Federal Court Cour fédérale

Date: 20170803

Docket: IMM-3696-16

Citation: 2017 FC 754

Ottawa, Ontario, August 3, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MICHAEL NINO DEL MUNDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Del Mundo sponsored his wife and child to become permanent residents in Canada in August 2013. His application under the family class was denied due to the failure to disclose his wife and child when he himself gained permanent resident status in Canada.

[2] For the reasons that follow, I will dismiss this judicial review application.

II. Background

[3] Mr. Del Mundo is a citizen of the Philippines. He became a permanent resident in Canada in November 2011 as a dependent child of his parents.

[4] Mr. Del Mundo and his spouse are said to have begun their relationship in December 2006. The Immigration Appeal Division ("IAD") found that the dates of co-habitation to be December 20, 2009 to November 18, 2011 based on the Spousal Questionnaire. Their first child was born in 2010. Mr. Del Mundo married his spouse on December 18, 2012, in the Philippines. They have since had another child.

[5] In August 2013, Mr. Del Mundo filed an overseas application to sponsor his wife and child to become permanent residents of Canada under the family class.

[6] On October 1, 2013, Mr. Del Mundo's sponsorship application was rejected, as he was found ineligible to sponsor his wife and child pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("the Regulations").

[7] Mr. Del Mundo appealed the decision to the IAD. On June 8, 2016, an IAD hearing was held with several witnesses. In a decision dated August 11, 2016, the IAD rejected Mr. Del Mundo's appeal. The IAD found that at least one year prior to Mr. Del Mundo's immigrating to Canada, that he and Mrs. Del Mundo were common-law partners, and in the alternative they "were clearly conjugal partners under the Regulations at the relevant time". The IAD did not find

that any of the exceptions under subsection 117(10) applied, where it can be determined that a family member was not required to be examined.

III. Issue

[8] The Applicant's issues are:

Did the IAD apply the wrong legal test when:

i. It determined the existence of a conjugal relationship in a case where the visa was denied because of the existence of a common-law relationship?

ii. It did not go through all of the factors to determine a common-law relationship?

IV. Standard of Review

[9] The issue of whether the Officer committed an error of law by applying the wrong test has been held to be subject to the correctness standard of review (*Sahota v Canada (Minister of Citizenship and Immigration)*, 2011 FC 739).

[10] The IAD's decision concerning if the IAD made a finding regarding the relationship is reviewable on the reasonableness standard. The Court must be satisfied as to the existence of justification, transparency and intelligibility within the decision-making process, and find 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 paras 47-48). It is not open to this Court to substitute its own view for a more preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

V. The Law

[11] Under the Regulations, the definition of "common-law partner" and "conjugal partner" are described as follows:

common-law partner means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year.

conjugal partner means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year.

Member

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(a) the sponsor's spouse, common-law partner or conjugal partner;

(b) a dependent child of the sponsor;

…

Excluded relationships

117 (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

[…]

(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor

conjoint de fait Personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an.

partenaire conjugal À l'égard du répondant, l'étranger résidant à l'extérieur du Canada qui entretient une relation conjugale avec lui depuis au moins un an.

Regroupement familial

117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

a) son époux, conjoint de fait ou partenaire conjugal;

b) ses enfants à charge;

…

Restrictions

117 (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

[…]

d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce

and was not examined.

dernier et n’a pas fait l’objet d’un contrôle.

VI. Analysis

[12] Mr. Del Mundo presented an oral argument that was not in the Memorandum of Fact and Law. The Respondent objected to this argument as this was the first time he had heard about it. This Court has held that arguments not presented in the written memorandum will not be entertained by the Court (*Mishak v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1242).

[13] In my opinion, it prejudices the opposing party, who is obviously taken by surprise. Further, it is clear that the Court is not in a position to fully assess the merits of a new argument suddenly raised at the hearing.

[14] Mr. Del Mundo had opportunity to present these arguments prior to the hearing as under Rule 15 of the *Federal Court Immigration Rules*, it is possible to file a Further Memorandum of Law as well as a Reply Memorandum. In this case, Mr. Del Mundo did not file a Further Memorandum after leave was granted nor did he file a Reply. Thus, the Respondent did not have an opportunity to respond to the arguments before hearing. I would normally not entertain their new arguments but in this case the arguments are similar but just fleshed out better as the other arguments were very sparse. Additionally, the Respondent was able to respond to this nuance in Mr. Del Mundo’s oral argument. In this exceptional situation, I will deal with all of the arguments.

[15] In the Memorandum, Mr. Del Mundo argued that when the Officer found that the couple were in a common-law- relationship, the Officer did not mention any of this knowledge in the refusal letter. Mr. Del Mundo submitted that the IAD went beyond their jurisdiction when she substituted her own finding that the parties were in a conjugal relationship. Mr. Del Mundo's position is that the IAD does not have jurisdiction to make findings of fact not reached by the original visa officer. Further, Mr. Del Mundo says that without notice that conjugal relationship was at issue that the couple was not prepared at the IAD hearing to answer allegations not in the original refusal letter and that this was not procedurally fair.

[16] The IAD hearing is *de novo* (*Kwan v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 971 at para 17). The IAD heard viva voce evidence at the hearing which strengthens that the hearing is *de novo*. Paragraph 117(1)(a) of the Regulations includes both conjugal partner and common-law partner as being members of the family class . It was well within the IAD's jurisdiction to determine if on appeal the couple were disqualified by virtue of paragraph 117(9)(d) of the Regulations. There is no basis for the argument presented. Mr. Del Mundo was represented by legal counsel and was given all the procedural fairness that should be accorded this appeal including the opportunity to give written submissions (dated February 28, 2015), filed additional documentation and the couple gave evidence at the hearing. For all these reasons, this argument fails as the correct test was applied and Mr. Del Mundo was given notice and all the procedural fairness they were entitled to.

[17] Furthermore, at the hearing Mr. Del Mundo argued that the wrong legal test was applied because: a) the IAD did not look at all of the factors to consider whether someone was cohabitating; b) the IAD did not clearly decide whether they lived together for over one year.

[18] Mr. Del Mundo's argument that the IAD applied the wrong test relies on *Walia v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 622 [*Walia*]. The IAD noted that *Walia* was also relied on at the IAD hearing. Mr. Del Mundo submitted that information in the documents was incorrect and that the IAD should believe the declarations and testimony of the witnesses. At the IAD and in this hearing, it was submitted that he was only refused as being in a common-law relationship and that the IAD did not follow *Walia* so he was not clearly found to be in a common-law relationship. The argument then, as is above, is that he was never refused because he was in a conjugal relationship so then the IAD erred.

[19] That case is not authority for the factors to be used when determining whether a person fits in the definition of a "family member" under section 117 (a) of the Regulations. In *Walia*, the application was regarding a mother and son's inadmissibility for two (2) years (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, section 40(2)(a)) for misrepresentation that she was cohabitating pursuant to section 40(1) a) of the Regulations. The applicant argued that there was no evidence that she was cohabitating. On those facts the judge agreed. In that particular case, it appears the only evidence was that the parties were sharing a house. The Judge listed other things that could be considered such as sexual relations and financial etc. to determine if the parties were in a common-law relationship under that section. That case is distinguishable from these facts.

[20] In this case, the test is set out in the Regulations (see above). The IAD found that there was no dispute that the child is Mr. Del Mundo's child and a dependent. The IAD also found that there was no dispute that the parents were not legally married when the Mr. Del Mundo came to Canada. The IAD then went on to determine if his wife was excluded by section 117(9) d) by looking at whether she met the test of being a member of the family class by being either in a common law partner or conjugal partner as defined in the Regulations.

[21] The IAD acknowledged the numerous discrepancies in the evidence. Subsequent to the spousal questionnaire both Mr. and Mrs. Del Mundo, along with other witnesses, denied that the couple had cohabited for any extended period of time before he immigrated to Canada.

[22] In deciding to reject the appeal, the IAD placed more weight on Mrs. Del Mundo's application than on subsequent testimony. In the Spousal Questionnaire, in response to question 27 "Have you and your sponsor lived together?" she checked "Yes" listing December 20, 2009 to November 18, 2011, and December 9, 2012 to January 17, 2012, as dates of co-habitation. The IAD held that the evidence in the questionnaire was "credible and reflective of the true nature of the relationship between the appellant and the principal applicant as compared to the evidence submitted after the refusal of the application."

[23] Based on the evidence from the wife, the IAD concluded on a balance of probabilities that the parties were in a common-law relationship under the Regulations at the relevant time or in the alternative were "clearly conjugal partners under the Regulations at the relevant time."

[24] The IAD made clear findings that Mr. and Mrs. Del Mundo were common-law spouses as found at paragraphs 14, 15, 17, and 18 of the IAD's decision. These reasons included specific dates and reasons why it gave more weight to some evidence over others. It is not for this Court to re-weigh evidence. The reasons support the conclusion reached (*Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 12-18).

[25] I find that the IAD applied the proper test as set out in the Regulations. I do not find that the IAD exceeded their jurisdiction to make the proceeding procedurally unfair. Further, I find that there was evidence to support the determination and the decision was reasonable.

[26] Mr. Del Mundo has failed to demonstrate a reviewable error and this application will be dismissed.

[27] No question for certification was presented and none arose.

JUDGMENT in IMM-3696-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3696-16
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