Federal Court  Cour fédérale

Date: 20150429

Docket: IMM-1292-14

Citation: 2015 FC 546

Ottawa, Ontario, April 29, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

DONA LEE MAHABIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Donna Lee Mahabir (the Applicant) has brought an application for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board. The IAD determined that the Applicant's marriage to David Boodoo, a national of Trinidad and

Tobago, was genuine but was nevertheless entered into primarily for the purposes of immigration.

[2] For the reasons that follow, the application for judicial review is allowed and the matter is remitted to a differently constituted panel of the IAD for re-determination.

II. Background

[3] The Applicant is a Canadian citizen. At the time of the IAD's decision she was 31 years old. She is cognitively impaired.

[4] At the time of the IAD's decision Mr. Boodoo was 41 years old. He is also cognitively impaired.

[5] Mr. Boodoo has previously attempted to immigrate to Canada. In May, 1996 he arrived on a visitor's visa and overstayed. He made a refugee claim that was rejected in November, 2003, and he then failed to appear for a pre-removal interview in April, 2006. Mr. Boodoo was eventually deported in March, 2009.

[6] The Applicant and Mr. Boodoo married in Trinidad and Tobago in May, 2010. The Applicant subsequently submitted a spousal sponsorship application as a member of the family class. An immigration officer assessed the *bona fides* of the marriage and concluded that it was a marriage of convenience and the relationship was not genuine. The spousal sponsorship application was therefore denied. This decision was appealed to the IAD.

[7] The IAD found that the marriage was genuine. However, the IAD also found that the marriage was entered into primarily for immigration purposes, and that this had been coordinated by the Applicant's parents and Mr. Boodoo's parents.

[8] The IAD's conclusion that the marriage was entered into primarily for immigration purposes was based on the following considerations:

- The cognitive impairment of both parties to the marriage;
- The previous efforts of Mr. Boodoo's family to keep him in Canada;
- The timing of the marriage, specifically 14 months following Mr. Boodoo's deportation;
- Records of the Canada Revenue Agency which indicated that Mr. Boodoo's residence was the same as that of the Applicant in 2006 and 2007, although they claimed to have first met in July, 2008; and
- All of Mr. Boodoo's family resides in Canada, and his mother returned to Trinidad and Tobago to be with him until he could come to Canada.

[9] The IAD therefore dismissed the Applicant's appeal.

III. Issues

[10] There is only one determinative issue raised in this application for judicial review: whether it was reasonable for the IAD to base its conclusion regarding the primary purpose of the marriage on the family's intentions.

IV. Analysis

[11] The standard of review applied by this Court to decisions of the IAD regarding the primary purpose of a marriage is reasonableness (*Gill v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 [*Gill 2012*] at para. 17; *Dunsmuir v. New Brunswick*, 2008 SCC 9).

[12] Section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 provides as follows:

4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.

[13] It is noteworthy that the previous version of this section (in effect from March 22, 2006 to September 29, 2010) read as follows:

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.
[Emphasis added.]	[Soulignement ajouté]

[14] Under the current provision, a finding that a marriage is genuine is not sufficient. It is also necessary that the marriage not be entered into primarily for the purpose of acquiring immigration status.

[15] In *Gill 2012*, Chief Justice Crampton held that the relevant intention is that of the parties to the marriage:

> **33** This is because, in contrast to the present tense focus of the first of the two tests set forth in section 4 of the Regulations, which requires an assessment of whether the impugned marriage "is not genuine," the focus of the second of those tests requires an assessment of whether the marriage "was entered into primarily for the purpose of acquiring any status or privilege under the Act" (emphasis added). Accordingly, in assessing whether the latter test is satisfied, the focus must be upon the intentions of both parties to the marriage at the time of the marriage. I agree with the Respondent that testimony by those parties regarding what they

> were thinking at that time typically will be the most probative evidence regarding their primary purpose for entering into the marriage.

[16] In *Gill v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 902 [*Gill 2014*], Justice O'Reilly held that placing the focus on the family's intentions was unreasonable:

> **11** […] In my view, the IAD unreasonably emphasized Ms. Gill's husband's family's motivations, as well as the family's immigration history. In doing so, the IAD arrived at an unreasonable conclusion regarding the primary purpose of the marriage.
>
> **12** The IAD reasoned that Ms. Gill's husband's parents wanted their son to join them in Canada, so they arranged for him to marry a permanent resident. However, it neglected to take account of the fact that the parents spend a substantial portion of each year in India, which mitigates the so-called "pull factor" toward Canada. In addition, the parents' motivation is not necessarily the same as their son's.
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> **13** Further, the IAD deduced from the family's immigration history -- showing that other family members were trying to immigrate to Canada, including by way of sponsorship applications -- that Ms. Gill's husband shared those motivations. In my view, it was unfair to attribute the alleged desires of other persons to Ms. Gill's husband, particularly where there were strong indications that the marriage was, indeed, genuine. The couple may well have been pleased with the immigration possibilities arising from the marriage, but that is far from saying that it was their primary motivation.

[17] Justice O'Reilly concluded as follows:

> **15** It is clear that there are two distinct considerations involved in these kinds of cases – the genuineness of the marriage and the primary motivation for it. An applicant for permanent residence is not considered a spouse if the marriage is not genuine or if the motivation for it was primarily for an immigration purpose. But the

> two considerations are related (*Grabowski v Canada (MCI)*, 2011 FC 1488, at para 24). This means that the stronger the evidence regarding the genuineness of the marriage (and where there is a child involved, this is strong evidence on its own), the less likely it is that it was entered into primarily to obtain an immigration advantage (*Gill v MCI*, 2010 FC 122, at para 6-8). And *vice versa*. The more compelling the proof that the couple was seeking immigration status, the more likely it will be that the marriage was not genuine.
>
> **16** Here, there was strong evidence that the marriage was genuine – its duration, the fact that the couple had a child together, and their genuine compatibility. Conversely, the evidence of an immigration motive for the marriage was weak, attributed primarily to the desires of other family members, not those of the couple. On this evidence, I find that the IAD's decision was unreasonable, as it fell outside the range of defensible outcomes based on the facts and the law.

[18] In this case, it is clear that the IAD's focus on the family's intentions was motivated in large part by the cognitive impairment of both parties to the marriage. However, the IAD did not find that the parties were incapable of forming the intention to marry, and both spouses were also accepted as competent witnesses before the IAD.

[19] Having found the marriage to be genuine, the IAD's focus on the intentions of the couple's families to determine that it was entered into primarily for immigration purposes was unreasonable. This Court's analysis in *Gill 2012* and *Gill 2014* is dispositive. The application for judicial review must be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter is remitted to a differently constituted panel of the IAD for re-determination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1292-14
STYLE OF CAUSE:	DONA LEE MAHABIR v THE MINISTER OF IMMIGRATION AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 13, 2015
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	APRIL 29, 2015

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