Federal Court  Cour fédérale

Date: 20200327

Docket: IMM-4137-19

Citation: 2020 FC 443

Ottawa, Ontario, March 27, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KANWALJIT KAUR SIDHU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review pursuant to subsection 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of an Immigration Appeal Division [IAD] decision dated June 25, 2019 [Decision] refusing the Applicant's second application to sponsor her foreign national husband on the grounds that the matter had already been previously decided (*res judicata*).

[2] The application for judicial review is dismissed. My reasons are below.

II. Decision under Review

[3] The Applicant is a Canadian citizen who seeks to sponsor her foreign national husband to come to Canada.

[4] Her first sponsorship application was in 2015. A visa officer refused it on the grounds that the marriage was entered into primarily for the purpose of acquiring status or privilege or was not genuine, per the *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 4(1). The IAD upheld the officer's decision in March 2016.

[5] In 2017, the Applicant submitted a second sponsorship application. It was dismissed for the same reasons. She appealed the decision to the IAD.

[6] Prior to considering the matter, the IAD sent a letter to the parties identifying that the doctrine of *res judicata* may apply, and the panel member requested submissions. In June 2019, the IAD, without conducting an oral hearing, dismissed the matter based on the doctrine of *res judicata*, finding that the three-part test detailed by Justice Kane in *Ping v Canada (Citizenship and Immigration)*, 2013 FC 1121 [*Ping*] was met. The IAD found that there were no "special circumstances" that warranted not applying the doctrine and confirmed the officer's refusal of her application for sponsorship.

[7] The Decision is now under judicial review. The Applicant alleges that the IAD erroneously refused to apply the special exception to the doctrine of *res judicata* in spite of her new evidence that should have caused the IAD to apply it. The Applicant noted that this new evidence included:

1. Open source material regarding inter-caste marriages
2. Affidavit from Applicant's father stating his new position about the marriage
3. Medical document about Applicant's fertility treatments
4. Applicant's affidavit
5. Letters of support for the marriage
6. Evidence showing Applicant and husband interacting, including photos

III. Issues and Standard of Review

[8] The Applicant concedes that the IAD properly applied the three-step test for the application of *res judicata*. The Applicant contends that the IAD erred in not finding that a "special exception" to the doctrine applies. The Respondent disagrees and submits that no special exception exists in the circumstances. The issue therefore is: did the IAD reasonably exercise its discretion not to apply the "special circumstances exception" to the doctrine of *res judicata*?

[9] Both parties agree that reasonableness is the appropriate standard of review. As the Respondent notes, the exercise of discretion in applying *res judicata* attracts substantial deference: *Rahman v Canada (Minister of Citizen and Immigration)*, 2006 FC 1321 at para 13 and *Chéry v Canada (Citizenship and Immigration)*, 2012 FC 922 at para 14.

[10] This matter was argued prior to the Supreme Court's decision in Canada *(Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Court did not direct further submissions on the standard of review and counsel did not request such an opportunity. I have reviewed the Supreme Court's recent review of the Canadian administrative law framework, along with the parties' submissions, and find that this question should be assessed under a reasonableness standard of review. I can see no reason to rebut the now-presumed presumption of reasonableness (*Vavilov* at paras 16–17, 65–68).

[11] A reasonable decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and must be justified in light of the relevant facts and law that constrain the decision-maker (*Vavilov* at para 99).

IV. Parties' Positions

A. *Did the IAD reasonably exercise its discretion not to apply the "special circumstances exception" to the doctrine of res judicata?*

(1) Applicant's Position

[12] As noted above, the Applicant concedes that the IAD properly determined that the test for *res judicata* was met in this case. However, they argue that the IAD should not have applied it. The Applicant cites Justice Russell from *Sami v Canada (Citizenship and Immigration)*, 2012 FC 539 at para 67 [*Sami*]:

> The case law has established that, where the preconditions are met, issue estoppel must apply unless special circumstances exist which would warrant hearing the case on its merits. The Supreme Court of Canada has determined that an evaluation of the special

> circumstances requires the decision-maker to ask whether, taking into account all of the circumstances, the application of issue estoppel would result in an injustice.

[13] In other words, "where the three [*res judicata*] pre-conditions exist, the decision-maker is then obligated to consider whether to exercise discretion to hear the matter anyway": *Sami* at para 30.

[14] The Applicant argues that the evidence that she has adduced should have been enough to trigger the "special circumstances" exception. The Applicant then goes through this evidence and notes the reasons why she feels it is compelling. For her, they prove that the marriage is indeed genuine.

[15] The Applicant relies on *Sami* as one of the few cases where this Court has used its power of judicial review to intervene in a similar "marriage to gain status" type of case. She submits that the circumstances of her case at least warrant a fair consideration, not a simple dismissal based on *res judicata*. She acknowledges that the doctrine of *res judicata* should be applied carefully. In short, she asks the IAD to give her "a break".

(2) Respondent's Position

[16] The Respondent maintains that the Applicant simply disagrees with the IAD's considerations and conclusions in its assessment of the evidence. It argues that the bar to overcome *res judicata* is high, and the new evidence presented must be "practically conclusive of the matter".

[17] The Respondent provides case law establishing the high bar for new evidence's ability to override *res judicata*. It must be more than merely additional evidence that bolsters previous evidence: *Vo v Canada (Minister of Citizenship and Immigration),* 2018 FC 230 [*Vo*]; *Ping* at para 23. The evidence must be conclusive or decisive. For the Respondent, the Applicant's evidence failed to meet this high bar.

V. Analysis

A. *Did the IAD reasonably exercise its discretion not to apply the "special circumstances exception" to the doctrine of res judicata?*

[18] In light of the Applicant's concession that the three-part test for the application of the doctrine of *res judicata* applies, it is not necessary to review the test. The only matter to consider is whether the special circumstances exception to the doctrine applies in this case.

[19] From *Vo,* there are two situations where a decision-maker may use their discretion to decline to apply *res judicata*:

> [9]…a decision-maker retains the discretion to refuse to apply issue estoppel where doing so would cause an injustice […] 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 […]

[20] The IAD found that both stages of the discretionary part of the analysis militated toward applying *res judicata*. The IAD determined that its application would not lead to an injustice, and

that the new evidence was insufficient to meet the special circumstances exception to the doctrine.

[21] To use Justice Kane's words, the new evidence presented to satisfy the "special circumstances" discretionary exception must be "practically conclusive of the matter": *Ping* at para 23.

[22] The initial 2016 IAD decision upheld a visa officer's decision that the Applicant's marriage was entered primarily for the purpose of acquiring status or privilege or was not genuine. A question that arises from this is: exactly how much or what kind of evidence is required to show that evidence is "practically conclusive" that a marriage is genuine? Justice Manson, in *Tiwana v Canada (Citizenship and Immigration)*, 2016 FC 831 at para 32, notes that each case must be decided on its own circumstances—a "one size fits all" solution is elusive.

[23] The Applicant relies heavily on *Sami* for authority that the Court can intervene. In *Sami*, Justice Russell dealt with a similar situation: the IAD found that *res judicata* had prevented the appeal of similar proceedings, in spite of evidence of seven years of marriage between the Applicant and her husband. Justice Russell found that the evidence presented in her case was sufficient to address the issues that caused her downfall in the first case (*Sami* at para 81).

[24] Recently, Justice Gascon in *Basanti v Canada (Citizenship and Immigration*) 2019 FC 1068 [*Basanti*] dealt with a man attempting to sponsor his wife for the fifth time. In dismissing the application for judicial review, Justice Gascon noted that the primary purpose at the time of

the marriage remains the matter to be established under paragraph 4(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] and in assessing whether this test is satisfied, the focus must be upon the intentions of both parties to the marriage at the time of the marriage (*Basanti* at para 28). Respecting new evidence, Justice Gascon noted that to be decisive the new evidence would have to genuinely affect the analysis or evaluation of the intention of the spouses at the time of the marriage (*Basanti* at para 30).

[25] I will note that *Basanti* takes place in a slightly different context—the IAD was not considering *res judicata* in that case, but rather found that the applicant in that case could not overcome the IAD's initial finding that the marriage was entered into for the purpose of obtaining status by simply showing evidence of a continuing relationship. Although evidence of a continuing relationship might be a factor that is slightly relevant toward establishing intent at the time of a marriage, it is of limited use—it is only one consideration.

[26] As explained in *Basanti* at paras 36-37, the Regulations were amended in 2010 to make the relevant test disjunctive:

> The two-part test now set out in subsection 4(1) of the IRP Regulations requires an assessment of whether the marriage was entered into primarily for the purpose of acquiring any status or privilege under IRPA (the "primary purpose test"), as well as whether the marriage is genuine (the "genuineness test"). The two tests focus on different time periods. The primary purpose test is in the past tense and requires an examination of the intention of each spouse at the time of entry into the marriage. For its part, the genuineness of the relationship is in the present tense and is to be assessed at the time of the decision (*Singh v Canada (Minister of Citizenship and Immigration*), […] However, because it is now a disjunctive test, failure by an applicant in respect to either part of the test will preclude obtaining the necessary visa to come to Canada […]

[27] I note that the IAD found, in the original 2016 decision, that neither part of the test was met. I also note that *Sami* was concerned only with the second part of the test, the genuineness of the marriage (*Sami* at para 3). Therefore, *Sami* is of limited use.

[28] Justice Gascon has made it clear in *Basanti* that the first part of the test is difficult to affect with new evidence about the relationship. Although evidence of a continuing relationship can act as evidence that the intent of the parties was not for an improper purpose, it is only one consideration. Therefore, it is difficult to say whether any new additional evidence would be "conclusive of the matter."

[29] The Applicant has presented some information on caste systems in India, some affidavits (including one from her father who states that the family now accepts the marriage), evidence that they have visited each other—albeit for nearly a year, evidence of communications, evidence of fertility treatments, and some photos of the couple together. This mostly speaks to their continuing relationship, not whether the initial intent of their relationship was for the purpose of achieving status.

[30] Considering the above, in my view, the Applicant's evidence is still not "practically conclusive" that the marriage, *at the time of marriage*, was genuine and made for a proper purpose. It indicates that the intent *may* have been slightly more likely to have been proper. The first stage of the Regulations' requirements—s 4(1)(a)— is difficult, but not impossible, to satisfy after a decision is made and affirmed for the first time. This is due to the high evidentiary bar that an applicant must meet and it is a fact-driven consideration.

[31] In reviewing the IAD Decision I have determined that it was reasonable to find that the evidence presented was insufficient to show that it was “practically conclusive” that the parties married with the proper intentions. The IAD’s determination that not applying the exception to the doctrine of *res judicata* would not lead to an injustice and that the new evidence was insufficient to meet the special circumstances exception was a reasonable determination based on the evidence.

VI. Conclusion

[32] For the reasons above, this application for judicial review is dismissed. There is no question for certification and, in my view, none arises.

JUDGMENT in IMM-4137-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. There is no order for costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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