Federal Court  Cour fédérale

Date: 20180525

Docket: IMM-4861-17

Citation: 2018 FC 547

Ottawa, Ontario, May 25, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RHONDA CHARMAINE KELLY

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, the Minister of Citizenship and Immigration [Minister], seeks judicial review of a decision by the Immigration Appeal Division [IAD] dated November 1, 2017, wherein the IAD allowed the appeal by the Respondent, Ms. Rhonda Charmaine Kelly, of the visa officer's decision refusing the sponsorship application for her spouse, Mr. Ige.

II. Background

[2] Ms. Kelly is a Canadian citizen. In January 2015, she applied to sponsor her spouse for permanent residence in Canada as a member of the family class. Mr. Ige is a Nigerian national.

[3] Ms. Kelly and Mr. Ige met in March 2013 on an online forum for families of cancer victims. Each of them had lost partners of previous relationships to cancer.

[4] After exchanging messages and talking over the phone during several months, they met in person for the first time in New York City on April 17, 2014. They were married in the United States on December 30, 2014.

[5] Ms. Kelly filed a sponsorship application for Mr. Ige in early 2015 in the Canadian visa office in Accra, Ghana, for processing.

[6] After an initial review of the file, the visa officer had concerns regarding the ability of Mr. Ige to marry Ms. Kelly and noted a number of contradictions in the evidence provided. Consequently, procedural fairness letters requesting additional information and documents were sent to Mr. Ige. An information request was also sent to the American authorities as Mr. Ige had obtained a temporary visitor visa from the United States.

[7] On April 26, 2016, the sponsorship application was refused by the visa officer on the basis that Mr. Ige was inadmissible for misrepresentation under paragraph 40(1)(*a*) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]. The visa officer found that Mr. Ige had misrepresented or withheld the following material facts: (1) his previous marital status to a person named [IOJ]; (2) the death certificate for IOJ; and (3) the medical certificates of the cause of death. The visa officer determined that the evidence adduced by Mr. Ige did not establish that his former relationship to IOJ was only common law, nor did it provide support that IOJ was deceased. The visa officer concluded that the misrepresentation or withholding of these material facts induced or could have induced errors in the administration of the IRPA because at the time of their marriage, Mr. Ige was the spouse of another person.

[8] On May 12, 2016, Ms. Kelly filed a notice of appeal to the IAD pursuant to subsection 63(1) of the IRPA. After the appeal was filed, the Minister made an application to add two (2) grounds of refusal pursuant to subsection 4(1) and subparagraph 117(9)(*c*)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] for consideration by the IAD in the appeal. The Minister's request was granted on April 24, 2017.

[9] Ms. Kelly's appeal proceeded before the IAD on August 24, 2017. After hearing oral evidence from Ms. Kelly, Mr. Ige who testified by telephone from Nigeria, and their witnesses, the IAD allowed the appeal on November 1, 2017. The IAD concluded that at the time of their marriage, Mr. Ige was able to legally marry Ms. Kelly. The IAD also concluded, on the basis of the testimony and evidence on file, that the marriage was genuine.

[10] The Minister now challenges the decision of the IAD, arguing that the IAD failed to consider subparagraph 117(9)(*c*)(i) of the IRPR and that it failed to consider the contradictory objective documentary evidence, rendering the decision unreasonable.

III. Analysis

A. *Subparagraph 117(9)*(c)*(i) of the IRPR*

[11] Pursuant to subsection 11(1) of the IRPA, a foreign national must apply for a visa or any other document required by the regulations before entering Canada. The visa or other documents may be issued if the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the IRPA.

[12] Subsection 12(1) of the IRPA provides that a foreign national may be selected as a member of the family class on the basis of his or her relationship to a Canadian citizen or permanent resident. Eligible relationships are defined in paragraph 117(1)(*a*) of the IRPR and include a sponsor's spouse, common law partner or conjugal partner. However, certain types of relationships are excluded from the family class under subsection 117(9) of the IRPR. In particular, subparagraph 117(9)(*c*)(i) of the IRPR enunciates that a foreign national cannot be a member of the family class if, at the time of his or her marriage, this person or the person's sponsor was the spouse of another person.

[13] Under the terms of subsection 63(1) of the IRPA, a person who has filed an application to sponsor a foreign national as a member of a family class may appeal to the IAD the decision of

the visa officer not to issue the foreign national a permanent resident visa. However, subsection 64(3) prohibits appeals of a decision based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common law partner or child.

[14] As a result of the limited right of appeal found in the IRPA, the Minister contends that the IAD must first determine, as a matter of jurisdiction, if the foreign national is a member of a family class or whether he should be excluded pursuant to subparagraph 117(9)(*c*)(i) of the IRPR. The Minister is of the view that the IAD failed to consider subparagraph 117(9)(*c*)(i) of the IRPR despite it being added as an additional ground for refusal, thus committing an error of law, reviewable on a standard of correctness. The Minister further argues that if the IAD had considered this ground of refusal, it could have dismissed the appeal on that basis alone.

[15] I disagree.

[16] Although the Minister argues that the IAD's failure to consider subsection 117(9)(*c*)(i) of the IRPR is reviewable on a standard of correctness, this Court has found that the failure to consider a claim as put forward is reviewable on the standard of reasonableness (*Vilmond v Canada (Citizenship and Immigration)* 2008 FC 926 at para 13) and that the standard of review applicable to the IAD's interpretation of its jurisdiction to hear an appeal is also that of reasonableness (*Flore v Canada (Citizenship and Immigration)*, 2016 FC 1098 at para 20). However, regardless of the applicable standard of review, I find that the IAD did in fact consider the application of subparagraph 117(9)(*c*)(i) of the IRPR.

[17] It is clear from the decision that the IAD considered the jurisdictional issue. While it did not specifically refer to subparagraph 117(9)(*c*)(i) of the IRPR, the IAD examined two (2) issues: (1) whether Mr. Ige was legally free to marry Ms. Kelly at the time of their marriage; and (2) whether the marriage was genuine or had been entered into for immigration purposes.

[18] With respect to the first issue, the IAD noted at the outset that the appeal regarded the refusal of the visa officer to grant a visa to Mr. Ige on the basis that he had misrepresented a material fact concerning his previous marriage to IOJ. The IAD then indicated that the reason invoked for misrepresentation was the allegation that Mr. Ige would have been in another relationship at the time of his marriage to Ms. Kelly. The IAD considered the evidence and explicitly found that "[Mr. Ige] was able to legally marry [Ms. Kelly] in this case. […] One would imagine that if [Mr. Ige] was still married to another person that he would not have been able to [*sic*] this", referring to Mr. Ige's marriage to Ms. Kelly. By explicitly stating that Mr. Ige was able to legally marry Ms. Kelly, the IAD recognized that it was not an excluded relationship under subparagraph 117(9)(*c*)(i) of the IRPR.

[19] It is also clear from the transcript of the hearing that the IAD was aware of its obligation to consider the jurisdictional question raised by the application of subparagraph 117(9)(*c*)(i) of the IRPR. At the outset of the hearing, the IAD stated that "if it would be clear that 117 would not be respected then the rest of the exercise kind of becomes moot" (Certified Tribunal Record at 1669).

[20] I agree with the Minister that in certain circumstances, it may be necessary for the IAD to determine at the outset whether the foreign national is a member of the family class. For instance, pursuant to section 65 of the IRPA, the IAD may not consider humanitarian and compassionate considerations for the purpose of an appeal under subsection 63(1) or (2) of the IRPA unless "it is decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations." However, there are cases where the jurisdiction question is inextricably intertwined with the misrepresentation issue on appeal. This is one of those cases. The finding that Mr. Ige was able to legally marry Ms. Kelly because he was not married to another person is determinative of both the jurisdictional issue and the misrepresentation issue.

[21] Accordingly, I do not find that the IAD committed an error in law as suggested by the Minister.

B. *Did the IAD fail to consider the contradictory objective documentary evidence?*

[22] The Minister submits that the IAD failed to consider the contradictions in the documentary evidence filed by Mr. Ige to support his contention that he was free to marry Ms. Kelly. According to the Minister, the visa officer had many concerns regarding the evidence, including the two (2) death certificates which were produced by Mr. Ige to support the allegation that his common law partner, IOJ, had passed away. The Minister argues that the IAD failed to address the contradictions between the death certificates, which had been identified by the visa officer. The Minister also takes issue with various other elements of the evidence that the IAD failed to mention, consider and assess in its reasons. By doing so, the IAD failed in its duty to

explain in its reasons the rationale for accepting at face value the conflicting evidence before granting the appeal.

[23] It is well-established that the decision-maker is presumed to have considered all of the evidence that was before it and that it is not required to refer to each and every piece of evidence. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court of Canada held that if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes", the criteria which render the decision reasonable are met (*Newfoundland Nurses* at para 16; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[24] In the case at bar, it appears from the reasons that the IAD was aware of the inconsistencies and discrepancies in the evidence on file. The IAD explicitly referred to some of the discrepancies in the documents and noted the different standards in the record-keeping processes in Nigeria. However, the IAD had the benefit of hearing the oral testimony of Ms. Kelly, Mr. Ige, as well as the other witnesses, and found them to be credible. In the end, the IAD accepted the witnesses' explanations regarding the shortcomings in the documentary evidence.

[25] The fact that the IAD did not reference each piece of evidence or list each inconsistency in its decision is not indicative of a failure to consider the specific evidence. Upon review of the decision and the underlying record, I am satisfied that the IAD considered all of the evidence and

that it was reasonably open to the IAD to give more weight to the explanations provided by the witnesses. It is not this Court's role to reweigh the evidence and to come to a preferred outcome than that reached by the IAD. The decision is justified, transparent and intelligible and therefore calls for deference (*Dunsmuir* at para 47).

[26] For all of these reasons, the application for judicial review is dismissed. No questions of general importance were proposed for certification and I agree that none arise.

JUDGMENT in IMM-4861-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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