Federal Court  Cour fédérale

Date: 20161201

Docket: IMM-2513-16

Citation: 2016 FC 1336

Toronto, Ontario, December 1, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

RUPINDER KAUR MANGAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], seeking to set aside the decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada in File No. TB3-05489, dated June 1, 2016 [Decision], which denied the Applicant's motion to have her appeal granted on the basis that on the facts of the case the doctrine of *res judicata* or issue estoppel applied.

[2] For the reasons that follow, this application is dismissed as it is premature.

[3] The Applicant is an Indian national who entered Canada as a live-in caregiver on July 21, 2004. On March 5, 2007, she applied for permanent residence. On each such occasion the Applicant stated that she was single and never married. Her last name at such time was Deol.

[4] In August 2007, in the course of reviewing the application for permanent residence, an officer made a report pursuant to s 44(1) of the *IRPA* alleging that the Applicant had failed to disclose her marriage in March 2003 to Rajinder Mangat [Rajinder]. Eventually a hearing was held before the Immigration Division [ID]. At that time the Applicant alleged that she was not married to Rajinder, but they had become engaged in 2003. The ID determined that the Minister had not discharged the onus to prove on a balance of probabilities that the Applicant was married prior to coming to Canada. While the Minister of Public Safety and Emergency Preparedness could have appealed that decision, this was not done and the Applicant was granted permanent residence on March 24, 2010.

[5] The Applicant claims she married Rajinder on May 28, 2010. On August 24, 2010 she applied to sponsor him for permanent residence. The visa post in India conducted an interview in June 2011 and a field investigation in February 2012 in Rajinder's village. The sponsorship was refused on the basis that the declared date of marriage was false and the parties were actually married in 2003. As a result, Rajinder was determined to be inadmissible as a member of the family class and on the basis of misrepresentation. His application for a permanent residence visa was refused. That refusal was appealed to the IAD by the Applicant as the sponsor. Before the

appeal was heard, the Applicant brought a motion before the IAD claiming the issue was either barred by *res judicata* or, issue estoppel. In the alternative, the Applicant alleged that the appeal should be granted on the basis of abuse of process or collateral attack. The IAD denied the motion. The application before me is for judicial review of that denial. The Applicant's appeal to the IAD has not yet been heard on the merits as the parties are awaiting the outcome of this judicial review.

[6] The counsel for the Respondent argued in her written submissions that this application should be dismissed on the basis of prematurity. At the oral hearing I decided to hear from the parties first on prematurity before deciding whether oral submissions on the merits of the application were required. At the conclusion of the hearing I indicated the application was premature and reasons would follow. These are the reasons.

[7] The Applicant made three arguments as to why the application is not premature: (1) the IAD is a court of record under the *IRPA*, so the administrative process was finished when the IAD rendered its decision on the motion; (2) because the Applicant was arguing before the IAD that the matter was *res judicata* there is an exception to the general case law addressing prematurity in that she was trying to prevent re-litigation of a matter already decided when she was found not to be inadmissible by the ID; (3) in a variation of the re-litigation argument, to have the current matter proceed to a hearing would involve bringing the administration of justice into disrepute if there are two conflicting decisions of the same facts – a favourable one to the Applicant and an unfavourable one to her spouse.

[8] The Respondent submits that the second and third arguments made by the Applicant really go to the merits of *res judicata* and are not legitimate exceptions to the principle of prematurity, whether as understood at common law or, pursuant to paragraph 72(2)(a) of the *IRPA.*

[9] With respect to prematurity, the Respondent submits the issue is straightforward. This application is premature as the administrative process has not yet been concluded. The Respondent relies on *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] to say that there is a presumptive principle that an administrative process be allowed to run its course and only exceptional circumstances can warrant judicial review before then. The Respondent also argues that it has been determined in *Canada (Minister of Citizenship and Immigration) v Varela*, 2003 FCA 42 [*Varela*] that a decision by an administrative tribunal to reject a *res judicata* argument is not an exceptional circumstance as contemplated by *CB Powell* because the issue of *res judicata* could still be raised before the tribunal and would create grounds for judicial review or, it could not be raised at the tribunal and still raised at judicial review of the final decision.

[10] The Applicant submits that the IAD is a court of record under section 174 of the *IRPA.* Therefore it conducts a judicial process, not administrative one, so *CB Powell* does not apply. Alternatively, the Applicant says this case falls within the exception to the presumptive principle as a different decision by the IAD would have been dispositive of the appeal.

[11] In my view, based on the existing authorities at common law and under the *IRPA*, this

application is premature. Despite the Applicant's valiant attempts to distinguish this case from *CB Powell* and *Valera*, I am not persuaded an exception should be made from the general principle. In *CB Powell*, the decision being challenged was made by the President of the Canada Border Services Agency, who determined he did not have jurisdiction to rule on the question put to him. The legislation provided that his decision could be appealed to the Canadian International Trade Tribunal [CITT], which was also a court of record under section 17 of its enabling legislation. Nonetheless the aggrieved CB Powell sought judicial review of the President's decision. The Court of Appeal required all remedies before the CITT be exhausted before judicial review was available. In *Valera*, the Court of Appeal in a very brief decision clearly said that as the matter under review was an interlocutory ruling on an evidentiary matter, the application for judicial review was premature.

[12] With respect to paragraph 72(2)(a) of the *IRPA*, the Court of Appeal in *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288 [*Somodi*] dealt with an application for judicial review of a decision of a visa officer which had refused a spousal sponsorship application for permanent residence status as a member of the family class. At the same time as the judicial review application was made, the sponsor appealed the decision of the visa officer. Mr. Justice Mandamin determined the application for judicial review was barred from proceeding by paragraph 72(2)(a) of the *IRPA*. A question was certified for the Court of Appeal because the question of whether paragraph 72(2)(a) applied to bar the spousal application while the sponsor was exercising a right of appeal had not at that time been determined.

[13] The Court of Appeal distinguished existing jurisprudence on the basis that the party seeking judicial review in those cases had no means of redress other than judicial review. The

Court found that in the *IRPA* Parliament had established a comprehensive, self-contained process with specific rules to deal with the admission of foreign nationals as members of the family class. The Court also found that the right of appeal given to the sponsor, coupled with the statutory bar against judicial review until any right of appeal has been exhausted, combined to make the earlier jurisprudence obsolete. The Court found that the broad prohibition in paragraph 72(2)(a) in the *IRPA* restricting resort to judicial review to be after "any" right of appeal has been exhausted prevails over section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 granting the right to apply for judicial review and is broader than the limited statutory bar found in section 18.5 of that Act.

[14] The Court determined that the certified question should be answered to clarify the law as it was not confined to the facts in *Somodi*. The Court answered the certified question in the affirmative. The question which was posed in *Somodi* was:

> Does section 72 of the *IRPA* bar an application for judicial review by the Applicant of a spousal application, while the sponsor exercises a right of appeal pursuant to section 63 of the *IRPA*?

[15] In my view, *CB Powell* and *Valera* satisfactorily address this application at common law to enable me to find it is premature. The Applicant wished to pose a certified question under paragraph 72(2)(a). I am satisfied that *Somodi* satisfactorily answers the question he wished to pose. This application is also premature under section 72 of the *IRPA*.

[16] It is not necessary to deal with the merits of the interlocutory decision by the IAD. The Applicant can still raise the issues on any subsequent judicial review should the final decision by the IAD be subjected to review.

[17] For these reasons the application is dismissed without prejudice to the Applicant bringing the same arguments at any future judicial review after the IAD renders a final determination.

THIS COURT'S JUDGMENT is that the application is dismissed without prejudice to the same arguments being raised at a judicial review of the IAD's final decision.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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