

Federal Court



Cour fédérale

Date: 20180110

Docket: IMM-2790-17

Citation: 2018 FC 22

Toronto, Ontario, January 10, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

CONCHITA FERRARO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Ms. Ferraro seeks review of an Immigration Appeal Division [IAD] decision of June 1, 2017, which found that her marriage to a citizen of the Dominican Republic was not genuine. The IAD denied her sponsorship application under the Spouse or Common Law Partner in Canada class. The IAD concluded that the marriage was not genuine and was entered into for the purpose of obtaining a status or privilege under the *Immigration and Refugee Protection Act* [IRPA] as set out in s.4 of the *Immigration and Refugee Protection Regulations* [IRPR].

[2] For the reasons that follow, this judicial review is granted.

I. Background

[3] The relationship between Ms. Ferraro and her spouse started in November 2011 and they married in February 2013. Ms. Ferraro and her spouse communicate daily. She has visited her spouse in the Dominican Republic on thirteen occasions.

[4] On November 21, 2014, the spouse's application for a permanent residence visa as a member of the family class was denied because the Visa Officer [the Officer] found that the marriage was not genuine and was entered into for immigration purposes.

[5] Ms. Ferraro appealed to the IAD.

II. IAD Decision

[6] The IAD found that from the perspective of Ms. Ferraro, the marriage was genuine. The IAD found Ms. Ferraro's testimony consistent and found that the documentary evidence supported her reported trips to the Dominican Republic, regular communication with her spouse, and her financial support of him. The IAD noted that based upon Ms. Ferraro's demeanour and the corroborating evidence, there was substantial evidence that the marriage was genuine for Ms. Ferraro.

[7] However, the IAD concluded that the marriage was not genuine for the spouse. The IAD noted the long-term relationship (5 ½ years) and the frequency of the communication between the couple. However, the IAD concluded that the gaps in knowledge and inconsistencies in testimony on the part of the spouse indicated that it was not a genuine marriage for him.

Specifically, the IAD noted that the spouse indicated that he had nothing in common with Ms. Ferraro. The IAD noted that the spouse's description of their shared activities lacked detail.

[8] The IAD found that his testimony, the failure to explain why he fell in love with Ms. Ferraro, and differences in age and cultural background demonstrated a lack of "genuine engagement" by the spouse.

[9] The IAD concluded that the evidence of both spouses is relevant and that genuine intent on the part of the Ms. Ferraro alone is insufficient. Therefore, the IAD concluded that there was no evidence to show that it was a genuine marriage for Ms. Ferraro's spouse.

III. Issue and Standard of Review

[10] The only issue on this application is whether the IAD decision that the marriage between Ms. Ferraro and her spouse was not genuine pursuant to s.4(1) of the IRPR is reasonable.

[11] The IAD's assessment of the genuineness of marriage is reviewable on a reasonableness standard (*Canada (Citizenship and Immigration) v Moise*, 2017 FC 1004 at para 17).

IV. Analysis

[12] The IAD primarily assessed this case under s.4(1)(b), and carried over his conclusions on s.4(1)(b) to s.4(1)(a). However, s.4(1)(a) and (b) are disjunctive (*Trieu v Canada (Citizenship and Immigration)*, 2017 FC 925 at para 37 [*Trieu*]). An applicant must demonstrate that a marriage is both genuine and that it was not entered into for the primary purposes of acquiring a status under the IRPA (*Trieu*, at para 36; *Gill v Canada (Citizenship and Immigration)*, 2012 FC 1522 at paras 29-30 [*Gill*]).

[13] There is also a temporal distinction between each test. Claims under s.4(1)(a) are assessed at the time of the marriage, while claims under s.4(1)(b) are assessed at the present time (*Gill*, at paras 32-33). As confirmed in *Lawrence v Canada (Citizenship and Immigration)*, 2017 FC 369 at para 14, evidence relevant to one element of the test can also be relevant to the other.

[14] With this in mind, the IAD failed to consider the positive evidence of a genuine marriage in comparison to the spouse's negative credibility. The IAD considered this same evidence respecting Ms. Ferraro, and concluded that the marriage was genuine for her. However, it failed to explain why this same evidence could not support the same conclusion for the spouse.

[15] While it is true that the IAD does not have to "make an explicit finding on each constituent element..." (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16), and in fact is presumed to have considered all the evidence (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1), a failure to address central, contradictory evidence is a reviewable error.

[16] In *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17, the Court stated:

When the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[17] This comment is applicable to this case. Here, the IAD did not mention the photos of the Applicant and the spouse, the letters of support from family and friends, and the numerous text messages and phone calls between the couple when analyzing the credibility of the spouse. This

was considered probative evidence for Ms. Ferraro, but it was not assessed for the spouse, even though it contradicted the credibility conclusions made about him. The IAD decision contradicts the full record.

[18] Therefore, this decision lacks “justification, transparency, and intelligibility” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). As noted by the Federal Court of Appeal in *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 27, the IAD’s failure to consider the evidence in light of the record is a “badge of unreasonableness.” A decision cannot be reasonable in the sense explained in *Dunsmuir* if it does not explain its conclusions in light of the evidence.

[19] This application for judicial review is therefore granted.

[20] There is no question for certification.

JUDGMENT in IMM-2790-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of IAD is set aside and the matter is remitted for redetermination; and
2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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