Federal Court  Cour fédérale

Date: 20110513

Docket: IMM-5976-10

Citation: 2011 FC 552

Montreal, Québec, May 13, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

LARISA POLICHTCHOUCK
KRISTINA POLICHTCHOUK
NICOLE POLICHTCHOUK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), of a decision of a Citizenship and Immigration Canada (CIC) Immigration Officer (the officer), dated September 27, 2010, whereby the officer refused an application submitted by Larisa Polichtchouk (the principal applicant) and her two daughters for permanent resident status.

I. BACKGROUND

[2] The principal applicant (born January 11, 1971) and her two daughters are citizens of Israel. They came to Canada on August 4, 2007 and sought refugee protection shortly thereafter.

[3] In January of 2009, while in Montreal, the principal applicant met Mr. Anton Makievski (born June 30, 1981). Mr. Makievski, like the principal applicant, was born in the former Union of Soviet Socialist Republics (USSR) and had recently come to Canada from Israel. Both the applicants and Mr. Makievski had their respective refugee claims heard by the Immigration and Refugee Board of Canada (IRB) on the same day: March 19, 2009. The applicants' refugee claim was denied in April of 2009. The applicants filed an application for leave which was ultimately denied and a Pre-Removal Risk Assessment (PRRA) application which was denied as well. Mr. Makievski's refugee claim, however, was granted by the IRB on May 11, 2009.

[4] On June 7, 2009, the principal applicant married Mr. Makievski. Shortly thereafter, on August 27, 2009, Mr. Makievski filed an application for permanent residence in Canada based on his status as a protected person. He included the three applicants as family members on his application. The principal applicant also filed an application for permanent residence as family members of Mr. Makievski, dependent on his application for permanent residence.

[5] On September 1, 2010, the CIC sent a letter to Mr. Makievski requesting that he and the principal applicant attend at the CIC offices in Montreal for an interview on September 20, 2010.

The letter requested that Mr. Makievski bring certain documents with him, including, “Tous autres documents ou information que vous jugez pertinent pour démontrer la bonne foi de votre mariage.” Mr. Makievski and the principal applicant attended, as requested, on September 20, 2010 and were interviewed individually.

[6] On September 27, 2010, the CIC officer who had conducted the interviews and whose decision is currently under review granted Mr. Makievski’s application for permanent residence, but found that the applicants could not properly be included. The decision to refuse the applicants’ application for permanent residence is the decision that is currently under review.

II. THE DECISION UNDER REVIEW

[7] In a letter dated September 27, 2010, the officer indicated that in order to make a claim for permanent residence as a family member of a protected person, the principal applicant was required to demonstrate that the criteria set out in section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*) were satisfied. She also indicated that dependent family members included in the application were required to meet the criteria set out in section 129 of the *Regulations*.

[8] Ultimately, she concluded that the applicants had not satisfied the requirements for permanent residence. Specifically, they had not demonstrated that the principal applicant’s marriage to Mr. Makievski was genuine or not entered into primarily for the purpose of acquiring permanent

residence in Canada, as per section 4 of the *Regulations*. In November of 2010, the applicants were provided with reasons, which consisted largely of the officer's notes.

III. ISSUES

a) Did the officer err by referring to sections 124 and 129 of the Regulations in the refusal letter?
b) Was the officer's determination as to the bona fides of the principal applicant's marriage unreasonable?

IV. STANDARD OF REVIEW

[9] Questions of law are generally reviewable against the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12, at para 44; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9, at para 60 (*Dunsmuir*)). Whether or not the officer erroneously referred to inapplicable portions of the *Regulations* in the refusal letter that was sent to the applicants is a question of law to which the correctness standard should be applied. The Court must consider "whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer" (*Dunsmuir*, above at para 50).

[10] On the other hand, determinations as to whether a relationship is genuine or entered into for the purpose of obtaining status are primarily factual in nature and are therefore reviewable against the reasonableness standard (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 417, [2010] FCJ No 482, at para 14; *Yadav v Canada (Minister of Citizenship & Immigration)*, 2010

FC 140, [2010] FCJ No 353, at para 50; *Chen v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1227, [2008] FCJ No 1539, at para 8. In this regard, 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*, above at para 47).

V. ANALYSIS

a) Did the officer err by referring to sections 124 and 129 of the Regulations in the refusal letter?

[11] The applicants argue, and the respondent concedes, that the officer was wrong to refer to sections 124 and 129 of the *Regulations* in the refusal letter. Section 124 of the *Regulations* sets out the criteria for when a foreign national can be considered a member of the "spouse or common-law partner in Canada class". Section 129 of the *Regulations* outlines the criteria for when an accompanying family member of a person who makes an application as a member of the "spouse or common-law partner in Canada class" becomes a permanent resident.

[12] As the applicants rightly point out, the principal applicant did not apply as a member of the spouse or common-law partner in Canada class. Subsection 130(1) of the *Regulations* indicates that a sponsor, for the purposes of a sponsorship application in the spouse or common-law partner in Canada class, must be either a permanent resident or a citizen of Canada. Mr. Makievski was neither at the time of the applicants' application.

[13] Instead, the applicants applied as family members, dependent on Mr. Makievski's application for permanent residence as a protected person. Subsection 176(1) of the *Regulations* allows an applicant for permanent residence in the protected person category to include in their application any of their "family members":

Family members	**Membre de la famille**
176. (1) An applicant may include in their application to remain in Canada as a permanent resident any of their family members.	**176.** (1) La demande de séjour au Canada à titre de résident permanent peut viser, outre le demandeur, tout membre de sa famille.

[14] Although the officer erroneously referred to sections 124 and 129 in her refusal letter, I agree with the respondent that this error did not undermine her ultimate determination. The crux of the officer's determination was that the principal applicant's marriage to Mr. Makievski lacked *bone fides* under section 4 of the *Regulations* and that, as a result, the principal applicant could not be considered Mr. Makievski's "spouse" for the purposes of the *Regulations*. This determination would have had the same consequences regardless of whether the officer considered the applicants under section 176 of the *Regulations* or sections 124 and 129. By concluding that the principal applicant should not be considered Mr. Makievski's spouse, the officer effectively removed the principal applicant and her children from being considered "family members" vis-à-vis Mr. Makievski.

[15] The determinative question for consideration on this application, then, is whether the officer's decision as to the *bona fides* of the principal applicant's marriage was unreasonable.

b) Was the officer's determination as to the bona fides of the principal applicant's marriage unreasonable?

[16] Pursuant to section 4 of the *Regulations*, as it read at the time, the burden was on the principal applicant to prove either (1) that her relationship with Mr. Makievski was genuine, or (2) that it was not entered into primarily for the purpose of acquiring status or privilege under the *IRPA*. The officer concluded that the principal applicant had not discharged that burden. She found that it had not been demonstrated that the marriage was genuine and that, in fact, their marriage was a relationship of convenience entered into for the purposes of acquiring permanent residence in Canada.

[17] The applicants submit that the officer's conclusion in this regard was based on irrelevant issues and on the mischaracterization of material facts.

[18] First, the applicants argue that the officer disbelieved, without basis, the applicants' evidence that the decision to get married was made on May 7, 2009, four days before the IRB's positive determination in Mr. Makievski's case. Both Mr. Makievski and the principal applicant indicated in their interviews with the officer that Mr. Makievski proposed on May 7, 2009. They point to the "Avis de publication des bans" as further corroborating evidence in this regard. The applicants claim that the officer, "did not believe them for unstated reasons." I disagree.

[19] Nowhere in the officer's reasons did she indicate that she disbelieved the applicants regarding the May 7 proposal date. Instead, the officer simply noted that both Mr. Makievski and the principal applicant had insisted that the proposal had taken place on May 7, 2009, prior to the positive IRB decision. Given that the actual marriage took place only after the positive IRB decision, accepting that the proposal occurred on May 7 (after the applicants' claim for protection had been rejected) does nothing to undermine the officer's ultimate conclusion as to the lack of *bona fides*.

[20] Second, the applicants contend that the officer erred when she indicated that the principal applicant's parents and sister, despite being in Canada, had not attended her wedding. The officer erred, the applicants allege, because she failed to address the explanation provided by Mr. Makievski for the family's absence: the principal applicant's grandmother had recently died and they were in mourning. In this regard, the applicants claim that they were only informed of the interview on the day of the interview itself and, had they been informed earlier, they would have been in a position to provide the officer with additional supporting documents and information.

[21] While I agree that the absence of the principal applicant's parents and sister cannot be said to be a major negative factor counting against the *bona fides* of the principal applicant's marriage in the current case, this does not mean that the officer erred in her treatment of the evidence. Neither the officer's notes nor the affidavit evidence indicate that the principal applicant said anything about her family being in mourning. Given that the principal applicant was best situated to provide the officer with an explanation concerning her own family, and given that no satisfactory explanation

was provided by her, I cannot find that the officer erred in this regard.

[22] As to the applicants' contention that they were only given same-day notice of the September 20 interview, the record shows that, in fact, the officer had sent a letter to Mr. Makievski on September 1, 2010 informing him of the interview three weeks in advance. It should also be noted that Mr. Makievski and the principal applicant were specifically requested, in that letter, to bring documents to demonstrate the *bona fides* of their marriage.

[23] Third, the applicants allege the officer acted unfairly by not confronting Mr. Makievski with regards to his failure to notify immigration officials of his change of address in February of 2009, when he alleges he moved in with the principal applicant. Had he been given this opportunity, Mr. Makievski claims that he would have told the officer that he did not change his address officially because he was still uncertain about the relationship at that time.

[24] In note however that this explanation would no longer be true by May 2009 given that Mr. Makievski claims to have proposed to the principal applicant at that time.

[25] In any event, while Mr. Makievski's explanation might have addressed why no change of address was submitted to immigration officials in February of 2009, it would not have explained the central contradiction pointed to by the officer in her reasons: that on the application for permanent residence completed by Mr. Makievski in August of 2009, Mr. Makievski had indicated that he had moved in with the principal applicant in June of 2009 (i.e. after the IRB decisions), as opposed to in February of 2009 (i.e. before the IRB decisions) as he and the principal applicant had indicated in

their respective interviews. I agree with the respondent that it was reasonable for the officer to note this discrepancy between the documentation provided and the testimony as to the commencement of cohabitation.

[26] Fourth, the applicants submit that the officer misunderstood and misconstrued what Mr. Makievski meant by his repeated questions regarding the process and timelines for receiving permanent residence. While the officer took his questions as being solely self-directed, in fact, Mr. Makievski alleges that his questions were intended to encompass not only his own status but also that of the principal applicant and her children.

[27] However, not only did the officer note that Mr. Makievski had asked 4-5 times about his own status, as opposed to that of his wife or her children, she further indicated that, in general, Mr. Makievski's responses did not suggest that he was concerned about his new family. The applicants have not provided sufficient evidence to warrant this Court's interference with the officer's findings of fact in this regard.

[28] Fifth, the applicants contend that the officer committed a reviewable error by only addressing a part of Mr. Makievski's answer to the question about his future plans. While the officer noted that Mr. Makievski wanted to travel around the world, the applicants claim that she failed to indicate that he also stated that he had studied cooking while in Russia and planned on taking more cooking courses so that he could go into business with his wife.

[29] However, there is no reference in Mr. Makievski's application for permanent residence to the fact that he had taken cooking courses while in Russia. Furthermore, since Mr. Makievski stated that he moved from Russia to Israel in 1997, any cooking classes he did take would have been taken prior to when he was 16 years of age.

[30] I am not convinced that the officer erred in her treatment of Mr. Makievski's response to her question about future plans. The officer found that Mr. Makievski's response demonstrated a lack of seriousness with respect to the interview process. This is a determination to which deference is owed.

[31] Finally, the applicants allege that the officer erred in referring to the age difference between Mr. Makievski and the principal applicant in her reasons (Mr. Makievski being ten years younger than the principal applicant). They suggest that the officer's reference reveals that she relied on, "preconceived notions as to the age of a husband and wife."

[32] I find this argument to be without merit. Nothing in the officer's reasons indicate that she made a negative determination as to the *bona fides* of the principal applicant's marriage based on the ten year age difference. The officer merely noted that the principal applicant had said that she found the age difference to be awkward at first.

[33] Overall, I find that the officer considered many relevant aspects of the principal applicant's relationship with Mr. Makievski, including: the timing of their cohabitation, proposal and marriage, the circumstances of their wedding, demonstrated concern and shared commitment and their future

plans. The officer determined that the principal applicant had not sufficiently demonstrated that her relationship was genuine or not entered into primarily for the purpose of acquiring status. I find that there exists justification, transparency and intelligibility within the officer's decision-making process and that her decision as to the *bona fides* of the principal applicant's marriage falls within a range of possible, acceptable outcomes defensible in respect of the facts and law.

[34] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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