Federal Court  Cour fédérale

Date: 20150323

Docket: IMM-190-14

Citation: 2015 FC 360

Ottawa, Ontario, March 23, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

KELLY HAPPY OZIEGBE

Applicant

and

MINISTER AND CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Kelly Happy Oziegbe (the Applicant) has brought an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) of a decision made by an Immigration Officer (the Officer) at the Canada Immigration Centre, Etobicoke, Ontario, on December 19, 2013. The Officer refused the Applicant's claim for

permanent residence as a member of the Spouse or Common-law Partner in Canada Class on the ground that the Applicant had not satisfied Regulation 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Regulation 124(a) requires an applicant to demonstrate that he or she is the spouse of a sponsor, and that he or she cohabits with the sponsor in Canada.

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

II. Background

[3] The Applicant is a citizen of Nigeria. He applied for permanent residence under the Spouse or Common-law Partner in Canada Class on November 26, 2012. An application to sponsor and an undertaking were submitted by his spouse Katherine Patti Scott, who is a Canadian citizen.

[4] The Applicant arrived in Canada on January 9, 2004. He was arrested by the Canada Border Services Agency on November 6, 2006 after the expiry of his visa. Following his release on bond, he was arrested a second time on August 14, 2008 for failing to comply with the conditions of his release. He was arrested a third time on April 29, 2010, again for failing to comply with the conditions of his release. He was released on March 11, 2011 with his aunt Chionyedue Opia Evans serving as bondsperson. He says that he met his spouse on April 22, 2011 at the library while accompanied by his aunt, and they married a year later.

[5] One of the conditions of the Applicant's release was that he reside at all times with his aunt at her residence in Richmond Hill, Ontario. He was not permitted to leave the residence subject to certain exceptions.

[6] There is no dispute that the Applicant and his spouse have never cohabited.

[7] The Applicant says that he was prevented from cohabiting by the conditions of release imposed upon him by the Respondent. He explains that his spouse owns a house with two elderly tenants, and she must remain there in case problems arise. His spouse constantly travels in connection with her work, and stays at his aunt's house almost every other weekend. There is not much space at his aunt's house, as several other family members and friends reside there from time to time. The Applicant's spouse confirms that she stays at the aunt's house almost every weekend and during the week when she is able to. While she does leave some things at the Applicant's residence, she carries most of her belongings with her.

[8] According to an affidavit sworn by the Applicant on February 15, 2014, immediately following his marriage he reported his change in circumstances to the Canada Border Services Agency and requested a variation of his bail to enable him to live with his wife. This was refused.

III. The Officer's Decision

[9] The Officer found that the Applicant was not a member of the Spouse or Common-law Partner in Canada Class because there was insufficient proof of cohabitation.

[10] The Officer acknowledged that the Applicant and his spouse may be in a genuine relationship that was not entered into primarily for immigration purposes. However, the Officer concluded that the Applicant and his spouse had never cohabited at any point in their relationship. The Officer was not satisfied by the explanations that the Applicant and his spouse offered as to why they were not living together, and found that they had not exhausted options that would allow them to live as a couple while complying with the Applicant's conditions of release. The Officer noted that there were no restrictions on where the Applicant's spouse could live.

IV. Issue

[11] The sole issue raised in this application for judicial review is whether the Officer's conclusion that the Applicant and his spouse were not cohabiting was reasonable.

V. Analysis

A. *Standard of Review*

[12] A finding of cohabitation is a factual determination and is reviewable against the standard of reasonableness: *Said v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1245, [2011] FCJ No 1527 [*Said*] at para 18 and *Gilani v Canada (Minister of Citizenship and Immigration)*, 2013 FC 243, [2013] FCJ No 240 at para 17 [*Gilani*].

Regulation 124 states as follows:

124. A foreign national is a member of the spouse or common-law partner in Canada class if they:	124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :
(a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;	a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;
(b) have temporary resident status in Canada; and	b) il détient le statut de résident temporaire au Canada;
(c) are the subject of a sponsorship application.	c) une demande de parrainage a été déposée à son égard.

[13] It is well established that a failure to meet the requirement of cohabitation in Regulation 124 is fatal to a sponsorship application under the Spouse or Common-law Partner in Canada Class: *Mandbodh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 190, [2010] FCJ 216 at para 11.

[14] Justice Zinn adopted the following definition of cohabitation in *Chaudhary v Canada (Minister of Citizenship and Immigration)*, 2012 FC 828, 2012 CarswellNat 2158 at para 12:

> While cohabitation means living together continuously, from time to time, one or the other partner may have left the home for work or business travel, family obligations, and so on. The separation must be temporary and short.

[15] If there is no cohabitation by the spouse and sponsor, the applicant is not eligible: *Gilani* at para 21. Whether the applicant and his spouse intend to live together is irrelevant to a finding that they are not cohabiting: *Laabou v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1269 at para 31. In *Said* at para 34, Justice Russell stated:

> [34] If there was no cohabitation then sponsorship was not possible. There was no reason to consider whether the marriage "was not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act" as set out in section 4 of the Regulations. The issue for the Officer was not about why the marriage was entered into, but whether the Applicant and his Sponsor were cohabitating at the time of the application. I see no reasonable error on this point.
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> [35] Further, Justice Shore held in Laabou, [2006] F.C.J. No. 1587, above, at paragraph 27, that the failure to meet any of the conditions in subsection 124(a) of the Regulations is fatal to the claim. Whether or not their marriage was genuine, the fact remains - as reasonably found by the Officer - that the Applicant and his Sponsor are not cohabiting. This is sufficient to exclude him from the Spouse in Canada class.

[16] In *Ally v Canada (Minister of Citizenship and Immigration)*, 2008 FC 445 [*Ally*], it was a condition of the applicant's release that he stay away from his wife and reside with his uncle. Justice Russell held (at para 33) that this did not render the Officer's conclusion that there was no cohabitation unreasonable. He ruled that the onus was on the applicant to comply with the Act. The couple's inability to cohabit was a function of the situation in which they placed themselves at a crucial time in their lives when the applicant was seeking permanent residence in Canada.

[17] This case bears some resemblance to *Ally*. It was the Applicant's own actions—specifically, his failure to comply with his bond conditions on at least two previous occasions—that resulted in the requirement that he reside with his aunt as bondsperson, and precluded him from living with his spouse at her residence.

[18] Furthermore, unlike the applicant in *Ally*, the Applicant in this case was not required by his conditions of release to live separately from his wife. It may not have been the most desirable arrangement for the Applicant to cohabit with his wife at his aunt's house, but this was one option they could have explored.

[19] While the Applicant stated in an affidavit sworn subsequent to the Officer's decision that he had tried unsuccessfully to vary his conditions of release, there is nothing to indicate that this was brought to the attention of the Officer. A decision cannot be impugned on the ground that the decision-maker failed to consider evidence that was not presented: *Kumarasamy v Canada (Minister of Citizenship and Immigration)* (2000), 184 FTR 105 at para 3; *Singh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 69 at para 12; *Patel v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4786. In any event, even if the Applicant's bail conditions could not be varied, they placed no restrictions on where his wife could reside.

[20] The Officer considered the Applicant's explanation for why he was not cohabiting with his spouse and rejected it as unsatisfactory. In my view, this was reasonable.

[21] The Applicant's assertion that procedural fairness required the Officer to conduct a home visit to determine the suitability of accommodations at the aunt's house is similarly without merit. The onus was on the Applicant to satisfy the Officer that he met the requirements of Regulation 124. He was unable to do so.

[22] The Officer's finding that the Applicant did not meet the cohabitation requirement of Regulation 124(a) falls within the range of possible, acceptable outcomes in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). The application for judicial review is therefore dismissed.

[23] The parties have not proposed a question for certification, and none arises in this case.

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

DOCKET:	IMM-190-14
STYLE OF CAUSE:	OZIEGBE V MINISTER CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 10, 2015]
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	MARCH 23, 2015

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