Federal Court  Cour fédérale

Date: 20140529

Docket: IMM-7854-13

Citation: 2014 FC 522

Ottawa, Ontario, May 29, 2014

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

HAYTHAM ATTAALLAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], that seeks to set aside a decision dated November 21, 2013 in which Danielle LeBrun, an immigration officer of Citizenship and

Immigration Canada [CIC] [the Immigration Officer], dismissed the Applicant's application for permanent residence [APR] as a member of the spouse or common-law partner in Canada class.

II. Facts

[2] The Applicant is Palestinian born on January 1, 1979. He came to Canada in September 2001 as a student and claimed refugee protection in October 2001. His application was rejected by the Immigration and Refugee Board in March 2005, and in June 2005 the Federal Court denied him leave for the judicial review of this decision.

[3] The Applicant filed an application for permanent residency based on humanitarian and compassionate grounds in August 2005. In April 2009, this application was also denied, and in September 2010 the Federal Court once again denied him leave for judicial review.

[4] The Applicant was informed of his future removal in February 2012, but he filed an application for a pre-removal risk assessment [PRRA] in March 2012, which was denied in July 2012. This decision remains unchallenged.

[5] In May 2012, while his PRRA application was still pending, the Applicant married Lucia Valvano, a Canadian citizen and lawyer. In June 2012, he filed an APR as a member of the spouse or common-law partner in Canada class, sponsored by Lucia Valvano.

[6] After reviewing certain documents relating to the Applicant on October 25, 2013, the Immigration Officer sent a letter to the Applicant and his sponsor summoning them to an

interview and asking that they provide additional documents. The interview took place on November 4, 2013, and the next day, on November 5, 2013, the Immigration Officer requested further documents from the Applicant and his sponsor. Only some of the requested documents were provided.

[7] On November 21, 2013, the Applicant's APR was denied.

III. Decision under review

[8] In the letter and in her notes, the Immigration Officer recalled the legislative framework applicable to the Applicant's APR and found that she was not persuaded that the Applicant cohabits with his sponsor in Canada (pursuant to paragraph 125(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]), and that the marriage was genuine and was not entered into merely for the purpose of acquiring any status or privilege under the IRPA (pursuant to section 4 of the IRPR).

[9] In coming to the conclusion that the Applicant does not cohabit with his sponsor in Canada, the Immigration Officer examined among other things the Applicant's electronic file at the Canada Border Services Agency [CBSA], where the Applicant is required to report monthly. The Applicant claimed to live at 4555 Bonavista Avenue, in Montreal, Quebec, with his spouse and sponsor. The Immigration Officer noted that the Applicant's address in the file was 148 Waterbridge Drive, in Ottawa, since 2008, that he had yet to change his marital status, still appearing as "not married", and that he still reported to the Ottawa office on a monthly basis despite living in Montreal since May 4, 2012. The Immigration Officer also examined other

documentary evidence which lead her to believe that the Applicant and his sponsor did not live together. The Immigration Officer also made numerous findings with respect to the genuineness and the purpose of their marriage.

IV. Applicant's submissions

[10] The Applicant claims that the Immigration Officer's decision is unreasonable because she relied on extrinsic evidence and failed to confront the Applicant and his sponsor with respect to several of her main concerns. The Applicant was not afforded with a reasonable opportunity to reply and this constitutes a violation of natural justice, as he did not know the case that had to be met. In addition, in relation to other findings, the Applicant contends that the Immigration Officer made a series of unreasonable plausibility inferences considering the evidence submitted.

V. Respondent's submissions

[11] The Respondent argues that both of the Immigration Officer's findings are entirely reasonable and that either finding (i.e., the Applicant not living with his sponsor in Canada or their marriage not being genuine) was sufficient to warrant her dismissal of the Applicant's APR.

[12] It was reasonable for the Immigration Officer to conclude that the Applicant does not live with his sponsor in Canada as this finding was based on several elements obviously present in the Applicant's file and interview. Amongst other things, the Applicant failed to change his address in his electronic file at the CBSA and he continued to report in Ottawa despite allegedly

living permanently in Montreal. Also, the documentary evidence produced demonstrates that the Applicant's address in Montreal is nothing more than a façade.

[13] It was also reasonable for the Immigration Officer to find that the Applicant's marriage with his sponsor was one of convenience considering the evidence submitted and the factual findings on which her decision was based. The Respondent adds that the Immigration Officer had the benefit of seeing the Applicant and his sponsor. Also, contrary to the Applicant's assertion, the Immigration Officer did offer them an opportunity to reply by submitting them to an interview and by requesting that they produce additional documents, but she simply remained unsatisfied despite the Applicant's response.

VI. Applicant's reply

[14] In replying to the Respondent's claims, the Applicant refers to specific paragraphs of his original submissions but submits no additional argument.

VII. Issues

[15] The parties somewhat agree on the issues to be addressed by this Court, and I would reword the questions as follows:

1. Did the Immigration Officer err when she dismissed the Applicant's APR as a member of the spouse or common-law partner in Canada class?

2. Did the Immigration Officer breach procedural fairness by failing to confront the Applicant and his sponsor to several of her main concerns, thus depriving the Applicant and his sponsor of the opportunity to respond?

VIII. Standard of review

[16] The first issue constitutes a factual determination to be examined under the standard of reasonableness (on the issue of cohabitation, see *Mills v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1339 at para 19, [2008] FCJ No 1745 and *Said v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1245 at para 18, [2011] FCJ No 1527 [*Said*]; for the genuineness of the marriage, see *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 417 at para 14, [2010] FCJ No 482 and *Koffi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 7 at para 16, [2014] FCJ No 3 [*Koffi*]).

[17] And under the standard of reasonableness, this Court's analysis will show great deference to the Immigration Officer's findings and will be concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process". This Court will have to determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] SCJ No 9 [*Dunsmuir*]). Following this standard of review, it is not up to the Court to reweigh the evidence or "to substitute its own view of a preferable outcome." (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] SCJ No 12 [*Khosa*])

[18] The second issue, as it is a question of procedural fairness, shall be reviewed following the standard of correctness (*Khosa*, above, at para 43). With respect to this issue, no deference is owed to the Immigration Officer (*Dunsmuir*, above, at 50).

IX. Analysis

[19] Prior to embarking on the analysis of the two issues, it would be appropriate to present an overview of the process undertaken by the Applicant and his sponsor under the IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The relevant legal provisions are reproduced in the annexe to these reasons.

[20] The Applicant applied for an APR as a member of the spouse or common-law partner in Canada class. Sections 12 and 13 of the IRPA enact the right to be sponsored and to sponsor, stating that, subject to the IRPR, a Canadian citizen or permanent resident can "sponsor a foreign national who is member of the family class." Section 123 of the IRPR prescribes that "the spouse or common-law partner in Canada […] is a class of persons who may become permanent residents […]" pursuant to section 12 of the IRPA. Section 124 specifies who exactly qualifies as a "member" of the "spouse or common-law partner in Canada class", including the fact that the member must be the "spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada". As such, in order to be considered a member of the appropriate class, the Applicant must live with his spouse, but the Immigration Officer concluded that he did not.

[21] What is more, section 4 of the IRPR further specifies that a person shall not be considered a spouse or a common law partner in cases where the marriage was "entered into

primarily for the purpose of acquiring any status or privilege under the [IRPA]" or that "is not genuine." In the present matter, the Immigration Officer found that the marriage failed on both accounts.

A. *Did the Immigration Officer err when she dismissed the Applicant's APR as a member of the spouse or common-law partner in Canada class?*

[22] Considering the decision under review and the arguments submitted, this issue requires that this Court determine whether the Immigration Officer's findings are reasonable with respect to both the cohabitation of the spouses and the genuineness of their marriage. As stated above, this Court must avoid reweighing the evidence while doing so, as this was the task of the decision-maker. Here, the Applicant mostly makes unsupported assertions which cannot override the reasonableness of the decision as a whole.

[23] First, was it reasonable for the Immigration Officer to conclude that the Applicant failed to establish, on a balance of probabilities, that he cohabited with his sponsor in Canada? For the following reasons, this Court finds this conclusion was reasonable.

[24] Although certain elements did tend to establish that the Applicant and his sponsor lived together in Canada (certain monthly bills, the lease for the Montreal apartment, Quebec driver's licence, etc.), several pieces of evidence established otherwise, i.e. that they lived apart.

[25] One of the main reasons why the Immigration Officer did not believe the Applicant cohabited with his sponsor in Canada is the electronic file regarding him that is under the

responsibility of the CBSA, which states that the Applicant must report to the CBSA office in Ottawa on a regular basis and that he must inform the CBSA of any change in his residential address in the 48 hours following the change. According to this file examined by the Immigration Officer, the Applicant is not married and still resides at 148 Waterbridge Drive in Ottawa even though he claims to be living in Montreal with his sponsor. The Immigration Officer even contacted a CBSA office to confirm the information. To the contrary of what the Applicant contends, he was confronted with this concern during his interview by the Immigration Officer, but he simply failed to provide a satisfactory response. This is a strong piece of evidence against the Applicant's claim because he failed to change his address despite having the obligation to do so. It is hard to understand why the Applicant, who allegedly lives in Montreal, would prefer his file not be transferred in that city.

[26] On top of the CBSA electronic file on the Applicant stating that he is not married and that he lives in Ottawa, there were other elements in the application which lead the Immigration Officer to find that the Applicant did not reside with his sponsor, including the following:

- The Applicant still reports on a monthly basis to the CBSA in Ottawa despite living in Montreal since May 4, 2012;
- The Applicant's credit card statements indicate that he travels frequently between Ottawa and Montreal;
- The Applicant's correspondence coming from his financial institution is all sent to his address in Ottawa;
- The Applicant owns a $350,000 house at 150 Waterbridge Drive, in Ottawa, which he rents out to three people, and the leases signed after the Applicant's alleged move to Montreal all state that his address is in Ottawa;

- Despite owning a $350,000 house in Ottawa, the Applicant and his sponsor allegedly live together in a one-bedroom apartment in Montreal;

- The Applicant's corporation income tax return for 2012 states that his address is in Ottawa;

- The Applicant did not produce an income tax return for 2012 in Quebec.

[27] The Applicant and his sponsor were asked on two occasions to provide additional documents – once at the interview and another time by way of letter sent after the interview. The Applicant sent only limited documents, and the documents thus submitted were explicitly considered by the Immigration Officer in her reasons.

[28] Combined, all these elements certainly make it reasonable for the Immigration Officer to have found that the Applicant failed to establish, on a balance of probabilities, that he cohabits with his sponsor in Canada, as she was simply not convinced. Her reasons and notes in this regard are clear and intelligible and they definitely allow this reviewing court to understand why she took this decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16, [2011] SCJ No 62).

[29] As such, I find that the Immigration Officer's finding that the Applicant had not satisfied the requirement set out in paragraph 124(*a*) of the IRPR was reasonable. This finding does not warrant this Court's intervention.

[30] Although, as duly noted by the Respondent in its factum, a negative finding with respect to the cohabitation of the spouses under paragraph 124(*a*) of the IRPR is sufficient to reject the

claim as a whole for absence of sponsorship (see *Said*, above, at paras 34-35), I will nonetheless examine the issue of the marriage.

[31] Second, was it reasonable for the Immigration Officer to conclude that the Applicant failed to establish, on a balance of probabilities, that his marriage to his sponsor was genuine and was not entered into primarily for him to acquire a status of a privilege? The Immigration Officer's conclusion in this regard is based on the following factual findings:

- There is an 11 year age difference between the spouses;
- Practically all family members and friends of the spouses do not know about the relationship;
- Only a few family members attended the wedding, which took place in Ottawa;
- The Applicant claims that his sponsor's family members did not attend the wedding because of a family conflict but he does not know the nature of this conflict;
- The spouses know little of each other's interests and share few common life goals and plans;
- The spouses allegedly live together in a one-bedroom apartment despite the fact that the Applicant owns a $350,000 house in Ottawa;
- The Applicant's professional activities take place exclusively in Ottawa while his sponsor works only in Montreal;
- The spouses are not financially interdependent;
- The sponsor knows little of the Applicant's past;

[32] The finding related to the age difference is weaker, but the others are quite strong and fully explain the fact that the Immigration Officer was not convinced of the genuineness of the Applicant's marriage to his sponsor.

[33] The Applicant and his sponsor contend that their explanations were not considered by the Immigration Officer, but the notes and reasons indicate the contrary. Once again, the Applicant and the sponsor simply failed to provide satisfactory answers and explanations, and as noted by the Respondent, assessing the genuineness of the marriage, or lack thereof, was solely the duty of the Immigration Officer:

> [1] It is well established in the case law of this Court that there is no specific criterion, or even a set of criteria, to determine whether a marriage is genuine pursuant to section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] (*Ouk v Canada (Minister of Citizenship and Immigration)*, 2007 FC 891 at para 13; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 432 at para 23; *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490 at para 20). It is exclusively up to the visa officer to determine the relative weight to grant each of the factors, based on the facts, to ensure the inherent logic of the applicant's story according to the particular clues, or references made by the applicant himself, meaning the encyclopedia of references, a dictionary of terms, a picture gallery of the applicant's file in addition to an assessment to determine whether the facts on file taken together create harmony or discord (*Keo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1456 at para 24; *Zheng*, supra).
>
> [*Koffi*, above, at para 1]

[34] As it was the case for the cohabitation of spouses, the Immigration Officer's reasons and notes are clear and intelligible and most certainly explain how she came to her conclusion, which, for this very reason, shall remain undisturbed. Thus, it was reasonable for the

Immigration Officer to find that the Applicant had failed to establish that his marriage was genuine and not entered into for the purpose of acquiring any status or privilege under the IRPA pursuant to paragraph 4(2) of the IRPR. Similarly to the first finding, this second finding does not warrant the intervention of this Court either.

B. *Did the Immigration Officer breach procedural fairness by failing to confront the Applicant and his sponsor to several of her main concerns, thus depriving the Applicant and his sponsor of the opportunity to respond?*

[35] The Applicant claims that the Immigration Officer should have confronted him with the content of the telephone conversation she had with the CBSA Officer in Montreal. The Applicant further argues that he should have been given the opportunity to disabuse the Immigration Officer's concerns in this regard.

[36] However, having read the notes, I find that the Applicant was indeed offered the opportunity to address the Immigration Officer's issues regarding his file at the CBSA. To the question "According to your CBSA file you have a reporting requirement once a month at CBSA office in Ottawa. So how do you manage this since you are living in Montreal? Why you never ask your CBSA file be transferred to CBSA Montreal regarding your reporting requirement?" (*sic* throughout) the Applicant answered: "Declares that he never asked to transfer his CBSA's file to Montreal. Declares that he informed the CBSA Office of his change of address but they ask him to continue to report there in Ottawa." (*sic* throughout) Even his sponsor spoke on the issue during the interview, adding: "She knows that he has reporting requirement in Ottawa every beginning of the months. Declares that they never ask for his file to be transferred in Montreal." (*sic* throughout)

[37] As such, both the Applicant and his sponsor were made aware of the Immigration Officer's concerns with respect to the Applicant's file at the CBSA and they were both given the opportunity to respond but simply failed to give satisfactory answers and, consequently, I find that the Immigration Officer did not commit a breach of procedural fairness.

[38] The parties were invited to submit a question for certification, but none were proposed.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mitchell Goldberg	FOR THE APPLICANT
Margarita Tzavelakos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mitchell Goldberg Attorney Montreal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT