

Federal Court



Cour fédérale

Date: 20120419

Docket: IMM-4663-11

Citation: 2012 FC 455

Toronto, Ontario, April 19, 2012

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

NANTHINY SIVAKUMAR

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Ms. Nanthiny Sivakumar (the “Applicant”) seeks judicial review of the decision made by the Immigration and Refugee Board, Immigration Appeal Division (the “IAD”) on June 28, 2011. In that decision, the IAD dismissed the Applicant’s appeal of her removal order made on February 4, 2009 by a Member of the Immigration Division (the “ID”). The ID had found the Applicant inadmissible pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (the “Act”), that is upon the basis of a misrepresentation.

II. Background

[2] The Applicant is a citizen of Sri Lanka. She was married to Kandiah Sivakumar in Singapore, in a traditional Hindu religious ceremony, on October 21, 2003. This marriage was registered with the civil authorities on November 14, 2003.

[3] On April 21, 2004, the husband submitted an application to Sponsor and Undertaking for the Applicant. The application was approved by a visa officer and the Applicant became a permanent resident upon landing in Montréal, Quebec, on December 31, 2004.

[4] The Applicant moved in with her husband in Montréal, but claims that the husband wanted her to engage in sexual practices that appeared unnatural to her. She left him on January 21, 2005, and went to Toronto where she had family members.

[5] By letter dated July 9, 2005, the husband wrote to Citizenship and Immigration Canada complaining that the Applicant did not live with him and did not intend to live with him. He also referred to the outstanding undertaking to sponsor her: "I signed a contract responsible for 3 yrs in Canada. I do not want to take care to her anymore. I am not responsible for her any action or as claim for refugee status in Canada or financial help ...".

[6] This letter from the husband led to correspondence dated December 20, 2007, from a Hearings Officer at the Canada Border Services Agency to the Applicant, convoking her to an admissibility hearing pursuant to subsection 44(2) of the Act.

[7] An admissibility hearing was held by the ID on February 4, 2009. The evidence before the ID consisted of the oral testimony from the Applicant, the letter from the Applicant's husband, a copy of a joint divorce petition submitted to the Ontario Superior Court dated February 21, 2006 and a copy of a Divorce Judgment dated July 4, 2006, dissolving the marriage of the Applicant and her husband. The ID concluded that the Applicant was inadmissible due to a misrepresentation as to the genuineness of her marriage pursuant to paragraph 40(1)(a) of the Act and an exclusion order was issued against the Applicant at the end of that hearing.

[8] The Applicant pursued an appeal before the IAD and a hearing was held on February 18, 2011. The evidence before the IAD consisted of the transcript of the proceedings before the ID, the decision of the ID, certain documentary evidence about country conditions in Sri Lanka, particularly concerning the status of women and cultural norms about reporting family violence, and the oral evidence of the Applicant.

[9] The Applicant testified about the circumstances of her marriage, the circumstances surrounding her departure from her husband in January 2005, the circumstances about signing the divorce petition. She testified about the many factual errors contained in the petition, including the fact that she could not have signed the petition on the date indicated since she was in United Kingdom at that time, as shown by stamps in her passport; that her husband had arranged for the lawyer and she did not know the lawyer's name; that the address given for her on the divorce petition was not her address since she had never lived in Scarborough, Ontario; that the husband's address was incorrect as he was not a resident of Ontario; and that when she signed the petition, it was blank and did not include the statements upon which the ID and ultimately the IAD relied.

[10] Much of the argument before the IAD focused on whether the Applicant had been represented by a lawyer in the signing and drafting of the joint petition for divorce.

III. Discussion and Disposition

[11] The IAD found that the Applicant is inadmissible on the basis of having made a misrepresentation, pursuant to paragraph 40(1)(a) of the Act. That paragraph provides as follows:

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[12] The issue arising in this application for judicial review is one of mixed fact and law and therefore reviewable on the standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 47; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para 59).

[13] According to the decision in *Khosa, supra*, the reviewing Court is to assess the challenged decision in terms of justification, transparency and intelligibility; it is not open to it to substitute its own view of a preferable outcome.

[14] In my opinion, having regard to the record and the applicable standard of review, the IAD's decision does not meet the standard of reasonableness. The decision appears to be based upon speculation on the part of the decision-maker. In that regard, I refer to paragraphs 30, 32 and 33 where the IAD said the following:

[30] . . . The joint petition for divorce does not contain a completed lawyer's certificate. However, there is a Superior Court of Justice of Ontario certificate of divorce dated September 29, 2006 on which there is a handwritten certification of same date by a Regina Tyronne attesting that it is a true copy of the original Court certificate. [...]

[32] . . . Moreover, there was no reason suggested as to why anyone would place a fake stamp providing so much personal detail on a Court certificate that evidences the completion of the divorce case, unless the person whose name is on the stamp is who she represents herself to be. [...]

[33] Despite the appellant having made written submissions well in advance of this hearing calling into question whether the appellant actually attended before a lawyer or just thought the person her sponsor arranged for her to see was a lawyer, the appellant was unable to state the name of the Tamil speaking lawyer that assisted her with her joint petition for divorce. [...]

[15] The uncontested facts in this matter are that the Applicant married and subsequently divorced. I fail to see how the involvement of a lawyer, or otherwise, in the drafting and filing of a joint petition for divorce, raises questions about the genuineness of her marriage. In my opinion, the IAD reached an unreasonable conclusion and thereby committed a reviewable error.

[16] In the result, the application for judicial review will be allowed and the matter remitted to a differently constituted panel of the IAD for redetermination.

[17] There is no question for certification arising.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review of the decision of the Immigration Appeal Division (the “IAD”) of the Immigration and Refugee Board is allowed.

The matter is hereby returned to a differently constituted panel of the IAD for redetermination.

“E. Heneghan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4663-11

STYLE OF CAUSE: NANTHINY SIVAKUMAR v. THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 4, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** HENEGHAN J.

DATED: April 19, 2012

APPEARANCES:

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