Federal Court  Cour fédérale

Date: 20130307

Docket: IMM-2969-12

Citation: 2013 FC 243

Ottawa, Ontario, March 7, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SYED WAQAS ALI GILANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr Syed Waqas Ali Gilani, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act* SC 2001, c 27 [*IRPA*] of a decision made by an Immigration Officer [the Officer] at the Canada Immigration Centre, Etobicoke, Ontario, dated March 16, 2012, refusing his claim for permanent residence as a member of the Spouse or Common-law partner in Canada class, because he had not satisfied Regulation 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] which requires an

applicant to demonstrate that the applicant is the spouse of a sponsor and that the applicant cohabits with the sponsor in Canada.

[2] For the reasons that follow the application is dismissed.

Background

[3] Mr Gilani is a citizen of Pakistan who arrived in Canada in 2003. He married his sponsor, Rossana De Santis, a permanent resident of Canada, on May 24, 2006. In January, 2008, Mr Gilani's application for permanent residence was approved in principle.

[4] Later in 2008, Citizenship and Immigration Canada [CIC] received a tip, referred to as a "poison pen letter" which claimed that the applicant's marriage was one of convenience, and that the applicant was paying his sponsor as a part of the agreement. In 2011, the Canadian Border Services Agency [CBSA] conducted an investigation, either in response to the tip or as part of a broader probe, which led to the applicant's arrest in October, 2011.

[5] As a result of surveillance, CBSA found that the applicant was not residing with his spouse and sponsor, but rather with his sister and brother-in-law. CBSA also found that his cell phone bill was sent to his sister's address and his car was parked at this address and never at his sponsor's home address. CBSA also noted that his spouse and sponsor, a recipient of an Ontario Disability Support Pension [ODSP], had not advised ODSP that she was married, and still indicated her status as "single".

[6] Following the applicant's release from detention following his arrest, he returned to his sponsor's residence. CIC sent a procedural fairness letter on October 12, 2011 setting out the allegations that the applicant was not cohabiting with his sponsor. The applicant provided submissions in reply and statutory declarations from relatives and friends who attested that the applicant and sponsor were married but had been apart for a period of time in 2011.

[7] The applicant and sponsor were interviewed by the Officer on March 15, 2012.

The Decision under Review

[8] The Officer determined that the applicant had satisfied the eligibility requirements to apply for permanent resident status in the spouse and common-law partner in Canada class, but failed to demonstrate that he "cohabits with (his) sponsor in Canada" as required by Regulation 124(a) of the *IRPR*.

[9] The Officer considered the evidence from CBSA and the applicant's submissions in response to the procedural fairness letter which explained that he spent some nights at his sister's home to help with her young family and because of its proximity to his work and also because he and his sponsor had some conflicts following her miscarriage in November 2010 which led him to leave in January, 2011, but that the time apart was not intended as a separation.

[10] The Officer referred to the statutory declarations from friends and family in support of the applicant's assertion that he and his sponsor were married and that their time apart was temporary and due to the miscarriage and other reasons, including the proximity of his sister's home to his

work and his assistance to his sister and her young children, but attributed little weight to these declarations because they came from relatives and friends closely tied to the applicant and were self-serving.

[11] The Officer considered the explanations and information provided at the March 15, 2011 interview with the applicant and his sponsor, and found that the applicant lacked basic information about the sponsor's pregnancy and miscarriage, and that his answers were not consistent with his sponsor's answers. With respect to the cell phone bill, the Officer concluded that it was more likely that it was sent to his sister and brother-in-law's address because the applicant lived there, rather than because the applicant's brother-in-law was paying the bill. With respect to the sponsor's status as single for the purpose of her ODSP benefits, the Officer found that while the sponsor indicated that this was a mistake which she had taken steps to clarify, there was no evidence that she had done so.

[12] The Officer also noted that the applicant had few answers or explanations at the time of his arrest and his answers and explanations at the time of the interview were likely made up and the result of having time to prepare.

[13] The Officer clearly stated that he gave no weight to the "poison pen letter", but relied on the results of the CBSA investigation and the submissions of the applicant in response, including the interview.

[14] The Officer acknowledged that the applicant and his sponsor appeared to have resided together after his release from detention in October, 2011 and that a couple need not spend every night together in the same home. However, the Officer concluded that it appeared that the applicant and his sponsor were not cohabiting from January, 2011, or earlier, until the time of his arrest.

The Issues

[15] The applicant submits that the decision should be quashed on four grounds. First, the Officer unreasonably gave low probative weight to relevant and corroborative evidence, namely the statutory declarations of family and friends. Second, the Officer made unreasonable findings of fact with respect to the couple's cohabitation, the pregnancy and the CBSA investigation. Third, the Officer made veiled findings about the genuineness of the marriage and conflated cohabitation with genuineness. Fourth, the Officer breached principles of procedural fairness by not disclosing the details of the poison pen letter.

[16] The respondent submits that the Officer's decision was reasonable based on his assessment of all the evidence and that the applicant is, in essence, asking the court to reweigh evidence, which is not the role of the Court.

Standard of review

[17] The parties agree that in accordance with *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law. A finding of cohabitation is a factual

determination and reviewed against a standard of reasonableness: *Said v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1245 [*Said*] at para 18.

[18] The relevant provision of the Regulations governing the spouse of common-law partner class is the following:

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.

Did the Officer breach principles of procedural fairness by not disclosing the poison pen letter?

[19] The Officer clearly stated that he gave the "poison pen letter" no weight. The Officer relied on the CBSA investigation, the results of which were disclosed to the applicant in the procedural fairness letter sent in October, 2011. In addition, the contents of the poison pen letter, even though no weight was given to it, were disclosed to the applicant and his sponsor at the interview and they had an opportunity to respond. As noted by Justice Mosley in *Wang v Canada*, 2011 FC 812 at paragraph 13, a "poison pen letter" need not be disclosed if the allegations are made known to the applicant.

> **[**13] Moreover, the applicant's contention that there was a breach of procedural fairness because the letter or its particulars were not

> disclosed to the applicant or her husband is without merit. It has been held that a "poison pen letter" does not necessarily have to be disclosed to an applicant so long as the applicant is made aware of the allegations contained therein: *D'Souza v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 57, 321 F.T.R. 315 at para. 14. This is what occurred here. During the applicant's husband's interview, the visa officer explicitly indicated that they had received an anonymous letter and gave him the opportunity to respond to the visa officer's concerns: Visa Officer's Decision, Applicant's Record, pgs. 50-52. No breaches of natural justice can said to have been committed.

[20] Similarly, in this case there was no breach of procedural fairness.

Did the Officer make veiled findings regarding the genuineness of the marriage?

[21] The applicant submits that the Officer conflated the requirements that a marriage be genuine with the cohabitation requirement and made veiled findings about the genuineness of the marriage. I do not agree. While the Officer referred to the CBSA report as suggesting that the "couple is not cohabiting in a genuine marital relationship", it is clear from the CBSA investigation and from the Officer's decision as a whole that he was focused on the cohabitation requirement. In addition, it is well settled that failure to meet any of the requirements of Regulation 124 is fatal. If there is no cohabitation with the spouse and sponsor, the applicant is not eligible.

[22] As noted by Justice Russell in *Said* at para 34:

> 34 ….. If there was no cohabitation then sponsorship was not possible. There was no reason to consider whether the marriage "was not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act" as set out in section 4 of the Regulations. The issue for the Officer was not about why the marriage was entered into, but whether the Applicant and his Sponsor were cohabitating at the time of the application. I see no reasonable error on this point.

> [35] ….. Further, Justice Shore held in *Laabou*, above, at paragraph 27, that the failure to meet any of the conditions in subsection 124(a) of the Regulations is fatal to the claim. Whether or not their marriage was genuine, the fact remains – as reasonably found by the Officer – that the Applicant and his Sponsor are not cohabiting. This is sufficient to exclude him from the Spouse in Canada class.

[23] In *Mandbodh v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 216, 2010 FC 190, Justice Boivin referred to the criteria in Regulation 124 and noted, at para 11:

> **[**11] Failure to meet one of the above-mentioned conditions is fatal to the applicant's application for permanent residence. Essentially, the applicant is asking this Court to consider the concerns raised by the officer and the explanations provided by the applicant in reply and to reweigh those explanations and arrive at a different conclusion, which is not the role of this Court**.**

Did the Officer reject corroborating evidence?

[24] The applicant submits that the Officer erred in rejecting the corroborating evidence which supported the applicant's claim that he and his sponsor had been married for six years and, although they had been apart for almost a year, this was not a permanent separation and was due to the conflict following the miscarriage. The applicant submits that the Officer erred in giving the statutory declarations of family low probative weight because they were self serving and from persons with close ties to the applicant, and that the Officer failed to consider the declarations from the friends. The applicant, relying on *Ugalde v Canada (Minister of Public Safety and Emergency Preparedness*), [2011] FCJ 647 [*Ugalde*], argues that evidence can not be rejected only because it is self serving. The applicant notes that those who submitted the declarations are the best placed to describe the relationship and the reasons for the applicant's time away from his sponsor.

[25] The respondent submits that the Officer was entitled to attribute low weight to the statutory declarations and that he did not do so solely on the basis that the declarations came from family and friends with close ties. The respondent submits that the Officer analysed the contents of the declarations, referred to this information in his decision, and weighed all this information against the evidence provided in the CBSA investigation.

[26] As noted by Justice de Montigny in *Ugalde*:

> [26] However, jurisprudence has established that, depending on the circumstances, evidence should not be disregarded simply because it emanates from individuals connected to the persons concerned: *R v Laboucan,* 2010 SCC 12, at para 11. As counsel for the Respondent rightly notes, *Laboucan* concerned a criminal matter; however, immigration jurisprudence from this Court has established the same principle. Indeed, several immigration cases hold that giving evidence little weight because it comes from a friend or relative is an error.
>
> [27] For example, in *Kaburia v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 516, Justice Dawson held at paragraph 25 that, "solicitation does not per se invalidate the contents of the letter, nor does the fact that the letter was written by a relative." Likewise, Justice Phelan noted the following in *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714, at para 27:
>
> > The Officer gives little weight to other witnesses' affidavit evidence because it comes from a close family friend and a cousin. The Officer fails to explain from whom such evidence should come other than friends and family.
>
> Similarly, Justice Mactavish stated the following in *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226, at para 31:
>
> > With respect to [*sic*] letter from the President of the organization, I do not understand the Board's criticism of the letter as being "self-serving", as it is likely that any evidence submitted by an applicant will be

> beneficial to his or her case, and could thus be characterized as 'self-serving'.
>
> [28] In light of this jurisprudence, and under the circumstances, I do not believe it was reasonable for the Officer to award this evidence low probative value simply because it came from the Applicants' family members. Presumably, the Officer would have preferred letters written by individuals who had no ties to the Applicants and who were not invested in the Applicants' well-being. However, it is not reasonable to expect that anyone unconnected to the Applicants would have been able to furnish this kind of evidence regarding what had happened to the Applicants in Mexico. The Applicants' family members were the individuals who observed their alleged persecution, so these family members are the people best-positioned to give evidence relating to those events. In addition, since the family members were themselves targeted after the Applicants' departure, it is appropriate that they offer first-hand descriptions of the events that they experienced. Therefore, it was unreasonable of the Officer to distrust this evidence simply because it came from individuals connected to the Applicants.
> (emphasis added)

[27] Other cases have looked at the particular circumstances and reiterated that evidence should not be discounted solely because it is self serving. An additional passage in *Ahmed*, is relevant, where Justice Mactavish applied that principle:

> [32] That said, although there are problems with the Board's findings regarding the evidentiary value of the letter in assessing the nature of Mr. Ahmed's involvement with the Anjuman Hussainia, these findings were not patently unreasonable. The Board noted that the letter was written long after the alleged incidents took place, and made no reference to any of Mr. Ahmed's accomplishments or specific responsibilities within the Anjuman organization. Further, the Board's negative credibility finding regarding Mr. Ahmed's problems with the SSP did not hinge solely on this letter. The Board questioned several aspects of his claim, including the very existence of a tailor shop, and the extent of Mr. Ahmed's involvement in the rally. In these circumstances, it was not patently unreasonable for the Board to view this letter as being of little probative value.

[28] Similarly in *Ray v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ 927, at para 39, Justice Teitelbaum stated that while it is an error to attribute little probative value on the basis that the documents are self serving, other basis may support the low probative value attributed.

[29] The two issues raised by the applicant with respect to the declarations are related: whether the Officer assigned low probative value only because of the source of the declarations or for other reasons after an analysis of their contents; and, whether the Officer was required to specifically mention each one.

[30] The Officer referred to the statutory declarations from family and friends and he indicated that he gave "these documents" little weight. There is nothing on the record to suggest that the Officer ignored some of the declarations.

[31] The applicant submits that although the Officer says he considered all the evidence, he ignored the supporting declarations from friends. The applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ 1425, where Justice Evans noted at para 17 that "Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact."

[32] I would also note the words of Justice Near in *Karayel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1305, with respect to the applicability of this principle:

> [16] The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264, for the proposition that the Board committed a reviewable error by not at least acknowledging evidence that contradicted its finding regarding the Applicant's credibility. Cepeda is a seminal case often cited on judicial review when the Board has come to a conclusion that differs from information contained in a piece of evidence submitted by the Applicant. In this particular context it is important to remember that the general principle to be distilled from Cepeda's evolution into an all-purpose documentary evidence citation is that the more probative the evidence, the more likely the Court will find error when the Board ignores it (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, 282 NR 394 at para 9).

[33] In this case, the Officer did not make any blanket statements about the statutory declarations. The Officer referred to the declarations from family and friends both generally and specifically. The Officer referred to the statutory declarations of the family members in consideration of the applicant's explanation for spending nights at his sister's home and the Officer referred to the brother-in-law's declaration regarding the address on the cell phone bill and to the sponsor's declaration regarding her single status for the purpose of the ODSP benefits.

[34] While the Officer did not specifically refer to each of the statutory declarations from friends, he referred to his consideration of all the evidence before him. It must be recalled that the declarations were similar in content and the fact that the applicant and his sponsor had not been together since at least January, 2011 was not in dispute.

[35] The Officer acknowledged that the declarations sought to provide explanations for the applicant's time away from his sponsor, but based on the assessment of all the evidence, both in support and against, he gave the declarations low weight. As the respondent submits, the Officer was entitled to weigh all the evidence supporting the applicant with all the evidence provided by the CBSA investigation and the interviews and attribute low weight to the statutory declarations. The Court can not engage in a reweighing of the evidence.

[36] I do not agree that the Officer overlooked or ignored any of the declarations or that he assigned low probative value only because the declarations were provided by his sister and brother-in-law and by neighbors.

[37] In *Kornas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 517, Justice O'Reilly considered the reasonableness of an Officer's decision that found the applicant and his spousal sponsor were not cohabiting and found that while there was evidence supporting the claim that the couple lived together, there was also contrary evidence. The Officer's decision which canvassed all the evidence was not unreasonable as it fell within the range of acceptable outcomes, based on the facts and the law.

Did the Officer make unreasonable findings of fact?

[38] The applicant submits that the Officer erred in making unreasonable findings of fact on three significant issues; the couple's cohabitation; the pregnancy; and, the results of the CBSA investigation.

Cohabitation

[39] First the applicant argues that the Officer failed to consider the applicable Operations Manual, OP 2, which provides guidance to officers about the meaning of cohabitation and which notes that while cohabitation means living together continuously, some separations which are temporary and short are contemplated. The applicant submits that although he was staying at his sister's home after the miscarriage, he also spent time with his sponsor and her children and, as noted in their statutory declarations, their separation was temporary. The applicant further submits that the Officer failed to consider that the couple have lived together continuously since his release from detention following his arrest in October, 2011.

[40] The respondent agrees that OP 2 contemplates exceptions to cohabitation such as absences due to work or illness of a short and temporary nature, but not due to relationship problems. The Officer based his findings with respect to cohabitation on all the evidence. Given that the Officer found that the sponsor had not been pregnant and had not had a miscarriage, the explanation cited for the separation was not accepted. Moreover, a period apart of over 10 months is not a short period and it was not assessed by the Officer to be temporary.

[41] The respondent also submits that the FOSS notes, which were considered by the Officer and form part of the reasons for the decision, include information which reasonably led to the finding that the couple were not cohabiting, all of which was set out in the procedural fairness letter.

[42] The Officer reasonably concluded that the applicant was not cohabiting with his sponsor. At his interview, the applicant indicated that he was "gone" after January, 2011. His explanations for

why he resided with his sister and brother-in-law were not accepted as credible given the evasive answers he provided at the time of the arrest and the inconsistency in his responses at the interview with those of his sponsor. The Officer did not accept that the sponsor had been pregnant and, therefore, the explanation for the time apart had no foundation and no other credible reason was offered. The sponsor had not taken steps to advise ODSP that she was married and ODSP records confirmed that she remained listed as single. The applicant had admitted at his interview following his arrest that he had said that he did not support her so that she could continue to be eligible for the ODSP benefits.

The pregnancy

[43] The applicant submits that there was no evidentiary basis for the Officer to doubt that the sponsor had been pregnant and had a miscarriage. The applicant submits that the hospital emergency visit due to abdominal pain supports the sponsor's condition. In addition, both the applicant and the sponsor responded to the Officer's questions about the pregnancy at the interview.

[44] The respondent submits that there was no medical evidence to corroborate the assertion that the sponsor was pregnant and had miscarried. The hospital record merely recounted that the sponsor had said she had a positive pregnancy test, followed by a negative test. The purpose of the hospital visit was not due to the miscarriage. In addition, the applicant and respondent provided inconsistent answers at the interview with respect to their intention to have children.

[45] The Officer's finding that the sponsor had not been pregnant is not unreasonable. Although the Officer does not specifically refer to the lack of reliable medical evidence that one would expect

could be provided to establish that the sponsor had been pregnant or had miscarried, the Officer noted that he was not satisfied based on "the documentation provided". In addition, the sponsor and the applicant had very different responses regarding how long they had been attempting to conceive.

Over reliance on the CBSA investigation

[46] The applicant submits that the Officer placed too much reliance on the CBSA investigation but did not provide any details or dates of surveillance to the applicant.

[47] As noted by the respondent, all the allegations arising from the CBSA investigation were set out in the procedural fairness letter and the applicant provided submissions in response, therefore, there was no breach of procedural fairness.

[48] With respect to the applicant's submission that the officer overly relied on the CBSA investigation, it is not the role of the Court to reweigh the evidence. The CBSA letter and the FOSS notes were considered by the Officer and the Officer was entitled to place more probative value on this evidence than on the evidence provided by the applicant.

Conclusion

[49] The Officer's decision that the applicant failed to demonstrate that he "cohabits with (his) sponsor in Canada" as required by Regulation 124(a) of the *IRPR* was reasonable. While there was some conflicting evidence, the officer justified his conclusions, which were noted in the reasons, and were based on his assessment of all the evidence.

[50] The judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2969-12
STYLE OF CAUSE:	SYED WAQAS ALI GILANI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 22, 2013
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