Federal Court  Cour fédérale

Date: 20100118

Docket: IMM-2684-09

Citation: 2010 FC 45

Ottawa, Ontario, January 18, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

PARMANAND KAMTASINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review challenging a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board which determined that the Applicant's marriage to Indranie Kamtasingh was not genuine. Mr. Kamtasingh challenged the decision on several grounds, but only the issue of procedural fairness is worthy of consideration.

Mr. Kamtasingh states that the IAD Member (Member) denied him procedural fairness by preventing him from calling all of his proposed witnesses.

I. Background

[2] Ms. Kamtasingh is a citizen of Guyana, but in 2005 she was residing illegally in the United States with her parents. Mr. Kamtasingh is a Canadian citizen and lives in Ontario.

[3] The couple state that they met in July 2000 in Guyana during a visit by Mr. Kamtasingh. They met again in the United States in 2003 and claim to have fallen in love. They continued to see one another during Mr. Kamtasingh's occasional visits to the United States. They state they were engaged in 2004 and the evidence shows that they were married in a small civil ceremony in Schenectady, New York on March 28, 2005. On July 28, 2005 Mr. Kamtasingh applied to sponsor Ms. Kamtasingh as a spousal member of the family class under ss. 12(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Because that application was poorly documented, the visa officer was not satisfied that the marriage was genuine and a visa was refused. A second application was made on July 13, 2007, but it also was refused for the following reason:

> New application submitted. PA now lives in Guyana with her grandparents, and the sponsor is working with a consultant. No other changes. This application was refused last year because it was a marriage of convenience. There is nothing new in this new application to overturn the previous decision.

[4] Mr. Kamtasingh appealed the second decision to the IAD and a *de novo* hearing was held in Toronto on April 1, 2009. Mr. Kamtasingh was unrepresented, but he did ask the Member to assist him with some questioning. The IAD heard evidence from Mr. Kamtasingh and his brother and it dismissed the appeal on findings that the marriage was not genuine and that it had been entered into primarily to assist Ms. Kamtasingh to obtain status in Canada.

[5] At the beginning of the hearing the Member and Mr. Kamtasingh discussed the issue of his available witnesses and the need to call them. Set out below is the entire relevant exchange:

> MEMBER: All right, if you're comfortable proceeding. You have some witnesses here?
>
> APPELLANT: Yes, I do.
>
> MEMBER: Here like in the reception area?
>
> APPELLANT: Yes.
>
> MEMBER: You have two friends, a brother and an uncle. That's a lot of witnesses. Why do you need so many witnesses?
>
> APPELLANT: I wasn't sure of who you would want to speak to or what type of information you would be asking. It's just --
>
> MEMBER: Well, the issue really is the genuineness of the marriage.
>
> APPELLANT: M'hm.
>
> MEMBER: The first visa officer gave fairly detailed reasons, which I assume you've read. The second one basically adopted the reasons of the first visa officer and said nothing's changed.
>
> APPELLANT: M'hm.
>
> MEMBER: So that's the focal point, is to go back to that first visa officer and found out what was the -- what problems did they register, both visa officers, because one adopted the reasons of the other.
>
> I don't know what -- I mean, we've got a couple of hours set for this hearing. This is definitely a matter which should complete today, which should not -- it's not overly complicated. It should not go beyond one afternoon sitting.
>
> If some of the -- you know, some of your witnesses are simply going to reiterate what you are saying yourself I'm not sure what the point would be.

APPELLANT: Okay.

MEMBER: But that's -- it's your call. I want to hear from you as to do you think there's anything different from what you're about to say as the Appellant that these witnesses would be providing?

APPELLANT: To be honest, I'm not totally sure. As of right now actually waiting in the waiting room is my brother, who was present with me at the wedding, my sister, who is also here. She is knowledgeable of the wedding. She is -- my parents weren't able to attend and the reason being is because of her situations. And I also have my best friend who knows everything about me as well.

MEMBER: Well, Ms. Kusztra, I don't think you're contesting the fact that there was a wedding; are you? There seems to be the visa officer wasn't challenging ---

COUNSEL FOR RESPONDENT: No, sir.

MEMBER: --- the fact that there was a wedding ---

COUNSEL FOR RESPONDENT: No.

MEMBER: --- and there were guests at the wedding and so on. There was some issue over why your parents didn't attend but that's a different issue.

COUNSEL FOR RESPONDENT: And I believe the Appellant could clarify all of those.

MEMBER: Yeah. So I don't think we have to have somebody tell us that there was a wedding that took place or that he or she was at the wedding. There was a wedding. We're not challenging that. The visa officer was really -- had certain issues, such as the non-attendance of your parents and the fact that there was only one receipt, all the back and forth time you -- there was a Greyhound bus receipt I believe.

APPELLANT: Yes.

MEMBER: All the times you were to have visited. And there was some notes I think that the visa officer or somebody had found that your wife had written which seemed a bit rehearsed.

So those seem to be the major types of -- you know, the major types of issues. So I'm not sure that somebody saying "I was at the wedding" would really make a dent on that, other than yourself, and you can speak to that.

APPELLANT: Okay.

MEMBER: Now, your brother might have some useful information ---

APPELLANT: All right.

MEMBER: --- because you're alleging -- what are you alleging with regard to your brother? What will he be providing?

APPELLANT: The reason why you have that one Greyhound bus pass is because he himself and his wife were the ones that would drive me across the border back and forth.

MEMBER: All right. So he might have some useful information so maybe we'll hear from the brother.

And what about -- you said your father was here. What ---

APPELLANT: My sister.

MEMBER: Oh, your sister. What would she be able to present that you can't present yourself?

APPELLANT: Nothing really.

MEMBER: Okay. The brother I can see being useful.

APPELLANT: Okay.

[Emphasis added]

[6] The issue presented on this application is whether the Member, by proceeding in this way, breached the duty of fairness by effectively limiting Mr. Kamtasingh's right to fully present his case.

II. Issue

[7] Did the Member breach a duty of fairness with respect to Mr. Kamtasingh's right to fully present his case?

III. Analysis

[8] The determinative issue on this application is one of procedural fairness which must be assessed on the basis of correctness: see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at paras. 52-55.

[9] This is not a situation where the Member categorically refused to hear from the witnesses who were available to testify. It is clear, nevertheless, that the Member actively discouraged their participation on the ostensible ground that, with the exception of Mr. Kamtasingh's brother, they could add nothing of value to the issues of controversy. The Member was also concerned that the hearing be concluded within the two hours that had been allotted.

[10] Mr. Kamtasingh was unwisely not represented by counsel at the hearing. Experienced counsel would not have allowed the Member to limit the scope of relevancy, particularly where the credibility of Mr. Kamtasingh was the central issue for determination. In a situation involving an unrepresented party, the scope of the duty of fairness is different and I subscribe to the views expressed by my colleague, Justice Danièle Tremblay-Lamer in *Law v. Canada (Minister of Citizenship and Immigration)* (2007), 2007 FC 1006, 160 A.C.W.S. (3d) 879 at paras. 15-19:

15 Thus, the IAD is to be shown much deference in its choice of procedure so long as that procedural choice permits those who are affected by its decision to present their case.

16 Specifically, in the context of the procedural rights afforded to a self represented party, this Court has held that an administrative tribunal has no obligation to act as the attorney for a claimant who refused counsel, and that:

> […] it is not the obligation of the Board to "teach" the Applicant the law on a particular matter involving his or her claim. (*Ngyuen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1001, [2005] F.C.J. No. 1244 (QL), at para. 17)

17 However, while administrative tribunals are not required to act as counsel for unrepresented parties, they must still ensure that a fair hearing takes place. In *Nemeth v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, [2003] F.C.J. No. 776 (QL), at para. 13, O'Reilly J. asserted:

> […] But the Board's freedom to proceed in the absence of counsel obviously does not absolve it of the over-arching obligation to ensure a fair hearing. Indeed, the Board's obligations in situations where claimants are without legal representation may actually be more onerous because it cannot rely on counsel to protect their interests.

18 It has also been recognized that an unrepresented party "[…] is entitled to every possible and reasonable leeway to present a case in its entirety and that strict and technical rules should be relaxed for unrepresented litigants […]" (*Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, [2007] F.C.J. No. 254 (QL), at para. 22).

19 Therefore, it is evident that the specific content of procedural rights afforded to unrepresented parties is context-dependent. The paramount concern is ensuring a fair hearing where the unrepresented party will have the opportunity to fully present their case.

[11] Counsel for the Respondent argued that the Member's apparent reluctance to entertain evidence from some of the available witnesses had a principled basis. She argued that the Member was appropriately attentive to the need for administrative efficiency, to the potential relevance of the evidence, and to the avoidance of repetition. She also referred to the Member's early identification at the hearing of the issues that were of concern to him. Because the proposed witnesses had little, if any, relevant evidence to address the Member's specific concerns, their effective exclusion was said to be justified.

[12] The fundamental problem with the Respondent's argument is that the Member's narrow characterization of relevance was wrong. After correctly stating that the central issue before him was the genuineness of the marriage, the Member erred by telling Mr. Kamtasingh that the testimony of others, which only corroborated his evidence, would not be useful. The Member may well have had only a few issues of concern, but the credibility of Mr. Kamtasingh was obviously one of them. Corroborating evidence from other witnesses may have been sufficient to rehabilitate Mr. Kamtasingh's credibility and to displace the Member's other concerns. All of these witnesses had potentially relevant evidence to give concerning the genuineness of the marriage, even if their testimony was not "different" from Mr. Kamtasingh's evidence. In effect, what the Member did was predetermine the issue of credibility without having heard the witnesses. This is contrary to the principle expressed by Justice Eleanor Dawson in *Ayele v. Canada (Minister of Citizenship and Immigration)* (2007), 2007 FC 126, 60 Imm. L. R. (3d) 197 at paras. 11-12 where she held:

> 11 Third, one can never rule on the credibility of evidence that has not yet been heard. The presiding member violated this principle when he stated that even if the witnesses corroborated Mr. Ayele's testimony that subsequent testimony would not be credible.

> 12 Fourth, the essence of adjudication is the ability to keep an open mind until all evidence has been heard. The reliability of evidence is to be determined in the light of all of the evidence in a particular case. This is the reason why an adjudicator must remain open to persuasion until all of the evidence and submissions are received. Evidence, that at first blush may seem implausible, may later appear plausible when set in the context of subsequent evidence. It is, at the least, suggestive of an impermissibly closed mind to state that "there's no point calling the witness […] when the evidence is of no use and calling the witness is futile".

[13] I agree with counsel for the Respondent that the IAD has the right to limit repetitive testimony, but not by effectively excluding witnesses who could offer evidence going to the central issues of the case. The place to control excessive or repetitive evidence on issues of controversy which are central or determinative is generally not at the entrance to the witness box, but once the witness is testifying – and even then the member must grant some latitude to ensure that all important matters are covered. The IAD can, of course, limit the scope of evidence by stipulating certain points that are not in dispute. In a case like this one where the credibility of the Applicant is clearly in issue and where the genuineness of a marriage is in doubt, the evidence of immediate family and close acquaintances is highly relevant and should be heard without reservation. Indeed, it is difficult to see how a matter such as this could be fairly determined after only two hours of evidence, particularly where Mr. Kamtasingh was self-represented and was initially intending to lead evidence from several witnesses. This was a situation where the duty to allow Mr. Kamtasingh to fully present his case was sacrificed for the desire for administrative efficiency. That is not a permissible trade-off: see *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, [1985] S.C.J. No. 11 (QL) (S.C.C.) at para. 70.

IV. Conclusion

[14] The IAD breached the duty of fairness owed to Mr. Kamtasingh and this matter must be re-determined on the merits by a different decision-maker.

[15] Neither party proposed a question for certification and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ADJUDGES that this application is allowed with the matter to be re-determined on the merits by a different decision-maker.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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