

Federal Court



Cour fédérale

Date: 20160705

Docket: IMM-112-16

Citation: 2016 FC 754

Ottawa, Ontario, July 5, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SIU LUN TANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the December 16, 2015 decision of the Immigration Appeal Division [IAD] dismissing the Applicant's appeal of a decision refusing his wife's spousal sponsorship application for permanent residency. The IAD dismissed the appeal on the basis that the appeal is barred by *res judicata*.

II. Background

[2] The Applicant, Siu Lun Tang, is a Canadian citizen. He arrived in Canada in 1997 from China and was granted refugee protection soon after. The Applicant became a Canadian citizen in 2008.

[3] On February 18, 2008, the Applicant married Sanying Li in China, where Ms. Li resides. The couple first met in May of 2007.

[4] In August of 2008, the Applicant sponsored Ms. Li's application for permanent residency as a member of the family class. On January 14, 2008, Ms. Li's application was denied, and the Applicant appealed the decision to the IAD.

[5] On March 19, 2012, the IAD determined that both the Applicant and Ms. Li were not credible, and upheld the decision on three bases [the 2012 Decision]:

- i. that the Applicant and Ms. Li's marriage was entered into for the purposes of immigration, contrary to paragraph 4(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations];
- ii. that the couple's marriage was not genuine, contrary to paragraph 4(1)(b) of the Regulations ;
- iii. that the couple had not demonstrated that they possessed sufficient financial resources necessary to support Ms. Li after her arrival in Canada, as is required by section 39 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act].

[6] The Applicant sought judicial review of the 2012 Decision in May of 2012. Leave was denied and the application was dismissed on August 30, 2012.

[7] On February 12, 2014, Ms. Li again made a spousal sponsorship application for permanent residence. This application was denied on October 17, 2014.

[8] On November 14, 2014, the Applicant and Ms. Li appealed this decision to the IAD, which is the subject of this judicial review.

[9] The IAD dismissed the appeal on the basis that *res judicata* barred the Applicant from re-litigating the same matter that had been determined in the 2012 Decision.

[10] The IAD held that the doctrine of *res judicata* prevents the re-litigation of the same causes of actions, issues of law, or material facts where they have been previously determined by a court or administrative tribunal, following a two-step analysis. The Court must first be satisfied that the following pre-conditions are met: (i) the same issue has been previously decided in an earlier proceeding; (ii) the previous decision was final; and (iii) the parties in the present proceeding are the same as the parties to which the earlier decision applied (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25 [*Danyluk*]).

[11] If these pre-conditions are satisfied, the IAD has the discretion to consider whether *res judicata* ought to be applied, considering whether there are special circumstances that would bring the appeal within an exception to the doctrine. The Court must assess whether the public

interest in the finality in litigation outweighs the public interest in ensuring that justice is done on the facts of a particular case (*Danyluk*, above, at para 33).

[12] While the IAD may refuse to apply *res judicata* where new evidence is adduced that would have altered the decision in the prior proceeding, in this case, the new evidence adduced post-dated the 2012 Decision, and would not have altered the result.

[13] The IAD found that this case satisfied the pre-conditions for applying *res judicata*: the parties and issues are the same as in the 2012 Decision, which was a final decision.

[14] Further, although a court may also refuse to apply *res judicata* where there was a breach of procedural fairness in the prior proceeding, the IAD held that there was no evidence of any such breach.

[15] The IAD concluded that the doctrine of *res judicata* applied and that the Applicant's appeal should be dismissed.

III. Issues

[16] The issues are as follows:

- A. Was the IAD correct in finding that the test for *res judicata* was met?
- B. Was the IAD's finding that *res judicata* ought to be applied reasonable?
- C. Did the IAD fail to provide sufficient reasons for the decision?

IV. Standard of Review

[17] The issue of whether the pre-conditions for applying *res judicata* are met is reviewable on the correctness standard (*Chotai v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1335 at para 15 [*Chotai*]).

[18] The issue of whether *res judicata* ought to have been applied is reviewable on the reasonableness standard (*Chotai*, above, at para 16).

[19] Whether the IAD provided sufficient reasons is reviewable on the reasonableness standard (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22 [*NLNU*]).

V. Analysis

A. *Was the IAD correct in finding that the pre-conditions for res judicata were met?*

[20] The Applicant concedes that the IAD correctly identified the pre-conditions that must be met before applying *res judicata*, as set out by the Supreme Court in *Danyluk*, above. The Applicant further concedes that the parties in this proceeding and the 2012 Decision are the same, and that the 2012 Decision was final.

[21] The Applicant argues, however, that the issue in this proceeding is not exactly the same as the issue in the earlier proceeding. The only issue in the current proceeding is whether the

Applicant and Ms. Li's marriage is genuine. The 2012 Decision concerned both the genuineness of the couple's marriage *and* the couple's financial viability once Ms. Li arrived in Canada, which were so fundamentally intertwined that they effectively became "one macro issue". As a result, the issue in the 2012 Decision is not the same as the issue in the present proceeding, and therefore, according to the Applicant, the pre-conditions for applying *res judicata* are not met.

[22] *Res judicata* bars the re-litigation of any legal issue that has been determined in a prior proceeding, as well as any material fact necessary for the determination of that issue (*Danyluk*, above, at para 54).

[23] The 2012 Decision made three clear and unequivocal findings: (1) that the Applicant and Ms. Li's marriage was entered into for the purposes of immigration; (2) that their marriage was not genuine; and (3) that the Applicant did not possess sufficient financial resources to support Ms. Li upon her arrival in Canada. In the present proceeding, the Applicant is attempting to re-litigate two of those findings based on the same material facts. As such, *res judicata* does apply.

B. *Is the IAD's finding that res judicata ought to apply reasonable?*

[24] The Applicant submits that it was unreasonable for the IAD to determine that *res judicata* ought to apply, despite the existence of new evidence that was capable of altering the result of the 2012 Decision: the Applicant adduced evidence in the present proceeding regarding the state of the Applicant and Ms. Li's continuing relationship, including evidence of their efforts to bring their families together since their marriage.

[25] As the 2012 Decision was based, in part, on the lack of any evidence that the couple had attempted to bring their families together, the Applicant submits that this new evidence should have prompted the IAD in the current proceeding to exercise her discretion and refuse to apply *res judicata*.

[26] Subsection 4(1) of the Regulations provides that a person will not be considered a “spouse” under the Act where: (a) the marriage was entered primarily for the purposes of immigration; or (b) the marriage is not genuine.

[27] These are distinct findings. The latter considers the current state of the marriage – and thus is capable of evolution over time – while the former concerns only the purpose of the marriage at the time it was entered into (*Chotai*, above, at para 20).

[28] Consequently, a finding under subsection 4(1)(a) cannot be altered by adducing fresh evidence regarding the state of the marriage since its formation. It can only be altered by evidence concerning the nature of the marriage at the time it was entered into (*Chotai*, above, at para 21).

[29] In this case, the 2012 Decision held that the marriage between the Applicant and Ms. Li was both not genuine and primarily for the purposes of immigration. While the Applicant’s new evidence may have been capable of leading the IAD to find that the marriage may be genuine, it was not capable of altering the prior determination that the marriage was entered into primarily for the purposes of immigration.

[30] It was therefore reasonable for the IAD to determine that *res judicata* ought to apply in this case, as a production of new evidence would not have altered the determination in the 2012 Decision.

C. *Did the IAD fail to provide sufficient reasons?*

[31] The Applicant submits that the IAD's decision is unreasonable because it fails to provide sufficient reasons for why *res judicata* should apply, despite the breaches of natural justice the Applicant alleges occurred in the 2012 proceeding.

[32] The Applicant argues that *res judicata* does not apply where a breach of natural justice occurred in the earlier proceeding. In fact, the IAD correctly recognized that this exception to the application of *res judicata* exists. Yet, the IAD failed to address any of the Applicant's submissions regarding the breaches of natural justice he claims occurred during the 2012 proceeding – specifically, the manner of questioning at the hearing, including the tone in which questions were asked, and the use of “trap” questions.

[33] The Applicant has failed to provide any evidence to substantiate the alleged breaches of natural justice in the 2012 proceeding. The Applicant's claims were only made in his written submissions to the IAD, and were not supported by any statement by the Applicant or Ms. Li, or by any other documentary evidence. Moreover, a decision-maker is not required to make an explicit finding on each argument and constituent element, however subordinate, leading to its final conclusion (NLNU, above, at para 16). I find that the IAD's reasons are sufficient.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-112-16

STYLE OF CAUSE: SIU LUN TANG v THE MINISTER OF CITIZENSHIP
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