Federal Court  Cour fédérale

Date: 20150817

Docket: IMM-5099-14

Citation: 2015 FC 974

Ottawa, Ontario, August 17, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

RUNA AKTER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Runa Akter has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. Ms. Akter challenges a decision of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD], which dismissed her appeal of a visa officer's decision to deny her husband, Mr. Aashan Firoz Shah, a permanent resident visa.

[2] For the reasons that follow, I have concluded that the IAD reasonably found that Mr. Shah entered the marriage primarily for immigration purposes and he was therefore ineligible to be sponsored as Ms. Akter's spouse. The application for judicial review is dismissed.

II. Background

[3] Ms. Akter is originally from Dhaka, Bangladesh. She came to Canada as a permanent resident in 2003, having been sponsored by her family. Ms. Akter became a Canadian citizen in 2007.

[4] Mr. Shah is a citizen of Bangladesh. He first entered Canada on July 25, 2005, using a fraudulent passport. He subsequently made a refugee claim which was rejected by the Refugee Protection Division of the Immigration and Refugee Board [the RPD] on April 12, 2006. His application to this Court for leave and for judicial review of the RPD's decision was refused on July 19, 2006.

[5] Mr. Shah met Ms. Akter on August 27, 2006, and he proposed to her the same day. Mr. Shah was attending the same mosque as Ms. Akter's family, and he learned that they wished to arrange a marriage for Ms. Akter. Mr. Shah was introduced to Ms. Akter's family through a mutual friend and they met shortly afterwards.

[6] Ms. Akter married Mr. Shah on December 29, 2006, and the marriage was registered on January 5, 2007. Mr. Shah did not inform Ms. Akter that his refugee claim had been rejected or

that this Court had dismissed his application for leave and for judicial review. Instead, he led Ms. Akter to believe that his application was still pending, although in fact it had been rejected eight months earlier.

[7] Mr. Shah requested a Pre-Removal Risk Assessment [PRRA] on January 25, 2007. This resulted in a negative determination on March 15, 2007. A departure order was issued and Mr. Shah left Canada on April 25, 2007.

[8] Ms. Akter first applied to sponsor Mr. Shah as her spouse in 2007. The visa officer who reviewed the application discovered that some of the documents submitted by Mr. Shah in support of his application were fraudulent. The application was refused due to misrepresentation under s 40(1)(a) of the IRPA. Mr. Shah was deemed inadmissible to Canada for two years pursuant to s 40(2)(a) of the IRPA.

[9] Ms. Akter submitted a second application to sponsor Mr. Shah on July 24, 2009.

[10] On March 31, 2011, Ms. Akter and Mr. Shah had a daughter.

[11] On April 10, 2011, Mr. Shah attended an interview regarding the second spousal sponsorship application. During the interview, the visa officer discovered that Mr. Shah had falsely listed two cousins as his brothers on his Additional Family Information Form. Mr. Shah said that he had been advised to do this by an immigration consultant when he submitted his

refugee claim in 2006 so that he could sponsor them in the future, and he had therefore repeated the misrepresentation in his sponsorship applications.

[12] On May 30, 2011, Ms. Akter and Mr. Shah were notified that Mr. Shah's application for permanent residence was refused and that he had once again been found inadmissible due to misrepresentation under s 40(1)(a) of the IRPA. The visa officer also concluded that Mr. Shah had entered into the marriage primarily to obtain status in Canada. This conclusion was based on Mr. Shah's lack of credibility, the timing of the marriage, and his inability to provide reliable evidence to explain the origin of the relationship.

[13] Ms. Akter appealed the decision of the visa officer to the IAD pursuant to s 63(1) of the IRPA. The appeal was heard on October 8, 2013 and January 24, 2014. In a decision dated May 26, 2014, the IAD dismissed the appeal.

III. The IAD's Decision

[14] The IAD considered Mr. Shah's immigration history, including his fraudulent entry into Canada in July, 2005; his failed refugee claim in April, 2006; the dismissal of his application for leave and for judicial review in July, 2006; the negative PRRA in January, 2007; his deportation in April, 2007; and his two unsuccessful applications for permanent resident status in December, 2007 and May, 2011.

[15] Given that Mr. Shah had made misrepresentations in both of his permanent residence applications, the IAD concluded that he was neither a credible nor a trustworthy witness. The IAD also noted that the visa officers who had reviewed the applications had both expressed concern about the genuineness of his relationship with Ms. Akter and his reasons for entering the marriage. The IAD placed particular emphasis on the fact that Mr. Shah had misrepresented his immigration history to Ms. Akter when he met and proposed to her.

[16] The IAD acknowledged that Ms. Akter and her husband had been married for seven years, that Ms. Akter had visited her husband in Bangladesh four times, and that they have a child. Nevertheless, the IAD observed that Mr. Shah had demonstrated that he is very motivated to acquire status in Canada; not only for himself, but also for others.

[17] The IAD concluded that Mr. Shah had entered the marriage primarily for immigration purposes. Therefore, pursuant to s 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], Mr. Shah was found ineligible to be sponsored as Ms. Akter's spouse under s 12 of the IRPA. This also meant that the IAD lacked jurisdiction to hear the appeal pursuant to s 64(3) of the IRPA, and was precluded from considering humanitarian and compassionate [H&C] factors pursuant to s 65 of the IRPA.

[18] In the alternative, the IAD concluded that even if Mr. Shah was not excluded as a member of the family class the appeal should still be dismissed because Mr. Shah was inadmissible due to misrepresentation under s 40(1)(a) of IRPA. The IAD then considered whether the H&C factors raised by Ms. Akter warranted a successful appeal despite Mr. Shah's

misrepresentation. The IAD identified the best interests of the child [BIOC] as the most compelling factor and conceded that the couple's child would benefit from living with both of her parents in Canada. However, the IAD noted that Ms. Akter and Mr. Shah had a child knowing that they were in a long-distance relationship, and concluded that there were insufficient H&C considerations to warrant special relief.

IV. Issues

[19] Ms. Akter raised a number of issues respecting the IAD's decision, but only one emerged as determinative: whether the IAD reasonably concluded that Mr. Shah could not be recognized as Ms. Akter's spouse pursuant to s 4(1) of the Regulations because he had entered the marriage primarily for immigration purposes.

V. Analysis

[20] The standard of review to be applied by this Court to decisions of the IAD regarding the primary purpose of a marriage is reasonableness (*Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 [*Gill*] at para 17). This Court will intervene only if the IAD's decision lacks "justification, transparency and intelligibility" and does not fall "within the 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).

[21] Under the IRPA, a foreign national cannot be considered a spouse if the marriage was entered into in bad faith. This rule is found in s 4(1) of the Regulations:

> **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
>
> (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or
>
> (b) is not genuine.

[22] This is a disjunctive test (*Gill* at para 11). If the IAD finds that a marriage cannot withstand scrutiny under either prong, the foreign national will not be considered a spouse for the purposes of the Regulations. Whether a marriage was entered into primarily for the purpose of acquiring status under the IRPA involves an inquiry into the intentions of the parties at the time of the marriage. As Chief Justice Crampton wrote in *Gill* at paras 32 and 33:

> [32] I acknowledge that evidence about matters that occurred subsequent to a marriage can be relevant to a consideration of whether the marriage was entered into primarily for the purpose of acquiring any status or privilege under the IRPA [*Gill v Canada (Minister of Citizenship and Immigration)*, 2010 FC 122)]. However, such evidence is not necessarily determinative, and it is not necessarily unreasonable for the IAD to fail to explicitly consider and discuss such evidence.
>
> [33] This is because, in contrast to the present tense focus of the first of the two tests set forth in section 4 of the Regulations, which requires an assessment of whether the impugned marriage "is not genuine," the focus of the second of those tests requires an assessment of whether the marriage "was entered into primarily for the purpose of acquiring any status or privilege under the Act" (emphasis added). Accordingly, in assessing whether the latter test is satisfied, the focus must be upon the intentions of both parties to the marriage at the time of the marriage…
>
> [Emphasis original]

[23] Ms. Akter disputes the IAD's finding that the marriage was not genuine and was entered into by Mr. Shah primarily for the purpose of acquiring status under the IRPA. Ms. Akter says that a distinction must be made between the primary purpose of a marriage and the primary purpose of its timing. She notes that the timing of a marriage may indeed be affected by immigration considerations, but this does not mean that the marriage was entered into primarily for immigration purposes. She says that the IAD placed "undue weight on the timing of the marriage to the exclusion of all other factors".

[24] Ms. Akter also says that the indicia which satisfied the IAD that the marriage was genuine from her perspective were equally applicable to Mr. Shah. Accordingly, she argues that the IAD should have reassessed the visa officer's conclusion that Mr. Shah entered the marriage primarily for immigration purposes in light of what transpired over the seven years of the marriage.

[25] It is not the role of this Court to re-weigh those factors considered by the IAD (*Samad v Canada (Minister of Citizenship and Immigration)*, 2015 FC 30 [*Samad*] at para 21 and 32). The IAD was free to weigh each factor in the exercise of its discretion, and was free to give no weight to any given factor depending on the circumstances (*Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292 [*Ambat*] at para 32).

[26] In this case there was extensive evidence before the IAD of Mr. Shah's past dishonesty and abuse of Canada's immigration system. There were numerous objective reasons to doubt Mr. Shah's intentions for entering into the marriage, including his fraudulent entry into Canada in

2005, the timing of the marriage proposal, and Mr. Shah's lack of candour with his wife regarding his immigration status. Furthermore, in his interview respecting the first sponsorship application Mr. Shah said that the couple rushed to marry in Canada and did not marry in Bangladesh (where his family resides) in order to expedite his PRAA application. In his interview respecting the second sponsorship application, Mr. Shah listed two cousins as his brothers in the hope of obtaining status not only for himself but also for them.

[27] The IAD's conclusion that the marriage may have been genuine from Ms. Akter's perspective but was not genuine from Mr. Shah's perspective falls well within the range of possible and acceptable outcomes. It also confirms that the IAD properly considered the subjective intentions of the spouses (*Dalumay v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1179 at para 30).

[28] Ms. Akter also argued that the IAD failed to properly assess the H&C considerations raised in the appeal. However, as noted by Justice Phelan in *Canada (Minister of Citizenship and Immigration) v Chen*, 2014 FC 262 at para 14, if a person is not recognized as a member of the family class pursuant to the Regulations, then the IAD cannot exercise its H&C discretion.

[29] In this case, the IAD's determination that Mr. Shah was ineligible to be sponsored pursuant to s 4(1) of the IRPA was sufficient to dispose of the appeal. I have found that this determination was correct, and accordingly it is not necessary to consider the H&C analysis conducted by the IAD. I note only that a decision by the IAD to grant or refuse special relief falls within its core expertise and attracts a high degree of deference. The Court must not reweigh the

evidence that was before the IAD or substitute its own view of the matter (*Samad* at paras 21 and 32). The BIOC are only one factor to be considered among others (*Ambat* at para 27).

[30] Mr. Shah was found by the IAD to be inadmissible due to misrepresentation. While the BIOC were found by the Board to be a positive factor, Mr. Shah's history of abusing Canada's immigration system outweighed any H&C considerations. It was reasonably open to the IAD to conclude as it did.

VI. Conclusion

[31] For the foregoing reasons, the application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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