Federal Court  Cour fédérale

Date: 20150205

Docket: IMM-5591-13

Citation: 2015 FC 148

Ottawa, Ontario, February 5, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

LEONARDO CAETANO DE MENDONCA and EMANUEL CORREIA DA VASCONCELOS MELO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], Mr. de Mendonça [Principal Applicant] and his sponsor [Secondary Applicant] seek judicial review of a decision refusing the Principal Applicant's application for permanent residence as a member of the spouse or common-law partner in Canada class. The Applicants ask

this Court to set aside that decision and return the matter to a different officer for re-determination.

[2] The Principal Applicant is a man from Brazil who came to Canada on March 9, 2009, and applied for refugee protection a few months later. However, he abandoned that claim when he failed to show up for his hearing on May 12, 2011. On May 21, 2011, he married the Secondary Applicant, Mr. Melo, whom he had met about 7 months earlier. The Secondary Applicant is also from Brazil and he became a permanent resident of Canada on June 3, 2008, having been sponsored by his first husband, Mr. Woods. He and Mr. Woods separated on January 28, 2009, and their divorce took effect shortly before Mr. Melo married Mr. de Mendonça.

[3] On July 4, 2011, the Principal Applicant applied for permanent residence as a member of the spouse or common law partner in Canada class, with the Secondary Applicant as his sponsor. The Applicants were interviewed on June 28, 2012, and an officer was satisfied that they were in a genuine relationship and, therefore, granted stage 1 approval.

[4] However, the application was still not finalized when Citizenship and Immigration Canada [CIC] received information from the Canada Border Services Agency [CBSA] which suggested the Applicants were not cohabiting. Specifically, a CBSA officer attested that he had attended the address listed for the Applicants on September 30, 2011, and was advised by the building superintendent that Mr. Melo had lived there in unit 603 with his partner, Fabio Carmelio, but that he had gone back to Brazil six months ago. When that officer returned to that address on November 15, 2011, a neighbour said that two men and a woman had lived in that

apartment for the past year and a half, but she did not recognize either Mr. de Mendonça or Mr. Melo when she was shown photographs of them.

[5] The Applicants had updated their file with a new address in which they claimed to have resided since early 2012. When two CBSA officers attended that address on March 16, 2013, they reported that two people there said that the Principal Applicant lived in the basement but they did not recognize Mr. Melo when shown a photograph of him. The statutory declaration from one of the CBSA officers said that Mr. de Mendonça let them into his room, which was small, had a small bed, and contained only his belongings. According to the CBSA officer, Mr. de Mendonça said that Mr. Melo had taken all his possessions with him when he went to Brazil for a couple of months, and that he had temporarily moved into a smaller room in the same house to save money on rent.

[6] On June 19, 2013, an officer at CIC sent a letter to Mr. de Mendonça saying that he might be found inadmissible for misrepresentation and for violating his duty of candour because "[a] home visit report has been received from Canada Border Services Agency which confirms that you are not cohabiting with your sponsor, Emanuel Melo." This letter afforded the Principal Applicant 30 days to supply any additional information. Mr. de Mendonça took that opportunity to respond and supplied a number of documents to show that Mr. Melo had gone to Brazil to take care of his mother in February, 2013, which was why he was not present at the time of the home visit. Although the trip was only planned to take a couple of months, Mr. Melo was seriously injured in a car accident in Brazil and could not return to Canada until June 17, 2013.

II. Decision under Review

[7] By letter dated August 6, 2013, a CIC officer [Officer] refused the application for permanent residence.

[8] In a document explaining the rationale for the decision, the Officer recited some of the evidence before stating the following:

> I am not satisfied client and his sponsor are credible when they stated that they are cohabiting together and in a genuine relationship. There are confirmations that they are residing in separate addresses for [*sic*] long period of time. There were no submissions to file of their separation prior to the investigative report. If this investigation did not occur there would be confirmation that they are residing apart. The onus is on client and sponsor to be truthful under the Act. I am not satisfied with their explanation submitted in response to the procedural fairness letter. I am satisfied that this couple misrepresented the material fact that they are in a genuine marriage and cohabiting together.

[9] Thus, the Officer suspected that Mr. de Mendonça was inadmissible under paragraph 40(1)(a) of the *IRPA* and decided that he did not meet the requirements in paragraphs 72(1)(c), 72(1)(e)(i), and 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

III. The Parties' Submissions

A. *The Applicants' Arguments*

[10] The Applicants say that the key issue in this matter is one of disclosure: did the Applicants have enough information to know the case against them? As this is a question of procedural fairness, they say that it should be reviewed on the correctness standard.

[11] The Applicants note that the genuineness of their marriage had been established during the interview in June, 2012, and this is proven by the stage 1 approval of their sponsorship application.

[12] The Applicants argue that the fairness letter dated June 19, 2013, was misleading since all it referred to was a "home visit report". According to the Applicants, it was understandable that the Applicants responded by only explaining the circumstances of the Secondary Applicant's absence from the home at the time of the home visit.

[13] They were thus surprised to learn of certain "confirmations" that the Officer relied on in the reasons. The Applicants argue that they were not told the case they had to meet and cite the Supreme Court of Canada decision in *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879, 62 DLR (4th) 385. According to the Applicants, it was incumbent upon the Officer to disclose the substance of his concerns about the Applicants' cohabitation and the "confirmations".

[14] The Applicants state that they could have met the case against them had the Officer told them what it was. The Applicants urge the Court to send this matter back for re-determination, so that the Applicants can properly participate in the decision. In their view, there is no room for mistakes in this matter and it cannot be reduced to guessing games, since it could destroy their marriage (citing *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1174 at paragraphs 77-78, [2005] 1 FCR 485).

[15] The Applicants also argue that the Respondent misses the point when it tries to use the investigation reports to show that the decision is reasonable, as the issue is precisely about whether it was fair to rely on those reports without giving the Applicants a chance to address them.

B. *The Respondent's Arguments*

[16] The Respondent contends that the Applicants are improperly trying to attack the adequacy of the Officer's reasons, and otherwise argues that the process followed was fair.

[17] According to the Respondent, the Officer's decision was justified by the results of the home visits in 2011 and in 2013 (citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 15, [2011] 3 SCR 708 [*Newfoundland Nurses*]). After all, the Respondent rhetorically asks, if the Secondary Applicant was actually cohabitating with the Primary Applicant, why would he take all his belongings back to Brazil, a place with a very different climate?

[18] The Respondent otherwise acknowledges that there was a duty of fairness in this case, but says that the duty was fulfilled by the Officer in this case. Specifically, the Respondent argues that the Applicants were sufficiently informed of the case against them. The fairness letter raised concerns about the Applicants' co-habitation, and the Applicants could have provided more information in response to these concerns, even without being informed of the investigations in 2011. According to the Respondent, it was the Applicants' fault for not properly responding to the fairness letter.

[19] The Respondent compares this case to the situation in *Ali Gilani v Canada (Citizenship and Immigration)*, 2013 FC 243 at paragraphs 5-6, 46-47 [*Ali Gilani*]. There, the Officer relied on surveillance by the CBSA, and Madam Justice Catherine Kane rejected the contention that the dates or details of surveillance needed to be disclosed to the applicant in the procedural fairness letter.

IV. Issues and Analysis

A. *Standard of Review*

[20] If previous jurisprudence has determined the standard of review applicable to a particular issue before the Court, the reviewing Court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 57 and 62, [2008] 1 SCR 190 [*Dunsmuir*]).

[21] The primary issue raised by the Applicants is with respect to the procedural fairness afforded to them by the Officer in making his decision. The Officer deserves no deference on

this issue and it is reviewable on a correctness standard (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502). A decision-maker such as the Officer must afford affected persons the procedural rights to which they are entitled, although sometimes an error will not attract relief if it "is purely technical and occasions no substantial wrong or miscarriage of justice" (*Khosa* at paragraph 43).

[22] The other issues raised by the Respondent are questions of pure fact, and hence attract the reasonableness standard (see *Dunsmuir* at paragraph 53). Accordingly, this Court should not intervene if the Officer's decision is transparent, justifiable, intelligible and within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (see *Dunsmuir* at paragraph 47; and *Khosa* at paragraph 59). In other words, the Officer's decision should be respected if the reasons are understandable and intelligibly explain why he reached his conclusions and how the facts and applicable law support the result (see *Newfoundland Nurses* at paragraph 16). As the Supreme Court stated 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. *Procedural Fairness*

[23] The fairness letter addressed to the Primary Applicant in this case alerted him to the Officer's concern that a "home visit report … confirms that you are not cohabiting with your sponsor, Emanuel Melo." This visit occurred on March 16, 2013, and resulted in a statutory declaration from a CBSA officer who reported that the Primary Applicant appeared to be living

alone in a small apartment, amongst other things. It is not altogether clear from the record whether this declaration was provided to the Applicants with the fairness letter; however, the copy of the fairness letter attached to the Primary Applicant's affidavit filed as part of the application record does not contain this declaration.

[24] In response to the fairness letter, the Applicants submitted a letter dated June 28, 2013, which included additional information and materials about Mr. Melo's recent absence from Canada and his accident in Brazil. This letter and the enclosures were clearly considered by the Officer since the reasons for his decision refer to the Secondary Applicant's accident in Brazil and other matters contained in the Applicants' June 28th letter.

[25] The Officer nevertheless rejected that explanation because of certain "confirmations" that the Applicants were residing at separate addresses for a long period of time. These "confirmations" were the two additional statutory declarations dated September 30 and November 15, 2011, from the same CBSA officer who visited the Primary Applicant's residence on March 13, 2013. These declarations describe visits to Mr. Melo's residence, during which a neighbour and the building superintendent did not recognize a photograph of the Principal Applicant. These "confirmations" were not provided to the Applicants.

[26] I disagree with the Respondent's argument that the duty of fairness owed by the Officer to the Applicants was met in this case. It is true that the Officer here referred to the issue of the Applicants' cohabitation in the fairness letter, and that the Applicants were afforded an opportunity to respond to the Officer's concern in this regard. However, the Officer clearly based

his decision on not only the statutory declaration following the home visit in 2013, but also on the 2011 statutory declarations.

[27] I agree with the Applicants that the fairness letter misleadingly implied that the home visit report was the only source of concern. The Applicants should have been provided with copies of the earlier statutory declarations or, at a minimum, more information about the contents of these declarations so they could have responded with appropriate evidence or explanations.

[28] This case is not like *Ali Gilani*, where Justice Kane noted at paragraph 47 that "…all the allegations arising from the CBSA investigation were set out in the procedural fairness letter and the applicant provided submissions in response…". In this case, the fairness letter to the Primary Applicant merely stated that the CBSA home visit report "confirms that you are not cohabiting with your sponsor." The Applicants could not have known about the other evidence against them, and hence the Applicants did not know the case they had to meet and provide an informed response. It would be not only wrong but a miscarriage of justice if the manner by which the Officer made his decision in this case was sanctioned by this Court.

V. Conclusion

[29] As the Officer's decision was unfair, it is not necessary to address the other issues or arguments raised by the parties.

[30] The Applicants' application for judicial review is therefore allowed. The decision is set aside and the matter is to be returned to a different immigration officer for re-determination, with leave to the Applicants to update their application.

[31] Neither party proposed a serious question of general importance for consideration, so no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is allowed and granted;

2. the decision of the Officer dated August 6, 2013 is set aside; and

3. the matter is referred to a different officer for re-determination, with leave to the Primary Applicant to update his application for permanent residence.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5591-13
STYLE OF CAUSE:	LEONARDO CAETANO DE MENDONCA AND, EMANUEL CORREIA DA VASCONCELOS MELO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 19, 2014
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	FEBRUARY 5, 2015

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