Federal Court  Cour fédérale

Date: 20170724

Docket: IMM-4342-16

Citation: 2017 FC 707

Toronto, Ontario, July 24, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CRAIG ANTONIO WILLIAMS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of an officer at Immigration, Refugees and Citizenship Canada in Etobicoke [Officer], dated September 30, 2016 [Decision], which refused the Applicant's application for permanent residence under the Spouse or Common-Law Partner in Canada Class [Spousal Class].

II. BACKGROUND

[2] The Applicant is a 42-year-old citizen of Saint Vincent and the Grenadines who has resided in Canada since July 15, 2008. He met his wife and sponsor [Sponsor], Maymytty Claramouth Zasvetta, on June 21, 2009. They began cohabitation on September 12, 2009, and married on February 12, 2011.

[3] On November 27, 2012, the Applicant filed an application for permanent residence under the Spousal Class. He was determined eligible for permanent residence and was requested to provide additional information by letter dated November 4, 2013; however, the Applicant did not respond and was informed by letter dated May 12, 2014 that he was required to leave Canada by November 3, 2014.

[4] On September 4, 2014, the Applicant filed a second application for permanent residence under the Spousal Class. The application was confirmed complete in a letter from Citizenship and Immigration Canada [CIC] Mississauga dated February 14, 2016. Subsequently, the Applicant and his Sponsor were requested by letter from CIC-Etobicoke dated March 4, 2016 to attend an interview on March 15, 2016 [March 15 Interview].

[5] The Applicant claims that at the March 15 Interview, a supervisor was not satisfied that the Applicant resided at the address that was on the identity documents. The supervisor informed the Applicant that further investigation was required and the interview would be rescheduled within two weeks.

[6] On May 12, 2016, the Applicant and his Sponsor were requested by letter from CIC-Etobicoke to attend an interview on May 26, 2016 [May 26 Interview]. The Applicant claims that at the May 26 Interview, the officer could not find his file. Subsequently, a different officer informed the Applicant and his Sponsor that his file was still being reviewed and the Applicant would not be landed that day.

[7] On September 14, 2016, the Applicant and his Sponsor were requested by letter from CIC-Etobicoke to attend an interview on September 29, 2016 [September 29 Interview]. At this interview, the Applicant and his Sponsor were interviewed separately regarding the application.

III. DECISION UNDER REVIEW

[8] In a Decision sent to the Applicant dated September 30, 2016, the Officer refused the Applicant's application for permanent residence under the Spousal Class.

[9] In the letter, the Officer stated that the Applicant had failed to satisfy him that he was in an on-going, genuine relationship that had not been entered into for the purpose of primarily acquiring status or privilege under the *IRPA*. Accordingly, the application was refused.

[10] In the reasons for the Decision, the Officer referred to discrepancies between the answers of the Applicant and his Sponsor during the Interview, most notably the matter of his Sponsor's education. Although the application had included a letter from the North American College that confirmed the Applicant's Sponsor had been enrolled in the Food Service Worker Program on a full-time basis from July to November 2014, the Applicant had no knowledge that she had

attended school since they moved in together in 2009. Upon questioning, the Applicant stated he forgot that she attended school because he was more concerned with daily stresses such as rent money. The Applicant also assumed that his Sponsor was studying in the veterinary field because that had been her previous career prior to arrival in Canada; however, the Applicant's Sponsor had stated she wanted to become a certified chef. The Applicant explained that he had not known of the details of her career ambitions. The Officer found that both explanations for the discrepancies were implausible. Consequently, the Officer had serious concerns with the *bona fides* of the relationship between the Applicant and his Sponsor and refused the application.

IV. ISSUES

[11] The Applicant submits that the following are at issue in this proceeding:

A. Did the Officer ignore evidence when concluding that the marriage was not genuine and was entered into for immigration purposes?

B. Was the decision from CIC-Mississauga dated February 14, 2016 *functus officio*?

V. STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the

reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[13] This Court has held that the determination of whether a marriage is genuine is a question of mixed fact and law, which attracts a reasonableness standard: see *Bercasio v Canada (Minister of Citizenship and Immigration)*, 2016 FC 244 at para 17.

[14] The second issue, concerning whether an officer has the jurisdiction to review an application for permanent residence after inviting an applicant to a landing interview, or is barred from doing so by the doctrine of *functus officio*, is a question of law and is reviewable under the correctness standard: *Phan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1203 at para 26; *Salewski v Canada (Minister of Citizenship and Immigration)*, 2008 FC 899 at para 16.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[16] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] are relevant in this proceeding:

Bad faith	**Mauvaise foi**
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.
…	[…]
Member	**Qualité**
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.
…	[…]

Requirements for sponsor	**Exigences : répondant**
133 (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	**133 (1)** L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	[…]
(k) is not in receipt of social assistance for a reason other than disability.	**k)** n'a pas été bénéficiaire d'assistance sociale, sauf pour cause d'invalidité

VII. ARGUMENT

A. *Applicant*

(1) Evidence

[17] The Applicant argues that the Officer ignored significant evidence of the genuineness of the relationship and focused instead on one discrepancy from the September 29 Interview. For example, the Applicant had included evidence of his Sponsor's name change to include his surname, letters of support from friends, cohabitation since 2009, and photos of the wedding. Additionally, the Applicant and his Sponsor had given identical answers to over 20 questions during the September 29 Interview. However, the Officer focused on the fact that the Applicant did not know about a three-month course that his Sponsor attended in 2014 [the schooling issue]. The notes from the September 29 Interview demonstrate that a variety of topics were discussed, yet the Decision only mentions the schooling issue.

[18] In his submissions, the Applicant argues that the Officer ignored evidence and failed to explain how the schooling issue, which dates back to March 2014, overrides the rest of the evidence that supports the genuineness of the relationship; namely, the other answers in the September 29 Interview and supporting documentation. As this Court has repeatedly found, decision-makers must consider the totality of the evidence and not keep silent in regards to significant evidence on material issues: *Kalsi v Canada (Citizenship and Immigration)*, 2016 FC 442 at para 21; *Nijjar v Canada (Citizenship and Immigration)*, 2012 FC 903 at para 31. In the present case, the Officer ignored evidence such as the supporting documentation and the rest of the September 29 Interview. This focus on minor inconsistencies at the expense of other relevant evidence is a significant error: *Doraisamy v Canada (Citizenship and Immigration)*, 2012 FC 1053 at para 60.

[19] Moreover, since the Applicant had received a positive assessment from an officer at CIC-Mississauga in which he was approved for landing, the Applicant claims that the Officer had a duty to explain why the concerns regarding the genuineness of the relationship outweighed the outcome of the CIC-Mississauga decision.

[20] Finally, the Applicant argues that the Officer also ignored the approval of the Applicant's first application for permanent residence in 2013, which also supports the genuineness of the relationship.

(2) *Functus officio*

[21] The Applicant submits that officers erred by refusing to land him on March 15, 2016 and May 26, 2016; instead, he was scheduled for an interview on September 29, 2016.

[22] The Applicant claims that on February 14, 2016, he was advised by letter from an officer at CIC-Mississauga that the application was complete and that he would receive a landing interview. On March 4, he was advised via letter that the application had been processed and he would be landed on March 15. The letter stated that the Applicant was required to present original identity documents, two permanent resident card-sized photos, his Sponsor's photo identification, and proof of address for finalization. These requirements were intended to ensure that the couple were still living together, not to allow for reassessment of the genuineness of the relationship. Yet, at the March 15 Interview, the Applicant was asked questions about his identification documents and advised that additional evidence was required. Despite this information, the Applicant never received a follow-up letter except to schedule another landing interview.

[23] Consequently, the Applicant argues that, since there was nothing regarding the documentation presented at the March 15 Interview to warrant further concerns about the application, the officer erred by refusing to land the Applicant and cancel the interview. The application had been assessed as compliant with the legislative requirements and the relationship had been determined to be genuine, which is indicated by the subsequent transfer of the file to CIC-Etobicoke for finalization. There was no evidence to justify overturning CIC-Mississauga's

decision, which was *functus officio*, having been made by an officer at CIC-Mississauga who reviewed the entire file.

[24] The Applicant further argues that the same error was repeated at the May 26 Interview, when the Applicant was told that the review of his file had not been completed despite the fact that it had been two months since the March 15 Interview. Again, the Applicant submits that the decision to refuse to land him on May 26, 2016, despite his meeting all the legislative requirements was an error.

[25] Finally, the Applicant claims that it is extremely concerning to have his file reviewed by at least six officers: the officer in Mississauga; the officer and supervisor at the March 15 Interview; the two officers at the May 26 Interview; and the Officer at the September 29 Interview. The Applicant submits that the number of reviewing officers makes it difficult to understand who made the final Decision.

B. *Respondent*

[26] The Respondent submits that the Decision is reasonable. The Officer considered all of the evidence and determined that the application could not succeed. The reasons for the Decision reflect that all of the relevant factors were considered.

(1) Legislative Framework

[27] Under s 124(a) of the *Regulations*, a member of the Spousal Class is the spouse of a sponsor who is cohabiting with that sponsor. Section 4 of the *Regulations* states that a foreign national will not be considered a spouse if the marriage is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*.

[28] Section 5.36 of the Operational Manual IP-8 [IP 8] provides that officers may interview applicants to assess the authenticity of an applicant's relationship with their sponsor and to review relevant documents.

(2) Evidence

[29] The Respondent submits that the Officer considered the totality of the evidence. It was reasonable for the Officer to expect that both the Applicant and his Sponsor would have substantially consistent accounts of important facts and issues regarding how each of them spent their day and of their future plans. Moreover, the Applicant has not demonstrated that the Officer ignored evidence or that the findings in the Decision were not open for the Officer to make based on the record.

[30] The Respondent disagrees that the Officer failed to conduct a global assessment or focused on irrelevant considerations. The notes from the September 29 Interview demonstrate that the Officer was fully aware of all the answers and evidence provided by the Applicant and his Sponsor during the September 29 Interview and the reasons clearly explain the factors that

led to the refusal of the application. The fact that the reasons do not contain all of the elements that the Applicant would have preferred does not constitute a reviewable error.

[31] Additionally, reasons are not an independent ground of judicial review: *Dunsmuir*, above, at paras 47, 51, 57. The Officer assigned reasonable weight to the inconsistent and contradictory answers in the assessment of the marriage. Assessment of evidence is a factual matter within the specific expertise and discretion of a reviewing officer. As long as the evidence supports the finding, the Court should not re-weigh the evidence. In the present case, the Applicant did not satisfy the Officer with clear, convincing and cogent evidence that, on a balance of probabilities, the marriage was genuine. The reasons are adequate because the Officer stated the factors that led to the conclusion that the marriage was not genuine. The Respondent submits that the nature of the questions and conduct of the Officer were appropriate.

(3) *Functus officio*

[32] The Respondent also takes the position that the decision to invite the Applicant and his Sponsor for an interview in September 2016 does not constitute a reviewable error. The doctrine of *functus officio* only applies to final decisions; there was no final decision in this case because the Applicant was not landed. Immigration officers are not *functus officio* until the visa is issued or refused. Accordingly, the officer who lands the Applicant must be satisfied that the criteria were met. See *Ali et al v Canada (Citizenship and Immigration)*, 2012 FC 710 at para 29 [*Ali*]; *Brysenko v Canada (Citizenship and Immigration)*, [2000] FCJ No 1443 at para 6 [*Brysenko*].

C. *Applicant's Further Argument*

(1) *Functus officio*

[33] The Applicant further submits that, contrary to the Respondent's reliance on IP 8, the highlighted section does not apply to the present case. As indicated in the February 14 letter, the Applicant was not initially scheduled for a further interview. Instead, he and his Sponsor were given a landing appointment in which he was supposed to receive his permanent residence papers. However, it was after this appointment that an additional interview was scheduled.

[34] The Applicant also disagrees that *Ali*, above, is applicable to the present case. In *Ali*, the applicant submitted an overseas refugee application that was approved until an officer noticed that the individuals in the photos submitted for the medical exams were different than the individuals in the photos on file and a further interview was scheduled. The Court decided that since the initial interview was an "intermediate" decision that was only part of the selection process, it was not a final decision and *functus officio* did not apply: *Ali*, at para 25. Since the present case is an inland application, *Ali* is not relevant. Likewise, *Brysenko*, above, is not helpful to the Respondent because it is also an overseas decision.

[35] In the present case, the Applicant was informed on February 14, 2016 that the "processing of [the] application [had] been completed" and he was advised to bring identification documentation. Even if this was not a final decision and *functus officio* did not apply, there is no evidence that justifies the Officer to deny the Applicant landing on March 15. The Respondent has not submitted evidence to demonstrate why the Officer had reason to second-guess the

Mississauga finding on the genuineness of the relationship. Consequently, the Applicant submits that the Decision lacks transparency.

(2) Evidence

[36] The Applicant further argues that the reasons in the Decision are not transparent or intelligible. The Officer failed to explain why more weight was assigned to the inconsistency on the schooling issue over the positive and consistent answers that constituted the majority of the Interview. In *Momi v Canada (Citizenship and Immigration*), 2017 FC 50 at paras 11-12 [*Momi*], the Court concluded that the decision-maker erred in not explaining how overwhelmingly favourable answers and supporting documentation were insufficient to overcome minor discrepancies. Like *Momi*, the Applicant argues that the other evidence in his application was either not considered at all or, if it was, there is no explanation as to why it was not sufficient to overcome the discrepancy on one issue regarding the Sponsor's schooling.

D. *Respondent's Further Argument*

[37] The Respondent further submits that *Ali*, above, is applicable to the present case. Contrary to the Applicant's argument, Justice Mactavish did not distinguish between inland and overseas decisions: *Ali* at para 23.

[38] Moreover, it is clear that a final decision had not been rendered in the Applicant's application in the letter of February 14:

> IMPORTANT: You and your family members, if any, will be required to present <u>original</u> identification documents(s) to the

> Canada Immigration Centre at your appointment. A final decision concerning the granting of permanent residence status will be made at that time. If permanent residence is granted, the name that will appear on the confirmation of the permanent resident document is your name as it appears on your passport or identity documents.
>
> [Emphasis in original]

[39] The Respondent submits that the letter is clear that a final decision on the application had not been made, but a decision would be made following the appointment. The decision to grant an application for permanent residence is a discretionary one and it is incumbent on the officer who lands the applicant to be satisfied that the criteria have been met.

VIII. ANALYSIS

[40] As the Decision made clear, the spousal application was refused on the sole ground that the applicant appeared to be unaware of the Sponsor's education and career ambitions. He appeared to have no knowledge of the Sponsor's having attended school since the couple had moved in together, and he could not say what the Sponsor intended to study when she went back to school.

[41] The Officer appears to have been amazed that the Applicant "could not recall his wife attending school for over 3 months on a full-time basis" and that he did not know "of her future plan to study to become a certified chef." The Officer found the Applicant's explanations for his lack of knowledge in this regard to be implausible.

[42] Taken in isolation, it does indeed seem strange that a cohabitating husband does not know that his wife has been attending school for over 3 months, or that he does not know what she intends to study when she goes back to school. However, inattentive spouses are not unknown, and it was incumbent upon the Officer to assess *all* of the evidence before reaching a conclusion on the genuineness of this marriage. The Officer did not do this. There was a significant body of positive factors that was before the Officer that suggested a genuine relationship (and a different conclusion) which the Officer does not mention and which I think the Court must conclude was left out of recount. The Officer was obliged to consider the totality of the evidence in this case, which included the fact that an officer in Mississauga had already addressed the entire file and approved it for landing.

[43] Even if the Court were to rely upon the assumption that the Officer reviewed all of the evidence, including the many positive factors, the Decision still lacks intelligibility and justification because it is not possible to tell why the Officer thought the Applicant's lack of knowledge about his wife's educational activities outweighed all of the other positive factors at play in this case.

[44] It is telling, I think, that the Officer was told by the Sponsor why the Applicant did not know she was going back to school to become a certified chef. The Sponsor said:

> Q. Mentioned field of study that wish to pursue?
>
> S. Not sure if I mentioned specifically. Why? Been searching for future jobs; many changes in potential programs.

[45] The Applicant thought the Sponsor was going back to attend veterinary courses because she used to work as a veterinarian before coming to Canada. This is correct. The Applicant demonstrated he knew significant details about his wife's background and the Sponsor makes it clear that she could not remember if she had told the Applicant that she wanted to become a chef. There was no inconsistency here.

[46] In the Decision itself, the Officer says that there were discrepancies in the answers that were "not limited to" the educational issues specifically set out in the Decision. In fact, there are no other material discrepancies that I can find. The Officer overlooks the explanation given for the Applicant's not knowing what his wife wanted to study to become a certified chef, and tries to give the impression that there were other discrepancies when there are none, and then fails to take into account the important consistent answers that were given throughout the interviews.

[47] Justice Gleeson's words in *Ma v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1283 are instructive for the case before me:

> [10] In reaching this conclusion, the Officer noted that additional documentation was provided at the interview in support of the claim that the marriage was genuine, including tax statements, financial documentation, divorce certificates, affidavits and photos. Other than acknowledging receipt of this documentary evidence, the Officer did not address it in any way.
>
> [11] The documentation provided to the Officer demonstrates that Ms. Ma and Mr. Wilson hold a joint bank account and the account appears to be regularly used. The documentation reports that Ms. Ma and Mr. Wilson share the same home address on (1) tax documentation; (2) banking documentation; (3) cellular phone accounts; (4) health care documentation; and (5) automobile insurance documentation. In addition, the Officer was provided with a number of letters that purport to attest to the genuineness of the relationship. All of this evidence appears corroborative of the claim that Ms. Ma and Mr. Wilson are in a genuine relationship.

> However, none of the documentation is addressed in the Officer's decision. Nor is it evident in reviewing the record that the Officer actively considered this evidence.
>
> [12] It is true that a decision-maker is not required to address each piece of evidence and is presumed to have considered all the evidence placed before him or her. However, where directly contradictory evidence is not addressed by a decision maker a Court may more readily conclude that the decision-maker reached a determination without regard to the evidence before it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17).
>
> [13] In this case, I am not suggesting that the evidence is in itself determinative of the genuine nature of the marriage. However, it is, in my opinion, directly relevant to the analysis the Officer was undertaking. The Officer's failure to address this evidence undermines the transparency, intelligibility and justifiability of the decision. The reasons do not disclose how or even if, the Officer weighed this evidence against the negative credibility findings upon which the determination was based. This, in my opinion, is a reviewable error warranting the intervention of the Court.

[48] I cannot, however, accept the Applicant's argument that the decision of CIC-Mississauga was *functus officio* so that CIC-Etobicoke erred by refusing to land him on March 15 and again on May 26, instead of scheduling an interview on September 29, six months later.

[49] On this issue, I accept the Respondent's position that no final decision had been made in this case and that the Applicant had been informed of this in the CIC letter of February 14, 2016 which reads, in part, as follows:

> *IMPORTANT: You and your family members, if any, will be required to present <u>original</u> identification document(s) to the Canada Immigration Centre at your appointment. <u>A final decision concerning the granting of permanent residence status will be made at that time.</u> If permanent residence is granted, the name that will appear on the confirmation of permanent resident document is your name as it appears on your passport or identity documents.*

[Second emphasis added. Some emphasis from original removed.]

[50] I see no legal authority that prevents a review of the authenticity of a relationship by a local CIC office, and local officers who may have concerns in this regard should not be prevented from raising them because such concerns were not raised earlier in the process. I see nothing to prevent an officer from re-visiting the *bona fides* of the marriage before the visa is actually issued.

[51] There is also jurisprudence to suggest that visa officers can revisit decisions in certain circumstances. In *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 3 the Federal Court of Appeal said: "We agree with the judge that the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision." In *Kurukkal*, the reviewing judge had found *functus officio* did not apply in the context of H&C decisions because there was no right of appeal and the process was informal. If *functus officio* does not apply in an H&C decision, it appears to me that it would likely not apply in a spousal sponsorship decision.

[52] Counsel concur there is no question for certification and the Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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