Federal Court  Cour fédérale

Date: 20220106

Docket: IMM-2018-20

Citation: 2022 FC 12

Ottawa, Ontario, January 6, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

BASIL CARLTON CLARKE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Clarke [Applicant] applies for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of the Immigration Appeal Division's [IAD] March 3, 2020 decision [Decision] denying the Applicant's sponsorship appeal. The IAD found that section 4.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], titled "New Relationship", precludes the Applicant's sponsorship

of his wife in the family class. The Applicant asserts that his relationship with his wife is not new, and has been ongoing, uninterrupted, since 1997 despite an intervening marriage of convenience.

[2] I find that section 4.1 of the *Regulations* applies. Accordingly, the application for judicial review is dismissed.

II. Background

[3] The Applicant is a citizen of Jamaica and a permanent resident of Canada since 2017. The Applicant's mother moved to Canada in 1990. In 1997, the Applicant met a woman who later became his second wife [Mrs. Clarke]. At the time, she had two children. In 1998, the couple moved in together and in 1999, their son was born.

A. *Marriage of convenience and loss of permanent residence status*

[4] In 2005, the Applicant's mother told him that a woman in Canada [First Wife] was willing to enter a marriage of convenience with the Applicant and sponsor him to live in Canada. The Applicant married his First Wife and, in 2007, he came to Canada as a permanent resident. The Applicant did not have children with the First Wife. Later, he was able to bring his son to live with him in Canada. The Applicant never lived with his First Wife but lived with his mother until finding an apartment for himself and his son.

[5] In 2008, he divorced his First Wife and married Mrs. Clarke in Jamaica in 2009. In 2010, when the Applicant applied to sponsor Mrs. Clarke for permanent residence, the application triggered an investigation by immigration officials into the nature of his marriage to his First Wife. This led to a section 44 *IRPA* inadmissibility report that was issued against the Applicant in 2011 for misrepresentation. As a result, he lost his permanent resident status. His son did not lose his permanent resident status and the two continued to live together in Toronto.

B. *Application for permanent residence on humanitarian and compassionate grounds*

[6] After living in Canada without status, the Applicant submitted an application for permanent residence on humanitarian and compassionate grounds. The application was successful and the Applicant regained his permanent resident status in 2017. He then applied to sponsor Mrs. Clarke as his spouse for a second time.

[7] In 2018, after interviewing Mrs. Clarke, a visa officer in Jamaica found that their marriage was not genuine and refused the application under subsection 4(1) of the *Regulations*. The Applicant appealed the Decision to the IAD.

C. *The IAD hearings*

[8] The IAD heard the appeal over two hearings. The focus of the first hearing, in October 2019, was an appeal of the Decision based on subsection 4(1) of the *Regulations*. Toward the end of the hearing, the Minister's counsel requested to add section 4.1 of the *Regulations* as another ground of refusal.

[9] In between the first and second hearings, the Minister requested to add a third ground of refusal, under section 117(9)(d) of the *Regulations*. The IAD refused the request and the IAD proceeded on the basis that the sponsorship could be denied based on either subsection 4(1) or section 4.1 of the *Regulations*.

[10] At the second hearing, the Applicant and Mrs. Clarke testified that their relationship began in 1997 and continued without interruption. Their son also testified to their relationship.

[11] From the outset, the Applicant admitted that his marriage to his First Wife was not genuine. He claimed responsibility for this and apologised. He also stated that he paid for his mistakes with the loss of his permanent resident status and subsequent finding of inadmissibility resulting in him being unable to travel to Jamaica to see Mrs. Clarke for about seven years. Previously, and after regaining his status in 2017, the Applicant regularly travelled to Jamaica to see Mrs. Clarke.

III. Decision under Review

[12] The Respondent acknowledged, and the IAD found, that the Applicant and Mrs. Clarke's marriage was genuine. The IAD found that they and their son were credible witnesses. The IAD noted that they admitted to "not truly dissolving their relationship" and, as such, found that section 4.1 of the *Regulations* applied.

[13] The IAD noted that section 1 of the *Regulations* provides that the definition of "common-law partner" means "in relation to a person, an individual who is cohabiting with the person in a

conjugal relationship, having so cohabited for a period of at least one year." The IAD found that since around 1998, the Applicant and Mrs. Clarke (who was not yet married to the Applicant) were seen as a couple by their families, church, and the wider community. The IAD found their relationship to be a common-law partnership in the years before the Applicant immigrated to Canada.

[14] The IAD found that the relationship between the Applicant and Mrs. Clarke (then his common-law spouse) "lasted until [he] left for Canada in 2007." The IAD described the circumstances of the Applicant's 2007 move to Canada as follows:

> The [Applicant] said that he was reluctant to agree to marry his first spouse because he did not want to jeopardize his relationship with [Mrs. Clarke]. He said he could not bring himself to tell [her] about the plan to separate from her and leave for Canada. He said that his mother called [Mrs. Clarke] and told her by telephone. The [Applicant] said his plan was to settle in Canada and then return to marry [Mrs. Clarke]. He told [her] that he was committed to her and she said she would wait for him to return.

[15] At the IAD, the Minister's counsel argued that the Applicant's relationship with Mrs. Clarke was dissolved in 2007 by his marriage to his First Wife. Given the Applicant's admissions about the marriage to his First Wife, the Minister argued that all of the elements necessary for section 4.1 of the *Regulations* were satisfied.

[16] Section 4.1 of the *Regulations* states:

> **New relationship**
>
> 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 foreign national has begun a new conjugal relationship with that person after a previous marriage,

> common-law partnership or conjugal partnership with that person was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the Act.

[17] The Applicant argued that section 4.1 of the *Regulations* does not apply because the Applicant's non-genuine marriage to his First Wife does not automatically create a dissolution of the relationship with Mrs. Clarke. The Applicant submits that the evidence supports his argument that the Applicant and Mrs. Clarke carried on their long-distance relationship over the course of the Applicant's non-genuine marriage to his First Wife.

[18] The IAD agreed with the Minister, finding that the couple:

> [H]ad an ongoing obligation to answer all questions to Canadian immigration truthfully and, until the [Applicant's] admission at the hearing, this had not been done. Had he previously disclosed his ongoing relationship with [Mrs. Clarke], and lack of dissolution of their relationship, despite his marriage to [his First Wife], [he] may have been further examined by Canadian immigration. As a result of [his] misrepresentation about both his ongoing relationship with [her] and his marriage to [his First Wife], legitimate lines of investigation were cut off to Canadian immigration.

[19] The IAD further found that:

> The purpose of section 4.1 of the Regulations is to prevent foreign nationals from doing exactly what the [Applicant] and [Mrs. Clarke] did: a foreign national cannot 'formally' dissolve a common-law partnership, but <u>informally maintain that relationship, so that they are able to enter a marriage of convenience to obtain PR status in Canada, and then turn around and formalize the ongoing relationship as if it is a new relationship.</u> Accepting the [Applicant's] Counsel's interpretation of section 4.1 of the Regulations would defeat the purpose of the legislation.
>
> [Emphasis added]

[20] Due to the Minister's acknowledgement of the genuineness of the marriage between the Applicant and Mrs. Clarke, and the IAD's concurrence, the appeal under section 4(1) of the *Regulations* was allowed.

[21] Concerning the merits of the appeal regarding section 4.1 of the *Regulations*, the IAD concluded that the Applicant had the onus to prove, on a balance of probabilities, that he and Mrs. Clarke did not dissolve their relationship so that he could acquire permanent resident status in Canada. The IAD found that the Applicant did not discharge this burden. Overall, the IAD found that the couple "had a previous common-law relationship that was dissolved primarily to facilitate the [Applicant] acquiring permanent residency status in Canada by way of a marriage with a third party." Thus, the IAD found that Mrs. Clarke could not be considered for spousal sponsorship, due to the application of section 4.1 of the *Regulations*, and dismissed the appeal.

IV. Issues and Standard of Review

[22] The sole issue is whether the IAD's Decision is reasonable.

[23] The parties agree that the standard of review is that of reasonableness, as none of the circumstances that rebut the presumptive standard arise in this case (Canada (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16-17 [*Vavilov*]; *Fang v Canada (Citizenship and Immigration)*, 2020 FC 851 at para 10 [*Fang*]).

[24] To determine if a decision is reasonable, the Court must ask whether the decision "bears the hallmarks of reasonableness – justification, transparency and intelligibility" (*Vavilov* at para

99). A decision may be unreasonable is if it "is in some respect untenable in light of the relevant factual and legal constraints that bear on it" (*Vavilov* at para 101).

V. Analysis

[25] The Applicant correctly points out that the facts of this matter are unique. In my view, this case turns primarily on the interpretation of section 4.1 of the *Regulations* and whether the relationship between the Applicant and Mrs. Clarke was dissolved by the Applicant's marriage to his First Wife. I find that it was. As a result, I find that the marriage between the Applicant and Mrs. Clarke is a new relationship within the meaning of section 4.1 of the *Regulations*.

[26] Both parties agree that the modern approach to statutory interpretation requires that the words of an Act "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21). The IAD's interpretation of section 4.1 of the *Regulations* is set out above at paragraph 19.

[27] The Applicant submits that he and Mrs. Clarke never dissolved or ended their relationship despite his intervening marriage of convenience to his First Wife. As a result, section 4.1 of the *Regulations* does not apply, rendering Mrs. Clarke eligible as a spouse. The Applicant also argues that the IAD's reasoning that section 4.1 applies is without a legal basis and therefore, the Decision is unreasonable.

[28] The Respondent submits that the Applicant's interpretation of section 4.1 of the *Regulations* is inconsistent with principles of statutory interpretation. The Respondent states that this provision does not require the Applicant to have dissolved the emotional bond he maintained with Mrs. Clarke throughout his marriage to his First Wife. While the Applicant may have maintained an emotional relationship with Mrs. Clarke throughout his marriage to his First Wife, their prior common-law relationship was dissolved so he could marry his First Wife and thereby gain status in Canada. It follows that after his divorce to his First Wife, the Applicant and Mrs. Clarke began a new conjugal relationship when they married. In short, the *IRPA* and the *Regulations* do not allow for simultaneous relationships. Applying the Applicant's interpretation of section 4.1 would defeat its purpose, as stated by the IAD.

[29] I agree with the Respondent's interpretation of section 4.1. Section 4.1 contemplates what has occurred in the present matter: the "informal" continuation of the initial relationship after a spouse has gained status in Canada. The IAD found this to be the purpose of section 4.1. The IAD had little jurisprudence to rely on as there was little jurisprudence involving the same or similar facts.

[30] In spite of the unique facts, the Respondent's position is supported by the limited jurisprudence that exists concerning the interpretation or application of section 4.1 of the *Regulations*.

[31] In *Fang*, Justice Walker explained that section 4.1 of the *Regulations* "prevents a couple from appearing to dissolve an existing relationship to permit one spouse to obtain immigration

status in Canada, for example through a non-genuine relationship with a Canadian citizen [or permanent resident], only to subsequently resurrect the initial relationship" (*Fang* at para 12). The Applicant bears the onus of establishing that Mrs. Clarke is not a person described in section 4.1 (*Fang* at para 12).

[32] In *Fang*, Justice Walker also stated that section 4.1 is premised on three conjunctive elements to determine whether an applicant is caught by the provision. That test was recently affirmed in *Zheng v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 616 at para 12 [*Zheng*]. Applying the *Fang* test to the facts of this matter means that Mrs. Clarke will not be considered a spouse if:

1. She and Mr. Clarke had a previous marriage, *common-law partnership*, or conjugal partnership;
2. The previous marriage, common-law partnership, or conjugal relationship was *dissolved primarily so that the Applicant or Mrs. Clarke could acquire immigration status or privilege in Canada*; and
3. Mr. Clarke and Mrs. Clarke *subsequently began a new conjugal relationship*.

[33] I find that all three prongs of the test are satisfied in the present matter. On the first prong, the evidence is clear that the Applicant and Mrs. Clarke were in a common-law partnership since around 1998. The IAD determined that this relationship continued until 2007, when the Applicant came to Canada and married his First Wife.

[34] On the second prong, the Applicant argues that he and Mrs. Clarke did not end their relationship that year but that it continued uninterrupted to the present day. As a result, they did

not begin a “new relationship.” The Applicant’s main submission is that section 4.1 applies only to relationships that ended and then resumed as a “new” relationship, unlike in the present case.

[35] I do not accept the Applicant’s argument. The way this Court has interpreted section 4.1 of the *Regulations* suggests that the persistence of the relationship, in spite of an intervening marriage, does not mean that section 4.1 would not apply to Mrs. Clarke. In the cases considering section 4.1 of the *Regulations*, couples denied that their relationship continued despite an intervening marriage of convenience. In these cases, when evidence suggested that, on a balance of probabilities, the couple’s relationship persisted over the course of the marriage of convenience, this Court found that section 4.1 applied and precluded the foreign national from being considered a “spouse.”

[36] For example, in *Fang*, the Court was reviewing an IAD decision that found that Mr. Fang’s and Ms. Chen’s common-law relationship did not breakdown and that Mr. Fang’s first marriage was not genuine. Mr. Fang sought to challenge those findings but this Court found that section 4.1 of the *Regulations* applied and Ms. Chen was not considered a spouse.

[37] In the present matter, the Applicant has submitted that his relationship with Mrs. Clarke did not breakdown or dissolve but persists to this day. The Applicant also acknowledges that his marriage to his First Wife was not genuine. These circumstances are similar to the findings made by the IAD in *Fang*, which were upheld by this Court.

[38] Finally, with respect to the third prong, given how this Court has interpreted section 4.1, it is my determination that "new" relates to the fact or circumstance that the marriage to the Applicant's First Wife had the effect of ending or dissolving the relationship between the Applicant and Mrs. Clarke. It was therefore reasonable for the IAD, on the record before it, to determine that the relationship between the Applicant and Mrs. Clarke became "new" within the meaning of section 4.1 due to the Applicant's marriage to his First Wife and the subsequent divorce. I agree with the Respondent that the purpose of section 4.1 would be defeated if I accepted the Applicant's interpretation of section 4.1.

[39] Although the IAD's analysis was brief, the IAD's interpretation of section 4.1 of the Regulations is reasonable. It is consistent with the objective of the *IRPA*, which is to protect the integrity of the immigration system.

[40] For the above reasons, I find that section 4.1 of the *Regulations* applies to the circumstances of this case.

VI. Conclusion

[41] The Decision is reasonable. The IAD adequately considered all the evidence and reached a decision that falls within the range of reasonable outcomes. The Decision is transparent, intelligible, and justified. The application for judicial review is dismissed.

[42] Prior to the hearing, the Respondent proposed a question for certification to Applicant's counsel but Applicant's counsel did not agree. At the hearing, the Respondent stated that she

would send a revised question to Applicant's counsel, but Applicant's counsel said she would not consent to a question for certification. I directed that counsel could propose the question to the Court and the Applicant could also make submissions in reply. The Respondent proposed the following:

> Under s. 4.1 of the *Immigration and Refugee Protection Regulations*, can a previous marriage, common-law partnership, or conjugal partnership continue and not be "dissolved" where a person has entered into a subsequent marriage, common-law partnership or conjugal partnership for the purpose of acquiring status or privilege under the *Act*?

[43] The Court did not receive submissions from the Applicant.

[44] The test for certification was recently restated by Justice Roussel in *Dor v Canada (Minister of Citizenship and Immigration)*, 2021 FC 892 at paragraph 97:

> The criteria for certifying a question are well established. The proposed question must be determinative of the outcome of the appeal, transcend the interests of the parties to the litigation, and involve matters of significant consequence or general application. In addition, the issue must have been considered by the Federal Court and it must arise from the case itself, not simply from the way in which the Federal Court decided the case. A question that is in the nature of a reference or whose answer depends on the facts of the case cannot raise a properly certified question (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, at paras 46–47; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, at para 15–17; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, at para 4; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145, at paras 28–29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, at paras 11–12; *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCA No 1637 (FCA) (QL), at para 4).

[45] The Court declines to certify the proposed question. As stated above, I agree with the Applicant that this matter involves unique facts that are different from the average case. The question does not transcend the interests of the parties and it would not be determinative of the outcome of an appeal. I am also of the view that the proposed question is in the nature of a reference, rendering it inappropriate for certification (*Lunyamila v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46).

JUDGMENT in IMM-2018-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2018-20
STYLE OF CAUSE:	BASIL CARLTON CLARKE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	JULY 5, 2021
JUDGMENT AND REASONS:	FAVEL J.
DATED:	JANUARY 6, 2022

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