Federal Court  Cour fédérale

Date: 20161221

Docket: IMM-2284-16

Citation: 2016 FC 1401

Ottawa, Ontario, December 21, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SEMRET KASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a May 13, 2016 decision [the Decision] of the Immigration Appeal Division [IAD or the Panel] of the Immigration and Refugee Board dismissing the Applicant's appeal of an immigration officer's decision not to issue a permanent resident visa to her husband, Mr. Woldergabere [the Appellant], on the basis that their marriage is not genuine and was entered into primarily for the purpose of acquiring status or privilege under the Act.

[2] The Applicant was born in Eritrea but is now a citizen of Canada. When the Applicant came to Canada, she made an unsuccessful refugee claim. She was subsequently sponsored by her first husband. She then married her second husband in or around December 2005 and sponsored him. She subsequently divorced him because she said that he did not wish to have children.

[3] On October 14, 2011, the Applicant and the Appellant married in Uganda. He was also born in Eritrea, but he now lives in Uganda. He was previously married, from 2002 to 2010, and has two sons, of whom his ex-wife has custody. In 2012, the Applicant applied to sponsor the Appellant as her spouse. The Applicant has one child, of whom the Appellant is allegedly the father, born in Canada in May 2015. She claims that she conceived the child during the month of August 2014 while visiting with the Appellant in Uganda.

[4] By a letter dated April 22, 2014, an immigration officer refused the Appellant's application for permanent residence, finding that, pursuant to section 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, he was excluded from being considered a spouse under the Act. On May 8, 2014, the Applicant filed an appeal of this decision before the IAD.

[5] On May 13, 2016 the IAD dismissed the appeal and concluded that the Applicant had not proven on a balance of probabilities that the marriage is genuine and was not entered into primarily for the purpose of acquiring status or privilege under the Act. The IAD based this

conclusion on a number of inconsistencies in the Applicant's evidence, a significant one being that the Appellant is not the father of the child, but rather the child is that of her second husband.

[6] The Applicant raises two issues. The first relates to submissions contesting the reasonableness of the Panel's assessment of the evidence concerning the genuineness of the marriage. The second pertains to an allegation of incompetence by her Counsel in failing to introduce the Applicant's itinerary in support of her claim of being in Uganda with the her husband during the month of August 2014, the agreed upon month of the child's conception. However, during the course of the hearing it became apparent, based on the Applicant's passport that the Panel erred in concluding that the Applicant was not in Uganda in August 2014. As a result, the decision must be set aside for the purpose of conducting a new hearing.

[7] The Applicant first testified that she arrived in Uganda in September 2014. When it was pointed out by the Panel member that this would mean that the child was not conceived in Uganda, where the Appellant resides, she testified that she was mistaken and had arrived in Uganda on June 11, 2014 and returned to Canada in October 2014. There is no disagreement on this return date. She also indicated during the hearing that she could supply the Panel with an itinerary supporting the June 11, 2014 entry date, or that she could obtain a copy of the ticket to the same effect. The Panel ignored the request to present further evidence. Instead it found that Counsel could point to no place in the materials where an itinerary could be confirmed and would show that she was in Uganda in August 2014.

[8] The Panel then examined the Applicant's Canadian passport, which it had been provided. It contained an ambiguous Ugandan entry stamp on page 7, in the middle of the page, surrounded by four other stamps and with some hand written notes regarding a two month extension. The entry stamp was unclear because it was missing the last numeral of the year, as follows: "11 June 201[missing or unclear number]". In place of the missing number identifying the exact year was an equally illegible hand written character in the shape of the letter "L", which if intended to represent the numeral "4", was missing the down stroke (or it was covered over –only photocopies of the passport were before the Court).

[9] The Panel rejected the Applicant's evidence of her presence in Uganda, concluding that it was "impossible to discern whether [the Applicant] arrived in Uganda in 2014, or whether she was there at the probable time of conception". The Panel concluded that, given the absence of any information on the father on the Statement of Live Birth, it was "more likely than not that the father of the baby is the ex [husband of the Applicant] not [the Appellant]."

[10] During the hearing, Counsel for the Respondent referred the Court to a different version of page 7 of the Applicant's passport on which the ambiguous entry of "11 June 201[?]" was totally absent, as were the hand written notes extending the visa. It was at this time that the Court understood that there were two photocopies of the Applicant's passport taken on different dates, something the Panel had apparently not been aware of when it rendered its decision.

[11] The version without the ambiguous entry stamp had been filed by the Minister on May 8, 2014, i.e. before June 11, 2014, as part of the Appeal Record, while the second was filed on

April 28, 2016, as part of the Applicant's disclosure. When corroborated by the Applicant's testimony and the other entry and exit stamps on the passport, including the two-month handwritten extension, I find there is no doubt that the ambiguous stamp was applied on June 11, 2014, placing the Applicant in Uganda at the time of conception of the child.

[12] This finding contradicts the IAD's central conclusion that, in all likelihood, the Applicant's second husband was most likely the father of her child. Rather, it would appear that the Appellant is most likely the father of the child conceived in Uganda while the Applicant was there. Besides undermining the negative credibility finding against the Applicant, this finding would also corroborate her narrative that she divorced her second husband because he did not want to have a child. This renders the evidence that the Appellant was prepared to have a family with her more plausible. In addition, the fact that the child appears most likely to be that of the Appellant adds to the evidence supporting the genuineness of the marriage.

[13] As a further remark, the Court has some concern over the Panel's refusal to accept the Applicant's request to provide additional documentation, being her itinerary or a copy of her ticket to establish her presence in Uganda. The Applicant immediately recognized her mistake and offered to provide evidence to support her testimony that she was in Uganda in August 2014. I note that the Panel mentioned in its decision that no itinerary was provided to support her evidence, which leads the Court to surmise that her offers may not have registered with the Member. The preferred objective evidence would be that of the Airline confirming her travel to Uganda, but this aside, when a matter such as the Applicant's presence in another country can be

readily corroborated with little delay, it is probably incumbent on the Panel to allow her to do so, unless there are good reasons not to, none of which were present here.

[14] While the Court recognizes that the Panel relied upon other evidence in reaching its conclusion, the fact nevertheless remains that it placed considerable reliance on the issue of the child's parentage in arriving at its decision, both in respect of its factual and credibility findings. The Decision must therefore, be set aside to be heard by a different panel.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted; the decision is set aside and remitted to a differently constituted panel. No question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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