Federal Court  Cour fédérale

Date: 20150911

Docket: IMM-6610-14

Citation: 2015 FC 1055

Ottawa, Ontario, September 11, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

JOTIKA SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Jotika Singh has brought an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. The IAD dismissed Ms. Singh's appeal of the rejection by a visa officer of her husband's application for a permanent resident visa. The visa officer concluded that Ms. Singh was ineligible to sponsor her husband because she had failed to comply with a previous sponsorship undertaking.

[2] This was the second time that Ms. Singh had attempted to sponsor her husband, and the second time that she had appealed a negative decision to the IAD. The IAD therefore identified the possible application of the doctrine of *res judicata* as a preliminary issue. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*] at para 18, Justice Binnie of the Supreme Court of Canada described the operation of the doctrine as follows:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. […] An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[3] The IAD invited Ms. Singh and the Minister to make written submissions regarding the application of *res judicata* to the appeal. Following its consideration both parties' submissions, the IAD dismissed Ms. Singh's appeal. The IAD declined to hear the appeal because its previous decision was final and the new appeal involved the same issues and the same parties.

[4] Ms. Singh says that the IAD breached her right to procedural fairness because she was not given an oral hearing and she was therefore left to address the question of *res judicata* through written submissions without the assistance of counsel. She also argues that the IAD misapplied the doctrine of *res judicata* by failing to consider her special circumstances.

[5] For the reasons that follow, I have concluded that the procedure adopted by the IAD was fair, and that its application of the doctrine of *res judicata* was both correct and reasonable. The application for judicial review is therefore dismissed.

II. Background

[6] Ms. Singh is originally from Fiji. She became a permanent resident of Canada in 2001 when she was sponsored by her first husband, Ramesh Pratap. Shortly afterwards Mr. Pratap sponsored his parents and his brother, all of whom arrived in Canada on May 23, 2003. Ms. Singh co-signed an undertaking to provide them with basic requirements for a period of 10 years, ending on May 23, 2013. Ms. Singh and Mr. Pratap separated in 2004 and divorced in March, 2006. Mr. Pratap died on August 27, 2006. In September 2006, Mr. Pratap's parents applied for and began receiving social assistance from the Province of Ontario.

[7] In 2007, Ms. Singh became a Canadian citizen. She met Karan Shishi through her family's connections in Fiji, and they married on November 13, 2008. Mr. Shishi's first application for a permanent resident visa was denied on September 21, 2009 because his sponsor, Ms. Singh, was in default of the undertaking with respect to her former husband's parents and she was therefore ineligible to sponsor him. Ms. Singh says that she was unaware that her former husband's parents had received social assistance until she read the visa officer's decision.

[8] Ms. Singh appealed the visa officer's decision to the IAD, which dismissed the appeal on December 15, 2010. The IAD held that the undertaking was valid, and that Ms. Singh owed a considerable debt to the Province of Ontario for the social assistance received by her former

husband's parents. She was therefore found to be in default of an undertaking within the meaning of s 133(1)(g) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, and ineligible to sponsor her new husband. The IAD also considered whether humanitarian and compassionate grounds might justify special relief pursuant to s 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The IAD acknowledged that some hardship would result from the spouses' separation, but noted that Ms. Singh had not made any effort to repay her debt or establish a repayment plan. Instead, she chose to travel to visit her new husband and her parents. The IAD concluded that the humanitarian and compassionate considerations were insufficient to warrant special relief.

[9] According to Ms. Singh, in the course of her first appeal to the IAD the Minister's counsel suggested that she could re-apply to sponsor her husband once the period of her undertaking expired in May, 2013. She therefore made a second application to sponsor her husband as soon as the undertaking expired. By letter dated July 9, 2013, a visa officer informed Ms. Singh that she continued to be in default of her undertaking, and she was therefore ineligible to sponsor Mr. Shishi. The letter cautioned that her ineligibility would be a significant factor in the assessment of the sponsorship application. The sponsorship application was ultimately denied on October 18, 2013 on the ground that Ms. Singh remained in default of the undertaking.

[10] Ms. Singh appealed this second decision to the IAD on November 30, 2013. On March 17, 2014, the IAD wrote to Ms. Singh and the Minister's counsel to request written submissions regarding the possible application of *res judicata* given the previous IAD decision:

> As this appeal is based on the same grounds of refusal as the first appeal, it appears to be an attempt to re-litigate issues already decided. As such, the doctrine of *res judicata* or abuse of process may apply to this appeal.
>
> Exercising its jurisdiction to control its own process, the IAD requests the parties to present evidence and make submissions on whether or not *res judicata* applies to this appeal and on whether or not this appeal is an abuse of process. In addition to written argument, you may provide your affidavit and affidavits from any other supporting witnesses setting out the **new evidence** that is being provided in support of the appeal. The Minister's counsel may file responding argument and affidavit evidence.
>
> The following cases may be of assistance in providing your submissions:
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> - Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44
>
> - Sami, Sarda v. M.C.I. (F.C., no. IMM-5709-11), Russell, May 4, 2012; 2012 FC 539
>
> - Dhaliwal, Baljit Kaur v. M.C.I. (F.C. no. IMM-1211-12), Hughes, October 10, 2012; 2012 FC 1182
>
> [Emphasis original.]

[11] The IAD's letter specified that Ms. Singh should provide her submissions by April 14, 2014, that the Minister should provide submissions within 28 days, and that Ms. Singh would then have seven days in which to reply. Ms. Singh was also informed of her right to be represented by counsel at her own expense. The letter from the IAD stated that if it decided to dismiss the appeal on the basis of *res judicata* or abuse of process, no oral hearing would be held in keeping with Rule 25(1) of the *Immigration Appeal Division Rules*, SOR/2002-230.

[12] Ms. Singh chose not to be represented by counsel. She provided written submissions to the IAD on March 31, 2014, in which she asserted that she had been informed during the first

appeal that her application would be processed after the expiry of her undertaking in May, 2013. She asked that the condition regarding the undertaking be waived so that her husband could join her in Canada and help her to repay the debt. She indicated that she was unable to repay the debt alone, and promised that she and her husband would repay it as soon as possible. She also included a letter from her employer confirming that she is trustworthy and committed, and that her separation from her husband had caused her distress. A letter from Mr. Shishi described the hardship that their separation had caused him and confirmed his commitment to helping Ms. Singh repay her debt if he were permitted to come to Canada.

[13] On July 3, 2014, the Minister filed written submissions which asserted that the doctrine of *res judicata* was applicable and no decisive new evidence had been presented by Ms. Singh. Ms. Singh did not make any further written submissions in reply, despite having been informed of her opportunity to do so.

III. The IAD's Decision

[14] The IAD summarised the criteria for the application of *res judicata* found in *Danyluk*, and concluded that the appeal involved the same parties and issues as the previous appeal. The IAD noted that Ms. Singh had not sought judicial review of its previous decision, and the decision was therefore final. The IAD nevertheless considered whether any special circumstances warranted a hearing of the appeal, in particular whether Ms. Singh had adduced any "decisive new evidence". The IAD considered Ms. Singh's written submissions and supporting documents, but concluded that they demonstrated no effort on her part to address her outstanding debt. Her submissions merely reiterated the same position she had taken before the

IAD in 2010, *i.e.*, that she would repay the debt once her husband came to Canada. The IAD concluded that there were no special circumstances that would justify an exception to the application of *res judicata*, and no other issues that required a re-hearing. The IAD therefore declined to hear the appeal.

IV. Issues

[15] This application for judicial review raises the following issues:

A. Did the IAD's decision to consider the application of *res judicata* on the basis of written submissions when Ms. Singh was not represented by counsel breach her right to procedural fairness?

B. Did the IAD misapply the doctrine of *res judicata*?

V. Analysis

A. *Did the IAD's decision to consider the application of res judicata on the basis of written submissions when Ms. Singh was not represented by counsel breach her right to procedural fairness?*

[16] Questions of procedural fairness are reviewable by this Court against the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Sketchley v Canada (Attorney General)*, [2005] FCJ No 2056, at para 46).

[17] The concept of procedural fairness is "eminently variable and its content is to be decided in the specific context of each case" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21).

[18] Ms. Singh says that her response to the IAD's letter requesting written submissions on the application of *res judicata* should have alerted the IAD to the fact that she did not fully understand what was being asked of her. She argues that the doctrine of *res judicata* is too complex for a self-represented person to grasp, and that she was entitled to a heightened level of procedural fairness because she did not have the assistance of a lawyer (*Nemeth v Minister of Citizenship and Immigration*, 2003 FCT 590, 233 FTR 301 [*Nemeth*] at para 13; *Law v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1006 at paras 15-19; *Kamtasingh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 45).

[19] I am unable to accept Ms. Singh's argument. The letter from the IAD that requested written submissions regarding the application of *res judicata* clearly indicated that Ms. Singh had the right to be represented by counsel at her own expense. The letter explained the doctrine of *res judicata* and provided references to jurisprudence that might be helpful. The Minister's written submissions addressed the doctrine and its application in considerable detail. Ms. Singh, despite having been informed of her right to reply, offered nothing in response. While she was not required to seek the assistance of a lawyer, Ms. Singh must accept the consequences of not doing so (*Wagg v R*, 2003 FCA 303, [2004] 1 FCR 206 at para 25). An administrative tribunal is not required to act as counsel for a self-represented litigant (*Thompson v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 808 at para 15).

[20] Nor was the IAD obliged to hold an oral hearing or offer an alternative dispute resolution process. The IAD specifically informed Ms. Singh that no oral hearing would be held if it decided to dismiss the appeal on the basis of *res judicata*. Furthermore, as Justice Simon Noël observed in *Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321 [*Rahman*] at para 34, *res judicata* is necessarily something to be addressed in advance of a hearing because its purpose is to prevent the re-litigation of questions that have previously been settled by a court of competent jurisdiction.

[21] I am therefore satisfied that the IAD discharged its duty of procedural fairness by clearly identifying the issue, explaining the procedure to be followed (including Ms. Singh's right to reply to the Minister's submissions), offering Ms. Singh a reasonable opportunity to present her arguments, and informing her of her right to be represented by counsel.

B. *Did the IAD misapply the doctrine of res judicata?*

[22] *Res judicata* precludes the re-litigation of both the same cause of action (cause of action estoppel) and the same issues or material facts (issue estoppel): *Danyluk* at para 20. The underlying purpose of the doctrine is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case: *Danyluk* at para 33.

[23] Issue estoppel involves the application of a two-part test. The decision-maker must first determine whether the three preconditions of issue estoppel are met, as described in *Angle v Canada (Minister of National Revenue - M.N.R.)*, [1975] 2 SCR 248 at para 3:

a. the same question has been decided;

b. the decision said to create the estoppel was final; and

c. the parties to the previous decision or their privies are the same as the parties to the proceeding in which the estoppel is raised.

[24] Second, the decision-maker must consider whether the application of issue estoppel or *res judicata* would lead to an injustice (*Rahman* at para 20; *Danyluk* at para 67).

[25] Each step of the *res judicata* analysis attracts a different standard of review. Whether the preconditions to the operation of issue estoppel are met is a question of law and is reviewable by this Court against the standard of correctness (*Rahman* at para 12). Whether special circumstances exist to justify an exception involves the exercise of discretion, and is therefore reviewable against the standard of reasonableness (*Ping v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1121 at para 17).

[26] I am satisfied that the IAD's determination that the three preconditions for the application of issue estoppel were met was correct: Ms. Singh's appeal concerned the same question, the previous decision was final, and the parties were identical. Ms. Singh argues that the passage of time, and the strengthening of her bond with Mr. Shishi, required a new assessment of humanitarian and compassionate considerations. The fact remains, however, that the issues addressed in the previous appeal were precisely the same as those raised in the subsequent

appeal: whether Ms. Singh was in breach of an undertaking and whether there were sufficient humanitarian and compassionate reasons to overcome this breach.

[27] The IAD considered any change in Ms. Singh's circumstances, including her ongoing marriage to Mr. Shishi, in connection with the second step of the *res judicata* analysis: whether the application of issue estoppel would lead to an injustice. The IAD reasonably concluded that Ms. Singh had not established the existence of special circumstances to justify an exemption. She offered no new arguments nor had her circumstances changed in any material way since her previous appeal. Most importantly, she had made no effort to remedy her outstanding default on her undertaking, merely reiterating her intention to repay the outstanding debt once her husband arrived in Canada.

[28] Ms. Singh's case is in some respects a sympathetic one. She co-signed an undertaking with her former husband to support his parents for a period of 10 years. The marriage did not last, and following her former husband's death his parents immediately sought social assistance. They collected social assistance for the remaining duration of the undertaking and beyond. The amount owed is now very substantial. Ms. Singh was advised by the IAD in the first appeal of the steps she must take to remedy the situation: either repay the debt or make an alternative arrangement with the Province of Ontario. If any future sponsorship application is to succeed, Ms. Singh will have to demonstrate the efforts she has made to deal with the outstanding debt in some fashion.

VI. Conclusion

[29] For the foregoing reasons, this application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT

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

No question is certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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