

Federal Court



Cour fédérale

Date: 20131129

Docket: IMM-10061-12

Citation: 2013 FC 1203

Ottawa, Ontario, November 29, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ANGELA MARIE GRANATA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms Granata, a Canadian citizen, married Mr Mobolaji Debayo-Doherty (Mr Doherty), a citizen of Nigeria, on February 25, 2008. She subsequently applied to sponsor Mr Doherty for immigration to Canada. The application was refused by a visa officer and that decision was appealed. Ms Granata now seeks judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], of the September 6, 2012 decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, which dismissed her

appeal and found that her marriage to Mr Doherty was not genuine and was entered into primarily for the purpose of acquiring status under the *Act*.

[2] For the reasons that follow, the application is dismissed.

Background

[3] Mr Doherty is a citizen of Nigeria, where he currently resides. In November 2003, he entered Canada from the US, claiming refugee protection. In November 2004, his refugee claim was refused, and leave to appeal was denied. In May 2006, his motion for a stay of deportation was dismissed by this Court. A warrant was issued for his removal in August 2006, which was executed on March 10, 2009. On March 12, 2009, Mr Doherty was deported from Canada to the US and detained by US authorities until May 2009, then deported to Nigeria.

[4] Mr Doherty was previously married to another Canadian citizen in April 2006. They separated five months later and divorced in October 2007. He has a son from this marriage who resides in Canada. His ex-wife applied to sponsor him for permanent residence on April 17, 2006, but withdrew her sponsorship on June 11, 2007.

[5] The current application for sponsorship by Ms Granata was submitted in October 2009, after Mr Doherty's deportation. Mr Doherty was interviewed at the visa post in Accra on August 5, 2010. As a preliminary finding, the visa officer was satisfied that the marriage was genuine. However, before the visa application was finalized, the visa post received a letter from Ms Granata, sent on

July 30, 2010, which withdrew her sponsorship. Two weeks later she sent a letter to rescind the withdrawal of sponsorship.

[6] Mr Doherty was interviewed at the visa post in Accra again on November 15, 2010. The visa officer found that there was a breakdown of marital relationship which led to Ms Granata's withdrawal of her sponsorship, notwithstanding that the withdrawal had been rescinded. The visa officer was not satisfied that the marriage was genuine or that it was not entered into primarily for the purpose of immigration. The spousal sponsorship application was refused by letter dated November 15, 2010. This decision was appealed to the IAD.

The IAD Decision

[7] The IAD noted that to succeed on the appeal, Ms Granata must prove that the marriage was not entered into primarily for the purpose of her husband, Mr Doherty, gaining any status or privilege under the *Act* and that it is genuine.

[8] However, to dismiss the appeal, the IAD must find either that the marriage was entered into primarily for the purpose of acquiring status or privilege under the *Act* or that it is not genuine.

[9] The IAD noted the objectives of immigration, including to reunite families in Canada, but found that Ms Granata had failed to prove, on a balance of probabilities, both that the marriage was genuine and that it was not entered into primarily for the purpose of acquiring a status or privilege under the *Act*. In coming to this conclusion, the IAD noted that it considered the evidence and submissions, including the documentary and photographic evidence, the telephone invoices, the

length of time since the marriage, and the testimony given at the hearing. The IAD drew an adverse inference from the fact that Mr Doherty did not testify at the hearing. The IAD also found Ms Granata to be not credible, because her evidence was vague, evasive, self-contradictory, contradictory to information previously provided, and in some aspects defied logic and common sense. The IAD found that Ms Granata's lack of credibility rebutted the presumption that the evidence submitted was truthful.

[10] The IAD acknowledged that generally, the testimony of an applicant alone would be sufficient to address the *bona fides* of a couple's intentions and that negative inferences would not be drawn from the failure of the other party to testify. However, the IAD canvassed the jurisprudence and the relevant evidentiary principles and drew a negative inference from Mr Doherty's failure to testify.

[11] The IAD referred to John Sopinka, Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2d ed (Toronto: Butterworths, 1999) and jurisprudence referring to Professor Wigmore's treatise on evidence, notably *Ma v Canada (Minister of Citizenship and Immigration)*, 2010 FC 509, 368 FTR 116, which noted the relevant factors in determining whether it would be reasonable to expect a person to testify and which would support an adverse inference where that person does not testify.

[12] The IAD noted that much of the case rested on the credibility of Ms Granata and Mr Doherty and that there had been no opportunity to question Mr Doherty about the inconsistencies in

their accounts. The IAD also found, on a balance of probabilities, that Mr Doherty was aware of the hearing and chose not to testify by long distance telephone conference.

[13] The Board noted at para 25:

As stated earlier, the appellant's evidence was found to be not credible, trustworthy or reliable and therefore not presumed to be true. In such circumstances, the appellant's failure to call the applicant as a witness contradicts both logic and common sense and, as such, is further reason for not presuming the appellant's evidence given under oath as to the genuineness of her marriage to be true. An adverse inference is thus drawn from the applicant's failure to testify at this hearing.

[14] The Board found that Ms Granata's explanation for Mr Doherty's failure to testify – that telephone service was spotty and that he was at work, but that he could have called from home on a land line if they had known he should testify – was unconvincing.

[15] With respect to the genuineness of the marriage, the IAD acknowledged that there are many factors to consider in determining whether a marriage is genuine (*Khera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 632, [2007] FCJ No 886). The Board considered several factors individually and then weighed the factors cumulatively and found that, on a balance of probabilities, the marriage is not genuine.

[16] The IAD considered the length and timing of Mr Doherty's first marriage, and concluded that, on a balance of probabilities, his first marriage was not genuine and was entered into primarily for the purposes of obtaining status.

[17] The IAD also noted the inconsistency in their respective accounts of when they first met. Ms Granata stated that she met Mr Doherty in February 2006. Mr Doherty stated in his application that he was first introduced to Ms Granata on February 21, 2006. However, during his interview at the visa post he indicated that they met sometime towards the end of 2006. The IAD found his explanation for the discrepancy, including that he was mistaken about the dates, to be unsatisfactory. Moreover, Mr Doherty indicated that they started dating shortly after they met. However, the Board noted that Mr Doherty married his first wife in April 2006 and it would be illogical that he met and started dating Ms Granata in February 2006, shortly before his marriage to his first wife.

[18] The IAD noted that no photographs of the couple were submitted to substantiate their dating and cohabitation although there were photographs of the marriage ceremony with some people in the background.

[19] The IAD accepted that the couple has a son together, born a few months after their marriage, but noted that no photographs of Mr Doherty with their son, Nathan, were submitted, even though Mr Doherty was not deported until nine months after Nathan's birth. The IAD concluded that there was insufficient evidence of an existing relationship between Mr Doherty and his son.

[20] With respect to Ms Granata's withdrawal of sponsorship, the IAD found that, on a balance of probabilities, there was another reason for her actions. The IAD found that her explanation – that she withdrew her sponsorship because she learned that her husband was having an affair – to be unsatisfactory and not credible. In addition, during his interview at the visa post on November 15,

2010, Mr Doherty was not at all aware of the fact that Ms Granata had withdrawn her sponsorship on July 30, 2010. When confronted with the information that the sponsorship had been withdrawn and asked if there was any reason she would do so, Mr Doherty suggested that Ms Granata needed money and had asked his sister in the UK for funds, but he did not otherwise know why she would withdraw her sponsorship. However, at the IAD hearing, Ms Granata clearly stated that she had told her husband what she had done shortly after sending the letter in late July and August, and this was confirmed on cross examination. She also gave a differing account of the request for money; she stated that she asked her sister-in-law for money in October 2010, after she had rescinded her withdrawal.

[21] The IAD also considered the evidence of the couple's communication with each other. Based on the brevity of their phone calls, the superficial content of their letters, and the fact that Mr Doherty did not know about Ms Granata's withdrawal of the sponsorship application, despite her evidence that she told him everything, the IAD concluded that the evidence of ongoing communication was weak and insubstantial.

[22] The IAD accepted Ms Granata's evidence that neither financially supports the other, but that they had equally shared lottery winnings and Ms Granata had sent Mr Doherty two payments of \$5,000 and \$15,000 for his share.

[23] The IAD also noted that although Ms Granata testified that she visited her husband while he was incarcerated in the US, after his deportation from Canada, there was no documentary evidence to substantiate these visits.

[24] After finding the marriage to not be genuine, and due to the credibility findings, the negative inference drawn from Mr Doherty's failure to testify, the lack of credible explanations for the inconsistencies, and Mr Doherty's desire to enter and remain in Canada, given his immigration history, the IAD found that Ms Granata had not discharged the burden upon her and also concluded that the evidence demonstrated that the primary purpose of the marriage was to acquire status under the *Act*.

Issues

[25] Ms Granata, the applicant, submits that the decision is not reasonable because the IAD erred by: misapprehending the facts or failing to take relevant evidence into consideration; relying on improper principles; and, making unreasonable credibility findings.

Standard of review

[26] The genuineness of a marriage is a question of fact reviewable on the reasonableness standard (*Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 23 at paras 16-17, 403 FTR 271).

[27] The role of the court on judicial review where the standard of reasonableness applies is to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). "There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and

intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.”
(*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1SCR 339).

[28] With respect to credibility, the IAD's credibility findings are findings of fact and are to be afforded significant deference by the reviewing Court. The IAD had the opportunity to hear and observe Ms Granata give her evidence in an oral hearing and is in the best position to assess her credibility. In *Sanichara v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1015 at para 20, 276 FTR 190, Justice Beaudry stated:

[20] The IAD, in a hearing de novo, is entitled to determine the plausibility and credibility of the testimony and other evidence before it. The weight to be assigned to that evidence is also a matter for the IAD to determine. As long as the conclusions and inferences drawn by the IAD are reasonably open to it on the record, there is no basis for interfering with its decision. Where an oral hearing has been held, more deference is accorded to the credibility findings.

The IAD decision is reasonable

[29] The role of the Court is not to make a new decision but to determine if the IAD's decision was reasonable. In this case, the decision reached by the IAD, which is supported by the reasons and the record, is within the range of acceptable outcomes and is defensible. As noted below, the IAD commented on the lack of some documents that may have in fact been submitted; however, on their own or cumulatively, these misstatements were not significant or determinative of the decision.

Credibility

[30] The IAD's negative credibility findings were well-founded. For example, Ms Granata and Mr Doherty had differing accounts of when they met and when their relationship began. The Board

reasonably found these accounts to be inconsistent despite Ms Doherty's submissions to the Court that Mr Doherty clarified the dates in his interview and referred to his mistaken memory. The Board reasonably found the explanations not logical given that Mr Doherty married his first wife in April 2006, apparently after he met Ms Granata and, while that marriage was short-lived, there is some overlap in the dates.

[31] The IAD also had serious concerns about Ms Granata's explanation of why she withdrew and then hastily reinstated her sponsorship application. In addition to discrepancies in their testimony, the IAD reasonably drew a negative inference from the fact that Mr Doherty did not testify at the hearing or otherwise attempt to clarify their conflicting evidence.

[32] Ms Granata submits that the adverse inference is improper because only she could explain what she had told her husband about her withdrawal of sponsorship and because Mr Doherty was not aware, he could not have addressed this area of inconsistency. I do not agree. There were several inconsistencies in their accounts that could have been clarified if Mr Doherty had testified at the hearing. The determinative issue for the IAD was the withdrawal of sponsorship, the attempt to rescind the withdrawal, and the inconsistent accounts of when Ms Granata told Mr Doherty about this. Ms Granata now suggests that she may have only told Mr Doherty that she withdrew her sponsorship after his visa was refused in November 2010. A similar suggestion was made to the IAD at the hearing in her re-examination and the IAD noted that this was inconsistent with her testimony earlier in that hearing, which had also been confirmed on cross-examination. The IAD clearly did not accept this testimony. The participation of Mr Doherty at the hearing could have clarified when Ms Granata told him that she had withdrawn her sponsorship.

[33] Given the negative credibility findings and the lack of documentary evidence provided by Ms Granata, it was reasonable for the IAD to conclude that, on a balance of probabilities, she did not visit her husband in the US while he was in detention. Ms Granata submits that there was such evidence on the record because both she and Mr Doherty said this occurred during their interviews. The IAD's finding, however, is not unreasonable because there was no supporting evidence on the record before the IAD and the IAD had found Ms Granata to be not credible. Ms Granata's submission that no records are maintained of such visits or that records are not available is not an adequate response. There would be many other ways to demonstrate regular visits to the US, including gas, food, transportation or accommodation receipts. The lack of documentary evidence suggests that no efforts were made to provide any records to substantiate the cross border visits.

[34] Similarly, although Ms Granata submits that she and Mr Doherty did cohabit before and after their marriage, it was not unreasonable for the Board to find that there was no evidence to substantiate their cohabitation. The sponsorship application form lists a common address and the testimony of Mr Doherty at his first interview indicated that he lived with her at that address. Evidence to support cohabitation could take many forms, yet none was provided. The Board's finding was just that – there was no documentary evidence.

Communication and Relationship with their son

[35] Ms Granata submits that there was ample evidence to demonstrate that she and Mr Doherty had a genuine relationship, together with their son. The IAD, however, concluded that the evidence of ongoing communication was weak and insubstantial. The IAD analyzed the cards and letters sent

by Mr Doherty to Ms Granata and their son but found their content to be superficial. Such a finding was open to the IAD, given its experience in evaluating this type of correspondence. The IAD also noted the brevity, albeit regularity, of Ms Granata's telephone calls with her husband, most of which lasted under a minute. Furthermore, in response to Ms Granata's claim that she and her husband were very open with one another, the IAD reasonably placed significant weight on the fact that she had not told her husband about the actions she took to withdraw her sponsorship and then to rescind that withdrawal. Although Ms Granata indicated that she had told Mr Doherty about the withdrawal and rescission, she could not explain why he had no awareness of this when interviewed in November. The IAD reasonably concluded that Ms Granata and her husband, Mr Doherty, do not have meaningful ongoing communication with each other.

[36] The IAD also reasonably concluded that, on a balance of probabilities, Mr Doherty did not have a solid relationship with his son, Nathan. The IAD considered written correspondence in which he wrote fondly of the child but also noted the lack of any photographs with Nathan. The IAD gave more probative weight to the latter. While photographs are not determinative as they can be created to depict relationships that may or may not be genuine, it is not the role of the Court to re-weigh the evidence considered by the IAD.

The First Marriage

[37] I agree that the IAD's finding that Mr Doherty's first marriage to another Canadian citizen, who also sought to sponsor him and then withdrew sponsorship upon the breakdown of the marriage after five months, was not genuine, is not directly relevant to the IAD's determination whether the marriage to Ms Granata is genuine. The reference to Mr Doherty's first marriage was

part of the overall background that the IAD was entitled to consider. As Ms Granata submits, marriages break down for various reasons and this first marriage was short-lived. However, the finding regarding the first marriage was not the determinative factor in the IAD's decision; the IAD considered many factors in reasonably concluding that Ms Granata had not established that the current marriage was genuine.

Marriage Certificate

[38] Similarly, the IAD's reference that no marriage certificate was submitted merely reflects the confusion regarding whether the document was part of the package before the IAD. The record does indicate that an original certificate was provided to the visa post in Accra. Whether or not the certificate was provided to the IAD is not determinative. The IAD did not doubt that Ms Granata and Mr Doherty were legally married; the issue was the genuineness of the marriage.

The Withdrawal of Sponsorship

[39] The applicant's withdrawal of sponsorship and subsequent rescission of the withdrawal was considered carefully by the IAD. It placed significant weight on this and on Ms Granata's inconsistent evidence about her reasons for doing so and when she had told Mr Doherty.

[40] Ms Granata was repeatedly questioned at the IAD hearing about her actions and was given a full opportunity to explain her motivations, the source of the information that Mr Doherty was having an affair, and the timing of the letters, yet she was not able to provide a compelling, let alone, satisfactory explanation.

[41] For example, when questioned by the respondent's counsel during the hearing, to clarify the testimony she had previously given on this issue, Ms Granata had little to say:

- Q. ...So, he had his first interview [on August 5, 2010], everything was good. Then, they received the letters and that caused a few concerns. So, he was re-interviewed in November 2010, as per the record page[s] [25, 26]. So, he was re-interviewed in November 2010 just to look at the concerns. And when you look at the notes that were taken by the Visa officer, your husband had no clue about anything. He had no clue about the withdrawal. He had no clue about any issues that you two might have. So what do you think -- what happened there?
- A. I don't know. I have an open relationship with my husband. We talk about everything.
- Q. Okay. Can you be a little more detailed, like because that's really what refused the application is his --
- A. I know.
- Q. -- total ignorance about this whole situation, but you said that you talked to him two days after you put in the reinstatement letter.
- A. Correct.
- Q. So wouldn't in November -- what happened?
- A. I spoke to my husband -- me and my husband, we have an open relationship.

[42] The explanation offered did not line up at all with Mr Doherty's complete lack of knowledge about the withdrawal of sponsorship. This, coupled with the evidence of Ms Granata's request for money from Mr Doherty's sister, led the IAD to reasonably conclude that there was some other reason that motivated Ms Granata's actions.

Conclusion

[43] It appears that the spousal sponsorship may have otherwise succeeded, given the visa officer's preliminary assessment in August 2010 that the marriage appeared genuine, but for the applicant's withdrawal of her sponsorship. The withdrawal then led to further questioning which revealed more inconsistencies in their accounts and which raised valid concerns about their credibility. The IAD gave the applicant, Ms Granata, ample opportunity to explain her actions and motivations and she could not do so to the satisfaction of the IAD.

[44] The IAD reasonably concluded that Ms Granata had not met the burden upon her to satisfy on a balance of probabilities that the marriage was genuine and that it was not entered into primarily for Mr Doherty to acquire status under the *Act*. The burden rests on Ms Granata because she is the applicant and sponsor. However, the assessment of the genuineness and purpose of the marriage depended on the evidence of both Ms Granata and Mr Doherty. The IAD considered all the evidence before it and provided a thorough analysis and reasons that clearly indicate why the IAD determined that the relationship was not genuine and was entered into to acquire status under the *Act*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board made on September 6, 2012 is dismissed.

2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10061-12

STYLE OF CAUSE: ANGELA MARIE GRANATA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 14, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** KANEJ.

DATED: NOVEMBER 29, 2013

APPEARANCES:

Adetayo G. Akinyemi

FOR THE APPLICANT

Brad Gotkin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Adetayo G. Akinyemi
Barrister and Solicitor
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT