Federal Court  Cour fédérale

Date: 20150115

Docket: IMM-4040-13

Citation: 2015 FC 53

BETWEEN:

YUN LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

O'KEEFE J.

[1] The applicant requested permanent residence in Canada as a member of the family class under the Saskatchewan Immigrant Nominee Program [SINP]. A visa officer in Beijing, China refused her application. The applicant now seeks judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant seeks an order setting aside the negative decision.

I. Background

[3] The applicant is a Chinese citizen. She has two dependents on the permanent residence application: her husband and her son. The applicant's sister-in-law, a Canadian citizen residing in Saskatchewan, is the sponsor.

[4] The applicant has one son from her previous marriage. Her divorce was finalized on August 5, 2004. In early 2008, she met her present husband and they were wed at the end of 2008. The couple obtained an official marriage certificate on April 29, 2009.

[5] The applicant's sponsor sold her house in Toronto and moved to Saskatchewan in 2009 in order to help the applicant's family to qualify for Saskatchewan's immigration policy on the referral of family members. Her application under the SINP was approved provincially on March 14, 2011.

[6] In April 2012, the applicant received phone inquires at work from an immigration officer. On July 4, 2012, a CBSA officer visited the applicant's company for an in-person interview. Questions included applicant's work, family and spousal relationship.

[7] On July 20, 2012, the visa officer sent a letter to the applicant pertaining to the above concerns. On August 18, 2012, the applicant sent the visa officer a letter in response with explanations. The response was received on September 11 and reviewed on September 21, 2012.

[8] In the letter, the applicant explained that her knowledge as an assistant financial manager is mainly data summarization and she was unable to come up with the CBSA officer's requested numbers due to the structure and operation of the company. Also, she stated the photo in her wallet is of her ex-husband and it was in her wallet because she forgot to take it out after showing it to her son. As for the information relating to her current husband, she did not remember his number because she had stored his number in her phone and she did not know where her husband was at work because of the nature of his work as a self-employed electrician.

[9] On May 13, 2013, the applicant and her husband attended a four hour interview with the immigration officer, where they were examined separately regarding concerns of the applicant's marriage.

II. Decision Under Review

[10] The visa officer refused the applicant's permanent residence application on May 14, 2013. He cited section 4 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [the Regulations] and stated he was not satisfied that the applicant's relationship with her husband was genuine. In particular, the visa officer's decision was based on the site visit on July 4, 2012 and the interview on May 13, 2013 which had conflicting answers between the applicant and her husband.

[11] Insofar as the site visit on July 4, 2012 is concerned, the visiting CBSA officer made the following conclusion of "confirmed fraud":

> PA did not appear familiar with her work. It is not acceptable for a chief accountant to not know the most recent payments for the company's projects signed just the day before. She did not know how much taxes the company paid in the last year. This is something that every company accountant should know. PA's salary slips appears to have [*sic*] amended for 2008-2011. Receipts did not have PA's stamps prior to 2011. PA also knew nothing about her spouse, she could not even tell CBSA LO where he is working or his cell phone number. Serious concerns with spousal relationship. PA is carrying another man's picture in her wallet. As we do not have ex-spouse's photo. Cannot confirm if picture in PA's wallet is ex-spouse.

[12] Insofar as the interview on May 13, 2013 is concerned, the visa officer based his determination of a lack of genuineness in the applicant's marriage on the following facts: the applicant thinks her husband's best friend is also his apprentice because they often talk about work; the applicant's husband does not remember the exact number of days the applicant went away for vacation; and the applicant and the applicant's husband do not consider what is a gift the same way.

[13] The visa officer concluded the marriage was entered primarily for acquiring status in Canada and the applicant is not considered a spouse and cannot therefore qualify under the family member category. Further, the visa officer stated that the applicant was given an opportunity to address the concerns regarding the applicant's spousal relationship, but the applicant's responses did not alleviate the officer's concerns.

III. Issues

[14] The applicant submits the following issues:

1. What is the standard of review?

2. Did the officer provide adequate reasons for the negative decision pursuant to section 4 of the Act?

3. Was the applicant denied procedural fairness?

[15] The respondent replies with the following:

1. The applicant cannot complain of inadequate reasons.

2. The applicant was not denied procedural fairness.

[16] In my view, there are three issues:

A. What is the standard of review?

B. Did the officer breach procedural fairness?

C. Did the officer assess the genuineness of the applicant's marriage reasonably?

IV. Applicant's Written Submissions

[17] The applicant submits that under *Kastrati v Canada (Citizenship and Immigration)* 2008 FC 1141, [2008] FCJ No 1424 and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [*Dunsmuir*], the appropriate standard of review in this case is correctness as it involves questions of law and questions of natural justice.

[18] On the issue of adequacy of reasons for the decision, the applicant submits the visa officer's reasons, less than one page, are not detailed enough and do not meet the criteria stipulated by this Court. The applicant references *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 [*Baker*]; *Thalang v Canada (Minister of*

Citizenship and Immigration), 2007 FC 743, [2007] FCJ No 1002; and *Za'rour v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1281, [2007] FCJ No 1647.

[19] On the issue of procedural fairness, the applicant analyzes the five factors listed in *Baker*. The applicant submits that first, the nature of the decision is not one of spousal sponsorship, so the applicant could not have reasonably expected the assessment of section 4 on the genuineness of the marriage; second, under the statutory scheme, the refusal by the federal branch under the provincial nominee program does not afford an appeal to the Immigration Appeal Division; third, the decision is very important to the applicant and her spouse because they are looking to start a new life in Canada; fourth, under legitimate expectations, the applicant only expected examination by the federal branch on security and medical reviews, as opposed to challenges on the genuineness of their marriage; and fifth, under the choices of procedure made by the agency itself, since the visa officer was aware there are no appeal rights, his choice is unfair to the applicant because he did not provide an opportunity to the applicant to address his concerns.

V. Respondent's Written Submissions

[20] Here, the respondent has not made any submission pertaining to the standard of review.

[21] In response to the applicant's argument on the issue of the adequacy of reasons, the respondent submits the applicant should have requested the CAIPS notes, which contain a more detailed rationale for the decision. Also, the respondent submits the insufficiency of reasons in and of itself is not a singular basis to quash an administrative decision; rather, it is only a basis when the insufficiency of reasons frustrates the reviewing court's inquiry into the reasonableness

of a decision (see *Marine Atlantic Inc v Canadian Merchant Service Guild* [2000] FCJ No 1217 at paragraph 5, 98 ACWS (3d) 1214).

[22] On the issue of procedural fairness, the respondent counters that the applicant has erred in relying on the factors under *Baker* in determining the degree of procedural fairness to assert that the visa officer breached procedural fairness. In particular, the respondent submits that the applicant has made three flawed arguments: 1) the applicant is under a statutory obligation to establish the presence of a genuine family relationship under section 11 of the Regulations and the visa officer's assessment on this factor is not a breach of procedural fairness; 2) procedural fairness guarantee does not preclude a particular decision from being made; and 3) the applicant fails to establish that the visa officer breached procedural fairness in his decision.

VI. Applicant's Further Written Submissions

[23] In response to the respondent's memorandum, on the issue of adequacy of reasons, the applicant submits that even if she requested the CAIPS notes, she would not receive them in time to submit with the application record. Also, because the respondent relies on the CAIPS notes towards the adequacy of reasons, the respondent should have either attached the notes or requested an affidavit from the visa officer. The applicant further submits this case is unusual because the application was already approved at the provincial level.

[24] On the issue of procedural fairness, the applicant further submits that the visa officer failed to provide a reasonable opportunity for the applicant to respond to his concerns. She cites the following cases: *Canada (Minister of Citizenship and Immigration) v Ishmael*, 2007 FC 212,

[2007] FCJ No 289; *Zaouch v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 982 at paragraphs 10 to 12, 64 ACWS (3d) 844; *Velazquez Sanchez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1009, [2012] FCJ No 1097; *Chico v Canada (Minister of Citizenship and Immigration)*, 2009 FC 4, [2009] FCJ No 226; and *Zhang v Canada (Minister of Citizenship and Immigration)* 2008 FC 1120, [2008] FCJ No 1409.

VII. Respondent's Further Written Submissions

[25] In the respondent's further memorandum, it argues the visa officer did not breach procedural fairness. The applicant was required to comply with the requirements of the SINP as well as federal immigration law; and under paragraph 4(1)(b) of the Regulations, a key requirement is to demonstrate a genuine relationship. Therefore, procedural fairness does not preclude an assessment of whether there was a genuine marriage.

[26] Further, it argues the applicant already had an adequate opportunity to respond to the concerns about the genuineness of the marriage because the applicant was notified of this concern during the site visit. The applicant did have an opportunity to respond in the form of a letter and the officer did have all the documents pertaining to marriage in front of him.

VIII. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[27] A review on procedural fairness typically triggers the standard of correctness (see *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502; *Canada (Minister*

of Citizenship and Immigration) v Khosa, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339 [*Khosa*]). Here, the applicant submits the standard of correctness should be adopted for this judicial review. I agree.

[28] Insofar as the assessment of the genuineness of the marriage is concerned, it is a factual determination which is reviewable on a standard of reasonableness (see *Dunsmuir* at paragraph 47; see also *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 417 at paragraph 14, [2010] FCJ No 482; and *Koffi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 7 at paragraph 16, [2014] FCJ No 3 [*Koffi*]). This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; *Khosa* at paragraph 59). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the officer breach procedural fairness?*

[29] On the issue of adequacy of reasons, I agree with the respondent that the visa officer provided sufficient reasons and did not breach procedural fairness. First, under *Liang v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1301, 91 ACWS (3d) 141, Mr. Justice John Evans stated at paragraph 31:

> … the duty of fairness normally only requires reasons to be given on the request of the person to whom the duty is owed and, in the absence of such a request, there will be no breach of the duty of fairness.

[30] Here, the applicant submits that even if she requested the CAIPS notes, she would not receive them in time to submit with the application record. There is an obligation on the applicant to request reasons from the visa officer (see *Marine Atlantic Inc v Canadian Merchant Service Guild*, [2000] FCJ No 1217 at paragraph 5, 98 ACWS (3d) 1214). The time of receipt for the reasons of a decision does not affect the sufficiency of the reasons. Here, the reasons of the decision are available upon request. In this case, the CAIPS notes contain detailed reasons why the visa officer concluded the applicant does not qualify as a spouse under the statutory definition.

[31] The visa officer's decision is based on the issue of credibility. Here, I agree with the respondent that the visa officer did not breach procedural fairness. A visa officer is required to put the questions of credibility forward to the applicant in order to comply with procedural fairness. Here, the applicant was provided with an opportunity to address the visa officer's concerns after the site visit in July 2012 and to address the conflicting information provided by the applicant and her spouse during the interview in May 2013. The visa officer clearly stated he refused the application based on the discrepancies and that he found the applicant's explanation unsatisfactory to convince him otherwise. Therefore, the visa officer did not breach procedural fairness.

C. *Issue 3 - Did the officer assess the genuineness of the applicant's marriage reasonably?*

[32] Here, I am satisfied that the visa officer assessed the genuineness of the applicant's marriage reasonably. Under the category of family relationships, section 4 of the Regulations states there is a genuineness requirement in a marriage for someone to be considered a spouse.

[33] There is no particular criterion or set of criteria to determine whether a marriage is genuine pursuant to the Regulations (*Koffi*). The determination is very fact specific. Here, I will give a high deference to the visa officer's findings.

[34] There are a few findings of inconsistency in this case. The visa officer based his determination on a lack of genuineness in the applicant's marriage on the following facts: the applicant thinks her husband's best friend is also his apprentice because they often talk about work; the applicant's husband does not remember the exact number of days the applicant went away for vacation; and the applicant and the applicant's husband do not consider what is a gift in the same way.

[35] In my view, I cannot reweigh the evidence. Here, the officer's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes. Therefore, the officer did not commit a reviewable error and his decision is reasonable.

[36] For the above reasons, the application for judicial review is denied.

[37] The applicant has no proposed serious question of general importance to submit to me for my consideration for certification. The respondent shall have one week from the date of these reasons to submit a proposed serious question, if any, for my consideration for certification. The applicant shall have one week from the receipt of any proposed question to make submissions.

"John A. O'Keefe"
Judge

Halifax, Nova Scotia
January 15, 2015

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

***Immigration and Refugee Protection Regulations*, SOR`2002-227**

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	4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.

FEDERAL COURT

SOLICITORS OF RECORD

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