Federal Court  Cour fédérale

Date: 20130129

Docket: IMM-4432-12

Citation: 2013 FC 74

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 29, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ALAIN KINDEKI NZAU

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 by an immigration officer (officer) of Citizenship and Immigration Canada (CIC), dated April 16, 2012, refusing the applicant's application for permanent residence filed under the spouse or common-law partner in Canada class pursuant to subsection 12(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) and section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). Under this last provision, to be admitted in the spouse or common-law partner in Canada class, applicants for permanent residence must demonstrate that they: (a) are the spouse or

common-law partner of a sponsor and cohabit with that sponsor in Canada; (b) have temporary resident status in Canada; and (c) are the subject of a sponsorship application.

Facts

[2] The applicant is a citizen of the Democratic Republic of the Congo. He arrived in Canada on November 28, 2004, and claimed refugee protection, which was rejected on March 7, 2006.

[3] He alleges that he met his spouse (sponsor) on December 24, 2007, at a Christmas Eve party organized by friends. The sponsor is a refugee of Congolese origin and the applicant alleges that his relationship with her started at that time. After a customary marriage celebrated in their absence in Kinshasa on June 18, 2008, they started living together in September 2008. The civil wedding was held in Toronto on February 6, 2010, and on March 24, 2010, the sponsor filed an application to sponsor and undertaking with respect to the applicant to obtain his permanent residence in Canada in the spouse or common-law partner class.

[4] In a letter dated September 27, 2011, CIC required the applicant to submit certain documents in support of his application for permanent residence. The letter specified that the applicant had 30 days to provide the requested documents, and failure to do so would result in the refusal of his application. The list of required documents, annexed to the letter, stated the following, in particular: evidence of any joint account for the six last months; evidence of a jointly signed lease or a letter from the landlord of the building where the couple lives attesting to that fact; a copy of a joint purchase agreement or mortgage, of a home insurance policy, life insurance policy or even automobile registration and insurance, if applicable; a copy of telephone bill statements or other

utility bills for the last six months; proof of benefits from employer for the applicant or sponsor, if applicable; as well as any other information that the applicant wished to be considered by CIC.

[5] In a letter dated February 29, 2012, the officer informed the applicant that the information provided did not demonstrate that he met the requirements of paragraph 124(*a*) of the Regulations, that is, that he lived with the sponsor in Canada. The officer added that the applicant and the sponsor had to demonstrate that their sponsorship was valid under section 127 of the Regulations by producing (i) a copy of the notices of assessment issued to them by Revenue Canada for the last four years and (ii) evidence that they do not receive social assistance benefits. Again, the officer explicitly asked the applicant to provide all of the information that he wished to be considered by CIC.

[6] On March 23, 2012, the applicant sent a letter to CIC informing it that, because his spouse had three spontaneous abortions because of her working conditions, she had indeed received social assistance since the filing of the sponsorship application. He attached to the letter the medical evidence attesting to it, the evidence of part-time employment and the pay stubs of the sponsor (January to March 2011 and October to December 2011), a copy of the notices of assessment of the applicant (tax years 2007 to 2010) and the sponsor (tax years 2007 and 2008), and the first page of a residential lease in the name of the applicant and the sponsor, with no dates or signatures.

[7] On April 16, 2012, the officer refused the applicant's application for permanent residence essentially on the ground that she was not convinced that the applicant and the sponsor lived

together. The officer's notes in the Field Operations Support System (FOSS) show several concerns with respect to the evidence provided, including the following:

(a) the applicant submitted only the first page of a monthly lease, the initial period of which was from April 1 to April 30, 2012 (that is, after the letter dated February 29, 2012, in which CIC noted its concerns for the first time);

(b) the applicant and the sponsor did not indicate the same address in their tax returns for the year 2008 (pages 132-136 of the Tribunal Record);

(c) the applicant stated that he was single in his tax returns for the years 2007 to 2010, whereas the sponsor stated, for the same period, that she was married (note that she had previously been married and that her former spouse had passed away on December 10, 2007);

(d) the applicant and the sponsor both claimed tax credits of different amounts for the rent paid in 2010;

(e) a letter from TD Canada Trust indicating that the applicant and the sponsor have had a joint account there since March 2006, whereas, according to the sponsorship application, they met only in December 2007; and

(f) the sponsor did not demonstrate that she was no longer receiving social assistance.

Issues

In his application for judicial review, the applicant raised the following questions:

1) Did the officer breach her duty to act fairly by failing to give the applicant a reasonable opportunity to respond to her concerns and, more specifically, by failing to grant him an interview while she based her decision on his credibility?

2) Did the officer breach her duty to act fairly by providing insufficient reasons to refuse the sponsorship application?

3) Did the officer err by failing to consider the evidence supporting the genuineness of the relationship and by placing more weight on minor inconsistencies?

Applicable standard of review

[8] Findings of fact regarding cohabitation, for the purposes of the application of paragraph 124(*a*) of the Regulations, must be reviewed on the standard of reasonableness (*Said v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1245 at paragraph 18, [2011] FCJ No 1527; *Rakheja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 633 at paragraph 16, [2009] FCJ No 808; *Mills v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1339 at paragraph 18, [2008] FCJ No 1475), whereas questions of procedural fairness are subject to the standard of correctness (*Ally v Canada (Minister of Citizenship and Immigration)*, 2008 FC 445 at paragraphs 12-13, [2008] FCJ No 526 (*Ally*)).

[9] By applying the standard of reasonableness, the analysis of the Court will be concerned with the existence of "justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59). Put another way, the Court should only intervene 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" (*Dunsmuir*, above, at paragraph 47).

[10] Finally, regarding the applicant's argument on the insufficiency of the reasons for the impugned decision, I am of the opinion that the principles that appear in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16 (*NL Nurses' Union*) must apply. In that case, the Supreme Court of Canada stated that "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met."

Analysis

[11] For the following reasons, I believe that there was no breach of procedural fairness in this case and that, because the impugned decision is reasonable and sufficiently supported by the evidence in every respect, the Court's intervention is not warranted.

Arguments based on the officer's breach of her duty to act fairly

[12] The applicant essentially relies on the principles established in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, to maintain that the officer was required to give him the opportunity to respond to her concerns regarding his cohabitation with the sponsor. In that respect, the applicant relies on *Hakrama v Canada (Minister of Citizenship and Immigration)*, 2007 FC 85, [2007] FCJ No 105, which cites *Chitterman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 765, [2004] FCJ No 955, in which the Court decided that an interview can be justified in cases where the genuineness of a marriage is in question so that the applicant has the opportunity to address the doubts of the immigration officer. However, in *Hakrama*, above, at paragraph 25, Justice O'Keefe confirmed that the need for an interview is not absolute and that it

essentially depends upon the facts of each particular case.

[13] With respect, I am of the view that the officer was not required to hold an interview with the applicant in the circumstances of this case. First, the case law on sponsorship applications has established that "[t]he onus was on the Applicant to address the circumstances behind his application and meet the requirements of Regulation 124" (*Ally*, above, at paragraph 22). Second, the applicant had the opportunity to respond to the officer's concerns. In the letters dated September 27, 2011, and February 29, 2012, he was specifically informed that he had to submit convincing evidence of cohabitation and therefore had two opportunities to do so. In light of this Court's decision in *Ally*, above, the fact that all of the evidence was submitted by the applicant, that he was explicitly informed of the gaps in his file, that he had ample opportunity to clarify the state of his relationship and that he was clearly unable to produce the required documents, are, in my opinion, determinative. The officer's negative finding was based on this lack of evidence.

[14] The applicant argues that he could have provided convincing explanations if he was given the opportunity to address the officer's doubts with respect to his cohabitation with the sponsor. In an additional affidavit dated November 23, 2012, he reiterated that he has lived with the sponsor since September 2008. However, he added that, for cultural reasons, his spouse preferred to keep her former residence until they were officially married in February 2010.

[15] The applicant knew the requirements of the law for obtaining permanent residence as a spouse or common-law partner of a resident with the result that that explanation could have simply been submitted to the officer in a timely manner. It is well established that "[a] party cannot

introduce new evidence which was not before the decision-maker" (*Rojas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1303 at paragraph 9, [2012] FCJ No 1407, which cites *Lemiecha (Litigation Guardian) v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 1333, 72 FTR 49). As a result, I will not consider the applicant's additional affidavit. Furthermore, even if I had to consider it, I am of the opinion that the applicant would not have adequately explained the anomalies that arise from the documentary evidence submitted to the officer. First, the applicant failed to submit a valid residential lease and to establish that the sponsor no longer received social assistance. In addition, a close examination of the notices of assessment submitted clearly indicates that the applicant and the sponsor resided in separate locations in 2010. For the year 2008, the record contains two different versions of the notices of assessment issued to the applicant and the sponsor; the first one indicates a separate address and the second one indicates a common address. By submitting these documents to the officer, the applicant could not have thought that he was addressing her concerns with respect to the couple's cohabitation.

The officer's decision is reasonable and sufficiently reasoned with respect to all of the evidence before her

[16] The applicant claims that, by finding that he was not living with the sponsor, the officer carried out a microscopic analysis of the evidence, focused on minor details and failed to consider important evidence that demonstrated the genuineness of the relationship. The applicant argues the couple's financial, social, emotional and physical interdependence and refers in particular to photos of their civil wedding, their joint account with the TD Bank and the medical evidence of the three miscarriages that the sponsor apparently experienced since the start of their life together, that is, in 2008, 2009 and 2010. On that point, he raises the Court's recent decision in *Nijjar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 903 at paragraph 31, [2012] FCJ No 1099, in which Justice Simpson found that the Immigration Appeal Division erred by confirming a negative

finding concerning the genuineness of the applicant's marriage without taking into account the evidence of a recent miscarriage.

[17] It is true that the birth or conception of a child is evidence to which significant weight must be attached when determining the genuineness of a conjugal relationship or marriage (see also *Gill v Canada (Citizenship and Immigration)*, 2010 FC 12 at paragraph 8, [2010] FCJ No 15). However, in this case, the officer's decision is based neither on the relationship's lack of genuineness nor on the applicant's lack of credibility, but instead on the absence of evidence of cohabitation under paragraph 124(1)(*a*) of the Regulations.

[18] In *Cao v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1408 at paragraphs 24-30, [2006] FCJ No 1784, the Court specified that, to benefit from the sponsorship of a spouse or common-law partner, an applicant must, in addition to the conditions listed in section 124 of the Regulations, prove a genuine relationship or marriage.

[19] The list annexed to the CIC letter dated September 27, 2011, contains the documents required to establish the cohabitation. The applicant was unable to meet that requirement. Consequently, after reviewing all of the evidence submitted by the applicant and his sponsor, I am of the opinion that the officer's decision is one that falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] Finally, I am also of the opinion that the officer's reasons together with the FOSS notes and the letters requesting additional evidence sent to the applicant contain sufficient information to

allow the Court and the applicant to assess whether the decision meets the standards of legality (*Ralph v Canada (Attorney General)*, at paragraphs 17-19), and they are explained in sufficient delatil in light of the relevant regulatory provisions and the notices previously addressed to the applicant (*NL Nurses' Union*, above, at paragraphs 16-21). Therefore, there was no breach of the duty of fairness in that respect (see also *Xu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 418 at paragraphs 12-15 and *Dev v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1077 at paragraph 11).

[21] In light of the foregoing, this application for judicial review must be dismissed. No questions were proposed to me for certification and none will be certified.

[22] At the request of the respondent, the style of cause is amended to exclude the Minister of Public Safety and Emergency Preparedness from the proceeding and to name the Minister of Citizenship and Immigration as the sole respondent.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.
2. No question is certified.
3. The style of cause is amended to name the Minister of Citizenship and Immigration as the sole respondent.

"Jocelyne Gagné"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4432-12
STYLE OF CAUSE:	ALAIN KINDEKI NZAU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 21, 2013
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