Federal Court

Cour fédérale

Date: 20110211

Docket: IMM-1564-10

Citation: 2011 FC 171

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

OLUREMI ESTHER AKINMAYOWA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an immigration officer, dated June 10, 2009, denying the applicant's application for permanent resident status under the spouse in Canada class because the officer was not satisfied that the applicant met the requirements of regulations 4 and 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2004167 (the Regulations): namely that the applicant and her sponsor cohabited, and that the marriage was genuine and not entered into primarily for immigration purposes.

FACTS

Background

[2] The applicant is a 58-year-old citizen of Nigeria. She has three children in Nigeria. She arrived in Canada, alone, on June 25, 2002.

[3] On August 23, 2002, the applicant made a claim for refugee protection on the basis that she faced domestic abuse from her ex-partner in Nigeria. On November 10, 2004, in detailed reasons, the Board rejected her claim on the basis that the applicant lacked credibility.

[4] The applicant submitted a Pre-Removal Risk Assessment application that was also rejected.

[5] On June 14, 2004, the applicant submitted an application for permanent residence and an exemption from the in-Canada selection criteria based on humanitarian and compassionate grounds.

[6] On January 7, 2006, the applicant married her sponsor.

[7] On December 1, 2006, the applicant's sponsor submitted an in-Canada spousal sponsorship application on the applicant's behalf. This application was rejected on June 10, 2009, following a review of the application, the documentary evidence and an interview that the officer conducted with the applicant and her sponsor. It is the rejection of this application that is the subject of this judicial review.

[8] On February 19, 2010, the applicant's humanitarian and compassionate claim was dismissed because the applicant failed to convince the decision-maker that her personal circumstances were such that the hardship of having to obtain a permanent resident visa from outside Canada in the normal manner would be unusual and undeserved or disproportionate. This was directly related to the earlier finding that the marriage was not genuine and the applicant did not cohabit with her spouse.

Decision under review

[9] On June 10, 2009, an immigration officer rejected the in-Canada spousal sponsorship application submitted by the applicant's sponsor on the applicant's behalf. The officer was not satisfied that the applicant and her sponsor were cohabiting, nor that they were in a genuine spousal relationship. The officer based this negative credibility finding upon the several inconsistencies in the answers provided by the applicant and her sponsor during the interview that the officer conducted with them.

[10] The officer concluded as follows:

> Given that the Applicant and the Sponsor have been living together since January 2006, it is reasonable to expect that they would have been able to have the same answers for the above situations/questions, as they have now been living together for three years. They have also not provided enough valid supporting documentation to prove they are cohabiting.
>
> Given all the information and evidence above, I am not satisfied that the Sponsor and Applicant are cohabiting or are in a genuine spousal relationship, but one entered into only for the purposes of immigration.

New evidence disclosed at the hearing before the Court on February 1, 2011

[11] At the hearing before the Court on February 1, 2011, counsel for the applicant disclosed to the Court for the first time a letter prejudicial to the applicant's case, dated April 26, 2006. This letter to the Immigration Case Processing Centers in Mississauga and Vegreville from an anonymous source calling itself "**CONCERNED NIGERIAN/CANADIANS, TORONTO**", states, and I paraphrase:

1. the marriage between the applicant and her Canadian husband "should not be given a favourable consideration due to its illegal nature";
2. the applicant is married to a prominent business man in Nigeria and "there was no problem whatsoever within the family". The story before the Immigration and Refugee Board is "fiction";
3. the applicant arranged this marriage and paid $8,000; and
4. this is a "bogus marriage" for immigration purposes.

This letter was discovered by the applicant's counsel just before the hearing. Originally the wrong Certified Tribunal Record (CTR) had been sent by the Immigration Department to the Court. The correct CTR was only sent to the Court on December 14, 2010. At that time, the applicant's counsel had left for vacation (in Africa) and had no knowledge of the letter until just prior to the hearing. This letter had been sent to the Immigration Department in 2006, after the applicant had married her sponsor, and before the applicant's sponsor submitted an in-Canada spousal sponsorship application.

[12] Since the respondent's counsel was not aware that the applicant would be relying on this letter as "extrinsic evidence" which would have caused the immigration officer to have a bias

toward the applicant's credibility in relation to her marriage, the Court allowed the respondent to file written submissions on the issue after the hearing, and the applicant to reply. These further submissions have been received and considered by the Court.

LEGISLATION

[13] Regulation 124 of the Regulations defines which foreign nationals may be considered members of the spouse or common-law partner in Canada class:

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.

[14] Section 4 of the Regulations states that a foreign national will not be considered a spouse if the marriage was not genuine and was entered into primarily for the purpose of acquiring immigration status:

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.
. . .	. . .

ISSUES

[15] This application raises the following issues for consideration:

1. Whether the failure by the respondent to disclose to the applicant the April 26, 2006 letter from "CONCERNED NIGERIAN/CANADIANS, TORONTO" constitutes a breach of the rules of natural justice and the duty to act fairly; and, if it did not;
2. Whether the immigration officer's decision that the applicant's marriage was not genuine and that the applicant did not cohabit with her sponsor was reasonably open to the respondent based on the evidence.

STANDARD OF REVIEW

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[17] Questions of natural justice and the duty to act fairly are questions of law to be determined on the standard of correctness: *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at paragraph 44; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and 90; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 43. However, a breach that was purely technical or resulted in no substantial wrong or miscarriage of justice, or where the result would not differ upon reconsideration will not invalidate the decision: Khosa at paragraph 43, *Yassine v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. No. 949 (Fed. C.A.), *Gale v. Canada (Treasury Board)*, 2004 FCA 13.

[18] Questions of credibility and of the genuineness of a marriage or cohabitation relationship are questions of fact to be determined on a standard of reasonableness: see, for example, my decision in *Yadav v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 140, at paragraph 50, and the other decisions cited therein.

[19] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at paragraph 59.

ANALYSIS

<u>Issue 1</u>: Whether the failure by the respondent to disclose to the applicant the April 26, 2006 letter from "CONCERNED NIGERIAN/CANADIANS, TORONTO" constitutes a breach of the rules of natural justice and the duty to act fairly

[20] The Court finds that the failure of the respondent to disclose the letter to the Immigration Department from "CONCERNED NIGERIAN/CANADIANS, TORONTO" dated April 26, 2006, is a breach of natural justice and the duty to act fairly. Undoubtedly, this letter would cause the immigration officer to, at the outset of the decision-making process, doubt the credibility of the applicant and her husband. The law is clear that if the decision relies upon extrinsic evidence, that extrinsic evidence must be disclosed to the applicant. Moreover, the rules of natural justice and the duty to act fairly in this case mean that the applicant must be given an opportunity to see the letter that has been written alleging that her marriage is a fraud, so that the applicant has an opportunity to respond before the decision-maker is influenced by this letter.

[21] This letter may be legitimate "whistle-blowing". The Court appreciates the importance of such letters, and understands why they have to be anonymous. At the same time, the rules of natural justice and the duty to act fairly, require that the immigration department disclose such letters to the applicant concerned so that the applicant has an opportunity to respond before letter is relied upon.

[22] The obligation to disclose extrinsic evidence relied upon by the decision-maker in the immigration context was considered in *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461. In that case, the Federal Court of Appeal stated the following with respect to the general law:

> The principles applicable with respect to disclosure of evidence not within the knowledge of the person was formulated as follows by Dickson J. in *Kane*, supra, at 1115-16:
>
> > [...] each party to a hearing is entitled to be informed of, and to make representations, with respect to evidence which affected the disposition of the case [...]

[23] In *Mancia* the Federal Court of Appeal concluded that information on general country conditions that is publicly available does not need to be disclosed to an applicant in order to satisfy the duty of fairness. In this case, that exception does not apply. The letter at issue was extrinsic evidence not within the knowledge of the applicant, and the decision-maker therefore had a duty to give the applicant the opportunity to respond to it.

[24] In the case at bar, the immigration officer did not give weight or credibility to the documentary evidence showing that the applicant and her sponsor's marriage was genuine and that they cohabited at an apartment. The immigration officer, upon interviewing the applicant and her Canadian sponsor and spouse separately, found discrepancies between some of their respective answers to the same question. The Court has reviewed the immigration officer's notes of this interview and has found that some of the "discrepancies" can be explained as not being discrepancies, and that the vast majority of the answers from the two interviews were consistent and identical. The immigration officer gave these consistent responses no weight. Undoubtedly the "whistle-blowing" letter influenced the officer, as it would influence anyone.

[25] Accordingly, the Court cannot be satisfied that the breach of natural justice and the duty to act fairly could not possibly have affected the outcome of the respondent's decision. If the immigration officer had not considered from the outset that the marriage was a fraud confidentially

disclosed to the immigration department, the immigration officer may have given more weight to the documentary evidence supporting the genuineness of the marriage and cohabitation, and the consistent responses to the questions at the interviews.

[26] Accordingly, the Court finds that there has been a breach of natural justice and the duty to act fairly. The second issues will not therefore be considered.

CERTIFIED QUESTION

[27] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. this application for judicial review is allowed;

2. the decision of the immigration officer dated June 10, 2009 is set aside; and

3. the applicant's application for permanent residence and the sponsorship application are referred to another immigration officer for redetermination with a direction that the applicant may file further submissions in response to the April 26, 2006 letter and may provide further documents with respect to the genuineness of the marriage and the cohabitation.

"Michael A. Kelen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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