

Federal Court



Cour fédérale

Date: 20151202

Docket: IMM-270-15

Citation: 2015 FC 1335

Ottawa, Ontario, December 2, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RAMSAWACK CHOTAI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a decision by the Immigration Appeal Division [IAD] to dismiss the Applicant's appeal of a decision refusing a second spousal sponsorship application.

II. Background

[2] The Applicant, a citizen of Canada and a native of Guyana, married a woman from Guyana in 1999 shortly after his first marriage ended. He sponsored her for permanent residence, but the IAD in 2001 denied the spousal application because the relationship was not genuine and was entered into primarily for immigration purposes. The marriage ended shortly thereafter.

[3] The Applicant then met his current wife in 2007 in a telephone conversation through the future wife's sister. They were married three weeks after their first in-person meeting. The Applicant sponsored his wife's permanent residence application, but this was denied on the grounds that the relationship was not *bona fide* and was entered into primarily for the purpose of acquiring status under the *Immigration and Refugee Protection Act*, SC 2001, c 27, in accordance with s 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

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

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

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) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

[4] That decision was appealed to the IAD. In dismissing the appeal, the IAD held that the wife was using the Applicant to obtain status in Canada. That decision was not appealed.

[5] The Applicant then filed a second sponsorship application, which was refused in January 2014 pursuant to s 4 of the Regulations. The IAD dismissed the appeal, finding that the principles of *res judicata* were applicable.

[6] The two principal issues dealt with by the IAD were 1) whether the principle of *res judicata* applies, precluding the Applicant from litigating an appeal previously decided, and 2) whether there was an abuse of process or breach of natural justice in not permitting an oral hearing.

[7] In the IAD's consideration of the issue estoppel branch of *res judicata*, it outlined the two-step process from *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*] which must be engaged. Firstly, one must establish that the preconditions of issue estoppel exist. Secondly, one must consider whether issue estoppel should apply.

[8] The IAD found the preconditions for issue estoppel to exist:

- the same question had been decided;
- the decision was final; and
- the parties (or their privies) were the same.

[9] In determining that issue estoppel ought to apply, the IAD concluded that 1) the Applicant's alleged new evidence is not decisive fresh evidence that could not have been discovered by the exercise of reasonable diligence in the first application, and 2) the evidence was not demonstrably capable of altering the results of the first application.

[10] The new evidence was found not to address the matters which formed the basis of the first decision. The new evidence did not address conflicting evidence about the wife's prior relationships and employment; it included implausible explanations for information in a previous temporary residence application; it did not address the wife's failure to inform the Applicant of her prior application; and it did not address the timing and fast development of the relationship.

While the Applicant was genuinely invested in the relationship, it was the wife's intentions which led to the dismissal of the appeal. The fresh evidence did not materially challenge the finding that the wife was using the Applicant to gain residency in Canada.

[11] On the issue of procedural fairness in not holding an oral hearing (as credibility was alleged to be at issue), the IAD held that it was not assessing credibility but asking whether, assuming the evidence to be credible, it is sufficient to overcome the concerns in the first proceeding. No finding of credibility was made in respect of whether *res judicata* should be applied. Therefore, there was no denial of natural justice.

III. Analysis

A. *Issues*

[12] The issues are:

- was the decision of the IAD to apply the principles of *res judicata* lawful?
- was the decision of the IAD to deny an oral hearing a breach of natural justice?

B. *Standard of Review*

[13] The Applicant argues that correctness is the standard of review in respect to both issues. The Applicant is only partially correct.

[14] In respect to the application of the principle of *res judicata*, there are two aspects to the issue attracting different standards of review.

[15] The first aspect is whether *res judicata* arises at all (i.e. whether the preconditions for issue estoppel have been met). This is a legal determination of general application which does not engage the IAD's expertise. It must be determined on a correctness standard (see *Danyluk*).

[16] The second aspect is whether *res judicata* ought to be applied. This is a discretionary matter and is to be reviewed under the reasonableness standard.

[17] On the issue of an oral hearing, the Respondent argues that the issue of how to proceed is a discretionary matter left to the decision maker – therefore, a matter of reasonableness.

Absent a codified procedure, the Respondent's position is circular. The IAD does have the discretion to choose how to proceed; however, if that choice leads to a denial of natural justice, it cannot be upheld on the basis of reasonableness. A denial of natural justice is not a discretionary matter for which deference is owed.

C. Res Judicata

[18] Neither party contests that the principle of *res judicata* arises; they dispute whether it should be applied. The Applicant's position that the new evidence is sufficiently important as to alter the first decision is intricately woven into the issue of the need for an oral hearing.

[19] The Applicant's position can be summarised as follows: the new evidence (such of it as is truly new) shows that the relationship is real. Since it shows the continuum of a relationship said to be one of convenience, it shows that the relationship is genuine and rebuts the original decision. The thesis is that the longer a couple stays together, the more genuine the relationship.

[20] The issue in this case is not whether the relationship has become genuine. Section 4 of the Regulations does not speak to the state of the relationship from time to time but whether it "was entered into primarily for the purpose of acquiring any status or privilege under the Act" (emphasis added). It speaks to the state of the relationship, its purpose at the time at which it was entered.

Subparagraph (b) (“is not genuine”) speaks to the state of the relationship at the time it is being considered.

However, the decision is grounded in subparagraph (a), not subparagraph (b).

[21] As such, the “fresh evidence” must be evaluated with a view to whether it is sufficient to address and materially change the original decision. This is the distinguishing feature between this case and *Sami v Canada (Citizenship and Immigration)*, 2012 FC 539, 215 ACWS (3d) 190, where the fresh evidence addressed the IAD’s initial concerns.

[22] The IAD correctly applied the preconditions to issue estoppel. Its decision to apply *res judicata* was reasonable because the evidence was insufficient to alter the original decision. The fresh evidence did not address the actions of the wife, her conflicting information, her implausible explanations for earlier attempts to enter Canada on her own nor the lack of transparency toward the Applicant in not disclosing to him her prior attempts to enter Canada. These factors are compounded by her speedy development of a relationship with the Applicant.

D. *Procedural Fairness*

[23] The Applicant’s reliance on the absence of an oral hearing is misplaced. He argues that since credibility is in issue, he was entitled to an oral hearing so as to dispel those credibility concerns.

[24] However, credibility was not in issue. The IAD examined the evidence on the presumption that it was credible and accepted. The issue is one of sufficiency, not credibility.

[25] As such, an oral hearing was not necessary. There was no denial of natural justice or breach of procedural fairness.

IV. Conclusion

[26] For these reasons this judicial review will be dismissed.

[27] The parties have been granted leave to make submissions with respect to a certified question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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