Federal Court Cour fédérale

Date: 20191217

Docket: IMM-3617-19

Citation: 2019 FC 1624

Vancouver, British Columbia, December 17, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

SANJIV KUMAR MUTNEJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Sanjiv Kumar Mutneja, seeks judicial review of a decision of the Immigration Appeal Division [IAD] dated May 10, 2019 [Decision] , which determined his marriage to Anjali Mutneja was not genuine, pursuant to subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[2] For the reasons that follow, the application for judicial review is granted.

II. Facts

[3] The Applicant is a Canadian citizen, born December 31, 1971. He was previously married, and he has two children from his first marriage.

[4] Ms. Anjali Mutneja is an Indian citizen, born March 31, 1987. She was previously married twice, and she has one child from her second marriage.

[5] The Applicant and Ms. Mutneja communicated for the first time in May 2012, and met in October 2012.

[6] They married in June 2014 and their son was born in March 2015.

[7] The Applicant applied to sponsor Ms. Mutneja for permanent residence under the family class. However, the sponsorship application was refused, as the visa officer determined the couple's marriage was not genuine.

A. *IAD Decision*

[8] The Applicant appealed the visa officer's decision to the IAD.

[9] On May 10, 2019, after conducting a hearing, the IAD found Mr. Mutneja failed to establish, on a balance of probabilities, that his marriage to Ms. Mutneja was genuine.

[10] The IAD found that there were inconsistencies in the couple's testimony and that there were contradictions in important areas that the IAD would not anticipate in a genuine relationship with this couple's alleged contact and communication.

[11] The IAD noted that the couple were not compatible in age. The Applicant is almost 15 years older than Ms. Mutneja. The IAD concluded that while the age difference was not in itself determinative, in the context of its other concerns, this factor took on more significance.

[12] The IAD found that while the couple provided relatively consistent, though vague, evidence concerning their future plans together in Canada, they failed to present any evidence showing how their relationship would continue if the appeal was dismissed.

[13] The IAD indicated that it took considerable time to consider the evidence relating to the couple's child. The IAD acknowledged that credible evidence of a child of a relationship is generally indicia of a genuine relationship, but that this factor is not determinative of the genuineness of the relationship. The IAD concluded that the birth of a child did not outweigh the numerous concerns with the evidence presented.

III. Analysis

[14] The sole issue is whether the IAD's Decision is unreasonable. The standard of reasonableness dictates that this Court is to show deference to the IAD's reasoning and not to intervene unless it can be shown that the Decision falls outside a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" *(Dunsmuir v New Brunswick, 2008 SCC 9, 372 NR 1 at para 47)*.

[15] Notwithstanding the deference owed to decisions regarding the genuineness of a marriage, I am satisfied that the IAD erred in reaching its conclusion that the Applicant's marriage is not genuine for three reasons.

[16] First, while the IAD was entitled to weigh the evidence and to draw reasonable conclusions from the evidence, the evidence must reasonably support the conclusions reached. Here it did not.

[17] In its Decision, the IAD pointed to contradictions between the testimony of Ms. Mutneja, her interview with the initial visa officer and a field investigation conducted at the time the sponsorship application was being processed.

[18] By way of example, Ms. Mutneja testified before the IAD that she separated from her second husband as they frequently fought and her then mother-in-law was causing problems. The IAD concluded that Ms. Mutneja contradicted herself, noting that, during her interview with the visa officer, Ms. Mutneja stated that she separated from her second husband because he was not gainfully employed, was suspicious of her and would take money from her parents. I see no

contradiction in this. In fact, her testimony appears consistent with her subsequent statement to the visa officer that "they were having major arguments due to finances".

[19] The IAD also concluded that Ms. Mutneja's testimony that she had introduced the Applicant to her neighbours was contradicted by a field investigation which found that none of them had ever met her husband and they did not know about him. The IAD found that there was little evidence provided to explain this incongruity. While this may be, Ms. Mutneja was ill-equipped to explain why her neighbours responded as they did. She testified that her neighbours may not have understood who the investigator was and why they were inquiring. She also speculated that the questions regarding her past and current marriage may have been viewed as taboo by some or that others may not have agreed with her life choices.

[20] Second, the IAD focussed on minor inconsistencies in the couple's evidence and made negative credibility findings not supported by the evidence. By way of example, the IAD concluded that there was no evidence presented showing how the relationship would continue if the appeal was dismissed. Ms. Mutneja was in fact questioned on this subject. She testified that although there were no concrete plans, her expectation was that the Applicant would continue coming back and forth to India to live with her. I agree with the Applicant that the fact that the couple would maintain a long distance marriage if their case was dismissed does not detract from genuineness of their marriage.

[21] Third, and more importantly, I find that the IAD failed to consider the legal principles applicable to a child of the marriage. In *Gill v Canada (Citizenship and Immigration)*, 2010 FC

122, Mr. Justice Robert Barnes wrote at paragraphs 6 and 8 that the birth of a child would ordinarily be sufficient to dispel any lingering concerns as to the genuineness of a marriage and constitutes an evidentiary presumption in favour of genuineness.

> [6] When the Board is required to examine the genuineness of a marriage under ss. 63(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, it must proceed with great care because the consequences of a mistake will be catastrophic to the family. That is particularly obvious where the family includes a child born of the relationship. The Board's task is not an easy one because the genuineness of personal relationships can be difficult to assess from the outside. Behaviour that may look suspicious at first glance may be open to simple explanation or interpretation. […] The subsequent birth of a child would ordinarily be sufficient to dispel any lingering concern of this sort. […]
>
> [8] […] in the assessment of the legitimacy of a marriage, great weight must be attributed to the birth of a child. Where there is no question about paternity, it would not be unreasonable to apply an evidentiary presumption in favour of the genuineness of such a marriage. There are many reasons for affording great significance to such an event not the least of which is that the parties to a fraudulent marriage are unlikely to risk the lifetime responsibilities associated with raising a child. Such a concern is heightened in a situation like this where the parents are persons of very modest means.

[22] While the birth of a child is not conclusive evidence of the genuineness of a relationship, the IAD was obliged to weigh the fact that the Applicant and Ms. Mutneja have a child together and give this factor considerable weight. And yet, the Decision does not disclose any analysis of this factor. The IAD baldly states that "the birth of a child does not outweigh the numerous concerns with the evidence presented." The failure to explain why this important factor was outweighed by negative ones leads to the inference this factor was not properly considered.

[23] This is particularly troubling given a number of positive factors presented by the Applicant, including the fact that the couple took time getting to know each other for approximately 18 months to 2 years prior to their marriage; that their relationship began in 2012; that their conduct at their first meeting, engagement, wedding and after their wedding has been consistent with that of a married couple; that they have contact with and knowledge of each other's families and they have spent time with the Applicant's son from his first marriage; that they have continuing contact and communication over the phone and they have had nine visits for extended periods; that they have knowledge of each other's daily lives through their frequent communication; and that the Applicant financially supports Ms. Mutneja and their child.

IV. Conclusion

[24] For the above reasons, I am not satisfied that the IAD's Decision is intelligible and transparent or falls within the range of outcomes defensible in respect to the law and facts. The application for judicial review is therefore granted.

JUDGMENT IN IMM-3617-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The Decision of the Immigration Appeal Division in this matter is set aside.
3. The matter is remitted to a different panel of the Immigration Appeal Division for reconsideration.
4. No question is certified.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3617-19
STYLE OF CAUSE:	SANJIV KUMAR MUTNEJA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 16, 2019
JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	DECEMBER 17, 2019

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