Federal Court  Cour fédérale

Date: 20180228

Docket: IMM-3057-17

Citation: 2018 FC 230

Toronto, Ontario, February 28, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THI UT VO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Thi Ut Vo, seeks judicial review of an Immigration Appeal Division [IAD] decision, which dismissed her sponsorship appeal as *res judicata*.

[2] For the reasons that follow, I find no reason to disturb the IAD's decision.

I. Background

[3] Ms. Vo is a Canadian citizen. In 2009, she married Xuan Khanh Phan, who currently resides in Vietnam. That same year, Ms. Vo applied to sponsor Mr. Phan. The application was refused in 2011, and Ms. Vo appealed to the IAD.

[4] The IAD dismissed Ms. Vo's first appeal on November 14, 2013, concluding that Ms. Vo and Mr. Phan's marriage was not genuine and had been entered into primarily for the purpose of gaining immigration status in Canada [2013 Decision] (*Vo v Canada (Minister of Citizenship and Immigration)*, 2013 CarswellNat 10632 (WL Can) (Immigration and Refugee Board of Canada - IAD). No judicial review of the 2013 Decision was sought. Further, because the IAD made a finding of misrepresentation at this time, Ms. Vo was prohibited from submitting another sponsorship application for two years.

[5] In 2015, Ms. Vo reapplied to sponsor Mr. Phan, relying on evidence of their continued relationship, including the birth a child. That application, like the original sponsorship application, was also refused. Ms. Vo appealed to the IAD once again, which dismissed her appeal on June 23, 2017 [2017 Decision] (*Re Vo and Canada (Minister of Citizenship and Immigration)*, 2017 CarswellNat 7932 (WL Can) (Immigration and Refugee Board of Canada - IAD). The 2017 Decision is the subject of this judicial review.

II. Analysis

[6] I will begin with a short explanation of *res judicata*, given its importance to Ms. Vo's application, before setting out the issues that Ms. Vo raises and the appropriate standard of review. Finally, I will consider each of Ms. Vo's arguments in turn.

A. *The Doctrine of Res Judicata*

[7] *Res judicata* prevents parties from relitigating decided matters (*Erdos v Canada (Citizenship and Immigration)*, 2005 FCA 419 at para 15 [*Erdos*]). In the context of administrative decision-making, the objective of this doctrine is to balance fairness to the parties against the integrity of the administrative process, which is threatened by relitigation (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 21 [*Danyluk*]).

[8] The branch of *res judicata* relevant to Ms. Vo's application is "issue estoppel", which prevents parties from revisiting issues that have been decided in prior proceedings (*Toronto (City) v CUPE, Local 79)*, 2003 SCC 63 at para 23 [*CUPE*]; *Erdos* at para 16). Issue estoppel has three preconditions: (i) the same issue must have already been decided in an earlier proceeding; (ii) the previous decision must have been final; and (iii) the parties in the current proceeding must be the same as the parties to the earlier proceeding (*Danyluk* at para 25).

[9] However, even if these three preconditions are met, a decision-maker retains the discretion to refuse to apply issue estoppel where doing so would cause an injustice (*Danyluk* at paras 33, 62-67, and 80). Thus, even where the preconditions are established, a decision-maker

must still ask whether issue estoppel should be applied. The second part of the analysis is therefore an "override" stage, and is often framed as whether any "special circumstances" exist that would justify the non-application of issue estoppel (see *Tuccaro v Canada*, 2016 FCA 259 at para 30).

B. *Issues and Standard of Review*

[10] Ms. Vo asserted two "special circumstances" before the IAD, which she argued justified the non-application of issue estoppel: (a) fairness concerns in the second immigration officer's refusal, and (b) new evidence since the 2013 Decision — namely, the birth of Ms. Vo's daughter, subsequent visits to Vietnam, photographs of time spent together, and records of ongoing communication.

[11] The core of Ms. Vo's argument in this judicial review is that the IAD unreasonably conducted the second, override stage of the issue estoppel test by failing to appropriately consider these "special circumstances". Ms. Vo also argues that the IAD ignored evidence and gave inadequate reasons.

[12] The parties agree that an administrative decision-maker's application of the second stage of the test for issue estoppel — i.e., whether issue estoppel should be applied, as a matter of discretion — is reviewable on a reasonableness standard (*Chotai v Canada (Citizenship and Immigration)*, 2015 FC 1335 at paras 15-16 [*Chotai*]; *Ping v Canada (Citizenship and Immigration)*, 2013 FC 1121 at para 17 [*Ping*]).

[13] Further, the parties agree that the related issues Ms. Vo raises, with respect to ignored evidence and inadequate reasons, are also reviewable on a reasonableness standard.

[14] Thus, in this application, I am concerned with whether the 2017 Decision was justified, transparent, and intelligible, falling within the range of possible, acceptable outcomes defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

C. *Analysis of Ms. Vo's Arguments*

(1) The second stage of the test for issue estoppel

[15] As set out above, Ms. Vo put forward two kinds of "special circumstances" before the IAD in support of her position that issue estoppel should not bar her appeal: (a) fairness concerns in the second immigration officer's refusal, and (b) new evidence since the 2013 Decision.

(a) *Fairness of related proceedings*

[16] In *Danyluk*, the Supreme Court of Canada held that the "most important factor" when considering whether to apply issue estoppel is whether doing so in a particular case would "work an injustice" (at para 80). In that vein, Ms. Vo submitted before the IAD that fairness concerns with the second immigration officer's refusal justified the non-application of issue estoppel in her case.

[17] However, the IAD concluded in its 2017 Decision that there was no evidence that any of the previous proceedings, including the second immigration officer's refusal, had been unfair, or that Ms. Vo and Mr. Phan had not had their case properly adjudicated. The IAD noted that

Ms. Vo had the benefit of a full hearing before the IAD in 2013 with counsel, and that she had chosen not to seek judicial review of the IAD's 2013 Decision.

[18] The IAD also noted that Ms. Vo had the option of seeking further relief on the basis of humanitarian and compassionate concerns, and that there was no evidence of undue obstacles preventing Ms. Vo and her daughter from living with Mr. Phan in Vietnam. Thus, the IAD concluded in its 2017 Decision that there was "no potential injustice" in the circumstances of the case warranting the non-application of issue estoppel.

[19] In this application, Ms. Vo submits that the 2017 Decision was unreasonable because it failed to properly take into account her fairness concerns with respect to the second immigration officer's refusal. She submits that the immigration officer was predisposed against her and selectively ignored relevant information and evidence. She refers to the immigration officer's "objectionable" behaviour during questioning, and argues that Mr. Phan was "tricked" when questioned about his daughter.

[20] I do not accept Ms. Vo's arguments.

[21] First, it is clear that the IAD expressly turned its mind to the issue of unfairness, and concluded that there was no evidence of same — whether in respect of the IAD's 2013 Decision, the second immigration officer's refusal, or any of Ms. Vo's other circumstances.

[22] Further, while Ms. Vo indeed argued certain fairness concerns before the IAD, she did not submit that the immigration officer's refusal raised a reasonable apprehension of bias. Generally, a reviewing court will decline to consider issues raised for the first time on judicial review (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-23).

[23] Even putting aside this principle, as well as the fact that the second immigration officer's refusal is not the subject of this judicial review, there is no merit to Ms. Vo's submission. Allegations of bias are serious and must be supported by concrete evidence (*Panov v Canada (Citizenship and Immigration)*, 2015 FC 716 at para 20). It was open to the second immigration officer to explore the aspects of Ms. Vo's application that had raised credibility concerns in prior determinations, and which continued to raise concerns. I am satisfied that an informed person, viewing the matter realistically and practically, would not find that such questioning gave rise to a reasonable apprehension of bias (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 (SCC) at 394).

[24] Specifically with respect to the "trick question" allegation, I agree with the Respondent that any bias argument fails when that exchange is looked at in its entirety:

> Q: What did you and the SPR decide to do after the appeal was dismissed? We were depressed and sad for not being allowed to be together. So we decided to give birth to a child. Q: Why? I think that having a baby is evidence of our real marriage. Q: So you had a baby to show that your marriage was real? Yes.
>
> [Emphasis added]

[25] Clearly, the question only confirmed a statement made by Mr. Phan, and was not a leading question for the purpose of tricking him.

[26] In sum, I find that the IAD reasonably concluded that no fairness or injustice concerns justified the non-application of issue estoppel in Ms. Vo's circumstances, even if those concerns are reframed as bias allegations, as Ms. Vo has done in this application.

(b) *New evidence*

[27] New evidence, previously unavailable to a party, can constitute "special circumstances" justifying the non-application of issue estoppel. *CUPE* held that the existence of "fresh, new evidence, previously unavailable" that "conclusively impeaches the original results", can mean that a decision-maker should not apply issue estoppel to a particular case (at para 52). In *Ping*, Justice Kane held that to justify the non-application of issue estoppel, such new evidence must be "practically conclusive of the matter" (at para 23). In other words, it is not enough for a party to merely submit new evidence. Rather, that new evidence must also be decisive of the matters which the party seeks to revisit.

[28] Ms. Vo's most significant new evidence before the IAD was the birth of her daughter, an event which took place in 2014. Ms. Vo also argued that evidence of her continuing relationship with Mr. Phan, as demonstrated through visits, pictures, and ongoing communication, was new and decisive, such that issue estoppel should not be applied.

[29] The IAD began its analysis on this point by acknowledging that evidence of a continuing relationship can, in certain cases, constitute "decisive new evidence" for the purposes of the non-application of issue estoppel. However, the IAD noted that the birth of a child is not, on its own, determinative of the genuineness of a marriage, citing *Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 565 (at para 12), and that Ms. Vo's evidence of subsequent visits and communication was similar to the type of evidence dealt with in the 2013 Decision, which had not overcome the IAD's credibility concerns at that time.

[30] The IAD then considered this Court's decision in *Tang v Canada (Citizenship and Immigration)*, 2016 FC 754 [*Tang*], and observed that the 2013 Decision had rested on two determinations made under section 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]: (a) that Ms. Vo's marriage to Mr. Phan was not genuine, and (b) that it had been entered into primarily for the purposes of acquiring immigration status in Canada.

[31] In its 2017 analysis of whether Ms. Vo's new evidence was decisive, the IAD concluded that, even if Ms. Vo's new evidence was potentially capable of supporting the genuineness of her marriage, this new evidence could not overcome the IAD's 2013 conclusions regarding the marriage's primary purpose.

[32] Therefore, the IAD determined that Ms. Vo's new evidence did not constitute "special circumstances" that would justify the non-application of issue estoppel.

[33] In this application, Ms. Vo submits that the IAD "unfairly" concluded that her new evidence did not rise to the level of "special circumstances". She makes a number of arguments on this point.

[34] First, Ms. Vo submits that the 2013 Decision did not actually hold that her marriage was entered into for the primary purpose of acquiring immigration status in Canada, thus making it unreasonable for the IAD to rely on this finding in its 2017 Decision.

[35] Based on the clear wording of the 2013 Decision, this argument has no merit. The relevant paragraphs read as follows:

> 57 Given that I found them to be not credible, and given my finding that the marriage is not genuine, these two findings point to the marriage having been primarily entered into in order to acquire status or privilege under the Act.
>
> 58 Thus, I find that the appellant did not meet her onus to prove on a balance of probabilities that the marriage is genuine, and that it was not primarily entered into in order to acquire status or privilege under the Act.
>
> 59 I find that the marriage is not genuine and that it was primarily entered into in order to acquire status or privilege under the Act.
>
> 60 Thus, the applicant is excluded from the family class under section 4(1) of the Regulations.
>
> [Emphasis added]

[36] Further, to the extent that Ms. Vo is arguing that the 2013 Decision is unreasonable with respect to its findings on the marriage's purpose, Ms. Vo never sought judicial review of the

2013 Decision. It therefore stands as final. To challenge its reasonableness now constitutes a collateral attack which I will not entertain.

[37] Ms. Vo next relies on this Court's comments in *Sandhu v Canada (Citizenship and Immigration)*, 2014 FC 834 [*Sandhu*]. In that case, Justice Martineau held as follows:

> [13] Evidence of commitment subsequent to the marriage can be used to prove the primary purpose of the marriage. This might include evidence of a continuing relationship or the birth of a child. Additionally, new evidence may be relevant to the analysis of genuineness of the marriage or primary purpose, even if similar evidence was adduced in the first IAD hearing…
>
> […]
>
> [15] … On the facts of some cases, the birth of a child may be sufficient to warrant the non-application of res judicata. However, where the facts on which the previous decision was decided very strongly support the finding that the primary purpose of a marriage is to acquire status under the Act, it is less likely that this will be sufficient. In order to be decisive new evidence, the evidence must genuinely affect the analysis or evaluation of the intention. Evidence which simply bolsters or attempts to create the intention after the fact will be insufficient (*Gharu*, above, at para 17). What makes this case different from other cases is the admission made by the respondent that the new evidence establishes the genuineness of the marriage.

[38] Ms. Vo contends that the 2013 Decision's conclusion in respect of her marriage's purpose was based on weak findings — therefore, she argues that her evidence of continued commitment and the birth of a child ought to constitute decisive new evidence, capable of speaking to both the marriage's genuineness and its legitimate purpose.

[39] Finally, Ms. Vo relies more broadly on *Sami v Canada (Citizenship and Immigration)*, 2012 FC 539 [*Sami*]. In that case, the IAD had held that an appeal was barred by issue estoppel,

notwithstanding the applicant's evidence of continued commitment in the form of visits, photographs, and phone records. This Court set aside the IAD's decision on the basis that evidence of a continued commitment over time can constitute new, decisive evidence, capable of changing the result of the first appeal (at paras 77-79).

[40] When reviewing whether the IAD has reasonably decided to apply issue estoppel, this Court has consistently held that each case is unique and must be decided on its own facts (*Tiwana v Canada (Citizenship and Immigration)*, 2016 FC 831 at para 32 [*Tiwana*]; *Sandhu* at para 14). Just because in *Sami* and *Sandhu* evidence of a continued relationship or the birth of a child warranted judicial intervention, that is not dispositive of Ms. Vo's application. Rather, as Justice Kane observed in *Ping*: "it is not the nature of the evidence that is determinative but how that evidence addresses or overcomes the earlier findings" (at para 24).

[41] In other words, to justify this Court's interference with the IAD's 2017 Decision, Ms. Vo must establish that her new evidence was capable of addressing the concerns raised in the 2013 Decision, or of otherwise materially changing the IAD's 2013 analysis (*Chotai* at paras 21-22; *Sandhu* at para 15).

[42] At this point, the interplay between evidence speaking to a marriage's genuineness and evidence speaking to its purpose — the two factors set out in section 4(1) of the Regulations — warrants further comment.

[43] Sections 4(1)(a) and (b) are disjunctive: a foreign national is not considered a spouse if either the marriage is not genuine or it was entered into primarily for the purpose of obtaining immigration status (*Lawrence v Canada (Citizenship and Immigration)*, 2017 FC 369 at para 8). While there are links between these tests, they are nonetheless distinct (*Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522 at paras 29-30 [*Gill*]). For instance, this Court has recognized that a finding of genuineness weighs in favour of a finding that the marriage was not entered into for immigration purposes (*Sandhu* at para 12), but, given the disjunctive nature of sections 4(1)(a) and (b), genuineness is not determinative of purpose (*Gill* at para 29 and 32; *Sandhu* at para 12).

[44] The most that can be said is that evidence which speaks to genuineness may also be relevant to primary purpose, depending on the facts of the case (*Trieu v Canada (Citizenship and Immigration)*, 2017 FC 925 at paras 36-38). Typically, the most probative evidence with regards to a marriage's primary purpose will be evidence that speaks directly to what the parties were thinking at the time the marriage was entered into (*Gill* at para 33).

[45] In the context of the principles outlined above, it is clear to me that Ms. Vo's case is very different from the unusual circumstances considered by Justice Martineau in *Sandhu*, where the respondent conceded the genuineness of the marriage. *Sami* is also distinguishable, in that only the genuineness — not the primary purpose — of the marriage was at issue.

[46] More helpful is this Court's analysis in *Tiwana*. In that case, the IAD had concluded at the first IAD appeal that as a result of serious credibility concerns, the marriage was not genuine

and had been entered into for the purpose of acquiring immigration status. On judicial review of the IAD application of issue estoppel to bar a subsequent appeal, this Court found the IAD's decision to have been reasonable, despite evidence of a continued relationship, including the birth of a child, because the new evidence did not decisively speak to the IAD's initial concerns, including those relating to credibility (*Tiwana* at paras 33-37). In other words, the applicant's evidence of matters post-dating the marriage did not, in the circumstances of that case, decisively speak to the purpose of the marriage (*Tiwana* at paras 36-37).

[47] Here, I have considered the IAD's 2013 Decision, the nature of the new evidence submitted to the IAD in 2017, and the high bar set by *CUPE* and *Ping* before new evidence will justify the non-application of issue estoppel. With these points in mind, I find that it was reasonable for the IAD to conclude that, even if Ms. Vo's new evidence potentially supported her marriage's genuineness, it was not sufficiently decisive of the purpose of her marriage to warrant the non-imposition of issue estoppel.

[48] In this case, like in *Tiwana*, the IAD's 2013 Decision rested on significant credibility concerns, which the IAD concluded in 2017 were not addressed by Ms. Vo's new evidence. Further, and also similar to *Tiwana*, Ms. Vo's and Mr. Phan's efforts to have children were considered by the IAD in 2013, and these efforts did not overcome other concerns raised at that time (*Tiwana* at paras 31 and 34; see also *Dhaliwal v Canada (Citizenship and Immigration)*, 2012 FC 1182 at para 11).

[49] Thus, in the present circumstances, I am satisfied that the IAD reasonably concluded in its 2017 Decision that Ms. Vo's new evidence did not justify the non-application of issue estoppel: the new evidence did not specifically remedy prior credibility concerns, and it was similar to evidence already considered by the IAD in its 2013 Decision.

(2) Ignored evidence and inadequate reasons

[50] I will deal only briefly with these final two issues Ms. Vo raises, because their disposition flows in part from my above findings. Ms. Vo submits that the IAD ignored the evidence before it and reached its decision in a perverse or capricious manner, and that the IAD gave inadequate reasons for its 2017 Decision.

[51] When the IAD finds that certain evidence does not give rise to the appellant's desired outcome, it is not the same thing as the IAD ignoring that evidence. In other words, just because the IAD determined that issue estoppel barred Ms. Vo's appeal does not mean that the IAD ignored or overlooked her evidence of alleged "special circumstances". To the contrary, the IAD considered that evidence at length to determine whether any of it justified the non-application of issue estoppel. I therefore find that Ms. Vo's evidence was not ignored by the IAD and that the 2017 Decision was neither perverse nor capricious.

[52] On the point of adequate reasons, the IAD's reasons must be read together with the record and the outcome of the decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16 [*NLNU*]). The IAD does not have to make explicit findings on every piece of evidence submitted (*NLNU* at para 16;

Tang at para 33). Here, the reasons were comprehensive on the issue of *res judicata*, as well as intelligible, justified, and transparent (see *Tiwana* at para 40).

III. Conclusion

[53] For the reasons set out above, I have concluded that the IAD's second stage issue estoppel analysis was reasonable and did not ignore any evidence. I am further satisfied that, read in the context of the record and the outcome, the IAD's reasons were adequate — the IAD explained why Ms. Vo's new evidence, and the fairness issues she raised, did not constitute "special circumstances" warranting the non-imposition of issue estoppel.

[54] The application for judicial review is accordingly dismissed. No questions for certification were argued and none arise.

JUDGMENT in IMM-3057-17

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arose.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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