

Federal Court



Cour fédérale

Date: 20160624

Docket: IMM-5413-15

Citation: 2016 FC 721

Ottawa, Ontario, June 24, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**KUMARASRI SIVAPATHAM
MANCHUSASHINY PONNUTHURAI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants, Kumarasri Sivapatham and Manchusashiny Ponnuthurai, apply for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the IAD). The IAD dismissed Mr. Sivapatham's appeal from a visa officer's refusal of an application to sponsor his wife, Ms. Ponnuthurai, for immigration to Canada. The

IAD found the Applicants' marriage is not genuine and had been entered into primarily for immigration purposes.

[2] For the reasons that follow, I have concluded that the IAD was unreasonable in its treatment of the evidence. The application for judicial review is therefore allowed.

II. Facts

[3] Mr. Sivapatham is a permanent resident of Canada.

[4] Ms. Ponnuthurai is a citizen of Australia.

[5] The Applicants first met in person in August 2011. They were engaged and began cohabitating together in September 2011. The Applicants were legally married on November 15, 2011. This is Mr. Sivapatham's first marriage, and Ms. Ponnuthurai's third.

[6] On March 7, 2013, Ms. Ponnuthurai applied for a permanent resident visa as the sponsored spouse of Mr. Sivapatham.

[7] A visa officer refused the spousal sponsorship application, finding the marriage was not genuine and entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, SC 2001, c 27. Mr. Sivapatham appealed this decision to the IAD.

III. The IAD Decision

[8] Days before the IAD hearing, the Respondent applied to have an additional ground of refusal added to the appeal, alleging Ms. Ponnuthurai is inadmissible to Canada for overstaying her temporary resident visa.

[9] The IAD hearing was held on September 18, 2015. At the time of the hearing, Ms. Ponnuthurai was eight months pregnant with a child of the marriage.

[10] By decision dated November 4, 2015, the IAD rejected the appeal.

IV. Issue

[11] The determinative issue of this judicial review is whether the IAD was reasonable in its treatment of the evidence of the genuineness and purpose of the Applicants' marriage.

V. Analysis

[12] The IAD's assessment of the evidence is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-58 [*Khosa*]). Deference is owed to the IAD by virtue of its expertise and special position as trier of fact (*Khosa* at para 25). Courts will not interfere with the IAD's factual findings unless they were "made in a perverse or capricious manner or without regard for the material before it" (*Khosa* at para 72; *Federal Courts Act*, RSC, 1985, c F-7, s 18.1(4)(d)).

[13] On the reasonableness standard, the Court considers whether the decision is justified, transparent, and intelligible, and falls within the range of possible outcomes defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[14] The IAD is presumed to have considered all of the evidence that was before it and is not required to refer to each piece of evidence in its decision (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). However, the more important the evidence that is not mentioned specifically and analyzed in the IAD's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding

of fact “without regard to the evidence” (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, at para 17 (FCTD)).

[15] The Applicants submit that the IAD member ignored the probative evidence in favour of the genuineness of their marriage, and ignored the fact that they are cohabiting as a family and in a loving and stable relationship. The Applicants submit their testimony was largely consistent, but the IAD focused on minor details and on speculative plausibility findings.

[16] The IAD found the Applicants to not be credible, as their testimony was vague, inconsistent, and contradictory. The IAD had concerns with the evidence regarding when and how the relationship developed. Neither Mr. Sivapatham nor Ms. Ponnuthurai could consistently articulate when or how they first had contact with one another, and there was a lack of any documentary evidence to corroborate or clarify their contradictory claims on this point.

[17] The Applicants concede that their evidence varied about when they first contacted each other by Skype, but submit this was minor detail about a conversation four years ago in the context of multiple contacts by Facebook, Skype, and telephone.

[18] The IAD expressed concerns that the Applicants had not met in person at the time of the proposal, particularly given that the marriage was not arranged. This was clearly problematic for the IAD as Ms. Ponnuthurai had two previous failed marriages, and the IAD member expected Ms. Ponnuthurai to be “far more cautious” in ensuring she would not face the same issues a third time. The IAD found the speed and succession of the wedding also raised plausibility concerns. While it accepted that a ceremony took place in November 2013, it found that the marriage was likely orchestrated to facilitate Ms. Ponnuthurai’s immigration to Canada.

[19] The Court in *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122, explained that the IAD must be cautious not to apply its own understandings of expected conduct when assessing genuineness, especially when there is a child born of the union:

[6] When the Board is required to examine the genuineness of a marriage under ss. 63(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, it must proceed with great care because the consequences of a mistake will be catastrophic to the family. That is particularly obvious where the family includes a child born of the relationship. The Board's task is not an easy one because the genuineness of personal relationships can be difficult to assess from the outside. Behaviour that may look suspicious at first glance may be open to simple explanation or interpretation. [...]

[9] In its assessment of this marriage, the Board noted that "strong countervailing evidence" would be required to displace the significance of the birth of the child. The problem with the decision is that the Board's assessment of that "strong countervailing evidence" largely concerned trivial, inconclusive or irrelevant matters and ignored considerable evidence which contradicted its conclusion.

[20] Here the IAD noted that it had considered Ms. Ponnuthurai's pregnancy but concluded the pregnancy did not overcome the concerns with respect to the purpose and genuineness of the marriage. However, like in *Gill*, much of the "strong countervailing evidence" relied upon by the IAD related to inconclusive or irrelevant matters.

[21] The IAD disbelieved the Applicants because Ms. Ponnuthurai agreed to marry Mr. Sivapatham only a few months after they met, while she was still married to her second husband. However, the documentary evidence establishes that Ms. Ponnuthurai initiated the divorce much earlier, and it is not surprising that the Applicants married shortly after the divorce was finally granted.

[22] Similarly, the IAD drew a negative inference because Ms. Ponnuthurai agreed to marry Mr. Sivapatham without meeting him in person. The IAD reasoned that one would expect Ms. Ponnuthurai, having already been married twice in the past, to be more cautious before marrying Mr. Sivapatham. This is an unreasonable basis upon which to impugn the Applicants' credibility.

[23] Finally, the IAD failed to consider why Ms. Ponnuthurai would marry Mr. Sivapatham. With respect to family, the IAD found that Ms. Ponnuthurai's situation in Australia is "not much different" than her circumstances in Canada. The IAD also found that there were general similarities between Australia and Canada. These findings are impossible to reconcile against the conclusion that the marriage was arranged to afford Ms. Ponnuthurai some benefit or privilege in Canada.

[24] For the reasons outlined above, the decision of the IAD is unreasonable. The application for judicial review is allowed and the matter is remitted to a differently constituted panel of the IAD for reconsideration on the merits.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the matter is remitted to a differently constituted panel of the IAD for reconsideration on the merits and no question is certified for appeal.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5413-15

STYLE OF CAUSE: KUMARASRI SIVAPATHAM, MANCHUSASHINY
PONNUTHURAI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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JUDGMENT AND REASONS: MCDONALD J.

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