Federal Court  Cour fédérale

Date: 20190125

Docket: IMM-1787-18

Citation: 2019 FC 105

Ottawa, Ontario, January 25, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

RIZWAN AHMED KHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Rizwan Ahmed Khan, seeks judicial review of a decision of the Immigration Appeal Division [IAD] dated March 22, 2018. In that decision, the IAD dismissed his appeal of a decision made by an Immigration Officer at the High Commission of Canada in London, England [Visa Officer], refusing to issue permanent resident visas to Mr. Khan's wife, Rakhshanda Rizwan, and the couple's four (4) minor children.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] Mr. Khan is a Canadian citizen who was born in Pakistan. He was admitted to Canada as a permanent resident on October 4, 2005. On January 14, 2006, he married his first cousin, Ms. Rizwan, who is a citizen of Pakistan. Their marriage ceremony was performed in accordance with Muslim traditions.

[4] In December 2010, Mr. Khan applied to sponsor his wife under the spousal category. By letter dated September 10, 2014, the Visa Officer advised Ms. Rizwan that there were concerns the marriage certificate provided in support of the application, the *Nikah Nama*, was fraudulent. The Visa Officer also informed Ms. Rizwan that, if a senior immigration officer found the misrepresentation to be material to the application for a permanent resident visa, she could be found to be inadmissible under paragraph 40(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. On September 25, 2014, in response to this letter, Ms. Rizwan submitted a copy of a marriage registration certificate issued by the government of Sindh, Pakistan from the National Database Registration Authority [NADRA] dated September 18, 2014.

[5] On December 22, 2014, the Visa Officer refused Mr. Khan's sponsorship application on the basis that Ms. Rizwan did not meet the requirements of the IRPA. In a letter to Ms. Rizwan on the same day, the Visa Officer reported being satisfied that the *Nikah Nama* was counterfeit. As the application had been submitted under the family class category on the basis of

Ms. Rizwan's marriage to Mr. Khan, the marriage certificate was required to demonstrate that they were legally married. In the absence of a genuine marriage certificate, Ms. Rizwan could not be considered a member of the family class. The Visa Officer also informed Ms. Rizwan that the provision of a counterfeit marriage certificate, the *Nikah Nama,* constituted misrepresentation under paragraph 40(1)(*a*) of the IRPA. As a result, and pursuant to paragraph 40(2)(*a*) of the IRPA, Ms. Rizwan was found to be inadmissible to Canada for a period of five (5) years.

[6] Mr. Khan appealed the Visa Officer's decision to the IAD on the following grounds: (1) the Visa Officer breached a principle of natural justice by failing to provide him with an opportunity to address the specific concerns regarding the *Nikah Nama*; (2) the Visa Officer's decision pursuant to paragraph 40(1)(*a*) of the IRPA was invalid in law; (3) the Visa Officer erred in determining that Ms. Rizwan was not a member of the family class; and (4) the Visa Officer failed to take into account the existence of humanitarian and compassionate [H&C] considerations, including the best interest of the children affected by the decision, which warranted the IAD's exercise of discretion to grant special relief.

[7] On March 22, 2018, the IAD dismissed Mr. Khan's appeal. It found that the Visa Officer had failed to provide Mr. Khan with an opportunity to respond to the specific issues leading to the finding that the *Nikah Nama* was fraudulent and therefore constituted a breach of procedural fairness. Despite this finding, the IAD considered that it had the jurisdiction to examine the remaining issues *de novo*. It determined that the *Nikah Nama* was invalid in law and that Ms. Rizwan was therefore inadmissible to Canada on the grounds of misrepresentation. The IAD further held that without a valid *Nikah Nama*, Ms. Rizwan could not be considered Mr. Khan's

spouse and, as a result, could not be considered a member of the family class. Finally, the IAD concluded that it did not have jurisdiction pursuant to section 65 of the IRPA to grant special relief on the basis of H&C considerations, as Ms. Rizwan was not a member of the family class.

[8] Mr. Khan now seeks judicial review of the IAD's decision. He raises a number of issues which, in my opinion, can be summarized as follows:

1) Did the IAD fail to consider Mr. Khan's appeal *de novo*?

2) Did the IAD err in its analysis of the *Nikah Nama*?

3) Did the IAD err in finding that Ms. Rizwan is not a member of the family class?

4) Did the IAD fetter its discretion in refusing to consider H&C considerations relevant to the application?

5) Did the IAD err in finding Ms. Rizwan inadmissible to Canada on the grounds of misrepresentation pursuant to paragraph 40(1)(*a*) of the IRPA?

III. Analysis

A. *Standard of Review*

[9] The issues raised in this application relate to questions of fact and questions of mixed fact and law, and are to be reviewed against the standard of reasonableness (*Dunsmuir v New* Brunswick, 2008 SCC 9 at para 53 [*Dunsmuir*]; *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754 at para 10; *Pinamang v Canada (Citizenship and Immigration)*, 2016

FC 470 at para 8; *Fang v Canada (Citizenship and Immigration)*, 2014 FC 733 at para 18 [*Fang*]; *Hannan v Canada (Citizenship and Immigration)*, 2009 FC 14 at para 10 [*Hannan*]).

[10] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Dunsmuir* at para 47).

[11] As for the standard of review that applies to the "fettering of discretion" allegation, there has been some confusion in the case law. While the issue has traditionally been seen as a matter of procedural fairness, reviewable on the standard of correctness, the Federal Court of Appeal suggested in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 [*Stemijon Investments*] that the fettering of discretion might equally be reviewable under the reasonableness standard. The Federal Court of Appeal was careful to state however that the fettering of discretion is always outside the range of possible, acceptable outcomes and is therefore, per se, unreasonable (*Stemijon Investments* at paras 23-25). For the purposes of this case, it is sufficient to conclude that the fettering of discretion would constitute a reviewable error on either standard.

B. *Whether the IAD Conducted a* De Novo *Hearing*

[12] Mr. Khan submits that the IAD did not consider his appeal *de novo* in any meaningful sense. He argues that the IAD's decision centers on the *Nikah Nama* and the allegation that the

document was fraudulent. Mr. Khan believes that in conducting a *de novo* appeal, the IAD had the obligation to determine the genuineness of the marriage and to consider the evidence demonstrating, among other things, that the couple had been together for over twelve (12) years and had four (4) children.

[13] I am not persuaded by Mr. Khan's argument.

[14] The *de novo* nature of the IAD's proceedings signifies that it can review new evidence and render its own decision, rather than being bound by the original decision-maker (*Fang* at para 26). However, the *de novo* power of the IAD is limited to the jurisdiction conferred to it by the IRPA, including that which is provided for in section 65 of the IRPA, regarding appeals involving membership in the family class and the consideration of H&C grounds (*Fang* at para 27).

[15] After concluding that the Visa Officer had breached procedural fairness by failing to provide Ms. Rizwan with sufficient information of the specific concerns regarding the authenticity of the *Nikah Nama* in the procedural fairness letter, the IAD specifically noted that its jurisdiction to conduct appeals *de novo* enabled the breach to be cured on appeal without the need to return the matter to the Visa Officer for reconsideration. Furthermore, in order to address the concerns raised by the *Nikah Nama,* Mr. Khan was allowed to submit new evidence that was not before the Visa Officer. He was also afforded the opportunity to testify and raise other issues arising out of the Visa Officer's determination.

[16] It remains, however, that Mr. Khan had to demonstrate that Ms. Rizwan was a spouse under the family class category. To that end, the IAD needed to be persuaded that the couple was legally married. Based on the evidence before it, the IAD determined that the *Nikah Nama* was counterfeit. It also found that it could not rely on the NADRA marriage registration certificate to conclude that Mr. Khan and Ms. Rizwan were legally married. As a result, and in the absence of evidence demonstrating the validity of the marriage, Ms. Rizwan could not be considered a spouse. As such, it was not necessary for the IAD to examine whether the marriage was genuine. While the *Nikah Nama* remained a central concern before the IAD, this does not mean that the IAD did not conduct a *de novo* hearing.

C. *Whether the IAD Erred in its Analysis of the* Nikah Nama

[17] Mr. Khan submits that the IAD misconstrued the evidence regarding the *Nikah Nama* and provided inadequate reasons to justify its determination. He contends that the IAD failed to recognize that there were significant problems in the investigation of the *Nikah Nama*. Specifically, he argues that the IAD improperly relied on a report from the Anti-Fraud Unit and a letter from Union Council # 5 which stated that the *Nikah Nama* was "not registered in UC office and Qari Muhammad Akram Naqshbandi is not registered in Union Council No. 05".

[18] I agree with Mr. Khan that the IAD erred in concluding that the letter from Union Council # 5 stated that the marriage was not registered in *any* Union Council office. However, I am satisfied that it was nonetheless reasonably open to the IAD to conclude that the *Nikah Nama* was a fraudulent document.

[19] There is sufficient contradictory and confusing evidence on the record regarding the registration of the *Nikah Nama* to raise concerns about its authenticity. Mr. Khan testified that it was the responsibility of the wife's family to seek the services of the Qari who conducts and solemnizes the marriage. He also testified that the Qari is responsible for registering the marriage in the area where the Qari lives. Mr. Khan also provided evidence consisting of two (2) letters from a lawyer in Pakistan. In the first letter, dated September 30, 2016, the lawyer indicates that the proper Union Council for registration is Union Council No. 6. In a second letter, which is undated, the lawyer writes that the *Nikah Nama* is filed with the Union Council where the groom resides. Finally, there is evidence on the record demonstrating that the NADRA marriage registration certificate was issued to Ms. Rizwan by the secretary of Union Council # 4. In my view, it was not unreasonable for the IAD to give little weight to the letters of the Pakistani lawyer since the *Nikah Nama* noted as being attached to the September letter was not attached and because the second letter, which purported to be a legal opinion, was not dated and contradicted other information on the record. Moreover, the alleged High Court Order that Mr. Khan stated his lawyer from Pakistan had obtained was not provided to the IAD either.

[20] In addition to noting these concerns, the IAD also properly pointed out that the information on the *Nikah Nama* was not identical to the information in the NADRA marriage registration certificate. While the *Nikah Nama* indicated that the Qari who solemnized the marriage was Qari Muhammad Akram Naqshbandi, the NADRA marriage registration certificate indicated that the marriage was solemnized by an individual named Shah Muhammad Noori.

[21] Mr. Khan relies on *Hannan* to contend that the IAD's reasoning cannot stand up to probing examination. He argues that, similarly to *Hannan*, since Mr. Khan's lawyer in Pakistan indicated that the verification was done at the incorrect Union Council, the IAD's concerns regarding the *Nikah Nama* should have been dissipated. However, it is clear that the *Hannan* case is distinguishable from the case at bar. Contrary to *Hannan*, the discrepancies plaguing the *Nikah Nama* in the case at bar have not been explained by Mr. Khan. The evidence of Mr. Khan's lawyer is not only contradictory to itself – given the two (2) letters he provided – but is also contradictory to Mr. Khan's own evidence. Given the contradictions, the unanswered questions relating to the registration of the *Nikah Nama* as well as the discrepancies between the *Nikah Nama* and the NADRA, the *Hannan* case cannot be of help to Mr. Khan. Indeed, the discrepancies, which were entirely explained in *Hannan*, remain unexplained in the case at bar.

[22] Given the conflicting information on the record, it was not unreasonable for the IAD to conclude that the *Nikah Nama* was fraudulent.

D. *Whether the IAD Erred in its Analysis of Ms. Rizwan as a Member of the Family Class*

[23] Mr. Khan submits that the IAD erred in finding that Ms. Rizwan is not a member of the family class. First, he argues that even if there were issues with the *Nikah Nama*, the IAD nevertheless had the NADRA marriage registration certificate attesting to the validity of the marriage. Second, he maintains that the IAD should have considered whether the couple was in a conjugal relationship at the time of the sponsorship instead of solely considering whether Ms. Rizwan was a "spouse".

[24] Concerning Mr. Khan's argument regarding the NADRA marriage registration certificate, I am satisfied that the IAD reasonably found it did not alleviate its concerns regarding the validity of the marriage. The IAD reasonably noted that it did not know what Mr. Khan had presented to the NADRA or what other documents the NADRA had before it in order to issue the NADRA marriage registration certificate. In addition to the conflicting information regarding the identity of the person who solemnized the marriage, the IAD also noted that the "Marriage Solemnized by CNIC No." line was left blank.

[25] As for Mr. Khan's argument that the IAD should have considered whether the couple was in a conjugal relationship at the time of the sponsorship, Mr. Khan chose to have the sponsorship application proceed by way of a spousal sponsorship. In the "Generic Application Form for Canada" under box 2 entitled "Category under which you are applying", Mr. Khan indicated "spouse". The marriage certificate was therefore a relevant document for consideration in the application under this category. If Mr. Khan had wanted his application to be processed under a different category, without determining that it could be, he should have raised the argument before the IAD as different evidentiary burdens attach to the common law or conjugal partner categories. Accordingly, I find that Mr. Khan has failed to demonstrate that the IAD, or the Visa Officer for that matter, had the obligation to canvass all the categories set out in paragraph 117(1)(*a*) of *the Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] to determine whether Ms. Rizwan fell within the family class.

E. *Whether the IAD Fettered its Discretion in Refusing to Consider H&C Considerations*

[26] Mr. Khan contends that the IAD fettered its discretion and improperly relied on section 65 of the IRPA not to grant special relief. He argues that if this Court accepts that Ms. Rizwan ought to have been considered a member of the family class, the IAD should have considered the H&C considerations advanced by Mr. Khan and in particular, the best interests of the couple's four (4) children.

[27] Section 65 of the IRPA provides that the IAD may not consider H&C considerations arising on an appeal from a family class application unless it has been decided that the foreign national is a member of the family class and that their sponsor is a "sponsor" within the meaning of the class. Once the IAD determined that Ms. Rizwan was not a member of the family class, its jurisdiction to consider a claim for H&C relief ended (*Canada (Citizenship and Immigration) v Chen*, 2014 FC 262 at paras 13-14, 20-22).

[28] As I have already determined that the IAD reasonably concluded that Ms. Rizwan was not a member of the family class, it follows that the IAD did not have jurisdiction to consider the H&C grounds advanced by Mr. Khan.

F. *Whether the IAD Erred in Finding Ms. Rizwan Inadmissible to Canada on the Grounds of Misrepresentation*

[29] Paragraph 40(1)(*a*) of the IRPA provides that a foreign national is inadmissible for misrepresentation "for directly or indirectly misrepresenting or withholding material facts

relating to a relevant matter that induces or could induce an error in the administration of [the IRPA]".

[30] Given my conclusion regarding the reasonableness of the IAD's analysis of the *Nikah Nama*, I find that the provision of a fraudulent marriage certificate reasonably substantiates a finding of misrepresentation under the IRPA, as it could induce an error in the administration of the IRPA, in this case, the error being the characterization of Ms. Rizwan as Mr. Khan's spouse under paragraph 117(1)(*a*) of the IRPR.

IV. Conclusion

[31] To conclude, Mr. Khan has failed to persuade me that the IAD's decision falls outside of the range of possible, acceptable outcomes which are defensible in light of the facts and the law. Moreover, while Mr. Khan may disagree with the IAD's findings, it is not this Court's role to reweigh the evidence before the IAD or to substitute its view of a preferred outcome (*Khosa* at para 59; *Dunsmuir* at para 47).

[32] Accordingly, the application for judicial review is dismissed. No questions were proposed for certification and I agree that none arise.

JUDGMENT in IMM-1787-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration"; and
3. No question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Monique Ashamalla	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ashamalla LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT