Federal Court  Cour fédérale

Date: 20220531

Docket: IMM-5349-21

Citation: 2022 FC 789

Ottawa, Ontario, May 31, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MUHAMMAD SHABBIR SIDDIQUI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision of the Immigration Appeal Division [IAD] dismissing his appeal of a decision by a visa officer that determined his wife is not eligible to be sponsored for permanent residence under the family class, because she was not properly divorced from her previous husband pursuant to the laws of Pakistan.

[2] As explained in greater detail below, this application is allowed, because the IAD unreasonably declined to rely on the Applicant's wife's divorce certificate as evidence that Ms. Sadaf was legally divorced, based on an unsupported conclusion that the certificate was inconsistent with the family laws of Pakistan.

II. **Background**

[3] The Applicant, Muhammad Shabbir Siddiqui, is a permanent resident of Canada who seeks to sponsor his wife and daughter to come to Canada as members of the family class. The Applicant's wife, Sadia Sadaf, and their daughter currently live in Karachi, Pakistan.

[4] Both the Applicant and his wife were previously married to other people. The Applicant's first wife was his sponsor when he came to Canada. They were divorced in 2006. Ms. Sadaf was previously married in 2008, and she asserts that she was divorced in 2009. The Applicant and Ms. Sadaf were married in Pakistan on February 5, 2011. On January 13, 2012, the couple's daughter was born. Included in evidence is a DNA test establishing the Applicant's paternity.

[5] The Applicant made a first sponsorship application on November 20, 2012 [the First Application]. Following this application, Global Case Management System [GCMS] notes show that, among other issues, the officer reviewing the file had concerns about whether Ms. Sadaf was free to marry the Applicant in 2011 due to incomplete documentation verifying her divorce from her previous husband. Ultimately, the officer concluded that Ms. Sadaf was still the wife of another person when her marriage to the Applicant took place in 2011 and thus was ineligible to be sponsored under the family class, pursuant to s 12(1) of the *Immigration and Refugee*

Protection Act, SC 2007, c 27 [*IRPA*] and s 117(9)(c)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. The officer refused the First Application on January 7, 2015. Following the refusal, the Applicant made two requests for reconsideration, both of which were also refused.

[6] On July 28, 2016, the Applicant submitted a second application to sponsor Ms. Sadaf [the Second Application], supported by additional documentation including a Divorce Registration Certificate [the Second Divorce Certificate] containing dates different from those in the Divorce Certificate that accompanied the First Application [the First Divorce Certificate]. The Second Application also included a letter from the relevant Union Council for Dissolution of Marriage [the Union Council], identifying that dates in the First Divorce Certificate were incorrect. The officer reviewing the Second Application was concerned about the multiplicity of documents and inconsistencies therein and directed that a refusal letter be sent to the Applicant and Ms. Sadaf.

[7] Following this refusal, the Applicant submitted a notification of appeal, but he subsequently withdrew it on consent on the basis that the file would be re-opened. GCMS notes reveal that the visa office then sought to verify Ms. Sadaf's divorce with the Union Council. While the Union Council confirmed that the Second Divorce Certificate was indeed in its files, the GCMS notes state that the verification also concluded that the dates appearing on the certificate are inconsistent with the legal requirements of the *Muslim Family Laws Ordinance* of Pakistan [*MFLO*]. The notes explain that, under the *MFLO*, there is a mandatory 90-day reconciliation period, during which divorcing parties are given three opportunities to reconcile,

by way of written notice. The notes state that normally the Union Council will have copies of these notices, but in this case there was only one notice on file.

[8] The GCMS notes also reflect the visa officer's observation that the Union Council was not able to confirm that a letter was sent to Ms. Sadaf following her request to alter the dates on the divorce certificate, despite such a letter having been submitted in support of the Second Application that was on Union Council letterhead and that purported to be from the Union Council. The officer reasoned as follows:

> … Corruption has been confirmed to exist at UCs in Pakistan with fraudulent documents being issued. This is why typically verifications include the request for a Canadian officer/High Commission staff to visually inspect the document. Given indicators of improperly issued documents in this application the absence of a visual verification by HC staff, the information obtained from the UC carries less weight in confirming the validity of the documents. …

[9] The officer remained unsatisfied by the explanation from the Applicant and Ms. Sadaf that the various inconsistencies in the record were simple administrative errors and directed that a procedural fairness letter [PFL] be sent.

[10] In the final substantive GCMS entry regarding the Second Application, the officer stated that they reviewed the response to the PFL and did not believe it was sufficient to demonstrate that the legal requirements of the *MFLO* were met, allowing for Ms. Sadaf's divorce to be recognized under Pakistani law. Therefore, the officer concluded that Ms. Sadaf was not eligible to be sponsored as a member of the family class and refused the application.

[11] The Applicant appealed the decision to the IAD. The hearing took place between January and May 2021, and on July 26, 2021, the IAD issued the Decision dismissing the appeal that is being challenged in this application for judicial review [the Decision].

III. **Immigration Appeal Division Decision**

[12] In its Decision dismissing the appeal, the IAD identified that the issue under appeal was whether Ms. Sadaf's divorce took place in accordance with the requirements of the *MFLO*, such that she was legally divorced from her previous spouse at the time of her marriage to the Applicant.

[13] The IAD listed the documents that were submitted by Ms. Sadaf in respect of her divorce, including the two divorce certificates. Reviewing the First Divorce Certificate, the IAD noted discrepancies between dates therein and Ms. Sadaf's oral testimony and other documentation. The IAD also noted that Ms. Sadaf did not dispute that there were errors in the dates of her First Divorce Certificate. It concluded that this document was insufficient to establish that she was legally divorced from her previous husband in accordance with the laws of Pakistan.

[14] Next, the IAD noted Ms. Sadaf's testimony that the First Divorce Certificate was "cancelled" due to errors, necessitating the Second Divorce Certificate, and also acknowledged the letter from the Union Council stating that errors in the First Divorce Certificate had been corrected in the Second Divorce Certificate.

[15] The IAD also considered the verification efforts by the visa office, noting the verification concluded that the Union Council did have the Second Divorce Certificate on file but that the dates were inconsistent with the requirements of the *MFLO*. The IAD also noted that the verification did not confirm that the Union Council had a record of the letter explaining the errors on the First Divorce Certificate.

[16] The IAD then referred to the visa officer noting that no divorce becomes effective prior to a 90-day period during which the divorcing parties are given three opportunities to reconcile. The visa officer stated that these three opportunities are served by way of written notices and that normally a Union Council should have copies of these notices on file. However, in this case, there was only one such notice on file, and the IAD observed that only one notice had been submitted in the appeal. Moreover, the Applicant and Ms. Sadaf had provided conflicting testimony surrounding the number of notices received.

[17] The IAD also considered an opinion letter in evidence from Sabeen Shafi, a family lawyer registered with the Sindh Bar Council in Pakistan, who explained that the Union Council would have served three notices if the divorce was pronounced each month for three consecutive months, which generally happens if a woman is pregnant. Ms. Shafi stated that, in Ms. Sadaf's case, only one notice of failure of reconciliation was served. However, the IAD was concerned about inconsistency between this evidence and Ms. Sadaf's testimony that she received three notices.

[18] The decision also addressed Ms. Shafi's concern that the visa officer had not provide any evidence confirming its verification process. The IAD reasoned that the officer's detailed notes were sufficient evidence to establish that the verification happened as described, in light of the fact that neither the Applicant nor Ms. Sadaf provided any evidence of their follow-up inquiries with the Union Council after the verification, during which they allege the Union Council stated that it had not been contacted by the visa office.

[19] The IAD concluded that Ms. Sadaf's testimony lacked clarity and was internally inconsistent. Combined with the concerns arising from the verification check conducted by the visa office in relation to the Second Divorce Certificate, there was insufficient evidence to conclude that she was legally divorced from her husband according to the laws of Pakistan. The IAD therefore determined that, pursuant to s 117(9)(c)(i) of the *IRPR* Ms. Sadaf was not a member of the family class.

[20] The decision also addressed the Applicant's argument that a "*Tabesh* conversion" should be applied in order to consider the relationship between the Applicant and Ms. Sadaf as conjugal instead of spousal. The IAD refused to apply a *Tabesh* conversion, reasoning that anyone caught by s 117(9)(c)(i) of the *IRPR* cannot be a member of the family class, which is inclusive of conjugal relationships.

[21] The Applicant also argued before the IAD that humanitarian and compassionate [H&C] considerations are applicable in the appeal, relying on *Granados v Canada (Citizenship and Immigration)*, 2009 CanLII 78186 (CA IRB) [*Granados*]. The IAD rejected this argument,

finding that *Granados* was distinguishable because the applicant in that case was found to be a conjugal partner and thus a member of the family class. The IAD cited s 65 of *IRPA*, which states that the IAD may not consider H&C considerations unless it has decided that the foreign national is a member of the family class.

[22] The IAD concluded by dismissing the appeal.

IV. **Issues and Standard of Review**

[23] The Applicant's arguments raise several issues, which I would summarize as follows:

A. Was the Decision procedurally unfair because all the evidence upon which the Decision was made was not provided to the Applicant?

B. Was the Decision that Ms. Sadaf is not a member of the family class unreasonable because it misinterpreted the *MFLO?*

C. Was the Decision unreasonable for failing to apply a *Tabesh* conversion?

D. Was the Decision unreasonable because it failed to account for relevant evidence and to consider H&C considerations including the best interests of the Applicant's child?

[24] As indicated by the above articulation of the latter three issues, they are governed by the standard of reasonableness. The first issue, related to procedural fairness, is governed by the standard of correctness.

V. **Analysis**

[25] The Applicant's oral and written submissions raise a number of arguments challenging the reasonableness and procedural fairness of the Decision. Many of these arguments focus upon the genuineness of his marriage to Ms. Sadaf. However, as I read the Decision, it does not impugn the genuineness of the marriage but rather relates solely to the Applicant's failure to demonstrate that Ms. Sadaf was legally divorced from her first spouse.

[26] My decision to allow this application for judicial review turns on the second issue articulated above, surrounding the reasonableness of the IAD's interpretation of the *MFLO* in concluding that Ms. Sadaf is not a member of the family class. The Applicant argues that, in concluding that three notices of failure of reconciliation were required to effect a valid divorce, the visa office, and subsequently the IAD, misunderstood the family laws of Pakistan.

[27] As noted in the above explanation of the IAD's reasoning, it acknowledged that the Union Council had confirmed that the Second Divorce Certificate was on file with their office. However, the IAD declined to rely on this document as compelling evidence that Ms. Sadaf was legally divorced, because the verification conducted by the visa office resulted in a conclusion that the dates appearing on the Second Divorce Certificate were inconsistent with the legal requirements of the *MFLO*. The Decision does not expressly explain this concern about the dates. However, the ensuing analysis focuses upon the visa officer's observation that no divorce becomes effective prior to a 90-day period during which the divorcing parties are given three opportunities to reconcile. As I read the Decision, the IAD's concern about the absence of three

written notices in the reconciliation process, and inconsistent evidence surrounding such notices, contributed materially to the IAD's rejection of the Second Divorce Certificate as sufficient evidence that Ms. Sadaf was legally divorced.

[28] The difficulty with this analysis is the absence of evidentiary support for the conclusion that three notices are required under the *MFLO* to effect a legal divorce. While the GCMS notes state the visa officer's conclusion to this effect, the record provides no evidentiary support for this conclusion. To the contrary, the evidence of the Pakistani family lawyer, Ms. Shafi, is to the effect that three notices are served in circumstances where the divorce is pronounced each month for three consecutive months, which generally happens if a woman is pregnant. These circumstances did not apply to Ms. Sadaf. Moreover, the relevant provisions of the *MFLO* appear in the record. While those provisions include the reconciliation requirement, there is no reference to three notices being required.

[29] I appreciate that the IAD had other concerns, principally surrounding inconsistencies in testimony, that contributed to its conclusion that the Applicant had not established that Ms. Sadaf's divorce was in compliance with the *MFLO*. However, given the significance of the documentary evidence represented by the Second Divorce Certificate, which was acknowledged to be on file with the Union Council, the IAD's rejection of that evidence, without support for its conclusion that the certificate was inconsistent with the requirements of the *MFLO,* renders the Decision unreasonable.

VI. **Conclusion**

[30] As I have concluded that the Decision is unreasonable, based on the issue canvassed above, this application for judicial review will be allowed, and it is unnecessary for the Court to address the other issues raised.

[31] In the Application for Leave and for Judicial Review [ALJR] that initiated this proceeding, the Applicant seeks by way of relief an order setting aside the Decision of the IAD and sending his appeal for redetermination. I note that, at the hearing of this application, the Applicant (who is self-represented) made comments that suggested he may have the impression that the Court can confirm that his wife and daughter are members of the family class. However, as reflected in the relief sought in his ALJR, the remedy available to a successful applicant on judicial review is to set aside the erroneous decision and return the matter for reconsideration, typically by a differently constituted panel of the tribunal below. My Judgment in this matter will so order.

JUDGMENT IN IMM-5349-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the Immigration Appeal Division for redetermination.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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