Federal Court  Cour fédérale

Date: 20120628

Docket: IMM-8292-11

Citation: 2012 FC 828

Ottawa, Ontario, June 28, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ZAFAR CHAUDHARY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGEMENT AND JUDGMENT

[1] The applicant applied for permanent resident status under the spouse or common law partner in Canada class. By letter dated October 25, 2011 an officer refused his application stating that he had not shown that he met the requirement in s. 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 which requires that he be "the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada."

[2] Section 124(a) of the Regulations has two components that an applicant must meet. He must establish that he is a spouse and that he cohabits with his spouse. It is open to an officer making decisions under this provision to conclude that an applicant is not a spouse because the marriage is not genuine, or to conclude that although it is a genuine marriage, there is no cohabitation. In this case, the officer specifically informed the applicant that he had failed to meet the requirement in s. 124(a) of the Regulations "because you do not cohabit with your spouse in Canada." No mention was made of the *bona fides* of his marriage.

[3] For the reasons that follow, the decision of the officer is set aside.

Factual Background

[4] Mr. Chaudhary is a citizen of Pakistan. He came to Canada in December 2008 and filed a refugee claim. He met a Canadian permanent resident and citizen of the Philippines and they were married on January 9, 2010. Thereafter he discontinued his refugee claim and filed an application for permanent residence as a member of the in Canada spousal class.

[5] Unknown to the applicant and his spouse, an anonymous person had informed Citizenship and Immigration Canada that their marriage may not be genuine. The Field Operations Support System (FOSS) notes produced in this application show the following entry on June 29, 2011:

> APPLICATION FORWARDED FROM CPC VEGREVILLE TO LOCAL CIC REGINA FOR PROCESSING. APPLICATION REQUESTED BY LOCAL CIC DUE TO CONCERNS THAT THIS MAY BE A MARRIAGE OF CONVENIENCE. PRELIMINARY INVESTIGATION BY CBSA FROM A TIP SHOWS THIS RELATIONSHIP MAY NOT BE GENUINE.

SUGGESTED THAT INTERVIEWS BE CONDUCTED
BEFORE ANY DECISIONS ARE MADE.

[6] An investigation followed and the officer who made the decision under review interviewed the applicant and his spouse separately.

[7] It is of note that the FOSS notes show that when the officer interviewed the spouse she "EXPLAINED PURPOSE OF INTERVIEW WAS TO ASSIST ME IN THE DECISION MAKING PROCESS REGARDING THE BONAFIDES OF HER MARRIAGE TO ZAFAR." Similarly, when she interviewed the applicant she noted that she "EXPLAINED TO CLIENT THE PURPOSE OF THIS INTERVIEW WAS TO GARNER INFORMATION TO DETERMINE IF HE WAS INVOLVED IN A BONSFIDE [*sic*] MARITAL RELATIONSHIP WITH HIS WIFE."

[8] The officer asked each the usual questions going to the *bona fides* of a marriage, such as how they met, when they were married, their previous lives, bank accounts, and their living arrangements. The officer noted in the record that the answers of the applicant and his wife to the questions asked were similar but noted "THERE WAS A LENGTHY PERIOD FOR THE CLIENT AND HIS SPOUSE TO GET THEIR STORIES STRAIGHT."

[9] In response to questions relating to their living arrangements, the officer was informed that the applicant had recently moved to Landis in order to take employment. He returned to his wife in Regina every two weeks or so. The officer was also made aware that his spouse was travelling to Landis the weekend after her interview to be with him.

[10] The conclusion the officer reached, as recorded in the FOSS notes, is as follows: "I DO NOT FIND THAT THIS RELATIONSHIP IS BONAFIDE; CLIENT AND SPONSOR HAVE NOT PROVEN THAT THEY ARE FINANCIALLY, EMOTIONALLY AND PHYSICALLY DEPENDENT UPON EACH OTHER."

[11] However, the decision letter sent to the applicant makes no reference to any concerns regarding the *bona fides* of the marriage; rather it states that the application is rejected "because you do not cohabit with your spouse in Canada [emphasis added]." Although the FOSS notes indicate that the officer had concluded that the marriage was not *bona fide*, the decision letter does not state that the application was rejected on that basis; rather it states that lack of cohabitation is the only reason for rejecting the application.

[12] As the decision letter gives no explanation for the conclusion that the couple are not cohabiting, one may turn to the FOSS notes. However, the FOSS notes make scant reference to the issue of cohabitation. It is not possible from the FOSS notes to determine on what basis the officer concluded that the applicant and his spouse were not cohabitating. Nor is it possible to determine what definition of "cohabit" the officer was using. Temporary and short separations, of the sort that appears to have been the situation here, are permissible: *Ally v Canada (Minister of Citizenship and Immigration)*, 2008 FC 445. The respondent recognizes this as its manual for processing in Canada spousal applications states:

> While cohabitation means living together continuously, from time to time, one or the other partner may have left the home for work or business travel, family obligations, and so on. The separation must be temporary and short.

[13] The disconnect between the decision letter sent to the applicant and the FOSS notes and the lack of any serious analysis of the cohabitation of the applicant and his spouse renders the decision unintelligible.

[14] It was submitted that notwithstanding that the decision letter makes no reference to any finding as to the *bona fides* of the marriage, the Court ought to look to the FOSS notes and uphold the decision on that basis. I am unable to accept that submission as it requires speculation by a judge as to the basis of the decision under review. The decision letter sent to the applicant is presumed to set out the reason for the rejection of his application. If it does not mention other or different reasons set out in the FOSS notes that may be because the officer inadvertently failed to include them, or it may be because the officer changed her mind as to the basis of rejection in the interval between creating the FOSS notes and writing the decision letter. The Court has no way of knowing and cannot speculate on the "real" reasons for the rejection.

[15] The decision rendered is unintelligible and thus unreasonable, and it cannot stand.

[16] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the officer's decision is set aside, the applicant's application for permanent resident status under the spouse or common law partner in Canada class is remitted to a different officer for decision, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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