Federal Court Cour fédérale

Date: 20111101

Docket: IMM-283-11

Citation: 2011 FC 1245

Ottawa, Ontario, November 1, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MOHAMMED SAID

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of a Visa Officer (Officer), dated 22 December 2010 (Decision), denying the Applicant permanent residence status on the basis that he was not a member of the Spouse or Common-Law Partner in Canada class under subsection 124(a) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (Regulations).

BACKGROUND

[2] The Applicant is a citizen of Ghana who has been living in Canada since 1988. He applied in 2006 for refugee status which was denied in 2009. He is currently subject to a removal order. The Applicant's sponsor (Sponsor) is his wife, Katarzyna Zofia Nowaczek, who is a permanent resident of Canada. The Applicant and the Sponsor (Couple) were married on 2 March 1992. They have two sons together, Michael Lukasz Sare Said and Peter Christopher Nowaczek. Their sons are eighteen and nineteen years old respectively.

[3] The Applicant provided Citizenship and Immigration Canada (CIC) with several documents, including his Ghanaian passport, a letter of employment, a copy of a pardon from the National Parole Board, and his expired driver's licence. The Sponsor provided CIC with her Social Insurance Number Card, her Permanent Residence Card, and her 2008 Income Tax Summary. The Couple provided CIC with their marriage certificate and two photos of them on their wedding day. After the interview the Applicant provided CIC with further documents, including bank statements from TD Canada Trust for him and his wife and a payment slip from Toronto Community Housing.

[4] CIC called the couple for an interview on 29 November 2010. The Officer interviewed the Applicant and the Sponsor separately on 13 December 2010. Both parties were asked the same questions. They were asked where they lived, when they moved to their current address, what their home was like, and if they had ever been separated. They were also asked which of them had woken up first on the morning of the interview and other questions related to their relationship. Both the Applicant and the Sponsor answered the questions that were put to them.

DECISION UNDER REVIEW

[5] Based on the inconsistencies between their answers, the Officer made her Decision on the Applicant's permanent residence application and decided that the Applicant and his Sponsor were not cohabiting. Although they are formally married, the Applicant was not a member of the Spouse or Common-Law Partner in Canada class under subsection 124(a) of the Regulations because he and his Sponsor were not cohabiting.

[6] The Officer based her finding on five major inconsistencies.

[7] First, when asked where they lived, the Applicant answered that he used to live at 1884 Davenport Road, apartment 614 but that he currently lives at 75 Dowling Road, apartment 608. When asked the same question, the Sponsor said that she lived at 1884 Davenport Road, apartment 614. When asked to explain the discrepancy between their answers, the Applicant answered that they lived at 1884 Davenport Road, but were not fully moved in and so they kept both addresses. The Officer found that this was not a reasonable explanation and that "a couple should agree on what address they reside at, even if they only moved there a few months before."

[8] Second, when asked when they moved in, the Applicant said they had moved a month or two earlier, but still had the old address. The Sponsor said that they had lived at their current address for ten years. The Applicant said that he could not remember when they moved, but that he would fax the lease to the Officer. The Officer noted in her Decision that the Sponsor's 2008 Tax Summary indicated her address as 400 McCowan Road, apartment 608.

[9] Third, the Officer noted that, when asked to describe their apartment, the Applicant said that it was a two bedroom apartment in a building with seven floors and they paid $997 per month in rent. The Sponsor said that it was a two bedroom apartment in a building with 12 floors and they paid $850 per month in rent. The Applicant said that he, not the Sponsor, paid the rent because she was not working. He also said the rent had gone up.

[10] Fourth, when asked if they had ever separated after their wedding, the Applicant said they had but he did not remember when. He said that, if he and the Sponsor had an argument, she sometimes went to her parents' house. The Sponsor said that they had been separated for a few months near the beginning of the marriage, when they only had one son. She also said that she and the Applicant had separated for one year in 1995. When presented with her 2008 Tax Summary which showed her status as separated, the Sponsor said that they had not exactly had problems but were separated from 2008 to 2010. The Applicant said he didn't know about them being separated, though sometimes the Sponsor went to her parents' home. The Officer found that "it is not unreasonable to believe that a couple should agree whether they were separated recently or not."

[11] Fifth, when asked who woke up first the morning of the interview, the Applicant said that he thought it was him and that he woke without an alarm. The Sponsor said that she woke up first with an alarm. The Applicant explained the discrepancy by saying that he only wakes up with an alarm when he works, but did not do so that day. He said he awoke at 5:00 a.m., but did not remember if the Sponsor woke up before him or not. The Sponsor said she did not remember.

[12] The Officer also noted in her Decision that, though the bank statements provided after the interview show the Applicant and Sponsor with the same address, the statement with the Sponsor's name on it showed no activity other than an overdraft interest charge and a bank fee. The Officer

also noted that, although the Sponsor's bank statement had the Dowling Road address on it, the Sponsor did not say that she lived there.

[13] The Officer found that the couple was not cohabiting based these inconsistencies. Since they were not cohabiting, the Applicant did not meet the requirements of subsection 124(a) of the Regulations and was not a member of the Spouse or Common-Law Partner in Canada class. The Applicant was not eligible for permanent resident status because he was not a member of that class.

ISSUES

[14] The sole issue in this application is whether the Officer's determination that the Applicant and his Sponsor were not cohabiting was reasonable.

STATUTORY PROVISIONS

[15] The following provisions of the Act are applicable in this proceeding:

Family Reunification	**Regroupement Familial**
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
…	…

Regulations	**Application Générale**
14 (2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12,	**14** (2) Ils établissent et régissent les catégories de résidents permanents ou d'étrangers, dont celles visées à l'article 12,

[16] The following provisions of the Regulations are also applicable 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.
Spouse or Common-Law Partner in Canada Class	**Époux Ou Conjoints De Fait Au Canada**
123. For the purposes of subsection 12(1) of the Act, the spouse or common-law partner in Canada class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	**123.** Pour l'application du paragraphe 12(1) de la Loi, la catégorie des époux ou conjoints de fait au Canada est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
…	…

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.
Excluded Relationships	**Restrictions**
125. (1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if	**125.** (1) Ne sont pas considérées comme appartenant à la catégorie des époux ou conjoints de fait au Canada du fait de leur relation avec le répondant les personnes suivantes:
…	…
(*c*) the foreign national is the sponsor's spouse and	*c*) l'époux du répondant, si, selon le cas:
(ii) the sponsor has lived separate and apart from the foreign national for at least one year and	(ii) le répondant a vécu separément de cet époux pendant au moins un an et, selon le cas :
(A) the sponsor is the common-law partner of another person or the sponsor has a conjugal partner, or	(A) le répondant est le conjoint de fait d'une autre personne ou il a un partenaire conjugal,
(B) the foreign national is the	(B) cet époux est le conjoint de

common- law partner of another person or the conjugal partner of another sponsor	fait d'une autre personne ou le partenaire conjugal d'un autre répondant

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190, 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 well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[18] In *Mills v Canada (Minister of Citizenship and Immigration)* 2008 FC 1339, [2008] FCJ No 1475, Justice Michael Shore held that the standard of review with respect to a finding of cohabitation under subsection 124(a) of the Regulations is reasonableness. Reasonableness is applicable because the issue of cohabitation is one purely of fact. This standard was also applied by Justice Richard Boivin to the question of cohabitation under subsection 124(a) in *Manbodh v Canada (Minister of Citizenship and Immigration)* 2010 FC 190, [2010] FCJ No 216. The standard of review to be applied in this case is reasonableness.

[19] 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 paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at paragraph 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."

ARGUMENTS

The Applicant

[20] The Applicant argues that the Decision was unreasonable as it was not based on all the facts before the Officer. He says that his affidavit in support of judicial review and his answers given to the Officer's questions both show that he and the Sponsor were cohabiting. The affidavit of his Sponsor and her answers to the Officer's questions also show that they were cohabiting. Since he met the requirements under subsection 124(a) and was not excluded under section 125, the Officer's conclusion was unreasonable in the face of this evidence.

[21] The Applicant says his marriage to the Sponsor was conclusive proof that they were cohabiting. When the Officer concluded that the couple was not cohabiting, there was no basis for a conclusion they were not cohabiting as there is no evidence that the couple are divorced or separated. Since there was no proof that the marriage had broken down, the Officer's finding that they were not cohabiting was unreasonable.

[22] In his submissions, the Applicant quotes at length from Citizenship and Immigration Canada's *OP-2 – Guidelines for Processing Members of the Family Class*. He highlights the portions of section 5.25 – Characteristics of Conjugal Relationships, which define marriage as a status-based relationship based on formal recognition of the couple as a unit. As a status-based relationship, he says that formal marriage is conclusive proof of cohabitation. When the Officer

considered the application more as a common-law application rather than a spousal one she ought to have recognized the conclusive proof of a formal marriage. The Officer instead applied a test based on a common-law spousal arrangement. This made the Decision unreasonable.

[23] The Applicant also says that any findings of credibility the Officer might have made were not relevant to the determination that the couple was not cohabiting. She could have made adverse findings of credibility from inconsistencies in the Applicant's and Sponsor's answers, but only if they were lying. That said, those findings of credibility would not be relevant to the issue of cohabitation.

[24] The Decision was unreasonable because it did not have proper regard for the public interest. It was inhuman for the Officer not to consider the fact that the Sponsor and their children would likely have to go on public assistance if the Applicant was not granted permanent resident status. The Applicant provided financial support to his family, so it was unreasonable for the Officer not to consider the drain on the public purse his exclusion of the Applicant from Canada might cause.

[25] Finally, the Decision was unreasonable as it did not take into account the best interests of the Couple's children. The Applicant says that the Supreme Court of Canada has held that for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert alive and sensitive to them. He concedes that the best interests of the child do not outweigh other considerations, but they must always be taken into account. The Officer did not consider the interests of the Applicant's children, so her determination that he was not cohabiting with his Sponsor was unreasonable.

[26] The Applicant also says that, had the Officer complied with the rules of procedural fairness, she would have found he was a member of the Spouse in Canada class.

The Respondent

[27] The Respondent says that the Decision was reasonable as it was made on the basis of evidence before the Officer. He says *Singh v Canada (Minister of Citizenship and Immigration)* 2007 FC 1356, [2007] FCJ No 1756 at paragraph 32, shows that the onus was on the Applicant to "put [his] best foot forward." The Applicant failed to do so. The inconsistencies between the Applicant's and the Sponsor's answers at the interview were such that the Officer could only find that their marriage is not *bona fide*. The Decision was reasonable because there was evidence before the Officer on which she could base her conclusions.

[28] The Respondent also says that the Applicant's submissions amount only to a disagreement with the Officer's conclusions. Though the Applicant may disagree with the Officer's conclusions, mere disagreement is not enough to ground judicial review. This Court should not interfere because the Decision is to be given deference

ANALYSIS

[29] The Applicant has done little more in this application than make unsupported assertions.

[30] First of all, the Officer's finding that the Applicant and his Sponsor had failed to establish that they are currently in an interdependent relationship and are not cohabitating was reasonable, given the numerous contradictions that were not adequately explained. The finding falls within the range established by *Dunsmuir*, and, indeed, after reviewing the record, it seems to me that the

Officer could not reasonably have come to any other conclusion. The Couple were inconsistent about their address, they were inconsistent about the rent they pay, and they were even inconsistent about the room they slept in. The Applicant simply disagrees with the Decision and is asking the Court to reweigh the evidence and reach a different conclusion that favours the Applicant. The Court cannot do this. See *Mandbodh*, above, at paragraph 11, *Baptiste v Canada (Minister of Citizenship and Immigration)* 2006 FC 1382 at paragraph 25, and *Tai v Canada (Minister of Citizenship and Immigration)* 2011 FC 248 at paragraph 49.

[31] Second, the Applicant alleges procedural unfairness, but does not indicate what is procedurally unfair. He seems to mean that it was procedurally unfair for the Officer not to decide in his favour. There is no evidence of procedural unfairness and, in any event, the Applicant abandoned this ground at the hearing.

[32] Third, the Applicant says that the Decision is unreasonable because the Officer failed to consider the best interests of the children. He does not explain what the best interests of the children or other H&C factors have to do with a decision under subsection 124 of the Regulations that deals with whether the Applicant has established that he has an interdependent relationship with his Sponsor and cohabitates with her. The Applicant cites no authority in support of his position and, logically speaking, it is difficult to see how the Officer could decide that the Applicant was cohabitating with his Sponsor because it would be a good thing for the children to find that this was the case.

[33] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 67, the Supreme Court of Canada held that "[A] reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children." The power

conferred by the section referred to – subsection 114(2) of the former *Immigration Act* RSC 1985, c. I-2 – was the discretionary power to facilitate admission into Canada by exempting a person from a regulation on humanitarian and compassionate grounds. (see *Koud v Canada (Minister of Citizenship and Immigration)* 2001 FCT 856 at paragraph 11). While discretion was conferred by that section, which must be exercised in accord with the best interests of the child, there is no similar discretion conferred by section 124. That section only empowers an officer to determine a question of fact: whether or not the claimant is or is not a member of the prescribed class. There is no authority for the proposition, advanced by the Applicant, that the best interests of children must be taken into account when making a purely factual determination. I note also that, though they are not binding on the Court, the OP-2 Guidelines do not instruct officers to consider the best interests of the child when determining if a couple is cohabiting. This, I think, is the correct approach.

[34] At the hearing, the Applicant raised a further ground to the effect that, in addition to subsection 124 of the Regulations, the Officer was also obliged to consider the genuineness of the marriage under the Regulations. The case of *Singh v Canada (Minister of Citizenship and Immigration)* 2008 FC 673 is offered by the Applicant as authority for this position. However, the case is not on point because it involved a situation in which the Officer was obliged to consider the genuineness of the marriage. In the present case, for the purposes of the sponsorship application, the Officer was obliged to consider whether, under subsection 124, the Applicant and his Sponsor were cohabitating. This is precisely what the Officer did. If there was no cohabitation then sponsorship was not possible. There was no reason to consider whether the marriage "was not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act" as set out in section 4 of the Regulations. The issue for the Officer was not about why the marriage was

entered into, but whether the Applicant and his Sponsor were cohabitating at the time of the application. I see no reasonable error on this point.

[35] *Chertyk v Canada (Minister of Citizenship and Immigration)* 2008 FC 870 says that sections 124 and 4 of the Regulations must be read together. However, this is only because section 124 does not define "spouse." As Justice Frenette held at paragraph 26, "section 124 defines the membership parameters of the Spousal Class." Further, Justice Shore held in *Laabou,* above, at paragraph 27, that the failure to meet any of the conditions in subsection 124(a) of the Regulations is fatal to the claim. Whether or not their marriage was genuine, the fact remains – as reasonably found by the Officer – that the Applicant and his Sponsor are not cohabiting. This is sufficient to exclude him from the Spouse in Canada class.

[36] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-283-11
STYLE OF CAUSE:	MOHAMMED SAID
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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