Federal Court  Cour fédérale

Date: 20150904

Docket: IMM-574-15

Citation: 2015 FC 1048

Ottawa, Ontario, September 4, 2015

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

FRANZ CARL (JR.) ALUB GUERRERO
KRISTINE MAJE MERAMBEL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the January 14, 2015 decision of a Visa Officer and Manager, Economic Immigrant Unit, at the Embassy of Canada in the Philippines, wherein the Applicants' permanent residence applications were denied on the basis that they did not answer truthfully or produce all required documents, contrary to ss. 11(1) and 16(1) of the *Immigration and Refugee Protection Act* SC 2001 c 27 [IRPA], and the Applicants were ruled inadmissible to Canada for misrepresentation under section 40(1)(a) of the IRPA [the Decision].

[2] The Applicants' request that the Court quash the Decision and refer the matter back for reconsideration by a different visa officer.

[3] For the reasons that follow, this application is allowed.

I. Background

[4] The Applicant, Franz Carl (Jr.) Alub Guerrero [Guerrero] is a 33 year old citizen of the Philippines. He married the other Applicant, Kristine Maje Merambel [Merambel], on April 23, 2013 in the Philippines. They claim that their relationship began in 2004.

[5] Guerrero has been in Canada since September 2007, working as a food service supervisor. He applied for permanent residence in November 2010 under the Federal Skilled Worker Program. Merambel was added to his application after they were married in 2013.

[6] On November 15, 2013, Guerrero attended the port of entry at Carway, Alberta to finalize his permanent residence. He was accompanied by his alleged former girlfriend, Mae Yvette Martinez [Martinez], who worked for the same employer. They were questioned and the Canadian Border Services Agency [CBSA] officers learned about their relationship. As a result, the Applicants' permanent visas were revoked. It is disputed whether Martinez and Guerrero admitted that they were still in a relationship at that time or rather that they had been in a relationship in the past. After the incident at the port of entry, Guerrero confessed his infidelity to Merambel.

[7] On January 6, 2014, Guerrero was sent a procedural fairness letter from the Visa Office in the Philippines, referencing provisions of the IRPA relevant to the disclosure obligations of an applicant for permanent residence and the consequences of misrepresentation, and asking him to respond to concerns that he had an ongoing relationship with Martinez and therefore that his relationship with Merambel did not appear to be genuine. In response, Guerrero submitted a statutory declaration, letters from each of Merambel and Martinez, and documents intended to establish the genuineness of his marriage.

[8] The Decision was issued on January 14, 2015, rejecting the Applicants' permanent residence application, finding contradictions between the port of entry evidence and Guerrero's statutory declaration, and concluding that the Applicants' marriage was not genuine and that Guerrero had misrepresented or withheld material facts related to his conjugal relationship with Martinez.

[9] On February 4, 2015, the Applicants applied for leave and judicial review of the Decision.

II. The Impugned Decision

[10] The Decision states that on November 15, 2013 at Carway, Alberta the Applicant misrepresented or withheld the *bona fides* of his marital relationship with Merambel. It further states that this determination was reached because, when he applied to become a permanent resident on that date, he was accompanied by Martinez. His spouse, Merambel, whom he married in April 2013 and included in his application, was not present. During questioning by the Border

Services Officer, the Applicant revealed that Martinez was his long-term girlfriend with whom he had been living in Canada since 2009 in a conjugal relationship. Martinez confirmed living together since 2009 in a conjugal relationship. This misrepresentation or withholding of facts was material and induced an error in the administration of the IRPA as the Applicant's declared spouse, Merambel, had been issued a permanent resident visa as an eligible family member on his application.

[11] The Decision includes a letter from a Visa Officer dated January 14, 2015, stating that the Applicant's marriage to Merambel is not genuine and was entered into for the purpose of facilitating her entry into Canada. That letter notes that, on January 6, 2014, the Applicant, as a matter of procedural fairness, was given an opportunity to respond to the Officer's concerns arising from the information received at the port of entry, but that his response did not alleviate such concerns.

[12] As a result, the application for permanent residence was refused and the Applicant was found to be inadmissible to Canada for a period of five years from the date of the letter and pursuant to subsection 40(3) of the IRPA. He may not apply for permanent resident status during this five year period.

[13] The record before the Court also includes entries in the Global Case Management System [GCMS], which form part of the reasons for the Decision and reflect the following:

A. Some information provided in the Applicant's statutory declaration contradicts information he provided when questioned at the port of entry. For instance, the Applicant

stated that he and Martinez had a relationship for only four months in 2009. He stated that he broke it off when he went to visit Merambel in the Philippines in May 2009 and did not resume his relationship with Martinez upon his return. He stated that he and Martinez only started up their relationship again when they moved into the same house together in June 2010. In contrast, at the port of entry, he admitted that they had been in a relationship since 2008 and had been living together since 2009 and further indicated he would end his relationship once Merambel moved to Canada;

B. In his statutory documentation, the Applicant stated that he and Merambel had been in a relationship since January 2004 and provided proof of his genuine and ongoing marital relationship. The GCMS notes record the following:

    i. The Applicant proposed in 2009 when he visited, but he and Merambel only married in 2013;

    ii. They married in civil rites despite a long engagement, and the wedding photos do not show that the wedding had the level of preparation that would be usual after a long engagement; and

    iii. Joint property was bought in December 2013, after the Applicant was refused landing, and he remitted money only once before the marriage. After the marriage, he remitted money three times, one of which was after he was refused landing;

C. The letter from Merambel stated that the reason for their long engagement was because the Applicant was helping his family financially and that, when she found out about the affair, she was angry but decided to forgive him due to their history;

D. The letter from Martinez confirmed the same dates as the Applicant's document and stated that, despite their relationship ending in April 2013, she still had feelings for the Applicant and would be moving back to the Philippines;

E. The Officer was not satisfied that the marital relationship was genuine and ongoing and that the other relationship had ceased. Despite having married Merambel in April 2013, it appeared that Guerrero's relationship with Martinez continued to the point of his landing. The evidence provided to support the *bona fides* of his marital relationship was not sufficient to alleviate the Officer's concerns;

F. On balance, the Officer concluded that the Applicant entered into a marriage of convenience and added Merambel as a spouse after submission of his application in order to facilitate her entry into Canada; and

G. On the balance of probabilities, it is more probable that the Applicant has misrepresented his marital status that is material to a determination under the IRPA.

III. Issues

[14] The Applicant raises the following issues for the Court's consideration:

A. Whether there was a breach of the duty of fairness in relying on extrinsic evidence (the port of entry notes) without first allowing the Applicant an opportunity to respond;

B. Whether the findings about discrepancies between the port of entry evidence and the Applicant's statutory declaration are unfounded;

C. Whether there was an error in ignoring evidence or in rejecting evidence without justification; and,

D. Whether the finding about the *bona fides* of the Applicants' marriage is unreasonable.

IV. Standard of Review

[15] The parties agree, and I concur, that visa officers are afforded discretion in their decisions and that the appropriate standard of review to apply to a decision refusing an application for permanent residence on the grounds of misrepresentation is reasonableness (*Mahmood v Canada (Minister of Citizenship and Immigration)*, 2011 FC 433 at para 11).

[16] The Applicants also argue that the standard of review applicable to considerations of procedural fairness is correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404). While there is undoubtedly considerable jurisprudential support for this position, the recent decision of the Federal Court of Appeal in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, at paras 67-72 canvasses authority to the effect that some degree of deference should nevertheless be given to the decision-maker on some elements of the procedural decision. That decision does not resolve what Justice Stratas refers to as a "jurisprudential muddle" in this area, in part because it was not necessary to resolve the issue as the Court's conclusion was that, even on a standard of correctness, there was no basis to interfere with the applicable decision on the basis of procedural fairness.

[17] Similarly in the present case, for the reasons explained below, my conclusion is that procedural fairness concerns require the Decision to be revisited, even if I were to afford some degree of deference to the manner in which the decision-maker approached the process.

V. Submissions of the Parties

A. *Applicants' Position*

[18] First, the Applicants argue that the Visa Officer did not provide the port of entry notes to them in order to allow them an opportunity to respond to the alleged contradictions between those notes and the evidence subsequently submitted. The Applicants submit that this represents a breach of the duty of fairness owed to the Applicants.

[19] Second, it is submitted that the Visa Officer erred with respect to the findings of alleged contradictions between Guerrero's statutory declaration and the evidence that was given at the port of entry. The Applicants submit that a proper review of the statutory declaration does not reveal any of the alleged contradictions:

A. Guerrero stated that he met Martinez in December 2008, which does not contradict what was said at the port of entry about their relationship having started in 2008;

B. There is no denial in Guerrero's statutory declaration that he and Martinez lived in the same house between June 2010 and November 2014. He describes joint living arrangements among many co-workers; and

C. Neither Guerrero nor Martinez advised the port of entry officers that their relationship had been continuous since they first began seeing each other.

[20] The Applicants submit that the Visa Officer made negative credibility findings by focusing on minute details and neglected the essence of the evidence relating to Guerrero's and Martinez's relationship. This fixation prevented the Visa Officer from adequately assessing the underlying issue of whether the Applicants were in a genuine marital relationship.

[21] Third, the Applicants submit that the Visa Officer erred in ignoring evidence or in rejecting evidence without justification. The Officer references the letters from Martinez and Merambel but does not state anything more about what role the evidence played in the ultimate Decision. The Officer provides no analysis of the fact that these letters corroborate Guerrero's statutory declaration with respect to his affairs. This evidence was crucial with respect to assessing the *bona fides* of the Applicants' marriage.

[22] Fourth, the Applicants submit that the Officer's findings about the *bona fides* of the marriage are unreasonable. Merambel never ceased to be a member of Guerrero's family class by virtue of his affair. The Applicants acknowledged that there is no dispute that Guerrero and Martinez were in a romantic relationship. Rather, the dispute was as to the timing and duration of that relationship and whether it continued beyond the time that Guerrero married Merambel in April 2013. The Applicants also raised the argument that it is possible to be in two relationships at once. In other words, the fact of the relationship with Martinez did not preclude the relationship with Merambel being genuine.

[23] The Applicants also argue that the Officer impugns the genuineness of the Applicants' relationship based on generalizations and stereotypes. The Applicants submit that the Officer did not provide any basis for assumptions underlying the finding that the marriage was not genuine.

B. *Respondent's Position*

[24] First, the Respondent argues that there is no merit to the Applicants' assertion of a breach of procedural fairness. The Visa Officer advised Guerrero of the concerns regarding the validity of the marriage and the reasoning for those concerns in the procedural fairness letter. The Applicants' response to the letter also indicates that they were fully aware of the Officer's concerns. The Respondent noted that it is not common practice to provide port of entry notes in such circumstances as part of the duty of procedural fairness and took issue with the Applicants' characterization of these notes as extrinsic evidence, given that they reflect Guerrero's own statements at the port of entry. In oral argument in reply to this point, the Applicants submit that, in the interests of procedural fairness, such practice should be changed in circumstances where port of entry notes are to be used to impugn an applicant's credibility.

[25] Second, the Officer properly reviewed the statutory declaration, and the contradictions cited in the Decision reflect the evidence provided. The Officer did not make negative credibility findings by focusing on minute details. He considered the totality of the evidence when making the Decision and referred to the contradictions and inconsistences, which precluded him from making a positive determination.

[26] Third, the Respondent argues that no evidence was ignored and submits that the Applicants' arguments are merely an invitation for this Court to reweigh the evidence. The Officer need not mention every piece of evidence in his/her reasons.

[27] Fourth, the Respondent submits that the findings about the *bona fides* of the marriage were reasonable. The burden is on the Applicants to show that the marriage is genuine, on a balance of probabilities. There was proper and thorough consideration of the responses and submissions. The GCMS notes identify specific contradictions and note why the few explanations that were provided were not persuasive. The Officer was not required to advise the Applicants of his concerns and how they impacted the decision to be made. Overall, the Decision falls within the range of acceptable, possible outcomes, defensible on the law and facts.

VI. Analysis

[28] In my view, this application turns on the procedural fairness issue raised by the Applicants. They rely on *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 for the principle that an applicant must be provided a fair opportunity of correcting or contradicting negative statements before a decision is made. This principle has been further developed by this Court and is often expressed as a requirement that, if an officer intends to base a decision on extrinsic information of which an applicant is unaware, an opportunity to respond must be made available to enable the applicant to disabuse the officer of any concerns arising from that evidence (*Huang v Canada (Minister of Citizenship & Immigration)*, 2012 FC 145 at para 7). However, where the issue arises out of material provided by the applicant, there is no obligation to provide an opportunity for explanation, since the provider of the material is taken to

know the contents of the material (*Poon v Canada (Minister of Citizenship & Immigration)* (2000), 198 FTR 56 (Fed TD) at para 12; *Wang v Canada (Minister of Citizenship & Immigration)* (1999), 173 FTR 266 (Fed TD)).

[29] The authorities also draw a distinction between concerns about sufficiency of the evidence before a decision-maker and concerns about the credibility, accuracy or genuineness of the evidence. The duty to provide an opportunity to respond arises in the latter situation, but not in the former (*Hassani v Canada (Minister of Citizenship & Immigration)*, 2006 FC 1283 at para 24).

[30] In the case at hand, the evidence that the Applicants say should have been provided to them, before the Decision was made, are the port of entry notes. These notes purport to record the statements made by Guerrero and Martinez to CBSA officers at the Carway, Alberta port of entry in November 2013. The Respondent argues that the notes should be considered to represent evidence provided by Guerrero, of which he is aware, and therefore not extrinsic evidence that should have been disclosed to the Applicants.

[31] The challenge for the Respondent in advancing this position is the fact that, prior to production of the Certified Tribunal Record as part of this judicial review application process, the Applicants had never seen, reviewed or approved these notes. The notes are therefore different from a written statement or other documentary evidence submitted by an applicant and different from someone else's record of what an applicant has said where the applicant was provided an opportunity to review such record. In my view, in the absence of such an

opportunity, depending on the use of the record, the duty of procedural fairness may be engaged so that the impugned individual is not deprived of the opportunity to raise concerns about whether the statements were recorded accurately.

[32] The question therefore becomes whether the particular use of the port of entry notes in this case engages this duty of fairness and whether the content of the procedural fairness letter provided to the Applicants served to discharge that duty. This is not a situation where the Decision turns solely on the sufficiency of the evidence. As reflected in the Decision, and confirmed by the Respondent at the hearing, the Respondent's position is that the misrepresentation upon which the Decision turns was failing to disclose the existence of the relationship with Martinez, which persisted into the period of the marriage. This in turn raised doubts as to the *bona fides* of the marriage.

[33] The GCMS notes reflect that the Officer based his analysis in part on the documentary evidence submitted by the Applicants, such as photos and financial transactions, which did not satisfy the Officer that the marriage was genuine and could potentially be characterized as a sufficiency issue. However, those notes also make clear that the Decision is based at least in part on inconsistencies between the port of entry notes and the evidence contained in Guerrero's statutory declaration and the letters of Martinez and Merambel.

[34] The Officer refers to contradictions related to the precise timing of when the relationship with Martinez commenced, was suspended and resumed. The Applicants take issue with whether the evidence supports this finding of contradictions and submit that such finding focuses on

minute details and ignores the essence of the evidence provided. However, there is certainly a fundamental inconsistency between the port of entry notes and the evidence provided in response to the procedural fairness letter. The former reflects that Guerrero stated in November 2013 that he was still in a relationship with Martinez, which he would end when his wife moved to Canada, while the latter indicated that the relationship had ended by the time of the marriage in April 2013. The Decision reflects that it was at least in part on the basis of this inconsistency that the Officer concluded that the marriage was not genuine. As such, the Decision turns in part on an adverse credibility determination, which engages the duty of fairness.

[35] The procedural fairness letter of January 6, 2014 was intended to discharge this duty. The relevant paragraphs of the letter state as follows:

> You included an accompanying spouse, Kristine Maje Merambel, in your application whom you wed on April 23, 2013 however when you attempted to land in November 2013 at Carway, Alberta, it came to light that you have an ongoing long-term relationship with a girlfriend in Canada. You may therefore be found non-compliant as your marriage to Kristine does not appear to be genuine and may have been entered into in order to obtain permanent residence in Canada.
>
> Before a decision is made concerning your inadmissibility, you may forward to us a written explanation regarding the current state of your relationship with Kristine as well as your relationship with your girlfriend in Canada. You must also provide documentary evidence to support you relationship. Note that third party affidavits alone are not conclusive evidence to support an ongoing marital relationship.

[36] The question is whether this letter gave the Applicants the required opportunity of correcting or contradicting negative statements before the Decision was made. I find it does set out the Officer's concern, that Guerrero had an ongoing long-term relationship with a girlfriend

in Canada, such that his marriage did not appear to be genuine. However, it does not set out the detail of the statements, purported to have previously been made by Guerrero and Martinez as reflected in the port of entry notes, on which the Officer's concerns were based. Guerrero's affidavit, filed in support of this judicial review application, states that he advised the CBSA officers in November 2013 that his relationship with Martinez came to an end in April 2013 when he married Merambel and that he never stated that he would end the relationship when his wife came to Canada.

[37] CBSA officers are presumably well-trained in the skills necessary to take accurate notes to capture oral statements made by an applicant or other witness in this sort of situation. As such, Guerrero might have expected to face a significant challenge in attempting to convince the Officer of the position that he is advancing - the CBSA officers got it wrong and misunderstood what he was telling them in November of 2013. However, without having been apprised of the details of the statements that were attributed to him and Martinez, he was deprived of the opportunity to try to correct these statements, which I find represents a breach of the fairness obligation.

[38] This is the sort of concern, albeit in a different context, that Justice Keith Boswell addressed in his recent decision in *Huang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 905 [*Huang*]. That case concerned what Justice Boswell held to be an outdated exception, applicable to spousal interviews, to the obligation to seek clarification of any potential misunderstandings in cases where the evidence would have been sufficient had it not been for doubt about the credibility, accuracy or genuine nature of information submitted by an applicant.

In finding that there was a duty to disclose to the applicant in that case the content of an interview with his spouse, Justice Boswell held at paragraph 17 that the breach of that duty was material because, had the applicant been confronted with the supposed inconsistencies, she might have been able to convince the officer that they were just misunderstandings.

[39] In the case at hand, the inconsistencies were between different sets of statements both attributed to Guerrero, and also partially as against statements attributed to Martinez. Regardless, the reasoning in Huang is applicable, as Guerrero should have been afforded the opportunity to convince the Officer of his position that that the inconsistencies were a result of a misunderstanding of the evidence given at the time of the port of entry interview.

[40] I am conscious of the Respondent's point that it is not common practice to provide port of entry notes in circumstances such as these as part of the duty of procedural fairness. I am not suggesting that there should be a general obligation to do so. Rather, my conclusion is that, in the specific circumstances of this case, given the particular use that was made of such notes by the Officer in making the Decision, the content of the procedural fairness letter did not contain sufficient detail to satisfy the duty of fairness. My finding is that the Officer's approach to the discharge of that duty was accordingly incorrect and, if I were to afford some degree of deference to the manner in which the Officer approached that duty, I would also conclude such approach to be unreasonable.

[41] On this basis, the Decision must be set aside and referred back for reconsideration by a different visa officer. It is therefore unnecessary for the Court to consider the other issues raised by the Applicants.

[42] The parties were consulted, and neither proposed a question for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred back for reconsideration by a different visa officer. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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