Date: 20071105

Docket: IMM-5136-06

Citation: 2007 FC 1145

Ottawa, Ontario, November 5, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KELVIN JULIUS OSAZUMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (IRPA) for judicial review of a decision of an immigration officer (the officer), dated August 28, 2006, which denied the applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds and under the in-Canada Spousal policy.

[2] The applicant requests that the decision be set aside.

Background

[3] The applicant, Kelvin Julius Osazuma, is a citizen of Nigeria. He arrived in Canada on June 17, 2001 and immediately made a claim for refugee protection. His claim for refugee status was refused on December 3, 2003, and his application for leave and judicial review was dismissed on September 30, 2004.

[4] The applicant married Elizabeth Langford, a Canadian citizen, on August 28, 2002 in Montreal. The applicant and his wife subsequently filed a sponsorship application for permanent residence and an H&C application for an exemption from the permanent resident visa requirement. This application was refused on August 28, 2006 because the couple failed to submit sufficient documentary evidence to establish that they were cohabiting or in a genuine conjugal marriage. This is the judicial review of the officer's decision to refuse both the in-Canada Spousal and H&C applications.

Officer's Reasons

[5] The officer advised the applicant that the application for permanent residence under the in-Canada Spousal policy had been reviewed and rejected on the basis that the applicant's evidence

was unable to show that he and his wife cohabited as required by Regulation 124(a) and that their marriage was genuine as required by Regulation 4. The H&C application was also denied.

[6] With regards to the application for permanent residence under the in-Canada Spousal policy, the officer's notes indicate that there was insufficient evidence of cohabitation. Specifically, the officer took issue with the bank account statement, apartment leases, income tax notice of assessment, and photos provided by the applicant. The most relevant portion of the notes is reproduced below:

> THE APPLICANT MARRIED ELIZABETH LANGFORD, A CANADIAN CITIZEN, ON 28AUG2002 IN MONTREAL. ELIZABETH LANGFORD HAS SUBMITTED A SPONSORSHIP APPLICATION IN SUPPORT OF THIS APR. HOWEVER, THERE IS INSUFFICENT SUPPORTING DOCUMENTATION TO SATISFY ME THAT THE APPLICANT IS COHABITING WITH ELIZABETH LANGFORD. THERE IS A BANK ACCOUNT STATEMENT WITH A NEGATIVE BALANCE, WHICH INDICATES THAT IT BELONGS TO BOTH OF THEM & WAS MAILED TO 3345 BARCLAY AVE MONTREAL. HOWEVER, THE LEASE FOR THIS ADDRESS IS IN THE NAME OF ELIZABETH LANGFORD AND DOES NOT INDICATE THE APPLICANT ON THE LEASE AS A TENANT OR AN OCCUPANT. THE APPLICANT HAS SUBMITTED ONE NOTICE OF ASSESSMENT FROM THE CANADA REVENUE AGENCY. IT IS FOR THE TAX YEAR '2003 AND THE ASSESSMENT WAS MADE ON 3AUG'2004. THE APPLICANT'S MARITAL STATUS IS SHOWN AS SINGLE. THERE IS A LEASE FOR 9768 ST. PATRICK LASALLE QUEBEC, WHICH IS IN THE NAME OF THE APPLICANT & DOES NOT SHOW ELIZABETH LANGFORD AS EITHER A TENANT OR AN OCCUPANT. THE PHOTOGRAPHS SUBMITTED ARE FROM THE CIVIL MARRIAGE CEREMONY ONLY. BASED ON THE INFORMATION AND DOCUMENTATION PROVIDED, I AM NOT SATISFIED THAT THIS COUPLE ARE COHABITING OR IN A GENUINE CONJUGAL MARRIAGE, BUT RATHER HAVE ENTERED INTO THIS MARRIAGE FOR THE PRIMARY PURPOSE OF

> THE APPLICANT GAINING A PRIVILEGE UNDER IRPA. I GIVE NO WEIGHT TO THIS MARRIAGE.

[7] The officer then assessed the H&C application. The officer noted that the applicant was presently employed as a security guard in Burlington, Ontario and that his past employment in Canada included being employed as a general labourer and box maker. The officer also noted that the applicant volunteered his time as a sound technician with a local church. Having considered the evidence, the officer was not satisfied that the applicant was so established in Canada that to require him to leave the country to make his application for permanent residence would constitute unusual and undeserved or disproportionate hardship.

[8] The officer also indicated that she was not satisfied that the applicant would be unable to return to Nigeria, obtain suitable accommodation and employment, and make his application for permanent residence from outside of Canada. In making this finding, the officer noted that the applicant has no relatives in Canada, aside from his wife, and that his parents and sister reside in Nigeria. Furthermore, he had obtained a diploma from the University of Benin and had previously taught in Nigeria until he came to Canada. Based on these findings, the application was refused.

<u>Issues</u>

[9] The applicant submitted the following issues for consideration:

1. Whether the panel breached the principles of fair hearing.

2. Whether the panel misapprehended the evidence and or failed to take relevant evidence into consideration.

3. Whether the panel proceeded on improper principles and based its decision on erroneous findings of fact made in a perverse or capricious manner without regard for the material before it.

[10] I would rephrase the issues as follows:

1. Did the officer commit an error of fact in finding that the applicant's wife was not listed on the lease for [9768 St. Patrick] as either a tenant or an occupant?

2. Did the officer breach the duty of fairness by failing to provide the applicant with an opportunity to respond to the officer's concerns?

3. Did the officer breach the duty of fairness by failing to provide the applicant with adequate reasons for refusing the application?

4. Did the officer breach the duty of fairness by failing to consider all relevant information and facts in rendering the decision?

Applicant's Submissions

[11] The applicant submitted that the officer's factual finding that the applicant's marriage was not *bona fide* was based on no evidence, a mere speculation/conjecture as opposed to reasonable inference. The applicant submitted that the officer's negative decision was based primarily on the

fact that the two residential leases provided by the applicant did not include the names of the applicant and his wife as joint tenants. The applicant argued that there are good reasons for this.

[12] Firstly, he submitted that the lease for [3345 Barclays Ave.] in Montreal was signed by the applicant's wife prior to the marriage. The fact that the applicant and his wife chose not to amend this lease after their marriage does not mean that they were not living together. Furthermore, the applicant also submitted that he had indicated on his application for permanent residence that he had lived at this location from May 2002 until April 2005.

[13] As for the second lease [9768 St. Patrick] in Lasalle, Quebec, the applicant submitted that while his wife was not listed as a tenant, the applicant had clearly indicated on the lease under the section entitled "Notice of Family Residence" that he was married to Elizabeth Langford. The applicant also submitted that the fact that the addresses provided were consecutive residences is further proof that they were cohabiting.

[14] In arguing that the officer made an erroneous finding of fact based on mere speculation/conjecture as opposed to reasonable inference, the applicant relied on *Jones* v. *Great Western Railway Co.* (1930), 47 T.L.R. 39 at 45, which differentiates between a conjecture and inference. This case held that a conjecture may be plausible, but is of no legal value as it is merely a guess. On the other hand, an inference in the legal sense is deducted from the evidence and if reasonable, may have the validity of legal proof. The applicant submits that the officer's finding that the applicant's marriage was not *bona fide* was a conjecture, not an inference.

[15] The applicant also submitted that the officer breached the duty of procedural fairness on three grounds. Firstly, the applicant submitted that the officer owed the applicant a duty to invite him and his wife for an interview where any concerns relating to their cohabitation could have been addressed.

[16] Secondly, the applicant submitted that the officer made the decision without regard for the evidence before the officer. Specifically, the applicant submitted that the officer's finding that Elizabeth Langford was not included on the [9768 St. Patrick] Lasalle, Quebec lease is incorrect. She was not listed as a party to the lease, but her name was included under the "Notice of Family Residence Section."

[17] Finally, the applicant submitted that the officer breached procedural fairness by failing to provide adequate reasons for the refusal. The applicant submitted that where credibility is in issue, it is trite that a panel has a basic obligation to make a clear finding that the claimant is or is not credible and to give reasons for its finding. (*Armson* v. *Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R.. (2d) 150 (F.C.A.); *Rahman* v. *Canada (Minister of Employment and Immigration)* (No. 2)(1989), 8 Imm. L.R. (2d) 170 (F.C.A.); *Ababio* v. *Canada (Minister of Employment and Immigration)* (1988), 5 Imm. L.R. (2d) 174 (F.C.A.)).

[18] The applicant submitted that where a decision maker has breached procedural fairness, or where they have come to an erroneous finding of fact, the decision is liable to be quashed.

Respondent's Submissions

[19] The respondent submitted that the appropriate standard of review applicable to H&C decisions is that of reasonableness *simpliciter* (*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[20] On the issue of an alleged erroneous finding of fact, the respondent submitted that courts should not lightly interfere with the discretion of an immigration officer as H&C decisions are not simple applications of legal principles, but rather a fact-specific weighing of many factors. The respondent referred to *Legault* v. *Canada (Minister of Citizenship and Immigration)* (2002), 212 D.L.R. (4th) 139, which underlined that the task of weighing evidence belongs to the immigration officer and that the courts should not re-examine the weight given to the different factors by the officers.

[21] With regards to the requirement of an oral interview, the respondent submitted that the applicant failed to meet the evidentiary burden and now blames the officer for not giving him the opportunity to provide further evidence. The respondent submitted that the onus of establishing the facts on which the claim rests belongs to the applicant. The applicant's omission of pertinent information from his written submissions was at his own peril (*Owusu* v. *Canada (Minister of Citizenship and Immigration)* 2004 FCA 38 at paragraph 8). Furthermore, a submission that is oblique, cursory and obscure does not impose a positive obligation on the officer to inquire further about an issue relied on by an applicant (*Owusu* above). There is no general right to an oral hearing

to respond to concerns about the *bona fides* of a marriage. The respondent submitted that while the Department's Inland Processing Manuals suggest that interviews may be conducted where the *bona fides* of a marriage are in issue, and that officers should refer doubtful cases for investigation, neither of these provisions is mandatory. Furthermore, the respondent argued that in any event, these Ministerial guidelines do not create legally binding obligations (*Baker* above; *Williams* v. *Canada (Minister of Citizenship and Immigration)* (1997), 212 N.R. 63 (F.C.A.); *Renedo Perez* v. *Canada (Minister of Citizenship and Immigration)* (24 July 2001), Doc. No. IMM-4555-000 (F.C.T.D.)).

[22] The respondent submitted that there is a presumption that the immigration officer took into account all the evidence that was before them (*Sidhu* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 741 at paragraph 15 (T.D.)). The respondent also submitted that the applicant has failed to show otherwise.

[23] The respondent submitted that the officer provided sufficient reasons for her decision. The respondent submitted that the threshold for the adequacy of reasons in the form of the notes is quite low as it is inappropriate to require an administrative officer to give detailed reasons for their decision as may be expected of an administrative tribunal in an adjudicative hearing (*Ozdemir* v. *Canada (Minister of Citizenship and Immigration*) (2001), 282 N.R. 394 (F.C.A.); *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Russell* v. *Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 1276 (T.D.)). Furthermore, the respondent

submitted that while immigration officers are obliged to ensure that the reasons for the H&C decision reflect the rationale used to arrive at the decision and not just the factors considered, they do not need to mention every piece of evidence that was before them (*Naredo* v. *Canada (Minister of Citizenship and Immigration)* (2000), 192 D.L.R. (4th) 373 (F.C.T.D.)).

Analysis and Decision

Standard of Review

[24] The standard of review applicable to a decision regarding the *bona fide* nature of a marriage in the context of spouse in-Canada class permanent residence applications is reasonableness (*Singh* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 565 at paragraph 4; *Mohamed* c. *Canada (Ministre de la Citoyenneté et de l'Immigration)* 2006 CF 696 at paragraph 39). Breaches of procedural fairness are subject to judicial review on the standard of correctness.

[25] **Issue 1**

Did the officer commit an error of fact in finding that the applicant's wife was not listed on the lease for 9768 St. Patrick as either a tenant or an occupant?

The applicant submitted that the officer made an erroneous finding of fact when she concluded that Ms. Elizabeth Langford, the applicant's wife, was not listed on the lease for [9768 St. Patrick] as either a tenant or an occupant. The applicant based this argument on the fact that on page 4 of the lease for [9768 St. Patrick] wherein the applicant made the following declaration:

> **Notice to Landlord**
>
> I hereby declare that I am married to Elizabeth Langford . I hereby notify you that the dwelling covered by the lease will be used as the family residence.

[26] The respondent submitted that courts should not lightly interfere with the discretion of an immigration officer as H&C decisions are not simply applications of legal principles but rather a fact-specific weighing of many factors.

[27] While it is well established that immigration officers are owed deference on H&C proceedings, paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S., 1985, c. F-7 provides that this Court may grant relief if it is satisfied that the federal board, commission or other tribunal:

> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; . . .
>
> (Emphasis Added)

[28] Having reviewed the evidence and reasons, I am of the opinion that the officer erred in finding that the applicant's wife, Ms. Elizabeth Langford, was not listed as an occupant to the lease for [9768 St. Patrick]. There was evidence before the officer that clearly contradicted this factual finding. Under the section entitled "Notice of Family Residence" at page 4 of the lease for [9768 St. Patrick], the applicant clearly indicated that he was married to Elizabeth Langford and that they would be using the apartment in question as a family residence.

[29] In her reasons, the officer stated that the application was refused on the basis that:

> […] THE APPLICANT [DID] NOT MEET THE REQUIREMENTS OF REGS 124(A) IN THAT HE HAS NOT DEMONSTRATED THAT HE COHABITS WITH HIS SPONSOR OR THAT THE MARRIAGE WAS ENTERED INTO IN GOOD FAITH, RATHER THAN FOR THE PRIMARY PURPOSE OF GAINING A PRIVILEGE UNDER IRPA.

[30] The officer's erroneous finding that the applicant's wife was not listed on the lease for [9768 St. Patrick] as an occupant is directly relevant and determinative to the ultimate finding that there was insufficient evidence to convince the officer that the applicant and his wife did not cohabitate together. I do not know what the officer's decision might have been had the officer not made this factual error. As a result, I am of the opinion that the officer's decision was unreasonable. The application for judicial review is therefore allowed and the matter is referred to a different officer for redetermination.

[31] Because of my finding on this issue, I need not deal with the other issues.

[32] Neither party wished to submit a proposed serious question of general importance for consideration for certification.

JUDGMENT

[33] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section

The *Federal Courts Act*, R.S.C. 1985, c. F-7:

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
. . .	. . .
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

The *Immigration and Refugee Protection Regulations*, S.O.R./2002-227:

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	4. Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.
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.

The *Inland Processing Manual 8 – Spouse or Common-law Partner in Canada Class :*

> 10.2 Assessing for relationship of convenience
>
> If the documents provided do not give adequate proof of a genuine marital or conjugal relationship, or if officers doubt that the applicant is living with the sponsor, the CPC should refer the case to an inland CIC for investigation. The CIC may need to interview the sponsor and applicant separately to establish whether the relationship is genuine.

FEDERAL COURT

SOLICITORS OF RECORD

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