Federal Court  Cour fédérale

Date: 20150112

Docket: IMM-3916-13

Citation: 2015 FC 36

Ottawa, Ontario, January 12, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MOHAMMAD MIAH AND SUMAYA JAHAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Mohammad Miah [Mohammad or the Applicant], pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act], of the decision of Citizenship and Immigration Canada [CIC] dated May 22, 2013 refusing his application for permanent residence from within Canada under the spouse

or common-law partner in Canada class [the spousal application] because it was not satisfied that Sumaya Jahan [the sponsor or the co-Applicant] was divorced from her former husband Shuvo Kumar Das at the time of her marriage to the Applicant. Mr. Miah and Ms. Jayan will be collectively referred to herein as the Applicants.

[2] The Applicant is seeking an order of *certiorari* to quash the decision and an order of *mandamus* compelling the Respondent to reconsider the spousal application.

[3] I allow the application for the reasons that follow below.

II. Background

[4] The sponsor had been married twice before – first to Mr. Das on January 22, 2002 whom she claims she divorced on August 20, 2005 and second to Mohammad Shajedur Rahaman on January 19, 2007 whom she divorced on February 25, 2010. Both of the sponsor's prior marriages took place in Bangladesh.

[5] The Applicant is a citizen of Bangladesh. The Applicant and the sponsor met on June 17, 2008 and began cohabitating in Toronto, Ontario on September 19, 2008. They participated in a marriage ceremony on March 12, 2010 and the marriage was registered in Ontario on March 30, 2010. They had a child, Tashnuba Jannat Miah, while residing in Canada on September 11, 2012.

[6] Pursuant to paragraph 125(1)(*c*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], in order to be eligible to sponsor the Applicant, the sponsor

was required to show that she was not still married to either Mr. Das or Mr. Rahaman at the time of the marriage to the Applicant. Only the divorce in the marriage to Mr. Das is in dispute.

[7] During the sponsor's second marriage to Mr. Rahaman, she tried to sponsor him for permanent residency in the spouse or common-law class, but the application was withdrawn before CIC rendered a decision.

[8] The Applicant submitted the spousal application on May 23, 2011, with the sponsor providing a sponsorship undertaking on his behalf on the same date. In the sponsor's application to sponsor the Applicant, she disclosed her marriage to Mr. Rahaman, but not her marriage to Mr. Das.

[9] It was noted by CIC that the sponsor's divorce to her first ex-spouse, Mr. Das, was in question. As such, both the Applicant and his sponsor were scheduled for a spousal interview.

[10] When interviewed by a CIC officer on May 30, 2011, the sponsor indicated that she had not disclosed her first marriage because she had previously provided that information when she had applied to sponsor Mr. Rahaman and no longer had any evidence of the divorce because it had been given to the Immigration Refugee Board when she made her refugee claim. She further indicated during the CIC interview that she had not produced any divorce papers when she attempted to sponsor Mr. Rahaman, but that she had submitted an affidavit relating to her divorce from Mr. Das [the Divorce Affidavit].

[11] During the CIC interview, in answer to questions the sponsor indicated the following about her first marriage to Mr. Das:

1. It was a Muslim ceremony, though not done in the "proper Muslim way";

2. It had been performed by a Kazi or marriage court;

3. The marriage was registered by a Kazi even though Mr. Das was a Hindu and did not convert to Islam; and

4. Divorce by affidavit is all that is required in Bangladesh.

[12] During the May 30, 2011 interview, the CIC officer advised that the sponsor and the Applicant were required to provide an original copy of the sponsor's divorce certificate from Mr. Das and indicated to them that it would be sent overseas for authentication.

[13] On June 8, 2011, Applicants provided the Divorce Affidavit as evidence of the sponsor's divorce from Mr. Das. The following facts are noted in the Divorce Affidavit:

1. Mr. Das was of the Hindu faith;

2. The sponsor is of the Islamic faith;

3. The sponsor's marriage to Mr. Das was performed at Notary Public Registry No 80 in Bagerhat, Bangladesh;

4. Mr. Das left the sponsor and she does not know his whereabouts; and

5. The Divorce Affidavit bears the office seal of Rozinaa Aketer of the Bagerhat Court.

[14] The Divorce Affidavit was ultimately forwarded by CIC to the Dhaka, Bangladesh visa office for verification. The Dhaka visa office responded in February 2012 and provided the following information regarding the legal requirements for marriage and divorce in Bangladesh:

1. A Muslim girl cannot marry a non-Muslim man under Muslim law, but the *Special Marriage Act, 1872* allows for interfaith marriages, which would be evidenced by a certificate from the registrar;

2. The Special *Marriage Act, 1872* does not provide for "court marriages";

3. Interfaith marriages can only be registered by a special marriage registrar and can never be registered by a Kazi;

4. An affidavit of marriage is not valid evidence of a marriage unless registered by a court; and

5. If one is issued a Nikah Nama, both a Talaq Nama and registration of the divorce must be registered in the Marriage and Divorce register office are required for a divorce and an affidavit would not suffice.

[15] The Dhaka visa office verified the Divorce Affidavit and confirmed that the affidavit does not suffice as per the Bangladeshi law described below:

> Under section 2(i) of the *Muslim Marriage Act, 1939*, whereas the whereabouts of the husband are not known for a period of four

> years, the wife is entitled to get a decree of dissolution of her marriage. In that case notice to be served on heirs of the husband.
>
> - The names and addresses of the persons who would have been heirs of the husband under Muslim law on the date of filing shall be stated.
>
> - Notice of the suit shall be served on such person and such persons shall have the right to be heard in the suit.
>
> - Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

[16] On February 7, 2013, the CIC officer informed the Applicants that, based on the information received from the "mission abroad," the Divorce Affidavit was not sufficient to demonstrate that the sponsor was divorced from Mr. Das when she married the Applicant and therefore, that it appeared that Mr. Miah was inadmissible under section 125(1)(*c*) of the IRPA. She gave the Applicants an opportunity to respond to provide any information they would like considered indicating as follows:

> Due to the above submission, it appears that you are inadmissible under R 125(1)(*c*) (excluded relationships) of the *Immigration and Refugee Protection Regulations* as your sponsor's first divorce is invalid.
>
> […]
>
> Before a decision is made in this matter, you have the opportunity to provide any information you would like to be considered. […]
>
> If you need more than 30 days to provide the information/documents requested, please write to this office and explain why and how much more time you require.

[17] The Applicant requested an extension of time on February 25, 2013 to obtain further information to clarify the officer's concerns, which was granted. In the interim, the Applicants changed counsel and their new counsel responded to the officer's letter on March 7, 2013 indicating that the sponsor's divorce from Mr. Das was not done properly and that he would be filing a divorce application before the Ontario Superior Court of Justice. The Applicant's counsel requested that CIC hold the file until they had obtained the divorce certificate.

[18] On May 14, 2013 the CIC officer denied the Applicants' request to hold the file until the sponsor received the divorce certificate, indicating that a divorce document obtained at that time would not be a factor in her decision. On May 22, 2013, the CIC officer refused the spousal application because she found that the sponsor was married to Mr. Das at the time of her marriage to the Applicant, thereby disqualifying the Applicant under section 125(1)(*c*) of the IRPA.

[19] On the return of the application on September 18, 2014, it was acknowledged by the Applicants that their position had been compromised by their new counsel's statement that the divorce from Mr. Das was not done properly and that he would be filing a divorce application before the Ontario Superior Court of Justice to rectify the matter.

[20] The judicial review application was adjourned to permit the Applicants to file additional evidence to demonstrate that their former solicitor was incompetent or negligent, thus resulting in a denial of natural justice pursuant to the Federal Court Procedural Protocol of March 7, 2014:

Allegations Against Counsel or Other Authorized Representatives in Citizenship and Immigration and Protected Person Cases before the Federal Court.

[21] The Applicants filed two further affidavits. The first was from their former counsel. He deposed that he was told by the Applicants that they had received a letter from CIC advising them that the "paperwork" to prove the sponsor's divorce from Mr. Das was not properly done. He states that he had not been advised by the sponsor that the divorce from her first husband was invalid. She told him that she had divorced her first husband and that she had provided the paperwork.

[22] The former counsel advised that if there was a problem with the documentation, the sponsor could apply for a divorce order in the Ontario Superior Court. He was instructed to do so. On this understanding, he informed the officer that the divorce with Mr. Das was not performed properly and that he would be proceeding with a new divorce application on behalf of the sponsor in the Ontario Superior Court.

[23] He further deposed that had he known the real issue was whether the sponsor's divorce from her first husband was valid, he would have advised the Applicants to obtain advice from a lawyer from Bangladesh to prove that the divorce was valid.

[24] The second affidavit was filed by the sponsor which contained an opinion letter from a Bangladeshi lawyer which provided that:

1. The sponsor's first marriage was illegal and void because it was an interfaith marriage;

2. Even though the sponsor was married in a Muslim ceremony, she was not married under Muslim law and thus the *Muslim Marriage Act* of 1939/1961/1974 and other laws do not apply to her marriage;

3. The sponsor and her first husband were not issued with the "Nikah Nama", and thus a Talaq Nama is not required to effect a divorce;

4. The sponsor was married under a civil law, but the marriage was not covered under the provisions of the *Special Marriage Act, 1872* (Hindu-Muslim Marriage) as the marriage was not registered. The civil marriage is also defective and void; and

5. The sponsor's registration of the Separation/Divorce affidavit on August 24, 2005 was sufficient to terminate her previous Marriage Affidavit/agreement and affect her divorce/separation from Mr. Das.

III. Issue

[25] The issue in this matter is whether the Applicants' former solicitor was incompetent or negligent in his reply to the officer that the sponsor's divorce from Mr. Das was not done properly and that the sponsor proposed to rectify the situation by obtaining a divorce in the Ontario Superior Court, and if so whether this resulted in a denial of natural justice.

IV. Standard of Review

[26] The Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 held that it was not necessary for reviewing courts to engage in a full standard of review analysis where the appropriate standard of review is already well-settled by previous jurisprudence.

[27] Correctness is the appropriate standard of review for issues of natural justice and procedural fairness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43.

V. Analysis

[28] The guiding jurisprudence with respect to lawyer incompetence and natural justice was succinctly described by Justice Teitelbaum in *Shirvan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509, 143 ACWS (3d) 1098 at para 20 as follows:

> [20] The Applicants recognize that the test for incompetent counsel is very high. They submit that the party making the allegation of incompetence must show substantial prejudice to the individual, that prejudice must flow from the actions or inaction of the incompetent counsel, and that the prejudice must bring about a miscarriage of justice (*R. v G.D.B.*, 2000 SCC 22 (CanLII), [2000] 1 SCR 520; *Strickland v Washington*, 446 U.S. 668 (1984), per O'Connor J.; *Shirwa v Canada* (M.C.I.) 1993 CanLII 3026 (FCA), [1994] 2 F.C. 51 (T.D.); *Sheikh v Canada* (M.C.I.) [1990] 3 F.C. 238 (C.A.); *Tchiegang v Canada* (M.C.I.), 2003 FCT 249; Robles v. Canada (M.C.I.), 2003 FCT 374). It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different (*Olia v Canada* (M.C.I.) 2005 FC 315 (CanLII)).

[29] I am satisfied that the officer could rely upon the Applicants' former counsel statement that the sponsor's divorce from Mr. Das was not done properly. On that basis, there is no possible challenge to the officer's conclusion that the sponsor was ineligible to sponsor the Applicant because her marriage to him was invalid, as she would have been married to Mr. Das at the time of her marriage to the Applicant.

[30] The officer was also correct in the decision to refuse to grant a further extension to the Applicant for the purpose of the sponsor obtaining a divorce in Canada. A divorce from Mr. Das after the marriage would serve no purpose to restore the validity of her marriage to the Applicant or otherwise rectify her application to sponsor the Applicant.

[31] The Applicants argue that their former lawyer was incompetent in his communications with the CIC officer and the advice he provided them to file for a new divorce in Ontario. As a result they submit that his conduct resulted in a denial of natural justice by causing their sponsorship application to be irrevocably terminated with no possibility of renewal. I agree.

[32] It is clear from the advice of the former lawyer to the Applicants that he had completely misunderstood the issues and solutions required to service their legal needs. His advice to the sponsor to obtain a divorce in Ontario, and to so advise the officer of his client's intention do so and that the sponsor's divorce from Mr. Das was not done properly, was not only completely incorrect, it was fatal to their application.

[33] In his affidavit, the former lawyer acknowledges that he was not advised by the sponsor that the divorce from her first husband was invalid. Nevertheless, he somehow proceeded to communicate to the officer that the sponsor was not divorced from Mr. Das, resulting in the rejection of the sponsorship application. Under normal circumstances, a lawyer familiar with immigration law would have recognized the nature of the issue faced by the sponsor. If not a regular area of practice, the lawyer nonetheless should have declined to act or was required to investigate and properly understand the Canadian requirements for a spousal sponsorship in relation to the information being provided by his clients.

[34] Had he done so, the former lawyer would have determined that the issue was not that the divorce was not properly effected, but rather that CIC was not satisfied that the divorce was valid, and proceeded from there. By his own admission, he would have advised the Applicants to obtain advice from a lawyer in Bangladesh to prove the divorce was valid if he had recognized the nature of the problem. Instead, he incorrectly acknowledged the invalidity of the divorce of Mr. Das, thereby bringing the application to an immediate end.

[35] The Respondent raises a number of issues, mostly with respect to the brevity of the former lawyer's letter, suggesting that he acted on the information provided by the Applicants and did what he was asked to do. There is no suggestion however that he was misinformed by the Applicants, the problem apparently being his failure to properly investigate what issues arose in his clients' dealings with the CIC.

[36] From the fact that the Applicants accepted his advice to file for a divorce in Ontario, it would appear that they did not fully comprehend the nature of the officer's objection to their application. However, that does not excuse a lawyer from discharging his first task, which is to review and carefully understand the nature of the problem raised by the client in order that appropriate advice can be provided. It is clear that he had no understanding of the issue facing his clients' sponsorship application. In the circumstances, I conclude that his conduct did not meet the standards of the legal profession in the advice provided concerning their immigration sponsorship application.

[37] I also conclude that the Applicants sustained substantial prejudice resulting from the actions of their former lawyer. They are a married couple with a young daughter whose sponsorship application was denied. There appears little chance that a new application can be made due to constraints imposed by subparagraph 125(1)(*c*)(*i*) of the *Regulations*. Nor is it evident that the Applicants are entitled to any special humanitarian and compassionate consideration which might otherwise apply. In any event, I consider the rejection of the sponsorship application sufficient to constitute substantial prejudice.

[38] I am also of the view that there is a "reasonable possibility" that the result in their application would have been different. The sponsor has obtained evidence in the form of the affidavit from the Bangladeshi lawyer which undermines the preliminary assumptions made by the officer that the marriage to Mr. Das was not terminated by divorce as claimed.

VI. Conclusion

[39] The application is allowed. The officer's decision is set aside and the Applicant's application for permanent residence is to be referred to a different CIC officer for a re-determination. No certified questions were proposed for appeal and none arise.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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