Federal Court  Cour fédérale

Date: 20191022

Docket: IMM-277-19

Citation: 2019 FC 1317

Ottawa, Ontario, October 22, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ASHA KIPENGELE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application seeks judicial review of a decision dated September 5, 2018 [the Decision] of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD], dismissing an appeal of the decision of a visa officer of Citizenship and Immigration Canada [CIC], who refused the permanent resident visa application of the Applicant's daughter.

[2] The Applicant sought to sponsor her daughter's application as a member of the family class under section 117(1)(h) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the IRPR]. Section 117(1)(h) has been described as the "lonely Canadian" provision which, loosely speaking, permits sponsorship of any relative as a member of the family class if the sponsor has no other relative falling within a specified list of relationships (a) who is a Canadian citizen or permanent resident, or (b) whom the sponsor may otherwise sponsor.

[3] As explained in greater detail below, this application for judicial review is dismissed, because I have found that the IAD reasonably applied s 117(1)(h) of the IRPR to the evidence before it and concluded that the Applicant's daughter is not a member of the family class.

II. **Background**

[4] The Applicant, Ms. Asha Kipengele, is a citizen of Tanzania and a permanent resident of Canada. She married Ahmada Mohamed Mkamua under Tanzanian law in 2011, but she says that she and Mr. Mkamua separated in January 2014 and divorced in April 2017.

[5] The Applicant's daughter, Miriamu Abdallah Kilindo, is also a citizen of Tanzania. She is 37 years old and lives in Tanzania with her three minor children. In May 2014, the Applicant submitted an application to sponsor her daughter's permanent resident visa application on the basis that her daughter was a member of the family class under s 117(1)(h).

[6] By letter dated August 21, 2014, CIC noted the statement in the sponsorship application that the Applicant was married and requested clarification of her current marital status. On

December 8, 2014, the Applicant's representative confirmed that she and her husband are separated. The Applicant also submitted a sworn declaration dated December 6, 2014, affirming that she and her husband were separated.

[7] On January 29, 2015, CIC wrote to the Applicant, stating that she was not eligible to sponsor her daughter, because her daughter was not a member of the family class. The CIC explained that her daughter did not meet the requirements of s 117(1)(h), because there was another individual whom the Applicant could otherwise sponsor (i.e. her spouse).

[8] The Applicant subsequently submitted a handwritten document from her ex-husband dated April 28, 2017, and an accompanying translation, stating that he and the Applicant were divorced as of that date. In October 2017, CIC wrote to the Applicant and her daughter, refusing the visa application. CIC's letter explained that the evidence submitted was insufficient to satisfy CIC that the Applicant was indeed divorced. As such, her daughter did not qualify as a member of the family class under s 117(1)(h).

[9] The Applicant appealed CIC's decision to the IAD.

III. **Decision Under Review**

[10] On September 5, 2018, the IAD dismissed the appeal. The determinative issue in the Decision was whether s 117(1)(h) excluded the Applicant's daughter as a member of the family class. As noted in the Decision, s 117(1)(h) provides as follows:

Immigration and Refugee	***Règlement sur l'immigration***

***Protection Regulations*, SOR/2002-227**

Member

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

[…]

(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father

(i) who is a Canadian citizen, Indian or permanent resident, or

(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.

***et la protection des réfugiés*, DORS/2002-227**

Regroupement familial

117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

[…]

h) tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses parents ou de membre de sa famille qui est l'enfant de l'un ou l'autre des parents de l'un ou l'autre de ses parents, qui est :

(i) soit un citoyen canadien, un Indien ou un résident permanent,

(ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée

par le répondant.

[11] The IAD noted the following documentation submitted by the Applicant:

A. The Applicant's solemn declaration dated December 6, 2014, in which the Applicant affirms she and her husband had separated;

B. The handwritten statement of divorce dated April 28, 2017, in which the Applicant's husband writes that he and the Applicant were married from January 2011 until April 28, 2017; and

C. A First Islamic Divorce certificate dated November 20, 2017, which states that the Applicant and her husband divorced on April 28, 2017.

[12] The IAD also notes that the visa application's "lock-in" date was May 2, 2014, the date the application was filed. Section 121 of the IRPR provides that a person who applies for a permanent resident visa as a member of the family class must be a family member of the sponsor both at the time of the application (i.e. the lock-in date) and at the time of the determination of the application. Accordingly, for the application to succeed, the Applicant's daughter was required to be a member of the family class on May 2, 2014. The IAD held that she was not a member of the family class at the lock-in date, because the Applicant was legally married at that time, and therefore she could have otherwise sponsored her spouse for a visa application.

IV. **Issues**

[13] The Applicant's arguments raise the following issues for the Court's consideration:

A. What is the applicable standard of review?

B. Did the IAD err in its assessment under section 117(1)(h) of the IRPR?

V. **Analysis**

A. ***What is the applicable standard of review?***

[14] The parties disagree on the applicable standard of review. The Applicant's argument, that the IAD erred in its assessment under section 117(1)(h) of the IRPR, is based on the position that the IAD was required to consider whether her marriage was genuine as of the lock-in date of May 2, 2014, even though she was not divorced until 2017. She relies on s 4(1) of the IRPR, which provides as follows:

Immigration and Refugee Protection Regulations, **SOR/2002-227**	***Règlement sur l'immigration et la protection des réfugiés,*** **DORS/2002-227**
Family Relationships	**Regroupement familial**
Bad faith	Mauvaise foi
4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership	**4 (1)** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	**a)** visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	**b)** n'est pas authentique.

[15] The Applicant takes the position that she was separated from her husband as of May 2, 2014 , that her marriage was therefore not genuine as of that date, and that the resulting effect of s 4(1) is that, for purposes of s 117(1)(h) of the IRPR, Mr. Mkamua was not her spouse as of that date. Therefore, she argues, she would not have been able to sponsor him, and her relationship with him should not prevent her daughter from being a member of the family class under s 117(1)(h).

[16] Returning to the standard of review, the Applicant submits that the above argument is one of statutory interpretation and that the standard of correctness therefore applies. The Respondent takes the position that the reasonableness standard applies, relying on the decision of the Federal Court of Appeal in *Bousaleh v Canada (Citizenship and Immigration)*, 2018 FCA 143 [*Bousaleh*] at para 40:

> 40 Although this Court has yet to decide which standard of review applies to the interpretation and application of this particular provision of the Regulations by the IAD, the jurisprudence of the Federal Court concluding that reasonableness applies is quite satisfactory. It is consistent with the presumption of deference applicable when the IAD is interpreting its home statute and, as noted by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 44 (*Kanthasamy*), a certified question in respect of paragraph 117(1)(*h*) of the IRPA does not belong to any category of questions that may attract the application of the stricter standard of correctness.

[17] As both this passage and the analysis in *Bousaleh* relate to the interpretation of s 117(1)(h), I am satisfied that the standard of review applicable the present case is reasonableness. As will be evident from the analysis below, the issue raised by the Applicant engages mixed fact and law.

B. ***Did the IAD err in its assessment under section 117(1)(h) of the IRPR?***

[18] The Applicant's argument that the IAD erred is set out above.

[19] The Respondent submits the Applicant bore the onus of establishing her eligibility to sponsor her daughter and she therefore had to prove there was no other member of the family class who could be sponsored. The Respondent's position is that the evidence provided by the Applicant to the IAD did not establish that she could not sponsor her spouse. Moreover, the argument based on s 4(1) of the IRPR, upon which the Applicant relies before the Court, was not presented to the IAD.

[20] In response to these positions, the Applicant submits that she presented evidence that the marriage had broken down and that the IAD was therefore required to consider the applicable law alongside the resulting facts, even in the absence of an express articulation of the legal argument that the Applicant is now advancing before the Court. The Applicant specifically notes that she advised as to her separation and the state of her marriage: she and her husband were not in a relationship, they were not cohabiting, and they were living in different countries.

[21] I cannot agree with the Applicant that her submissions to the IAD give rise to a requirement to assess whether the condition of her marriage as of May 2, 2014 was such that Mr. Mkamua would not then be considered her spouse. The Respondent's submissions to the IAD note that, although the Applicant presented a declaration dated December 6, 2014, stating that she and her spouse were separated, there were no details provided in that declaration as to when the alleged separation took place. While the Applicant has filed an affidavit in this application

for judicial review, in which she states that she and her husband separated as of January 2014, this document was not before the IAD. At the hearing of this application for judicial review, the Applicant also referred to a document entitled "Verdict"**,** dated January 23, 2014, issued by a body described as "The Court of Judge in a Muslim Community" in Dar es Salaam, Province of Tanzania, purporting to dissolve a marriage. However, it is clear from the face of this document that it relates to the Applicant's daughter's marriage, not to the Applicant's marriage.

[22] At the hearing, I sought submissions on the significance of *Bousaleh* to the Applicant's argument surrounding the effect of s 4(1) of the IRPR. In that case, at para 84, the Federal Court of Appeal answered in the negative the following certified question:

> 84 […]
>
> In order to determine if an applicant is a member of the family class pursuant to paragraph 117(1)(h) of the Regulations, does the Minister have to consider the likelihood of success of a hypothetical application for permanent residence that could be made by a relative listed in that provision in light of an alleged health condition that could render that person inadmissible?

[23] In arriving at that conclusion, the Court held it was reasonable for the IAD to find that s 117(1)(h)(ii) was meant to establish an objective criterion to determine if the relative selected by the sponsor is a member of the family class, which focused on the characteristics of the listed relatives who may file an application for permanent residence rather than on the merits of such an application (*Bousaleh* at para 73).

[24] The Applicant submits that *Bousaleh* is distinguishable, because the effect of s 4(1) is that a person to whom a sponsor is married is not considered their spouse if the marriage is not

genuine. Section 4(1) states that this effect applies for purposes of the IRPR. Therefore, the Applicant argues, in the case of a non-genuine marriage, the sponsor's partner is not a spouse for purposes of s 117(1)(h).

[25] It is unnecessary for the Court to reach a conclusion on the merits of this argument. The Respondent acknowledges that, with a different set of facts that clearly established a matrimonial breakdown as of an applicant's lock-in date, it may be necessary to consider such an argument. However, I agree with the Respondent that the evidence before the IAD in this case did not result in such a requirement.

[26] Accordingly, it is my conclusion that the IAD reasonably found that the Applicant's daughter is not a member of the family class. This application for judicial review must therefore be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-277-19

THIS COURT'S JUDGMENT is that this application is dismissed. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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