Federal Court  Cour fédérale

Date: 20141113

Docket: IMM-5204-13

Citation: 2014 FC 1077

Ottawa, Ontario, November 13, 2014

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ISREE SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review by Isree Singh [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a decision by the Immigration and Refugee Board of Canada, Immigration Appeal Division [the IAD], dated July 11, 2013, wherein the IAD determined that the Applicant's marriage met the definition of

the exclusion in subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

[2] I am of the view that this application should be dismissed as the law stands, however I am certifying a question for the Federal Court of Appeal asking whether the applicable Regulations are *ultra vires* the IRPA. I have found the applicable Regulations *intra vires* and binding on me.

II. Facts

[3] The Applicant was born in 1958 in Guyana, came to Canada in 1998 and is now a Canadian citizen. He was married twice before the marriage in issue, but unfortunately both marriages ended unhappily for the Applicant. His cousin then introduced him to Sabitree Singh [the spouse or wife], who is a citizen of Guyana and the mother of Antonio Subedar. Her previous marriage from 1984 had ended in 2006 when her late husband passed away. After their introduction, she and the Applicant began speaking on the phone in early June 2008, met in person in Guyana for the first time on July 30, 2008 and were married in Guyana on the same visit, seven days later, on August 6, 2008.

[4] The Applicant applied to sponsor his wife once before, but the application was refused on March 20, 2009 due to insufficient documentary evidence to demonstrate an ongoing and genuine relationship. The Applicant did not appeal that decision. The Applicant submitted a second sponsorship application in January 2010 with additional and more comprehensive evidence. The spouse was interviewed in Guyana but the visa officer refused the application and found the spouse entered the marriage for the purpose of acquiring status or privilege under the

IRPA, and that the marriage was not genuine. The Applicant appealed, the IAD held a hearing, but dismissed the appeal. This application for judicial review arises from that dismissal.

III. Analysis

[5] At issue before the IAD was whether the marriage was either entered primarily for the purpose of acquiring any status or privilege under the IRPA (the "primary purpose test"), or was not genuine (the "genuineness test") pursuant to subsection 4(1) of the Regulations. Either finding, as the Regulations are now worded, preclude the spouse from obtaining the necessary visa to live with her husband in Canada: *Dalumay v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1179 at para 25 [*Dalumay*]. Subsection 4(1) of the Regulations now states:

Bad faith	Mauvaise foi
4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.

[6] It should be noted that subsection 4(1) was reformulated in September 2010. Notably, the word "or" between (a) and (b) was inserted to replace the word "and", thereby changing what

was a conjunctive definition to a disjunctive definition. The older version of subsection 4(1) states:

Bad faith	Mauvaise foi
4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	4. Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

[7] The key difference is that under the former definition, a marriage originally entered into for the primary purposes of acquiring status or privilege over time could become a genuine marriage thereby allowing the foreign spouse to join his or her partner in Canada. As worded now, however, a foreign national who originally entered into a marriage for the purpose of acquiring status or privilege, but whose marriage grows over time into a genuine marriage is barred from coming to Canada to live with his or her lawful spouse. Therefore, as the law now stands, the Applicant's wife of six years may not come to Canada to live with her husband even if their marriage is now genuine.

[8] At the hearing before the visa officer, the onus was on the Applicant to prove, on a balance of probabilities, that his marriage was genuine *and* was not entered primarily for the purpose of acquiring status or privilege under the IRPA. As a result of the visa officer's findings against the parties on both bases, the appeal to the IAD could only succeed if the Applicant

satisfied both requirements. Likewise, unless the regulations are *ultra vires* the IRPA or suffer some other defect, the Applicant may only succeed on this judicial review if he establishes that *both* the finding regarding primary purpose *and* the finding on genuineness fall outside the allowable ranges of reasonable outcomes.

A. *Standard of Review*

[9] Judicial review is not an appeal but rather an assessment of the reasonableness of a decision. This Court has held that decisions of the IAD, as an expert tribunal, are assessed on the reasonableness standard and are owed deference, and generally should only be set aside where there is an erroneous finding of fact made in a "perverse and capricious manner or without regard for the material before it", especially when dealing with questions of mixed fact and law such as credibility assessment and the genuineness of the marriage: *MacDonald v Canada (Minister of Citizenship and Immigration)*, 2012 FC 978 at para 16; *Dalumay* at para 19; *Kaur Barm v Canada (Minister of Citizenship and Immigration)*, 2008 FC 893 at paras 11-12.

[10] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[11] I will deal with the two parts of subsection 4(1) of the Regulations separately.

B. *4(1)(a): Marriage entered into primarily for the purpose of acquiring any status or privilege*

[12] Much of Applicant's argument on paragraph 4(1)(a) regarding primary purpose amounts to asking this Court to reweigh the evidence that was before the IAD. The Applicant disagrees strongly with the way the IAD assessed and evaluated the evidence before it. However, the decision of the IAD may only be set aside where it is unreasonable in that there is an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it.

[13] In my view, the Applicant has not identified a finding of fact made by the IAD in a perverse and capricious manner or without regard for the material before it in this connection. Based on the evidence before it, the IAD found, on the correct legal standard, namely on a balance of probabilities, that the wife (not the Applicant) entered into this marriage primarily for the purpose of immigrating to Canada with her son. Some of the key findings in arriving at this conclusion were: the Applicant was the only marriage candidate presented to his spouse; the spouse had very few reservations with the proposed match and agreed to marry the Applicant without first talking or meeting him; the Applicant's residence status in Canada played a role in the spouse's decision to marry him; they agreed to marry after a 30-45 minute long telephone call; the Applicant hadn't talked nor met his spouse's son before agreeing to enter into marriage; the hastiness of the marriage and the lack of evidence demonstrating that this is a characteristic of semi-arranged Indo-Caribbean marriages. In my view, all of these findings were open to the IAD on the record.

[14] I should note that the issue of arranged marriage was addressed by both sides at the hearing. While the application stated that the marriage was arranged (the "arranged" box was checked off), and while the Applicant described the marriage as a Caribbean "semi-arranged" marriage, the IAD correctly concluded there was no evidence as to what that particular expression meant. The IAD was criticized by the Applicant for drawing comparisons with arranged marriages in India, where the term "arranged" has, as I understand it, a specific meaning. The marriage in question was not arranged except that the parties were introduced to the Applicant's cousin who was also a friend of the father of the Applicant's spouse. In view of the evidence, the marriage was not arranged in any special sense of the word.

[15] In addition the IAD reasonably considered Indian marriage culture and customs because the comparison was raised by the Applicant's spouse who stated (regarding the size of the wedding): "As is customary with Hindu families in Guyana, there are no big ceremonies done after the first marriage ceremony." In my view, the IAD must also be credited with specialized knowledge in this regard. That said, it is clear the IAD's decision was not determined by this comparison.

[16] It was also open, i.e., reasonable for the IAD to find that the Applicant's residency in Canada played a role in the wife's decision to marry, and to give limited consideration to the spouse's submission that she was marrying in order to give her son the opportunity to have a father. I note that the IAD's suggestion that the wife chose to immigrate to Canada because Canada is a better place for her child to become someone, was not correct. That answer was based on a very different question, namely her plans for herself and her son once in Canada, and

not her purpose in marrying the Applicant in the first place. Overall, and I might not agree with the decision below, it was reasonable for the IAD to conclude on a balance of probabilities that the Applicant's spouse entered into the marriage primarily to immigrate to Canada with her son.

C. *4(1)(b): Genuine marriage*

[17] The foregoing conclusion regarding the primary purpose of the marriage is sufficient to dispose of this application for judicial review, as the law now stands, but in this case it is necessary to also review the IAD's finding regarding the genuineness of the marriage.

[18] The Applicant argues that the marriage subsequently developed genuineness, and submits that a currently genuine marriage of many years duration should be taken as strong evidence of the genuineness of the marriage *ab initio*. The Applicant cites *Paulino v Canada (Minister of Citizenship and Immigration)*, 2010 FC 542 at para 29, a case that predates the wording changes of subsection 4(1) of the Regulations:

> An analysis of section 4 of the Regulations requires: first, an assessment of the genuineness of the marriage; and second, a determination of whether the marriage was entered into primarily for the purpose of acquiring status or privilege. However, the Applicant need only prove that one of these branches does not apply to his case.

[19] The excerpt above refers to *Khera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 632 at para 6 [*Khera*], which states that a marriage originally entered into to gain status or privilege under the IRPA may become genuine over time:

> Under section 4 of the [Regulations], "a foreign national shall not be considered a spouse … if the marriage … is not genuine and was entered into primarily for the purpose of acquiring any status

> or privilege under the Act". According to the case law of this Court, these two requirements are conjunctive. *A conjunctive interpretation leaves open the possibility that a marriage, which was originally entered into for the purpose of gaining status under IRPA, may become genuine and therefore not excluded under the Regulations* […] [Emphasis added].

[20] What hasn't changed between the old and the new wording of the Regulations is that the past tense is used in reference to the primary purpose test ("was entered into"), while the present tense ("is not genuine") is used in relation to the genuineness test. Therefore the relevant time to assess the marriage's genuineness is the present, while the relevant time to assess the primary purpose of the marriage is in the past, i.e., at the time of the marriage. This is made clear by the use, in both the English and French texts of the Regulations, of the past tense respecting primary purpose (4(1)(a)) and the present tense for genuineness (4(1)(b)).

[21] The possibility alluded to in *Khera* is no longer permitted by the wording of the new Regulations, as found by this Court in *Keo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1456 at para 13:

> The amendment made to section 4 of the Regulations is not cosmetic in nature; the use of the word "or" in the English version and of the words "selon le cas" in the French version are very clear: if either of the two elements (genuineness of marriage and intention of the parties) is not met, the exclusion set out in the new subsection 4(1) of the Regulations applies.

[22] The following is the evidence relied upon by the IAD regarding genuineness, with my comments in parentheses:

i) the fact the Applicant owns property in Guyana (this was, however, a neutral consideration given that the Applicant lived with his spouse while there and that his brother looked after the property);

ii) the Applicant's financial support (which was both steady and unquestioned and which in my view is not a negative but a positive factor in the Applicant's favour); and

iii) the Applicant's visits and very regular calls to his spouse, and his stated plan to return to Guyana if judicial review is dismissed (all of which are again positive factors favouring the Applicant).

[23] That said, the IAD had concerns about the Applicant's relationship with his step-son. That concern appears to have been based on his wife's unawareness of a nickname the Applicant used for her son.

[24] In my view the IAD's finding that the marriage was not genuine was not reasonable for two reasons. First, the assessment of the relevant factors was unreasonable. Second, the wrong test was used in that genuineness is to be separately assessed from primary purpose. I will discuss each below.

[25] Regarding the assessment of relevant factors, each of the factors considered by the IAD actually support (or are neutral) regarding the genuineness of this marriage except one, namely the husband/step-son relationship. In my view it was unreasonable to find the marriage is not genuine based on so trifling a detail. But for this finding regarding the nickname, this marriage

appears to have developed over the years as solidly as one might expect, given the difficulties caused by the distance between the parties, and the related challenges caused by the Applicant's limited ability to be physically present with his wife and step-son. They live a great distance apart, which does not appear to be appreciated in a material way by the IAD.

[26] The IAD also erred in that it assessed the genuineness of the marriage, not as a stand alone matter to be determined by the IAD, but as factor to be weighed against its finding on the separate issue of primary purpose. The IAD stated:

> the testimony and documentary evidence in support of any subsequent development of the relationship after the marriage to be inadequate to outweigh the initial primary purpose of entering into the marriage in order for the Applicant and her child to immigrate to Canada for a better future.

In my view it was an error to ask whether genuineness 'outweighed' the primary purpose. That is not how the Regulations are worded. That is not how the Regulations should be interpreted or construed. As noted, the Regulations are now disjunctive and describe two different scenarios. In my view, one of two disjunctive provisions should not be tied to or determined by the other. One of two disjunctive provisions may not be deprived of legal effect because of a finding respecting the other. In law, one may not be 'outweighed' by the other. I understand that there may be some overlapping evidence between primary purpose and genuineness even given the differences in their temporal focal points, but that does not diminish the obligation of the IAD to consider the two separately. The interpretation and application by the IAD of subsection 4(1) of the Regulations was in my view unreasonable because it is not defensible.

D. *Question to Certify*

[27] The Applicant submits that subsection 4(1) of the Regulations is *ultra vires* its enabling statute because it is contrary to paragraph 3(1)(d) of the IRPA, which provides that one of the statute's objectives is "to see that families are reunited in Canada". According to the Applicant, under the disjunctive test now applicable, a family may not be reunited, regardless of how genuine their marriage has become, because of the spouses' motivations for entering into marriage in the first place.

[28] I do not agree with this submission. The Regulations and Parliament's intent was to create a disjunctive relationship between the genuineness and the primary purpose aspects of subsection 4(1) of the Regulations. Furthermore, subsection 4(1) of the Regulations operates to support the IRPA's objective of family reunification rather than to frustrate it. This was found to be the case with other analogous exceptions to this general objective. For example, the Federal Court of Appeal found that excluding a family member as a member of the family class under paragraph 117(9)(d) of the Regulations is not inconsistent with or *ultra vires* to the IRPA's family reunification objective: *Azizi v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406 at paras 27-32; *dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186 at para 48. In my opinion, the same logic applies to the present case and therefore subsection 4(1) of the Regulations is not *ultra vires*.

[29] In the result I am unable to grant judicial review because, as noted above, in order to succeed, the Applicant must obtain a finding that the IAD acted unreasonably regarding both the

primary purpose and genuineness tests. He has only succeeded on the issue of genuineness even though I have found the IAD acted unreasonably in respect of its assessment of the evidence and, in addition, applied the wrong legal test.

[30] The Applicant submits the following question for certification:

> Is the disjunctive element of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (as amended SOR/2010-208) *ultra vires* the enabling statute (the *Immigration and Refugee Protection Act*, SC 2001, c 27) because subsection 4(1) would prohibit the sponsorship of a spouse when the marriage was found to be *entered into* primarily for the purpose of gaining status, notwithstanding a finding that the marriage always was or subsequently became genuine, and would therefore frustrate the aims and objectives of the Act, in particular section 3(1)(d), "to see that families are reunited in Canada"?

[31] In my opinion, a positive answer to the proposed question would be dispositive of the application. Moreover, this issue goes beyond the interests of the parties and is a question of "broad significance or general importance": *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at para 11; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113). Therefore I will certify the question as set out above.

Conclusion

[32] I therefore conclude that the application for judicial review should be dismissed, a question should be certified, the whole with costs in the cause.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Judicial review is dismissed.

2. The following question is certified:

   Is the disjunctive element of subsection 4(1) of *the Immigration and Refugee Protection Regulations*, SOR/2002-227 (as amended SOR/2010-208) *ultra vires* the enabling statute (the *Immigration and Refugee Protection Act*, SC 2001, c 27) because subsection 4(1) would prohibit the sponsorship of a spouse when the marriage was found to be *entered into* primarily for the purpose of gaining status, notwithstanding a finding that the marriage always was or subsequently became genuine, and would therefore frustrate the aims and objectives of the Act, in particular section 3(1)(d), "to see that families are reunited in Canada"?

3. Costs in the cause.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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