Federal Court  Cour fédérale

Date: 20211021

Docket: IMM-6422-20

Citation: 2021 FC 1117

Ottawa, Ontario, October 21, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

OSMAN KAMARA
FATMATA KAMARA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Osman Kamara and Fatmata Kamara [together, the Applicants] seek judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IRB]. The IAD dismissed their appeal of the refusal of an immigration officer to grant Mr. Kamara's application to sponsor his wife for permanent residence. The IAD found that the

appeal was barred by the legal doctrine of *res judicata*, because Mr. Kamara had previously brought an unsuccessful application to sponsor his wife, and the IAD had dismissed his appeal in 2009.

[2] The Applicants presented new evidence to demonstrate their marriage was genuine, much of which the IAD acknowledged could not have been adduced at the first appeal. However, the IAD addressed this in a piecemeal fashion and effectively failed to address the crucial question of whether the evidence of continuing commitment was sufficient to establish the parties' intentions at the time of their marriage. The IAD's decision was therefore unreasonable.

[3] The IAD's choice not to hear *viva voce* testimony from the Applicants and their adult daughter also raises concerns of procedural fairness, but these are best left for the IAD's consideration upon redetermination of the Respondent's motion to dismiss the appeal.

[4] The application for judicial review is allowed.

II. Background

[5] The Applicants are a married couple from Sierra Leone. Mr. Kamara met his wife in 1990, when she was 11 years old. Their relationship began in 1995. Not long afterwards, they fled Sierra Leone due to the civil war and lived together in a refugee camp in Guinea. Their twin children, a son and a daughter, were born in Guinea in 1999. Mr. Kamara also has two children from a previous relationship.

[6] Mr. Kamara was sponsored as a refugee by his brother and came to Canada in 2002. He later became a Canadian citizen. He married Ms. Kamara on June 15, 2003 and applied to sponsor her, their twin children and his other two children. The sponsorship application was rejected, and the Applicants appealed to the IAD. In a decision dated December 2, 2009, the IAD rejected the marriage sponsorship appeal, but allowed the appeal of the four children.

[7] Mr. Kamara was the only witness who testified at the first appeal. The IAD found inconsistences between his testimony and the answers Ms. Kamara had given to questions during her interview with an immigration officer at the High Commission of Canada in Ghana. The IAD also noted that Mr. Kamara had an extramarital affair in Canada from 2004 to 2007. The IAD accepted that his marriage to Ms. Kamara was legal, but found it was not genuine. An application for leave and judicial review of the IAD's decision was dismissed by this Court on March 23, 2010.

[8] The couple's daughter was granted permanent residence and came to live with Mr. Kamara in Canada. Their son died in Sierra Leone in 2012 from kidney disease.

[9] The couple's daughter also has a serious kidney condition. She is currently diagnosed with end-stage renal disease, for which she receives dialysis. Her doctors are of the view that family reunification would help both Mr. Kamara and his daughter cope.

[10] Mr. Kamara submitted a new spousal sponsorship application in December 2018. The application was rejected in November 2019. Mr. Kamara appealed to the IAD, proposing that he,

Ms. Kamara, and their daughter all provide *viva voce* testimony. He also submitted a package of supporting materials that included letters from physicians and friends, proof of visits between the spouses, photographs, money transfer receipts, and text messages.

[11] The appeal was scheduled to be heard on October 9, 2020. However, two days before the hearing, the Respondent filed a motion requesting that the appeal be dismissed pursuant to the legal doctrine of *res judicata*. The hearing was cancelled and the Applicants were given an opportunity to make written submissions in reply to the motion. The IAD held that *res judicata* applied and dismissed the Applicants' appeal.

III. Issues

[12] This application for judicial review raises the following issues:

A. What is the standard of review?

B. Was the IAD's decision reasonable?

C. Was the IAD's decision procedurally fair?

IV. Analysis

A. *What is the standard of review?*

[13] *Res judicata* precludes the re-litigation of both the same cause of action (cause of action estoppel) and the same issues or material facts (issue estoppel): *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*] at paragraph 20. The underlying purpose of the doctrine is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case: *Danyluk* at paragraph 33.

[14] Issue estoppel involves the application of a two-part test. The decision-maker must first determine whether the three preconditions of issue estoppel are met, as described in *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at paragraph 3:

> (a) the same question has been decided;
>
> (b) the decision said to create the estoppel was final; and
>
> (c) the parties to the previous decision or their privies are the same as the parties to the proceeding in which the estoppel is raised.

[15] Second, the decision-maker must consider whether the application of issue estoppel or *res judicata* would lead to an injustice (*Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321 [*Rahman*] at para 20; *Danyluk* at para 67).

[16] Prior to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], each step of the *res judicata* analysis was understood to attract a different standard of review. As I wrote in *Singh v Canada (Citizenship and Immigration)*, 2015 FC 1055 at paragraph 25:

> Whether the preconditions to the operation of issue estoppel are met is a question of law and is reviewable by this Court against the standard of correctness (*Rahman* at para 12). Whether special circumstances exist to justify an exception involves the exercise of discretion, and is therefore reviewable against the standard of reasonableness (*Ping v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1121 at para 17).

[17] However, in *Vavilov* the Supreme Court of Canada ruled that reasonableness is the presumptive standard of review in all cases, subject to only limited exceptions. The presumption may be rebutted in one of three circumstances: (a) where the legislature has indicated that courts are to apply the correctness standard; (b) where there is a statutory appeal mechanism from an administrative decision to a court; or (c) where the rule of law requires courts to apply the standard of correctness, *e.g.*, constitutional questions, general questions of law of central importance to the legal system, and questions regarding the jurisdictional boundaries between two of more administrative bodies (*Vavilov* at para 53).

[18] While an administrative tribunal's application of the doctrines of *res judicata* and abuse of process may continue to attract the correctness standard of review, the Supreme Court's earlier jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions (*Vavilov* at para 60, citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 15).

[19] As will be seen from the analysis that follows, this case turns on the IAD's consideration of whether special circumstances justified an exception to the application of *res judicata*. This aspect of its decision involved the exercise of discretion, and is therefore reviewable against the standard of reasonableness.

[20] Accordingly, the Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[21] Questions of procedural fairness are not decided according to any particular standard of review. Rather, the Court must be satisfied that procedural fairness has been met (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14, citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-55).

B. *Was the IAD's decision reasonable?*

[22] There is no serious dispute that the IAD reasonably found the three preconditions of issue estoppel to be met in this case. The question before the IAD in the first appeal was whether the Applicants' marriage was genuine; the IAD's decision was final (leave to commence an application for leave and judicial review was refused); and the parties were the same. The focus of the Applicants' challenge is therefore on the IAD's finding that the application of *res judicata* would not lead to an injustice.

[23] In *Sami v Canada (Citizenship and Immigration),* 2012 FC 539 [*Sami*], the applicants had been married for more than five years and had gone through two immigration applications and appeals. Justice James Russell held that the duration of their relationship could constitute fresh evidence that the relationship was genuine, despite the earlier determination that it was not (*Sami* at paras 73-74). Justice Russell also observed that preventing family reunification is a potential injustice that the IAD must consider when exercising its discretion to revisit an earlier determination regarding the genuineness of a marriage (*Sami* at para 42).

[24] The IAD found that *Sami* did not apply in this case (at para 14):

> I find that *Sami* does not apply in this case. The fact that the Appellant and Applicant had children together was considered in the 2009 IAD decision, resulting in the children's appeals being allowed, while the Applicant's appeal was dismissed. Therefore, evidence of the children is not decisive new evidence. The length of time that has elapsed since the last dismissal in 2009 is insufficient to overcome the unresolved issues extant at the first hearing, including the lack of visits between the Appellant and Applicant and the lack of evidence of a continuing relationship.

[25] The IAD acknowledged the ample new evidence regarding the grave medical condition of the Applicants' daughter, who requires substantial assistance and support. Letters from physicians confirmed that Mr. Kamara and his daughter would both benefit greatly from Ms. Kamara's presence. The IAD described the situation as "heartbreaking".

[26] Nevertheless, the IAD held that none of the documentation tendered by Mr. Kamara constituted "decisive new evidence that is capable of altering the result of the first appeal", because it did not support a finding "either that the marriage is genuine or that it was not entered into primarily for immigration purposes" (at para 16). The IAD provided little in the way of analysis to support its conclusion that the length of time that had elapsed – 11 years – was insufficient to overcome the unresolved issues in the first appeal.

[27] The IAD concluded that the new evidence did not address the numerous inconsistencies and discrepancies that caused the panel to reject the Applicants' credibility at the first hearing (at para 18):

> Furthermore, I note that the evidence regarding the parties' children was considered in the first IAD appeal and addressed in the IAD's reasons, and the children's appeals were allowed as a result. None of the new evidence goes to the core of the IAD's finding that the Appellant failed to establish that the marriage was not entered into primarily for the purpose of acquiring permanent residence in Canada. A second marriage ceremony does not overcome the primary purpose at the time of the first civil marriage, the legality of which was not in issue in the first IAD appeal.

[28] The IAD unreasonably narrowed the question before it as pertaining to whether the new evidence was sufficient to overcome the precise credibility concerns identified by the first panel.

The broader question before the IAD was whether, taken as a whole, the evidence was sufficient to establish that the marriage was in fact genuine and not entered into primarily for immigration purposes.

[29] In *Sami*, Justice Russell accepted the applicants' argument that "the IAD addressed the evidence in a piecemeal fashion and effectively failed to address the crucial point that evidence of a continuing commitment which was not adduced, and could not have been adduced, at the previous hearings can speak to the parties' intention at the time of the marriage" (at para 71). The IAD committed the same error in this case. Its decision was therefore unreasonable.

C. *Was the IAD's decision procedurally fair?*

[30] In light of my conclusion that the IAD's decision was unreasonable, it is not strictly necessary to consider whether it was also procedurally unfair. I note, however, that the IAD's determination of whether the Applicants' marriage is genuine and/or entered into primarily for immigration purposes depends to a large extent on their credibility.

[31] The Respondent points out that *res judicata* is a pre-hearing matter that, if applied, precludes a full hearing. The IAD has the authority to summarily dismiss an appeal, without a full hearing on the merits, when an appellant seeks to re-litigate on essentially the same evidence (*Tiwana v Canada (Citizenship and Immigration)*, 2016 FC 831 at para 38).

[32] In this case, the Applicants are not seeking to re-litigate on essentially the same evidence, but have asked the IAD to revisit its previous determination based on new evidence of their mutual commitment. None of the parties identified any authority for the proposition that *viva voce* evidence is precluded on a preliminary motion to dismiss an appeal on the grounds of *res judicata*. Credibility lies at the heart of the determination the IAD must make in this case, and the IAD may therefore be assisted by hearing from the Applicants and their daughter in person.

[33] Moreover, an appeal to the IAD is intended to be a summary process. While *res judicata* is properly regarded as a matter to be determined in advance of a hearing on the merits, the IAD may also choose to reserve its decision respecting the application of the doctrine until the factual circumstances have been fully canvassed on appeal.

[34] Upon redetermination of the Respondent's motion to dismiss the appeal on the ground of *res judicata*, the IAD should consider whether to permit *viva voce* evidence on the motion, or alternatively reserve its decision until it has permitted the Applicants and their daughter to testify on appeal.

V. Conclusion

[35] The application for judicial review is allowed, and the matter is remitted to a different panel of the IAD for redetermination. None of the parties proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different panel of the IAD for redetermination in accordance with the Reasons for Judgment.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6422-20
STYLE OF CAUSE:	OSMAN KAMARA AND FATMATA KAMARA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDECONFERENCE BETWEEN TORONTO AND OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 7, 2021
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	OCTOBER 21, 2021

APPEARANCES:

Raoul Boulakia	FOR THE APPLICANTS
Kevin Spykerman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT