Date: 20070711

Docket: IMM-2244-06

Citation: 2007 FC 740

Ottawa, Ontario, July 11, 2007

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

JANY DOUGLAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] The Applicant, Jany Douglas, seeks judicial review of a decision of an immigration officer; (the Officer) dated April 18, 2005, wherein the Officer determined that the Applicant had not demonstrated sufficient humanitarian and compassionate (H&C) grounds to warrant exemption from the requirements of the *Immigration Refugee Protection Act*, S.C. 2001, c. 27, (the Act) that all applications for permanent residence in Canada be made from outside the

country. In particular, the Officer found that the Applicant had not met the requirements of the "new" public policy on spouses and common-law partners issued in accordance with the *Immigration and Refugee Protection Regulations* (the Regulations) with respect to the spouse or common-law partner in Canada Class and section 25(1) of the Act.

2. <u>Facts</u>

[2] The Applicant is a citizen of the Commonwealth of Dominica born June 22, 1971. She arrived in Canada on July 8, 1999, and made a claim for Convention refugee status, which was denied.

[3] In December 2001, she met her husband Nana Yaw Asomaning, a landed immigrant, and they were married on May 25, 2003. Shortly thereafter, the Applicant submitted an application sponsored by Mr. Asomaning for permanent residence within Canada based on H&C considerations. A son, Josh Asomaning, was born to the couple on August 1, 2003.

[4] In a letter dated September 13, 2005, the Applicant was informed that she had met the eligibility requirements to apply for permanent resident status as a member of the spouse and common-law partner in Canada class.

[5] A letter received by Citizenship and Immigration Canada (CIC) on December 23, 2005, purportedly signed by Mr. Asomaning, informed CIC of Mr. Asomaning's wish to withdraw his sponsorship of his wife since they were separated and no longer living together.

[6] On February 10, 2006, CIC requested further information from the Applicant to clarify the December 23, 2005 letter. As a result, Mr. Asomaning swore an affidavit dated March 10, 2006, wherein he attests to the following:

> I hereby state and confirm that I have not submitted any such letter of withdrawal, neither have I authorized anyone to submit any such letter on my behalf. I further state and confirm that I am still married to my wife and wish to abide by the undertaking submitted on her behalf in September 2003.

[7] The Officer compared the signature of Mr. Asomaning on the withdrawal letter with other signed documents on file by Mr. Asomaning and found that all the signatures appeared to be exactly the same.

[8] On April 13, 2006, the Officer placed a call to the Applicant's home to discuss the apparent inconsistency between the withdrawal letter and the affidavit. The Applicant stated that her husband was at work and stated at least two times that her marriage had not broken down. The Officer then asked for Mr. Asomaning's work number in order to conduct a telephone interview. The Applicant was in the process of providing a phone number when the call abruptly ended. The Officer called back three times and these calls went unanswered

[9] The Officer then called Mr. Asomaning's last known place of employment, Maple Leaf Foods. The employer confirmed that Mr. Asomaning was still employed there, but worked the night shift and consequently the Officer could not speak with him at that time.

[10] In an affidavit filed in support of her application, the Applicant attests that she did not mislead the Officer, and that her husband had indeed gone to work at a new part-time job at an African grocery store. The Applicant further attests that she did not hang up on the Officer and that the call was in fact terminated because the telephone had developed a problem as a result of being immersed in water earlier by her son Josh.

3. Impugned Decision

[11] In a letter dated April 18, 2006, the Officer informed the Applicant of the negative decision in respect to the public policy exemption, noting that a letter withdrawing sponsorship was provided to CIC. The Officer also informed the Applicant that her H&C application had also been considered and had been denied.

[12] In her CAIPS notes, the Officer found that the signature on the withdrawal letter appeared to be that of Mr. Asomaning and also found the Applicant not credible as a result of the phone conversation he had had with her and subsequent discussions with Mr. Asomaning's employer. As a consequence, the Officer determined that the marriage was not genuine.

[13] In her notes, the Officer writes that the application was also assessed on H&C grounds. She notes that the Applicant was found not to be a refugee. She also finds that the Applicant had parents and a sister in Dominica who may be able to provide her with emotional and financial support upon her return. With respect to her 2 ½ year-old son, the Officer expressed the opinion that he would integrate well into society wherever his mother is, and that his best interests are to be with his mother.

4. Issues

[14] This application raises the following issues:

1. Did the Officer err in finding the Applicant not credible?
2. Did the Officer err in determining that the marriage was not genuine?
3. Did the Officer err in finding there to be insufficient grounds to warrant processing of the application for permanent residence within Canada?

5. Standard of Review

[15] In *Sadiki Ouafae v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 459, my colleague Mr. Justice de Montigny conducted a pragmatic and functional analysis in order to determine the applicable standard of review of a decision by a visa officer involving the application of general principles under an Act or Regulations to a specific circumstances. For such questions of mixed law and fact, the learned judge determined that the applicable standard of review to be, reasonableness *simpliciter*. In *Ouafae*, it was also noted that determination of the applicable standard will depend on the nature of the decision and the context in which the decision is made. In that respect, decisions of visa officers based on an assessment of the facts are reviewable on a patent unreasonableness standard. For such decisions, this Court will not intervene unless it can be shown that the decision is based on an erroneous finding of fact made in a perverse or capricious manner. I accept the reasons and findings of my colleague in respect to the applicable standard of review of visa officers. His reasons were subsequently endorsed by the Federal Court of Appeal in *Bethouo Feliciano Eymard Boni v. Minister of Citizenship and Immigration)* 2006 FCA 68 at paragraph 7.

[16] The first two questions under review involve assessment of the facts. It is widely accepted in the jurisdiction of this court that such factual determinations are reviewed on the patent unreasonableness standard of review.

[17] The third issue involves consideration of eligibility requirements set out in the Regulations and the application of section 25(1) of the Act to the circumstances of the case. This is a question of mixed fact and law reviewable on a reasonableness standard.

6. Analysis

[18] On September 7, 2005, it was determined that the Applicant had met the eligibility requirements for permanent resident status as a member of the spouse and common-law partner in Canada class. Because of the withdrawal letter, the Officer found the Applicant not credible and determined that her marriage was not genuine. Consequently, the Officer concluded that the Applicant had not met the eligibility requirements for permanent resident status as a member of the spouse and common-law partner in Canada class and dismissed her application for permanent residence. I will now deal with the Officer's credibility findings and determination that the marriage was not genuine.

[19] The Officer found the Applicant not credible by reasons of her stating during the phone conversation that her husband was at work. In fact Mr. Asomaning was not at his usual place of employment at that time, but was actually at work at his new part-time job. These circumstances were unknown to the Officer at the time she rendered her decision. The Officer pursued the

matter with the Mr. Asomaning's full time employer who informed her that Mr. Asomaning was not at work at that particular time. Based on this information, the Officer incorrectly assumed that the husband was not at work because he was not at his usual place of employment and consequently found that the Applicant had misled her. In my view, the Officer's finding that Mr. Asomaning was not at work at the time the Applicant asserted he was is based on speculation by the Officer and is not supported by the evidence. The employment status of the Applicant's husband is a matter that could have been easily clarified had the Officer spoken with Mr. Asomaning. The Officer erred in impugning the Applicant's credibility on the strength of this erroneous finding.

[20] The Officer further impugned the Applicant's credibility by reason of the Applicant "refusing to answering the phone" after she hung up on her. This finding is also not supported in the evidence. The evidence reveals that the phone was cut off and the Officer was then unable to reach the Applicant by phone. There could be many reasons for this to have happened. The Officer simply speculated that the Applicant was rude and uncooperative. The Officer erred in so finding. In my view, it was not open to the Officer to impugn the Applicant's credibility on the basis of this erroneous finding.

[21] I find that the Officer's negative credibility findings to be based on speculation and not supported in the evidence and as a result are patently unreasonable.

[22] The Officer also found the Applicant's marriage not to be genuine. This determination flowed from her acceptance of the withdrawal letter. The Officer accepted the letter as genuine

notwithstanding the Applicant’s repeated assertions that the allegations contained in the letter were false. The Officer also had before her Mr. Asomaning affidavit evidence, wherein he attests that he did not send the withdrawal letter, that he is still married and that he always has and still supports the sponsorship. The Officer found the signature on the withdrawal letter appeared to be that of Mr. Asomaning and relied on this finding to conclude that the letter was genuine. I note that no expert evidence was sought to confirm this finding. The Officer inferred, based on her observation of other signatures of Mr. Asomaning on file that he signed the withdrawal letter.

[23] In my view, it was not open to the Officer to find the Applicant’s marriage not genuine. I come to this view based on the totality of the evidence that was before the Officer. Particularly Mr. Asomaning’s undisputed affidavit evidence attesting that he did not author the withdrawal letter and stating categorically that he is still married to his wife and still wished to sponsor her. Here, the marriage had already been determined to be genuine by the Respondent. It is only upon receipt of the withdrawal letter that the issue of the genuineness of the relationship arose. The Officer’s negative decision essentially turned on the withdrawal letter. In these circumstances, determining the authenticity of this letter was critical. Given the weight of the evidence supporting the Applicant’s version of the facts and in the absence of clear evidence which would have authenticated the signature on the withdrawal letter as being that of Mr. Asomaning, it was patently unreasonable for the Officer to conclude that the marriage was not genuine. In these circumstances, it would have been desirable for the Officer to pursue her investigation by at least speaking directly with Mr.Asomaning with respect to his sponsorship before concluding as she did.

[24] The above erroneous findings by the Officer were central to her decision to reject the Applicant's application for permanent residence. The decision will therefore be set aside.

[25] For the above reasons the application for judicial review will be allowed and the matter will be sent back for re-determination before a different visa officer to be dealt with in accordance with these reasons.

[26] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the Act and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed.

2. The matter is sent back for re-determination before a different visa officer to be dealt with in accordance with these reasons.

2. No serious question of general importance is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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