa Officer on common grounds, each of which rejections could have been appealed to the Tribunal and two (2) of which were in fact so appealed, I adopt the foregoing comments of the Tribunal as my own.
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> 18 The Applicant has had "her day in court". She is not precluded by the determination of abuse of process that is here under review from again seeking to have her husband's intent at the time of marriage redetermined on the basis of truly fresh evidence that is both qualitatively and quantitatively significant. On the facts that were before the Tribunal in this matter, and that are before the Court, I am satisfied that the Tribunal's conclusion that the new evidence that was before it did not meet that test but was rather "... merely additional evidence that tries to bolster or create the intention", was reasonably open to it.

[28] In *Anttal*, Justice Snider found that the new evidence submitted by the applicant which included photos, evidence of telephone calls and recent trips to India, and evidence of the applicant's pregnancy, did not overcome the earlier findings of the IAD regarding the applicant's credibility and misrepresentations.

> [19] The key issue in the Second IAD Appeal was the genuineness of the Applicant's marriage. Although the Applicant submitted photos, evidence of telephone calls and recent trips to India, as well as evidence of her pregnancy, the IAD in the second appeal did not find that the evidence submitted was sufficient to overcome the IAD's earlier findings. […] Accordingly, it was, at the very least, open to the IAD in the Second IAD Appeal to conclude that there was no decisive fresh evidence demonstrably capable of altering the outcome of the earlier finding. I do not find that the decision by the IAD in the Second IAD Appeal not to find that there

> were circumstances which warranted the hearing of the case on the merits is unreasonable.

[29] In the present case, the IAD reasonably concluded that the applicant's fresh or new evidence did not constitute special circumstances sufficient to overcome the application of *res judicata*. Unlike *Sami*, where the Court found that the new evidence of their continuing commitment responded to the basis on which the IAD had found their relationship to not be genuine (namely, their intent at the time of marriage), the applicant's new evidence did not address the IAD's concerns in the First Decision about the fact that they knew little about each other, married shortly after meeting for the first time in person and had begun their on-line relationship while the applicant was still married to and living with his first wife and that they "were not able to provide sufficient testimony to demonstrate depth to their relationship or what they had in common" because "gaps and discrepancies [in their testimony] are not indicative of a genuine spousal relationship with the extent of the alleged contact and communication between the couple" (First Decision, at para 9).

[30] The other new evidence that the applicant submits was ignored by the IAD, such as Ms Zhou's visits to his mother's grave, his payment of private school tuition fees for his step-daughter, and the purchase of a joint investment property in British Columbia, does not address the IAD's concerns about the relationship lacking depth and common interests.

[31] It should also be recalled that the IAD invited the applicant to make submissions on the application of *res judicata*. Those submissions, indicating that there was decisive new evidence and special circumstances to permit a rehearing on the merits, referred to the applicant's lack of legal representation and his lack of proficiency in the English language at his first hearing.

[32] The IAD considered these submissions and noted that the applicant did not demonstrate any lack of proficiency in English either in his oral or his extensive written submissions and that he was offered but declined an interpreter. The IAD also found that his submissions regarding his lack of legal representation failed because his conduct in the previous proceedings demonstrated that he was aware of the requirements, the processes, and the case to be met, and had no difficulty expressing himself at the hearings orally and in writing.

[33] Although the applicant also argues that the IAD should have separately balanced the injustice to the family that still remains apart against the application of *res judicata*, such a balancing goes beyond what is required.

[34] In determining whether special circumstances exist to warrant an exception to the doctrine of *res judicata*, it is necessary to consider whether, taking into account all the circumstances, the application of issue estoppel or *res judicata* would work an injustice (*Rahman*, *supra* at para 20; *Danyluk*, *supra* at para 67).

[35] While the couple may have continued their relationship, the new evidence the applicant submits as special circumstances to overcome *res judicata* cannot undo the findings made earlier.

[36] The IAD did not err in applying the principles of *res judicata*. The IAD considered all the applicant's submissions and circumstances in assessing whether the evidence justified exercising its discretion to overcome the application of *res judicata*, and reasonably found that it did not.

Did the IAD misstate the facts?

[37] The applicant submits that the IAD misstated some facts, which reveals that it did not conduct an adequate review of his new evidence. The applicant notes that the IAD erroneously referred to the "appellant's spouse…and her son", rather than her daughter; failed to note that the applicant separated from his ex-wife in May 2005, although they continued to live together until January 2007; and, failed to note that the applicant and Ms Zhou had been in daily contact by internet for five and a half months prior to marrying three weeks after their first in-person meeting.

[38] The Board did not misstate the facts with respect to the relationship. It is true that the internet relationship began while the applicant was still married and living with his first wife, although the applicant has indicated that they were separated but remained living in the same residence for practical and financial reasons. It is also true that the applicant married Ms Zhou within three weeks of their first face-to-face meeting.

[39] The reference to Ms Zhou's son appears to be a simple mistake, as elsewhere in the decision the IAD correctly refers to her daughter or to the applicant's step-daughter.

[40] The failure to mention details or nuances does not imply that the IAD did not consider the applicant's new evidence. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the Supreme Court noted that the reasons must be read together with the outcome to assess whether the result falls within a range of possible outcomes.

[41] Moreover, the fact that the IAD did not mention each document submitted does not indicate that it did not take them into account: on the contrary, a tribunal is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)).

Was the applicant denied procedural fairness?

[42] The applicant submits that he was denied procedural fairness at the first IAD hearing because he was not given an opportunity to call key witnesses, including a friend, his first wife, son and step-daughter. The First Decision mentioned a "poison-pen" letter and the testimony of his ex-wife, who later stated that the information was not completely accurate. The applicant, therefore, submits that the inability to call his ex-wife as a witness was an egregious breach of his right to procedural fairness.

[43] The applicant also argues that the IAD's comments that time constraints at hearings are not unusual and that parties are required to present their case strategically given the time constraints do not absolve a breach of procedural fairness. The applicant cites *Ayele v Canada (Citizenship and Immigration)*, 2007 FC 126, [2007] FCJ No 174 [*Ayele*], as authority that the IAD's refusal to hear his witness constituted a breach of the duty of procedural fairness.

[44] In *Ayele*, the Court reached that conclusion but on different facts from those present. Justice Dawson, as she then was, noted several reasons for finding that the IAD's decision to refuse to hear a witness who was expected to give relevant evidence that would have supported the appeal was a breach of procedural fairness, including, at para 11:

> [11] Third, one can never rule on the credibility of evidence that has not yet been heard. The presiding member violated this principle when he stated that even if the witness corroborated Mr. Ayele's testimony that subsequent testimony would not be credible.

[45] Unlike *Ayele*, the IAD specifically considered the applicant's witnesses before concluding that they would not possess relevant evidence to help the applicant overcome the earlier findings.

[46] The applicant was not denied procedural fairness. The applicant was given a fair hearing by the IAD in the First Decision and had an opportunity to fully present all the evidence that would have been relevant to his cause. The IAD, in the Second Decision, acknowledged that the applicant was unable to call his son and step-daughter as witnesses, and noted that applicants must present their cases carefully and cannot call all witnesses they may wish, but more importantly noted at para 12:

> The substantial lack of credibility and knowledge, and failure by the couple to demonstrate genuine relationship is not likely to be demonstrably altered by evidence from the children that they view the marriage as genuine. The Member in the previous appeal provided opportunity for both the appellant and applicant to give their testimony, undertook a detailed examination to ascertain whether the relationship was genuine, and eventually concluded that it was not, for reasons that are not directly or demonstrably altered by the evidence that might be offered by their children.

[47] The IAD reasonably concluded that no evidence that the children could have provided would remedy the defects in the applicant's case. The same could be said about any potential evidence that a family friend may give.

[48] With respect to the applicant's ex-wife, the IAD in the First Decision acknowledged that her evidence was not reliable and noted that "other concerns surrounding [the] relationship" were problematic for the applicant (First Decision, *supra* at para 9).

[49] The information provided by the applicant's ex-wife was clearly not the deciding factor in the decision; rather, the IAD based its decision on its own assessment of the facts, namely, the many discrepancies and gaps between the testimony of the applicant and his wife.

Conclusion

[50] The decision of the IAD that the application is *res judicata* and that the new evidence submitted by the applicant does not constitute special circumstances to override the doctrine of *res judicata* is reasonable.

[51] While this outcome may cause hardship for the applicant and his spouse, the IAD considered the applicant's submissions and reasonably found that the new evidence did not address the earlier findings. The decision falls within the range of acceptable outcomes and is justified on the facts and the law and was clearly explained by the IAD.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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