Date: 20080109

Docket: IMM-2179-07

Citation: 2008 FC 30

Vancouver, British Columbia, January 9, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

NARINDER KAUR ANTTAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant in this judicial review is Ms. Narinder Kaur Anttal, a Canadian citizen. On May 4, 2003, she married Gurdeep Singh Anttal, a national and resident of India and has subsequently applied twice to sponsor Mr. Anttal for immigration to Canada. In this judicial review application, the Applicant seeks to overturn the decision of a panel of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board, dated April 19, 2007. In its decision, the IAD determined that the second application for sponsorship should be dismissed on the basis that it was *res judicata*.

Issues

[2] As refined by the parties during their oral submissions, the issues in this application are as follows:

1. Did the IAD err in determining that *res judicata* applied despite the new evidence put forward by the Applicant?
2. Was the refusal of the IAD to adjourn the hearing a denial of procedural fairness?

Background

[3] Pursuant to provisions in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (IRPA) (in particular s. 12(1)) and the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations), a Canadian citizen may sponsor a spouse as a member of the family class. The spouse then becomes eligible for permanent resident status in Canada. However, any marriage must be genuine and not "entered into primarily for the purpose of acquiring any status or privilege under [IRPA]" (Regulations, s. 4).

[4] The Applicant's first sponsorship application was refused by a visa officer and, on appeal, by a panel of the IAD (the First IAD Appeal). In its decision, dated February 4, 2005, the IAD held that the Applicant had not demonstrated that her marriage was genuine or that it was not entered into primarily for the purpose of acquiring a status or privilege under the Act. In brief, the IAD found that the evidence at the hearing was not credible or trustworthy, citing numerous examples where the testimony of the Applicant consisted of misrepresentations, discrepancies and inconsistencies. Evidence of materials allegedly related to the marriage (such as telephone receipts,

calling cards, etc.) did not “overcome the major credibility concerns arising on appeal”. There was no judicial review of the decision in the First IAD Appeal.

[5] In August 2005, a second application was submitted. In a decision dated March 27, 2006, a visa officer refused this second application on the basis that there was simply no new or relevant evidence (either in the application or during an interview of Mr. Anttal) that persuaded the visa officer to conclude that the marriage was now genuine. Once again, credibility, as well the particular circumstances of the marriage, were key points upon which the decision was based.

[6] The Applicant appealed to the IAD (the Second IAD Appeal). On its own motion, the IAD requested submissions from the parties on the issue of whether the second appeal constituted an abuse of process, or whether it ought to be dismissed for *res judicata*.

[7] In response to this letter, the Applicant put forward new evidence including telephone bills, photographs, evidence of recent trips to India, and medical evidence confirming that the Applicant was pregnant. This evidence had not been provided to the visa officer and arose only at this appeal stage. The Applicant and Mr. Anttal offered to provide DNA evidence, after the child’s birth, as proof that Mr. Anttal was the father.

[8] Based on the written submissions, the IAD, in a decision dated April 19, 2007, concluded that the doctrine of *res judicata* applied to this case and that that there was no need to determine if

the second appeal constituted an abuse of process. The key elements of the decision are set out in the following extract:

> [12] Does the new evidence tendered with the second sponsorship's application constitute decisive fresh evidence; I find that it does not. Essentially, it gave the appellant the opportunity to prepare herself to be able to demonstrate that her marriage with the applicant is genuine. There is insufficient evidence provided nor are there sufficient explanations given as to why such a relationship was demonstrably lacking in the opinion of the IAD member, at the time of the hearing of the first appeal. More than telephone calls, photographs, recent trips to India and alleged pregnancy are required, in my view, to establish a genuine spousal relationship not entered into for immigration purposes and to constitute decisive fresh evidence of a genuine marital relationship. With respect to the alleged pregnancy, this is not in my view conclusive evidence *per se* of a genuine relationship not entered into for immigration purposes and does not establish the exception of *res judicata*.

[9] The appeal was dismissed on the basis of *res judicata* and without considering either the issue of abuse of process or the merits of the application. This is the decision that is the subject of this judicial review.

Analysis

[10] The test for *res judicata* was defined by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 25 and applied in the context of an IAD decision in the case of *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321. The first step of the test requires the decision maker to determine if the criteria for issue estoppel have been met (*Rahman*, above at para. 15). Those criteria are that:

1. the same issue has been previously decided in earlier proceedings;
2. the previous decision was a final judicial decision; and

3. the parties to the present proceeding are the same parties as the parties to which the previous decision applied.

[11] If an issue estoppel is raised, the decision maker must then consider whether special circumstances exist which warrant hearing the case on the merits (*Rahman*, above at para. 21).

[12] To determine whether the IAD properly applied the *res judicata* doctrine, it is necessary to consider whether the IAD's decision accords with the two-step analysis set out in *Danyluk* and applied in *Rahman*, above.

[13] Each step of the analysis requires a different standard of review (see *Rahman*, above, at paras. 12-13). The standard of review to be applied to the IAD's determination of the first step of the *res judicata* test is correctness while the standard of review of the IAD's determination of the second step is patent unreasonableness.

[14] With respect to the first step, the IAD determined that the three preconditions were present. I can see no error at this stage. Indeed, the Applicant does not raise any issue with this part of the IAD's analysis. In summary:

1. The same issue was raised on the Second IAD Appeal as that which was determined in the First IAD Appeal; that is, whether the marriage was genuine and not entered into primarily for the purpose of acquiring any status or privilege under the Act. Any

evidence submitted by the Applicant on the Second IAD Appeal did not change the nature of the question to be determined (*Hamid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 220 at para. 9; *Rahman*, above, at para. 17).

2. Second, it is clear that the decision in the First IAD Appeal was final. The IAD is a court of competent jurisdiction with the authority to dispose of sponsorship appeals (IRPA, s. 62). It has all the powers vested in a superior court of record with respect to any matter necessary for the exercise of its jurisdiction (IRPA, s. 174(1) and (2); *Rahman*, above at para. 18). Further, there was no application for judicial review from this decision.

3. Finally, the parties were the same in both proceedings.

The three preconditions for the application of *res judicata* were correctly found to have existed in the case at bar.

[15] Once it determined that the criteria set out in *Danyluk* applied, the IAD was required to turn its mind to whether there were circumstances that would warrant the hearing of the case on the merits. Was there "decisive fresh evidence"? The IAD concluded that there was not.

[16] As noted in *Rahman*, above at para. 13, the second step of the *res judicata* test is a discretionary decision reviewable on a patent unreasonableness standard. At this stage of the

analysis, the Applicant argues the IAD erred by concluding that the fresh evidence – including evidence of the Applicant's pregnancy – did not warrant the hearing of the case.

[17] The Applicant places great emphasis on the case of *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1425. While acknowledging that *Dhaliwal* dealt with an abuse of process issue rather than *res judicata*, the Applicant submits that *Dhaliwal* stands for the principle that, whether considering an abuse of process or *res judicata*, "ample, new, and relevant evidence" requires the IAD to hear the case on its merits. Furthermore, the Applicant argues, the case of *Rahman*, above, relied on by the Respondent, is distinguishable as there is ample, new, and relevant evidence in the case at bar. In short, the Applicant argues that the evidence in this case is much stronger than was the case in *Rahman* or other cases where *res judicata* findings were upheld (see, for example, *Hamid*, above).

[18] Unfortunately for the Applicant, this judicial review is not about comparing the evidence in this case to that presented in other cases. Rather, the task of the Court is to determine whether the IAD's decision, on the facts and evidence before it, was patently unreasonable. The Applicant is not arguing that the IAD ignored any evidence. Thus, the only question is whether the IAD's conclusion is so irrational that the Court cannot let it stand. I do not think that it is.

[19] The key issue in the Second IAD Appeal was the genuineness of the Applicant's marriage. Although the Applicant submitted photos, evidence of telephone calls and recent trips to India, as well as evidence of her pregnancy, the IAD in the second appeal did not find that the evidence

submitted was sufficient to overcome the IAD's earlier findings. In light of the serious credibility concerns found by both visa officers and the IAD in the First IAD Appeal, this conclusion is not unreasonable. I note that: (i) the case law has held that the birth of a child is not conclusive evidence of the genuineness of a relationship (*Rahman*, above at para. 29; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 565 at para. 12; *Hamid*, above at para. 13); and, (ii) the IAD's reasons for refusing the first appeal involved findings which were not addressed by the Applicant's new evidence. Accordingly, it was, at the very least, open to the IAD in the Second IAD Appeal to conclude that there was no decisive fresh evidence demonstrably capable of altering the outcome of the earlier finding. I do not find that the decision by the IAD in the Second IAD Appeal not to find that there were circumstances which warranted the hearing of the case on the merits is patently unreasonable.

Issue #2: Was the refusal of the IAD to adjourn the hearing a denial of procedural fairness?

[20] The Applicant submits that the IAD should have adjourned the hearing until DNA evidence could have been provided for the IAD's consideration. Proceeding to decide the *res judicata* question prior to obtaining this evidence was a denial of procedural fairness. I do not agree.

[21] Had there been a clear request for an adjournment, I may have agreed with the Applicant. However, the only indication that I can find on the Tribunal Record that the Applicant made a request to adjourn is the following written submission by the Applicant's counsel in response to a request by the IAD to provide submissions on the issue of *res judicata*:

> In light of the birth date of the child in the middle of 2007, it is suggested that it maybe appropriate for the Board to consider that this matter should proceed but that,

> in the interim, after the birth of the child, DNA tests should be performed to confirm the parentage of the child and that alternative dispute resolution should also be available.

[22] This is a far cry from an explicit request for an adjournment. The letter states, “it is suggested that it maybe appropriate for the Board to consider that this matter should proceed…” [emphasis added]. In other words, the letter indicated the Applicant was content with proceeding. The IAD accepted this letter at face value and proceeded to make its decision. I fail to see how doing so amounted to a violation of procedural fairness.

Conclusion

[23] For these reasons, the application for judicial review will be dismissed. Neither party proposed a question for certification.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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