Federal Court Cour fédérale

Date: 20181211

Docket: IMM-993-18

Citation: 2018 FC 1256

[UNREVISED ENGLISH TRANSLATION]

Montreal, Quebec, December 11, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ASAAD AL MOUSAWMAII

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Asaad Al Mousawmaii, is seeking judicial review of a decision rendered on January 18, 2018, by an immigration officer, rejecting his application for permanent residence presented under the spouse or common-law partner in Canada class.

[2] For the reasons that follow, the application for judicial review is allowed.

II. Factual Background

[3] The applicant is a citizen of Lebanon. He entered Canada on April 29, 2011, and filed a refugee protection claim. That claim was withdrawn at a later date for reasons that are not included in the record of the proceedings.

[4] In May 2012, the applicant met his spouse, a Canadian citizen of Moroccan origin. After dating for several months, they moved in together and got married on June 26, 2013.

[5] On October 24, 2013, the applicant filed an initial application for permanent residence in the spouse or common-law partner in Canada class. His application was accompanied by a sponsorship application submitted by his spouse.

[6] After the birth of their first child on April 27, 2014, the applicant and his spouse separated. During this separation, the applicant had a brief relationship with another woman. The applicant and his spouse resumed cohabitation in the summer of 2015.

[7] On September 24, 2015, the applicant's spouse withdrew her sponsorship undertaking. One month later, she submitted a request seeking to reverse the withdrawal of her sponsorship undertaking, but her request was denied by an immigration officer.

[8] On April 11, 2016, the applicant's spouse gave birth to the couple's second child.

[9] On August 29, 2016, the applicant filed a second application for permanent residence under the spouse or common-law partner in Canada class. During processing of the application, a tip was sent to the respondent at the following email address: Citizenship-fraud-tips@cic.gc.ca. The applicant's file was then transferred to an immigration officer by the Case Processing Centre in Mississauga.

[10] After interviewing the couple on November 1, 2017, the immigration officer rejected the application on January 18, 2018. In her letter to the applicant, she stated that she was not convinced that he had a genuine relationship with the sponsor.

[11] The applicant is seeking judicial review of this decision. He argues that the decision is unreasonable and that it was rendered in violation of the rules of procedural fairness. He is asking this Court to set aside the immigration officer's decision and to refer the matter back to a different immigration officer for redetermination.

III. Analysis

A. *Standard of review*

[12] It is well-established that the standard of review applicable to a finding that a marriage is not genuine or that it was entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], is that of reasonableness, since it raises questions of fact and law (*Onwubolu v Canada (Immigration,*

Refugees and Citizenship), 2018 FC 19 at para 11 [*Onwubolu*]; *Shahzad v Canada (Citizenship and Immigration),* 2017 FC 999 at para 14).

[13] When the reasonableness standard applies, the role of the Court is to determine whether the decision falls within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law". When "justification, transparency and intelligibility within the decision-making process" exist, it is not open to the Court to substitute its own preferred outcome (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para. 47 [*Dunsmuir*]).

[14] With respect to the allegation of a lack of procedural fairness, the Federal Court of Appeal recently clarified that questions of procedural fairness do not necessarily lend themselves to a standard of review analysis. Instead, the role of this Court is to determine whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada* (*Attorney General*), 2018 FCA 69 at para 54; *Dunsmuir* at para 79).

B. *Preliminary questions*

(1) Applicant's affidavit

[15] In both the memorandum filed and at the hearing, the respondent's preliminary remarks raised the argument that the applicant's affidavit, signed on April 24, 2018, did not comply with paragraph 80(2.1) of the *Federal Court Rules*, SOR/98-106 [Rules], because it was written in French and did not include an interpreter's declaration.

[16] The Court also notes that the supplementary affidavit signed on August 23, 2018, does not include an interpreter's declaration. However, unlike the affidavit from April, the supplementary affidavit contains a paragraph indicating that the affidavit [TRANSLATION] "was drafted, prepared and read in French" and that the applicant [TRANSLATION] "declares that he understands its exact contents".

[17] Counsel for the applicant replied that he took all the necessary precautions to ensure that the affiant understood the exact contents of his affidavit. The affidavit was reportedly read to the applicant in the presence of his spouse who translated it for him as it was being read.

[18] The translation of the statements contained in the affidavit by the applicant's spouse does not satisfy the requirements of paragraph 80(2.1) of the Rules. Since the applicant's affidavit fails to comply with the Rules, it was given little weight (*Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 315 at para 44).

(2) Style of cause

[19] The original style of cause included the applicant's spouse as a co-applicant. Further to a conference call held at the request of the Court after the hearing, counsel for each of the parties confirmed that the request for judicial review concerned only the applicant and his application for permanent residence filed in the spouse or common-law partner in Canada class. The name of the applicant's spouse was therefore removed from the style of cause.

C. *Reasonableness of the decision*

[20] The Court is of the opinion that the immigration officer's decision does not meet the intelligibility test prescribed by *Dunsmuir*.

[21] Under paragraph 12(1) of the IRPA, in order to be selected as a permanent resident in the family class, the applicant must meet the definition of spouse, common-law partner or other family member, as provided in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[22] Moreover, in order to be a part of the spouse or common-law partner in Canada class, the conditions set out in section 124 of the IRPR must be met. This provision reads as follows:

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.

[23] This provision must be read in conjunction with section 4 of the IRPR, which states as follows:

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.

[24] The wording of section 4 of the IRPR is unambiguous. A finding of bad faith may be based either on a finding that the marriage was entered into primarily for the purpose of acquiring a status or privilege under the IRPA or on a finding that the marriage is not genuine.

[25] In addition to being disjunctive, these tests also include a temporal distinction. Paragraph 4(1)(a) requires an assessment of the spouses' intention at the time of the marriage while paragraph 4(1)(b) calls for an assessment of the authenticity of the marriage at the present time (*Onwubolu*, at paras 13–14; *Gill v Canada (Citizenship and Immigration),* 2012 FC 1522 at paras 30, 33; *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1077 at paras 6, 26).

[26] In her letter to the applicant, the immigration officer concluded that he did not meet the criteria for the spouse or common-law partner in Canada class because she was not convinced that he had a genuine relationship with his sponsor. However, in her case notes, which are taken to be the reasons for the decision (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 44), she observes that the applicant must show that [TRANSLATION]

"the marriage was not entered into with the goal of obtaining permanent residence in Canada". She continues by conducting an analysis similar to an assessment of the authenticity of the relationship. Finally, she concludes that the applicant is maintaining a relationship with the primary goal of acquiring a status in Canada.

[27] Even though the immigration officer appears to rely on the test provided in paragraph 4(1)(b) of the IRPR in her letter to the applicant, despite using the term "relationship" instead of "marriage", both the observation she makes in her notes concerning the applicant's burden and the language used in her conclusion suggest rather the application of the test set out in paragraph 4(1)(a) of the IRPR. Given this ambiguity, the decision lacks intelligibility. The immigration officer should have clarified whether the applicant had failed to satisfy one or both of the criteria and provided the reasons for her decision accordingly.

[28] Moreover, given the inconsistency between the immigration officer's observation, her analysis and the conclusion in her case notes, it is impossible to determine whether the immigration officer applied the appropriate legal tests to reach her decision. Even with a generous application of the principles of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, and deference towards the decision, the Court is not satisfied that the immigration officer did not confuse the tests set out in section 4 of the IRPR. Even though there could be links between the primary purpose of the marriage and its authenticity, these are distinct tests under section 4 of the IRPR, which require an assessment based on different temporal dimensions. The use of the present tense to indicate

that the applicant [TRANSLATION] “is maintaining a relationship with the primary goal of acquiring a status in Canada” suggests that the agent confused the two distinct legal tests.

[29] For these reasons, the immigration officer’s decision is unreasonable because it does not satisfy the intelligibility test prescribed by *Dunsmuir*. The application for judicial review must therefore be allowed and the matter shall be referred back to a different officer for redetermination.

D. *Redacting the certified tribunal record*

[30] The Court finds it necessary to address one last point. Of its own accord, the respondent redacted certain pages of the certified tribunal record [CTR], namely, the tip-off email sent to the respondent to cast doubt on the authenticity of the marriage between the applicant and his spouse. The immigration officer who signed the certification that accompanied the tribunal record justified the fact that the document had been redacted by stating that disclosing the information would be injurious to national security or endanger the safety of any person. In a letter sent to the Court three days later, the respondent also cited informer privilege as an additional reason.

[31] At the hearing, the Court raised the redaction with the respondent. Since the Court was not satisfied with the response received, it invited counsel for both parties, by means of directions after the hearing, to provide written submissions on the application of section 87 of the IRPA to this matter and should it not apply, on the requirement to obtain leave from the Court before submitting a file containing redacted excerpts.

[32] In the context of a judicial review, sections 87 and 83 of the IRPA allow the minister to request the non-disclosure of information and other evidence when disclosure could be injurious to national security or endanger the safety of any person. In general, such a request is supported by a secret affidavit explaining the reasons why the redacted information cannot be disclosed and includes an appended document with the information the minister is seeking to protect. The judge assigned to the case would then review the minister's request and, where necessary, hold an in-camera *ex parte* hearing at which the minister may call upon the author of the secret affidavit to testify and explain his reasons for seeking to keep the information confidential. If the appointed judge concludes that the disclosure of the redacted information would be injurious to national security or endanger the safety of any person, this information will remain secret and will not be accessible to the applicant, counsel for the applicant or the public. However, the designated judge could order that a summary of the redacted information be provided to the applicant in order to allow the applicant to be sufficiently informed. The summary may not contain any element that if disclosed, would be injurious to national security or endanger the safety of any person (*Soltanizadeh v Canada (Citizenship and Immigration)*, 2018 FC 114; *Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948).

[33] In submissions filed on October 19, 2018, the respondent does [TRANSLATION] "not deny the possible application of section 87 of the IRPA" and indicates that [TRANSLATION] "at first sight, this is effectively a case where (within the meaning of section 83 of the IRPA to which section 87 refers), the disclosure of information or other evidence could potentially be injurious to national security or endanger the safety of any person". However, the respondent concluded that the common law police informer or informant privilege was more appropriate than the

process set out in section 87 to protect the information referred to in this matter. The respondent argued that because of the absolute nature of the privilege, which takes precedence over any procedural fairness that could be affected, there had been no need to obtain prior authorization from the Court to legitimately redact any information protected by that privilege from the tribunal record. Relying on the principles set out by this Court in *Canada (Citizenship and Immigration) v Hanjra*, 2018 FC 208 [*Hanjra 208*], the respondent added that there is no doubt that this privilege is applicable to immigration matters and to the tip-off system established in partnership with the Canada Border Services Agency. The respondent invited the Court to make a distinction from its earlier case law under which fairness required that the applicant be presented with the entire tip-off in order to provide the applicant with a fair opportunity to react to it (see *Patel v Canada (Citizenship and Immigration)*, 2012 FC 1389 at para 32). Finally, the respondent asked the Court to certify a question for the purposes of appeal in the event that the Court determined that the immigration officer's decision was unreasonable, either because the applicant was not informed of the existence of the tip-off or because he was not given a full or redacted copy thereof.

[34] Considering its finding that the decision was unreasonable, the Court does not intend to express an opinion on whether or not the privilege raised by the respondent applies in this matter. However, the Court believes that it must distinguish this case from *Hanjra 208*, cited by the respondent. In that case, the Court was asked to consider an application for judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, which ordered the Minister of Citizenship and Immigration [minister] to provide an unredacted appeal file, including the part of the file which, according to the minister, was subject

to police informer privilege. Mr. Justice Richard F. Southcott concluded that the IAD had erred in finding that it was entitled to have access to information subject to police informer privilege and that it had an obligation to review the redacted information to confirm the privilege. The decision on which the respondent relies in this matter does not concern this Court's power to review information for which privilege is claimed. On the contrary, the decision recognizes that in cases where the administrative tribunal does not have such authority, the matter would have to be referred to this Court (*Hanjra 208* at para 51).

[35] Even though the respondent does not refer to it, the Court notes that Southcott J. was simultaneously considering another application filed by the minister that stemmed from the same sponsorship file. The minister had provided the IAD with a certificate opposing the disclosure of the redacted information under section 37 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA]. The minister sought to have the Federal Court render a decision on this opposition, which led Southcott J. to make a determination on the application of police informer privilege (see *Canada (Citizenship and Immigration) v Hanjra*, 2018 FC 207 [*Hanjra 207*]. It is important to note that in the context of that application, unlike the matter we are concerned with here, counsel for the minister brought a copy of a confidential affidavit to the hearing; the unredacted notes from the GCMS were appended to this confidential affidavit, including the part concerned by the privilege. Counsel for the minister advised that he was prepared to file a copy of the confidential affidavit if the Court issued an order preserving its confidentiality. The Court received the confidential affidavit, which was filed under an order of confidentiality. Even though Southcott J. concluded that privilege applied to the redacted parts of the notes and accepted the principle that courts will decline to review privileged documents to ensure a claim of privilege,

he nevertheless recognized that the evidence or the arguments presented in the context of another case could establish the necessity of reviewing redacted passages (*Hanjra 207* at para 29).

[36] In the matter before me, the tribunal record reveals that an immigration officer had deemed that the marriage was genuine before the applicant's spouse withdrew her sponsorship undertaking in 2015. The respondent received the two-page tip-off on January 2, 2017, in the context of the second application for permanent residence. It was found to be sufficiently credible to trigger further investigation. In an interview, the applicant was not informed of the existence of the tip-off even though the immigration officer asked him questions about certain elements of this email. It was only when he received the immigration officer's notes, after filing his application for leave and judicial review, that the applicant learned of the existence of the tip-off. When he realized that the tip-off had been completely redacted when he received the CTR, the applicant raised a violation of procedural fairness in his supplementary memorandum.

[37] The Court recognizes that it is important not only to protect the identity of an informant who has been promised confidentiality, but also to protect the information that could identify the informant. However, the Court must be able to perform its duties. Whether it is an application filed under section 87 of the IRPA for cases where disclosure would be injurious to national security or endanger the safety of any person, an application under section 37 of the CEA when the objection is made on the grounds of public interest, or a motion for order of confidentiality under section 151 of the Rules, it is difficult to imagine that one party, alone, would be able to determine whether or not certain information should be disclosed to the other party when this

information was before the administrative decision-maker and might have influenced the administrative decision-maker's decision.

[38] That being said, the Court does not intend to discuss this issue any further. Consequently, the Court does not intend to certify the question proposed by the respondent.

JUDGMENT in docket IMM-993-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The immigration officer's decision dated January 18, 2018, is set aside;
3. The matter is referred back to a different officer for redetermination;
4. The style of cause is amended for the purpose of removing the name of the applicant's spouse;
5. No question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-993-18
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