Federal Court  Cour fédérale

Date: 20160420

Docket: IMM-4468-15

Citation: 2016 FC 442

Ottawa, Ontario, April 20, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

GEETA RANI KALSI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada. The IAD refused the applicant's appeal from the decision of the Visa Officer [Officer] on the basis that the applicant and her spouse entered into their marriage for the primary purpose of acquiring status or

privilege under the IRPA pursuant to paragraph 4(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] For the reasons that follow I find the IAD erred unreasonably and the application is allowed.

I. Background

[3] The applicant, Geeta Rani Kalsi, was born in India in 1968 and is now a permanent resident of Canada. She was afflicted with polio in infancy leading to post-polio residual paralysis. She is dependent on a wheelchair for her mobility.

[4] The applicant arrived in Canada in 2006 with her parents, sponsored by her brother. She resides with, and is dependent upon, her brother who has retrofitted his home to accommodate the applicant's special physical needs. Her brother has also provided financial support to the applicant since her arrival in Canada.

[5] The applicant met her spouse, Balbir Singh Dhillon, a citizen of India, as a result of an advertisement her sister posted in an India newspaper seeking a husband. They met on January 21, 2011 in India, he proposed on February 1, 2011 and they married on February 25, 2011. They lived together in India until the applicant returned to Canada on June 6, 2011.

[6] It was the applicant's evidence before the IAD that she intended to remain, and live in India after the marriage but subsequently realized that life was too difficult for her as a disabled

person. She returned to Canada and in July, 2012 applied to sponsor her spouse and his two adult children from a previous marriage for immigration to Canada under the spousal sponsorship class.

[7] In May, 2013, the Officer interviewed the spouse for the purpose of addressing concerns regarding the marriage. The interview notes indicate that the Officer did not find the spouse to be credible and forthcoming and concluded that the marriage had been entered into in bad faith to ensure immigration to Canada with the spouse's children.

[8] On May 30, 2013, the Officer refused the application finding, pursuant to subsection 4(1) of the IRPR that the marriage to the applicant was not genuine and the parties entered into the marriage primarily for the purpose of acquiring permanent residence in Canada. The Officer concluded that the spouse could not be a member of the family class pursuant to paragraph 117(1)(a) of the IRPR.

II. Decision under Review

[9] The IAD dismissed the appeal from the Officer's decision pursuant to paragraph 4(1)(a) of the IRPR, finding neither the applicant or her spouse were credible or forthright on their intentions for entering into the marriage. Having determined the applicant entered the marriage for the primary purpose of her spouse's immigration to Canada, the IAD found there is no need to assess the *bona fides* of the marriage.

[10] The IAD determination that the marriage had been entered into for the primary purpose of acquiring status or privilege under the IRPA was the result of a number of plausibility and credibility concerns arising out of the evidence provided by the applicant and her spouse.

III. Issues and Analysis

A. *Issues*

[11] The applicant raises issues relating to the *vires* and interpretation of subsection 4(1) of the IRPR, bias and the failure to consider and address relevant evidence.

[12] I am of the view that the IAD's failure to address directly relevant yet contradictory evidence is a reviewable error and is determinative of the application. I need not address the other issues raised except to note that both the *vires* and interpretation arguments advanced by the applicant have been subject to prior judicial consideration and guidance (*Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522, 13 Imm LR (4th) 153; *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1077, 467 FTR 153; *Burton v Canada (Minister of Citizenship and Immigration)*, 2016 FC 345 [*Burton*]).

B. *Standard of Review*

[13] The parties do not dispute that the reasonableness standard of review applies to the IAD's determinations on questions of fact and mixed fact and law (*Burton* at paras 13, 15; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 51).

C. *IAD's Treatment of the Evidence*

[14] The applicant submits that the IAD erred in ignoring evidence of the genuineness of the marriage such as efforts of the parties to communicate and the time spent together after marriage. In addition, the applicant argues that the IAD erred in finding it implausible that the applicant's intent was to return to India to be with her spouse after having come to Canada because of greater accessibility for people with disabilities. The applicant submits that her evidence that the situation in her brother's home was not good, her bedroom was in the living room, and her sister-in-law was unhappy with her living with them demonstrates why she wished to leave her brother's home for India. This evidence was not addressed by the IAD in reaching its implausibility finding.

[15] The respondent takes the position that there is no reason to believe that the IAD engaged in speculation in finding it implausible that the applicant intended to live in India with her spouse. The respondent argues that this finding is supported in the IAD's reasons and there is no basis to conclude that evidence was overlooked. I respectfully disagree.

[16] The applicant provided the following testimony before the IAD, testimony that is in my view directly relevant to the IAD's finding that it was implausible that the applicant planned to live in India with her spouse (Certified Tribunal Record, Volume 2 at pages 300 and 301):

> **COUNSEL**: What made you to decide to marry at 45, 40 years of age?
>
> **APPELLANT**: I was living with my parents. First I was living with my parents. That was a different kind of environment. Then I came here to my brother and sister-in-law so that is something different. So I was thinking that I'll be staying

> dependent on them all my life. So then I thought that I must need a companion and like a life partner in my life.
>
> **COUNSEL**: Can you go in more detail to explain what problems you anticipated or you were facing at this time when you decided to marry?
>
> **APPELLANT**: Like I cannot go like upstairs; I can't take the steps. Like my bed was in the living room. My closet and other stuff was also in the living room. **So my sister-in-law, she was like upset that you made, you know you turned our living room into a bedroom. So when her friends were you know coming there they were kind of like criticize me. So then I thought that I should remove myself from this place** [emphasis added].

[17] The applicant also explained in her testimony that she originally came to Canada because her parents were coming to Canada to live with her brother. She testified that she would have been alone with no one to assist with her care had she remained in India (Certified Tribunal Record, Volume 2 at page 322).

[18] The spouse's father-in-law, who appeared as a witness before the IAD corroborated the applicant's experiences with her family at page 370 of the Certified Tribunal Record, Volume 2: "my son told me that she wants to come here, she doesn't want to live in Canada. Then I asked why do you want to leave Canada. She said she has a problem in her household, her sister-in-law, she fights with her."

[19] Finally, the applicant was asked if she will continue to live with her brother if the appeal before the IAD is not successful. The applicant's response was that she has not made plans in the event she is not successful before the IAD and so will live with her brother (Certified Tribunal Record, Volume 2 at page 327 and 328). This might be viewed as contradicting her earlier

evidence. However, like the previous evidence relating to the applicant's explanation for intending to live in India and the father-in law's corroborative statement, it is not addressed by the IAD in reaching its implausibility finding.

[20] In *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 7-8, 208 FTR 267 (TD), Muldoon J held:

> [7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu.
>
> [8] In *Leung v. M.E.I.* (1994), 81 F.T.R. 303 (T.D.), Associate Chief Justice Jerome stated at page 307:
>
> > [14] Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.
> >
> > [15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. **The Board will therefore err when it fails to refer to relevant evidence which**

> **could potentially refute their conclusions of implausibility** [emphasis added].

[21] I recognize that the IAD is an expert tribunal, and this reviewing Court owes it deference (*Burton* at para 13). However as stated in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* [1998] FCJ 1425 at para 17, 157 FTR 35 (TD) "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"".

[22] In this case the IAD failed to directly address relevant and contradictory evidence relating to its finding that it was implausible that the applicant intended to remain in India after her marriage. This implausibility finding was the first made by the IAD and is a finding that is referred to throughout the IAD's analysis, and the decision cannot stand without it. In the circumstances the failure to address the evidence set out above is a reviewable error.

IV. Certified Question

[23] The applicant has proposed the following question for certification:

> Whether section 4(1)(a) of the IRPR requires a decision maker to decide whether or not at the time of entering into a relationship described in the section, including marriage, the intention of one or both of the parties was not *bona fides* for the purpose of entering into the relationship, but was instead a sham, a marriage of convenience or not undertaken in good faith.

[24] The respondent opposed this request. I have considered the written submissions of the parties.

[25] The Federal Court of Appeal has set out the test for certification of issues for the purposes of an appeal under paragraph 74(d) of the IRPA on a number of occasions (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 10-12, 36 Imm LR (3d) 167; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9, 28 Imm LR (4th) 231). These authorities establish that this Court may certify a question under paragraph 74(d) only where it (1) is dispositive of the appeal and (2) transcends the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. Furthermore, the question must arise from the case itself.

[26] Here the application has been decided based on the IAD's failure to address relevant evidence that directly contradicted one of the IAD's core findings, not on the basis of the matters identified in the applicant's proposed questions for certification. I therefore decline to certify the applicant's proposed question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is returned for redetermination by a different member.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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