Federal Court  Cour fédérale

Date: 20230412

Docket: IMM-1903-22

Citation: 2023 FC 524

Toronto, Ontario, April 12, 2023

PRESENT: Madam Justice Go

BETWEEN:

VICTOR EMEKA OKONKWO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Victor Emeka Okonkwo, is a citizen of Nigeria. He met his current wife and had two children with her in Nigeria before leaving for Poland in 2006. In Poland, he met a Canadian woman who sponsored him to Canada, where they got married and had triplets together. In his application for permanent residence, the Applicant failed to disclose his two Nigerian-born children. He separated with his Canadian spouse in 2010.

[2] The Applicant married his current wife in 2013 and filed a spousal sponsorship application in 2016 for her and their two children to come to Canada. The first sponsorship application was refused in 2016. The Applicant's appeal to the Immigration Appeal Division [IAD] was dismissed in May 2019 as the IAD found that the marriage is not genuine or was entered into for an immigration objective [2019 Decision].

[3] The Applicant submitted a second sponsorship application in December 2019, which was refused in October 2021 as the visa officer was not satisfied that the marriage is genuine. The Applicant appealed the second refusal to the IAD [second appeal].

[4] The substantive issue before the IAD in the second appeal was whether the Applicant's marriage to his spouse is genuine or was entered into primarily for the purpose of gaining status under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], pursuant to the disjunctive test set out in subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227: see Appendix A.

[5] After considering the new evidence and submissions presented by the Applicant, the IAD dismissed the Applicant's second appeal without a hearing in a decision dated February 2022 on the grounds that the doctrine of *res judicata* applies [Decision].

[6] The Applicant seeks judicial review of the Decision. For the reasons set out below, I dismiss the application.

II. Issues and Standard of Review

[7] The issues raised by the Applicant can be summarized as follows:

A. Whether the IAD unreasonably applied the principle of *res judicata* in finding that the new evidence submitted by the Applicant did not amount to a special circumstance warranting an exception to its application; and

B. In the alternative, whether the need for justice and family reunification should have weighed in favour of the Applicant on fairness grounds.

[8] The parties agree that the merits of the Decision, vis-à-vis the IAD's findings with respect to the applicability of *res judicata*, are reviewable on a reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; see also *Kamara v Canada (Citizenship and Immigration)*, 2021 FC 1117 [*Kamara*] at para 19.

[9] The Applicant seems to suggest that the IAD's interpretation and application of law should be reviewed on a correctness standard, contrary to his own reliance on *Kamara*. I note that *Kamara* affirms that the application of the law of *res judicata* is reviewed on a reasonableness standard, as it involves the exercise of discretion: at para 19.

[10] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible, and justified: *Vavilov* at para 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para

85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94 and 133-135.

[11] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep": *Vavilov* at para 100.

III. Analysis

A. *The Test for Res Judicata in the Context of Spousal Sponsorship Appeals*

[12] As affirmed by the Supreme Court of Canada [SCC] in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*] at para 25, the three preconditions for a finding of *res judicata* are: (1) the same issue has been previously decided; (2) the previous decision was a final decision; and (3) the parties to the present proceeding are the same ones to which the previous decision applied.

[13] Once the three preconditions are met, the decision-maker must assess whether special circumstances exist to justify not applying the doctrine of *res judicata*, such as the presence of decisive new evidence: *Saskatoon Credit Union Ltd v Central Park Enterprises Ltd*, 1988

CanLII 2941 (BCSC) [*Saskatoon Credit Union*] at 438; *Kaloti v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 365 (CA) [*Kaloti*] at paras 8-9.

[14] In *Kamara*, the Court framed this second part of the test as follows: "the decision-maker must consider whether the application of issue estoppel or res judicata would lead to an injustice": at para 15, citing *Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321 at para 20 and *Danyluk* at para 67.

B. *The IAD's application of the Principle of Res Judicata was reasonable*

i. The IAD's finding that the three preconditions for *res judicata* were met was reasonable

[15] In the 2019 Decision, the IAD discounted the Applicant's evidence of ongoing communications and his two visits to Nigeria because it was undermined by the wife's lack of knowledge of the Applicant.

[16] In an attempt to cure the defects from the first sponsorship application, the Applicant submitted the following new evidence during the second appeal: a DNA test which established paternity to his two Nigerian-born children; phone records of the Applicant calling an unidentified number for short calls in 2019; and evidence of one trip the Applicant took to Nigeria in 2019.

[17] The IAD invited the Applicant and the Minister's Representative to make written submissions on the application of the principle of *res judicata*, which they did.

[18] In the Decision, the IAD set out the three preconditions for the principle of *res judicata* as I summarized at para 12 above. The IAD found that all three preconditions were met, as the issue of whether the Applicant is in a genuine relationship that was not entered into for an immigration objective remained the same as the 2019 Decision. Further, the 2019 Decision was final because it was not judicially challenged at this Court, and the parties remain the same.

[19] While the Applicant concedes that the 2019 Decision was final and the parties remain the same, the Applicant submits that the issues before the IAD were not the same as in the 2019 Decision. The Applicant grounds this argument on the premise that new evidence demonstrating a continued commitment and which proves paternity constitutes "new issues" that the IAD had to assess.

[20] The Applicant's argument, in my view, is refuted by the case law that he himself relies on: see *Kamara* at paras 23-26 and *Sami v Canada (Citizenship and Immigration)*, 2012 FC 539 [*Sami*] at para 45. These cases confirm that the existence of new evidence is to be assessed under the special circumstances branch of the test. Besides, as the Respondent notes, the Applicant conceded in his written representations to the IAD that the principle of *res judicata* applied. I therefore reject this argument.

ii. <u>IAD's assessment of the new evidence under the special circumstances exception was reasonable</u>

[21] Next, the Applicant argues that the IAD erred in determining that the new evidence submitted did not constitute decisive new evidence such that an exception to the application of *res judicata* was warranted.

[22] In his second appeal, the Applicant provided extensive submissions analogizing his case to *Kamara* and *Sami* to argue that the lapse of their marriage of over eight years by the time of the second sponsorship appeal, from 2013 to 2021, was a valid ground to reassess the genuineness of the marriage.

[23] As the IAD noted, the second stage of the analysis constitutes an exercise of discretion and requires consideration of whether special circumstances exist to justify an exception to the application of *res judicata*: *Kamara* at para 19; *Sami* at para 67.

[24] The IAD acknowledged that proof of subsequent commitment, including as demonstrated by the passage of time, can constitute new decisive evidence that a marriage was genuine when it was entered into: *Sami* at para 78. However, the IAD distinguished *Kamara* because 11 years had passed in that case since the previous sponsorship application was dismissed, as opposed to the two years that had passed since the 2019 Decision in this case. Further, the IAD pointed out that the marriage of six years by the time of the 2019 Decision was already a factor weighing in favour of the appeal, but found to be not determinative. The IAD also noted the more extensive new evidence that was provided in *Kamara*, such as proof of multiple visits, photographs of time spent together, and money transfer receipts: at para 10.

[25] The IAD also distinguished *Sami* because only genuineness of marriage was at issue, whereas the primary purpose of the marriage was also at issue in the 2019 Decision.

[26] As part of the IAD's analysis of whether special circumstances exist to justify an exception to the application of *res judicata*, the IAD assessed whether the new evidence constituted decisive new evidence that is "practically conclusive of the matter": *Ping v Canada (Citizenship and Immigration),* 2013 FC 1121 [*Ping*] at para 23.

[27] The IAD relied on *Ping*, which states that the bar for finding new evidence decisive is very high, and that the new evidence must do more than "bolster the genuineness of the marriage": at para 22. The IAD also relied on *Vo v Canada (Citizenship and Immigration),* 2018 FC 230 [*Vo*], where a previous sponsorship appeal was similarly dismissed on both the genuineness and purpose of marriage grounds. In *Vo*, the Court upheld the IAD's decision that *res judicata* applied after finding that while the new evidence could reasonably support the genuineness of marriage, it could not support the purpose of marriage so as to warrant the special circumstances exception: at para 47.

[28] Finally, the IAD cited *Sidhu v Canada (Citizenship and Immigration),* 2020 FC 443 [*Sidhu*], which also distinguished *Sami* on the basis that the original application had been refused on only one ground – the genuineness of the marriage: at para 27. *Sidhu* also cited *Basanti v Canada (Citizenship and Immigration),* 2019 FC 1068 to note that where the intent of the parties is at issue, it is difficult to say whether new additional evidence would be "conclusive of the matter": *Sidhu* at para 28.

[29] The Applicant argues that the IAD unreasonably distinguished the case at bar from *Kamara* and *Sami* and that its preference for *Vo* and *Ping* was unjustified. For example, the Applicant notes that the child involved in *Vo* was born after the first appeal was refused, whereas in *Kamara* and this case, the children were born before the first sponsorship application.

[30] The Applicant also takes issue with the IAD's reliance on its finding that the new evidence submitted was the same type of evidence found to be not determinative in the 2019 Decision. The Applicant submits that "new evidence can be relevant, even if the same type of evidence was submitted at the first appeal", especially where the new evidence shows continued "commitment over time" to a marriage: *Sami* at paras 78-79. The Applicant asserts that the new evidence demonstrated such commitment over time in the case at bar, noting that the marriage in *Sami* had only lasted seven years whereas the Applicant's marriage had lasted eight years.

[31] I find that the Applicant's arguments lack merit for the following reasons.

[32] First, I agree with the Respondent that the IAD reasonably applied the legal principles and authorities surrounding *res judicata* in arriving at the Decision. Despite the Applicant's further attempt on judicial review to compare his case to *Kamara* and *Sami*, the Respondent submits, and I agree, that the IAD reasonably held that his length of marriage was not a special circumstance in this case, since only two years had elapsed since the 2019 Decision, where the then six-year marriage was found not to be determinative. I note that in *Sami*, the first IAD decision was dated 2007, and the second IAD decision under review was dated 2011, so four years had elapsed between the two appeals: at paras 3-4.

[33] Second, I find this case more analogous to *Ping*, *Sidhu* and *Basanti*, where the new evidence did not address the IAD's core concerns in its prior decision. Here, the concerns of the 2019 Decision centered on the Applicant's wife's lack of knowledge about her husband's personal life and history, the inconsistent evidence between the couple as to how they reconnected, and the evidence as to when or where the Applicant proposed. The IAD was also concerned about the Applicant's motivation to enter into the marriage in order to help his children obtain status in Canada. The new evidence submitted by the Applicant did not address any of these concerns.

[34] While I acknowledge that the IAD may accept evidence showing "commitment over time" to a marriage in its determination, per *Sami* at paras 78-79, the new evidence must still meet the high threshold of being decisive in order to justify not applying the doctrine of *res judicata*: *Kaloti* at paras 8-9; *Ping* at para 23.

[35] This leads me to my third reason for rejecting the Applicant's submissions, as I find that the IAD reasonably assessed the new evidence and concluded that it did not meet the high threshold. Regarding the DNA evidence, the 2019 Decision did not question the Applicant's paternity to his Nigerian-born children. With respect to the phone records showing the Applicant calling an unidentified number, it was reasonable for the IAD to find that such evidence did not constitute evidence of continuing commitment. As for the Applicant's trip to Nigeria in 2019, I agree that the IAD was being speculative when it opined that the Applicant could have been visiting his children rather than his wife. However, I also agree that it was ultimately open to the IAD to conclude that a visit to Nigeria was insufficient to overcome the decisive findings in the

2019 Decision regarding the wife's lack of knowledge and the Applicant's intent behind the marriage.

[36] In sum, it was up to the Applicant to submit new evidence that was capable of addressing the core concerns raised in the 2019 Decision, or of otherwise materially changing the IAD's 2019 analysis: *Vo* at para 41. The Applicant simply failed to do so.

[37] The IAD evaluated the new evidence submitted by the Applicant, as well as the passage of time since the 2019 Decision, and reasonably concluded that these factors were not "practically conclusive of the matter": *Ping* para 23. I see no reviewable error arising from the IAD's analysis.

C. *The IAD did not err in its assessment of whether the application of res judicata would lead to an injustice*

[38] The Applicant argues in the alternative that, should the Court disagree that the new evidence precludes the application of *res judicata*, the need for justice and family reunification should weigh in favour of the Applicant and his family. The Applicant emphasizes the *IRPA*'s enumerated objective at paragraph 3(1)(d) for the reunification of families to plea that his family deserves the warmth of a unified family after the children have lived in a separated household since 2006. He made similar submissions to the IAD in the form of a humanitarian and compassionate plea during the second appeal.

[39] The Applicant relies on *Kamara*, where the Court confirmed 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: at paras 22-23, citing *Sami* at para 42. The Applicant submits that here, the IAD did not reasonably address his submissions for the need of family reunification under *IRPA* and the overarching interests of justice. As such, the Applicant argues that the IAD's refusal to hear the appeal on its merits is tantamount to a breach of procedural fairness, and the Decision must be set aside: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at paras 23-24.

[40] I am sympathetic to the Applicant's situation, and the ongoing family separation between him and his wife and two children. I note however that the family separation arose in part due to the Applicant's decision not to disclose his Nigerian-born children in his permanent resident application.

[41] Given the lack of decisive evidence that could overcome the concerns of the IAD in the 2019 Decision, I find that it was reasonable for the IAD not to consider the humanitarian and compassionate circumstances that may arise in this case.

IV. Conclusion

[42] The application for judicial review is dismissed.

[43] There is no question for certification.

JUDGMENT in IMM-1903-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

APPENDIX A

***Immigration and Refugee Protection Regulations* (SOR/2002-227)**
***Règlement sur l'immigration et la protection des réfugiés* (DORS/2002-227)**

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.

FEDERAL COURT

SOLICITORS OF RECORD

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