Federal Court Cour fédérale

Date: 20160120

Docket: IMM-2123-15

Citation: 2016 FC 61

Ottawa, Ontario, January 20, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

SONG TAO CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the IAD) rendered on April 14, 2015, upholding a visa officer's decision to refuse the sponsored application for permanent residence in Canada of Miao Fen Zhou from China on the grounds that the marriage entered into

by the Applicant and Ms. Zhou was not genuine or was entered into for immigration purposes as prohibited by subsection 4(1) of the *Immigration and Refugee Protection Regulations* (the Regulations).

II. Background

[1] The Applicant is a 48 year old male originally from the People's Republic of China. He became a permanent resident of Canada in October 2001 after being sponsored by his wife at the time, Kiu Qun Ou. The Applicant was introduced to Ms. Zhou by her aunt in 2003, who put the two in contact via telephone. They continued to communicate with each other over the phone and while traveling in China in August 2004, the Applicant met Ms. Zhou in person for the first time. The next time the Applicant met Ms. Zhou in China in March 2007, they married. The Applicant's first sponsorship application was refused on May 19, 2008. An appeal was filed with the IAD and was later withdrawn when the Applicant found out that Ms. Zhou became pregnant and that the child was not his.

[2] According to the evidence, the Applicant quickly forgave Ms. Zhou, continued to visit her on a yearly basis and developed a strong bond with her first son. The Applicant is named as the father on the boy's birth certificate despite the fact that he is not the biological father.

[3] The Applicant re-sponsored Ms. Zhou in April 2013, which was again refused by a visa officer in Hong Kong in October 2013 (the Visa Officer).

[4] The Visa Officer found that Ms. Zhou was not a member of the family class pursuant to paragraph 117(1)(a) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (the Act), since Ms. Zhou did not convince the Visa Officer that prior to entering the marriage, there was a logical progression in the relationship or that a genuine relationship existed. The Visa Officer found that despite the fact that the couple were married for 6 years, Ms. Zhou did not display an in-depth knowledge of her husband.

[5] On July 29, 2014, Ms. Zhou gave birth to a girl and a DNA test confirmed that the Applicant is the father.

[6] The IAD upheld the Visa Officer's decision and found that the Applicant did not demonstrate, on a balance of probabilities, that the sponsorship application was excluded by subsection 4(1) of the Regulations.

[7] The IAD did not find the Applicant or his wife to be credible witnesses since their answers to questions during the interview with the IAD were "vague, evasive, and on a balance of probabilities […] largely manufactured to suit typical questions associated with the appeal process."

[8] In addition, the IAD found that the Applicant and his wife did not provide sufficient evidence to resolve the Visa Officer's concerns, that they did not demonstrate a clear plan for living together in Canada, and that on a balance of probabilities, the Applicant doubted his wife's

genuine commitment to the marriage, which is an indicator that the primary purpose of the sponsorship is to allow Ms. Zhou to acquire permanent residency in Canada.

[9] The Applicant submits that the IAD's reasons for dismissing the Applicant's appeal are inadequate since they lack transparency, intelligibility, and justification. The Applicant argues that the IAD committed a reviewable error in stating that the Applicant and his wife were "vague," "evasive," and "manufactured" answers to questions asked since the panel member did not provide transparent reasons in support of these conclusions or reasons in support of the IAD's negative credibility finding.

[10] The Applicant also submits that since a child was born of the relationship, the IAD was bound by this Court's decision in *Gill v Canada (Citizenship and Immigration),* 2010 FC 122, 362 FTR 281 [*Gill*], to attribute great weight to the birth of the child and apply an evidentiary presumption in favour of the genuineness of the marriage. The Applicant argues that the IAD committed an error in finding that this case is distinguishable on the facts without providing any reasons to explain why the presumption should not be applied.

III. <u>Issue and Standard of Review</u>

[11] The issue to be determined in this case is whether the IAD panel member, in concluding as he did and in the manner that he did, committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7.

[12] Findings made pursuant to section 4 of the Regulations are reviewable on a standard of reasonableness (*Sandhar v Canada (Citizenship and Immigration)* 2013 FC 662, at para 17, 435 FTR 109; *Ma v Canada (Citizenship & Immigration)*, 2010 FC 509, at para 26, 368 FTR 116; *Canada (Citizenship and Immigration) v Oyema*, 2011 FC 454, at para 7). It is well-settled that the standard of reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process [...] and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*New Brunswick (Board of Management) v Dunsmuir,* [2008] 1 RCS 190, at para 47, 2008 SCC 9 [*Dunsmuir*]).

III. Analysis

[13] The Applicant's main argument is that the IAD's decision and reasons lack transparency, intelligibility and justification.

[14] The approach reviewing courts should take when assessing claims concerning the "adequacy" of reasons was explained in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland*], where the Supreme Court stated that "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at para 14). In this respect, the Supreme Court indicated at paragraph 15 of this decision that reviewing courts may "look to the record for the purpose of assessing the reasonableness of the outcome."

[15] Yet, there are limits to the extent to which a reviewing court can use the record to supplement a tribunal's analysis. In this respect, I find that the summary of this Court's case law on this issue provided by Justice Richard Mosley in *Al Khalil v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 641, is directly on point:

> [31] While the Court can supplement the officer's reasons on the basis of *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 (S.C.C.) [NL Nurses], there is a wealth of jurisprudence holding that the Court cannot provide its own reasons for decision where none exist or where the decision-maker ignored central facts or issues. See e.g. *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353 (F.C.) at para 28; *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 (F.C.) at para 11; *Korolove v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 370 (F.C.) at paras 42-46; *Abbasi v. Canada (Minister of Citizenship and Immigration),* 2013 FC 278 (F.C.) at paras 7-8; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Raphaël*, 2012 FC 1039 (F.C.) at para 28; *Cheung v. Canada (Minister of Citizenship & Immigration)*, 2012 FC 348 (F.C.) at para 17; *Canada (Minister of Citizenship and Immigration) v. B451*, 2013 FC 441 (F.C.) at paras 33-37; *Vilvaratnam v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 154 (F.C.) at para 36.
>
> […]
>
> [49] The officer did not explicitly respond to the applicants' arguments. Yet this does not mean that the Court must necessarily quash his decision. If the ultimate outcome is reasonable in light of the record, NL Nurses instructs the Court to supplement the officer's reasons and uphold his decision.
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> [50] At the same time, the applicants are right that it is not the Court's task to correct erroneous reasoning or engage in boundless speculation. From the many authorities cited by the applicants, I have selected three passages which express the limits which the Court should respect.
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> [51] In *Pathmanathan*, above, at para 28, Justice Rennie (then a member of this Court) explained:

> *Newfoundland Nurses* does not authorize a court to rewrite the decision which was based on erroneous reasoning. The reviewing court may look to the record in assessing whether a decision is reasonable and a reviewing court may fill in gaps or inferences reasonably arising and supported by the record. *Newfoundland Nurses* is a case about the standard of review. It is not an invitation to the supervising court to re-cast the reasons given, to change the factual foundation on which it is based, or to speculate as to what the outcome would have been had the decision maker properly assessed the evidence.
>
> [Emphasis added]

[52] In *Komolafe*, above, at para 11, it was again Justice Rennie who commented:

> *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[53] Finally, in *Korolove*, above, at paras 45-46, Justice Strickland observed:

> In my view, the Respondent in the present case is essentially asking the Court to undertake its own assessment of the record and, to paraphrase *Kane*, attribute a justification to the Citizenship Judge. The Respondent's submissions require the Court to examine the record with a fine-tooth comb, pull out the relevant dates, undertake its own calculation of the Applicant's absences and assume that this constitutes the justification underlying the Citizenship Judge's conclusion. This is precisely the exercise undertaken by the Respondent in its written submissions.
>
> In my view, such 'reverse-engineering' of the Citizenship Judge's Decision crosses the line between supplementing and substituting reasons.
>
> [Emphasis added]

[16] I agree with the Applicant that the IAD did not provide any specific examples of vague and evasive testimony from the hearing. While the Respondent argued that the Court should follow *Das v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 219, 121 ACWS (3d) 129 [*Das*], which upheld a Refugee Board finding of vagueness and evasiveness because it was supported in the transcript, I am of the opinion that *Das* is distinguishable from the facts of this case. Further to a review of the IAD decision and the record before me, I find it difficult to conclude that the IAD's finding of vagueness and evasiveness was supported in the record since the IAD failed to address key facts and issues in its decision such as the Applicant financially supporting his wife in China, that he visits her at least once a year for a few weeks and on these occasions takes care of her first son as if the boy were his own child, that the couple remained married despite the wife's infidelity, that they conceived a child together and intend on raising their child and Ms. Zhou's child born outside of the marriage together despite the negative sponsorship application. The Applicant's wife even expressed a desire to have another child with the Applicant once she immigrates to Canada.

[17] The IAD's failure to address this evidence prevents me from concluding that the 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, [2008] 1 SCR 190).

[18] While the Respondent, in its submissions, pointed to paragraphs in the transcript purporting to demonstrate the "vague" and "evasive" manner in which the Applicant and his wife testified, I find that with this exercise, the Respondent is asking this Court to carry out an analysis of the facts in the place of the IAD panel member and find justification for the IAD's

decision. The case law is clear that this is not the function of a reviewing court (*Pathmanathan,* above at para 28; *Korolove,* above at para 45).

[19] Further to reading the record, I can only speculate as to how the IAD came to the conclusion that the Applicant and his wife provided “vague” and “evasive” testimony during the interview in support of the negative credibility finding, and cannot decipher which portions of the interview were “manufactured” to suit typical questions associated with the appeal process as the IAD panel member failed to elaborate as to what the typical questions are. Most striking is the IAD’s failure to assess the significance of the birth of the Applicant’s daughter.

[20] In discussing the IAD’s assessment of the genuineness of a marriage when a child is born of the marriage, Justice Robert Barnes stated the following in *Gill*:

> [6] When the Board is required to examine the genuineness of a marriage under ss. 63(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, it must proceed with great care because the consequences of a mistake will be catastrophic to the family. That is particularly obvious where the family includes a child born of the relationship. The Board's task is not an easy one because the genuineness of personal relationships can be difficult to assess from the outside. Behaviour that may look suspicious at first glance may be open to simple explanation or interpretation. An example of this from this case involves the Officer's concern that the wedding photos looked staged and the parties appeared uncomfortable. The simple answer, of course, is that almost all wedding photos are staged and, in the context of an arranged marriage, some personal awkwardness might well be expected. The subsequent birth of a child would ordinarily be sufficient to dispel any lingering concern of this sort. […]

> [8] The Board was correct in acknowledging that, in the assessment of the legitimacy of a marriage, great weight must be attributed to the birth of a child. Where there is no question about paternity, it would not be unreasonable to apply an evidentiary presumption in favour of the genuineness of such a marriage. There are many reasons for affording great significance to such an event not the least of which is that the parties to a fraudulent marriage are unlikely to risk the lifetime responsibilities associated with raising a child. Such a concern is heightened in a situation like this where the parents are persons of very modest means.

[21] In my view, the IAD erred in dismissing the application of *Gill* to the facts of this case. While there is no evidence on the record indicating that this is an arranged marriage, there is a great physical distance and age disparity between the couple, which could explain some of the comments made by the Applicant and his wife, which the IAD panel member found suspect, but who, as explained earlier, did not draw attention to any suspicious comments nor explain why he held those comments to be suspicious. As I previously indicated at paragraph 17 above, I find that in assessing the credibility of the Applicant and Ms. Zhou, the IAD ignored substantial evidence that contradicted its finding that the marriage was not genuine or was entered into for immigration purposes.

[22] While I agree with the Respondent that the existence of a biological child does not require a finding that a marriage is genuine, I cannot agree with the Respondent's submissions that the IAD had concerns that outweighed the existence of the child as no reasonable concerns are readily apparent from a reading of the IAD's decision. Given the significant weight to be given to the birth of a child born of the marriage, I am of the view that at the very least, the IAD had an obligation to provide reasons to explain how and why it came to the conclusion that the birth of the Applicant's daughter failed to satisfy the IAD's concerns regarding the genuineness

of the marriage. As stated by Justice Barnes in *Gill* at paragraph 6 of the decision, great weight should be given to the birth of the child as the "consequences of a mistake will be catastrophic to the family." In my view, the lack of adequate reasons given by the IAD demonstrates its failure to engage in a substantive analysis of whether the marriage was caught by section 4 of the Regulations.

[23] Moreover, I am also of the opinion that the record does not elucidate how the IAD concluded that the Applicant and his wife did not address the Visa Officer's concerns regarding the lack of a plan for living together in Canada. Further to a review of the transcript, I find that the Board's finding that the couple's plan for a life in Canada was unclear is not reasonable. In my view, a plan was conceived by the couple and it cannot be said that the plan was unrealistic. The Applicant states that he plans to enrol his children in school, which would allow his wife to pursue language studies to learn English. Moreover, his parents, who lived in the same building as the Applicant at the time, are willing to look after the children while the Applicant and his wife are busy at work or at school. The Applicant and his wife agreed that she would balance pursuing studies and working. While the Applicant lived in a one-bedroom apartment at the time, his wife testified that once she moved to Canada with the children, they plan on finding a more spacious apartment. The couple also applied for the daughter to be given Canadian citizenship so that she could live in Canada with the father as a contingency plan in the event that the sponsorship claim is rejected. In my view, the couple's testimony demonstrates a clear and realistic plan for living together in Canada.

[24] I find, therefore, that the IAD's decision was unreasonable.

[25] No question of general importance has been proposed by the Respondent. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;

2. The decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada, dated April 14, 2015, is set aside and the matter is referred back for determination by a different panel;

3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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