

Federal Court



Cour fédérale

Date: 20171208

Docket: T-283-17

Citation: 2017 FC 1130

Ottawa, Ontario, December 8, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

S. L.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision [Decision] of the Canadian Human Rights Commission [the Commission] dated January 31, 2017, made pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the CHRA], in which the Commission

determined that an inquiry by the Canadian Human Rights Tribunal [the Tribunal] into the Applicant's complaint against Citizenship and Immigration Canada [CIC] was not warranted.

[2] The Applicant, who was unrepresented, is seeking an order to set aside the Decision on the grounds that (1) he was denied procedural fairness, (2) the Commission failed to deal with his complaints with respect to the *Privacy Act*, RSC 1985, c P-2 [*Privacy Act*], violations when it agreed to consider the issue of the Office of the Privacy Commissioner declined jurisdiction, and (3) the Commission unreasonably concluded that the factors applied by CIC to demonstrate a *bona fides* conjugal relationship did not adversely discriminate against him because of his disability, when he was prevented from fulfilling many of these factors because he would lose his entitlements to Ontario disability benefits if outside of the country for more than seven days in a year.

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

II. Background

[4] The Applicant filed a complaint with the Commission against CIC, with respect to CIC's refusal of the sponsorship of his conjugal spouse Mr. R. L., a Filipino national. The complaint was first received by the Commission on July 18, 2012. The alleged grounds were sexual orientation and disability.

[5] In March 2008, the Applicant met Mr. R. L. in an online chat room. Between January 2009 and January 2010, the Applicant made three separate visits to the Philippines and spent a total of 25 days with Mr. R. L.

[6] During this period of time the Applicant was a resident of the Province of British Columbia until he moved to Ontario in the middle of 2010. He was in receipt of disability benefits in both provinces as a person suffering from the hepatitis C virus [HCV]. As a condition of being a recipient of disability benefits, the Applicant was not permitted to leave the province paying the benefits for periods of more than 7 or 30 days, without the risk of losing his entitlement to the benefits.

[7] In March 2009, CIC refused Mr. R. L.'s application for a temporary resident visa.

[8] In April 2010, the Applicant sought to sponsor Mr. R. L. to immigrate to Canada as a permanent resident, as a member of the family class. An officer can approve a sponsorship application only if the sponsor satisfies the requirements continuously from the day the application was filed until the officer decides the application.

[9] On June 10, 2010, the Applicant's sponsorship application was approved and Mr. R. L.'s permanent resident visa application was found to meet the requirements for completeness. The application was forwarded to the Canadian Embassy in Manila for further processing.

[10] On July 20, 2010, a visa officer [the Officer] sent a letter to Mr. R. L. informing him that he was to attend an interview and bring documentation as proof of the relationship with the Applicant. On October 21, 2010, Mr. R. L. attended the interview in the Philippines with the Officer.

[11] During the interview Mr. R. L. was asked questions about the Applicant, namely why he was not employed, to which the answer given was that he was prevented from working because of a health issue described as a medical condition related to liver problems that he had since childhood. Mr. R. L.'s further evidence was that they had not been physically intimate and did not have physical/sexual relationship.

[12] The Officer outlined the factual findings as follows:

- Mr. R. L. and the Applicant (Sponsor) had only met three times in 12 months (January and February 2009, in Manila on each occasion for 7 days, and January 2010 in Bangkok for 11 days), and their time together was brief;
- there was no cohabitation between the two parties;
- Mr. R. L. admitted there was no physical intimacy between the two parties;
- Mr. R. L. and the Applicant (Sponsor) have never lived together in a “married—like state” nor had they combined their income both economically and socially;
- there was no mutual interdependence;
- Mr. R. L. had not demonstrated that he was knowledgeable of the Applicant’s (Sponsor’s) background; and

- it also appeared that Mr. R. L.'s concern was to enter Canada and not to live on a permanent basis with the Applicant (Sponsor).

[13] The Officer noted that the information provided during interview merely confirmed the information on file. Upon considering all the information provided, the Officer was not satisfied that Mr. R. L. met the definition of a "conjugal partner". As such, the Officer did not consider Mr. R. L. to be a member of the Family Class, and refused the application.

[14] In December 2011, the Applicant and Mr. R. L.'s relationship ended.

[15] The Commission first received the Applicant's complaint on July 18, 2012.

[16] After being notified of the complaint, CIC initially raised objections to the Commission dealing with the complaint because the Officer's decision was before the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. The Commission prepared a section 40/41 Report, and communicated to the parties that the Commission would not deal with the complaint on the basis that (1) the appeal of the refused sponsorship was being handled through the appeal to the IAD and (2) the issue regarding breach of the Applicant's privacy rights was being considered by the Ontario Privacy Commissioner [OPC]. However, during the disclosure period, the complainant advised that he had withdrawn his appeal before the IAD because his relationship with Mr. R. L. had ended. Similarly, the OPC declined to consider the Applicant's complaint. Consequently, the section 40/41 Report was not placed before the Commission and the complaint was transferred to the Investigations Division.

[17] An Investigation Report [First Report] was prepared and disclosed to the parties on March 4, 2014. In its letter of decision, which was sent to the parties on June 9, 2014, the Commission accepted the recommendations in the First Report and decided, pursuant to subparagraph 44(3)(b)(i) of the CHRA, to dismiss the complaint. Among the recommendations made by the Investigator was that there was no violation of the Applicant's privacy rights in that the issues raised involved exemptions from disclosure, which were not within the jurisdiction of the Commission.

[18] The Applicant sought a judicial review of the Commission's decision. The judicial review was heard by the Federal Court. In its decision of July 8, 2015 (2015 FC 835), the Federal Court granted the Applicant's application, set aside the decision of June 4, 2014 and returned the matter to the Commission for reinvestigation by another investigator. The Judgment further stipulated that upon completion of the investigation, the Investigator's new Report was to be submitted to the Commission for a fresh reconsideration of whether an inquiry into the Applicant's human rights complaint by the Tribunal was warranted.

[19] The presiding judge determined that the unrepresented Applicant was denied procedural fairness because the CIC did not respond appropriately to the Applicant's inquiries. Paragraphs 27 and 28 of the Court's decision are particularly relevant, and read as follows:

[27] Before me, Mr. [S. L.] argued that the visa officer's application of the standard criteria for the existence of a conjugal relationship to him and Mr. [R.L] resulted in discrimination. He contends that it was impossible for him to cohabit with Mr. [R.L] and likewise impossible for him to visit for more than 30 days in a year as the requirements associated with continued receipt of his provincial disability benefits prevented him from being absent from Ontario for more than 30 days per year. Similarly, CIC had

denied Mr. [R.L.] a visitor's visa. These assertions were not clearly made to the Commission Investigator before she penned her Report. Likewise, she did not have evidence before her of what Mr. [R.L.] claimed occurred during the interview with the visa officer.

[28] Had Ms. Falconi, the CIC Investigator, been aware of these facts, she might have reached a different conclusion regarding the lack of evidence in support of a *prima facie* case of discrimination as the requirements for cohabitation or a greater number of visits may have adversely impacted Mr. [S. L.] due to his disability. Further, Mr. [S. L.]'s case before the Commission would have been strengthened had he filed an affidavit from Mr. [R.L.] to establish that the visa officer was hostile towards Mr. [R.L.], that Mr. [R.L.] in fact told the visa officer that he and Mr. [S. L.] had been sexually intimate with each other and that Mr. [S. L.] had been providing Mr. [R.L.] with financial support.

[Emphasis added and some names rendered anonymous]

[20] On January 19, 2016, the Investigator contacted the Applicant to inquire as to whether he had an affidavit from Mr. R. L. After advising that he did not have one, discussions and correspondence ensued between the Applicant and the Investigator. The Applicant claims that procedural fairness was denied to him in the result that no further evidence was provided by Mr. R. L., including none regarding the issues referred to in 2015 FC 835. This issue was considered at length during the hearing. After the Respondent's submissions, the Applicant conceded that no procedural unfairness occurred and abandoned the issue. The Court is satisfied that no procedural unfairness occurred based on the record and submissions of the parties.

[21] The Investigator concluded the Investigation Report [Second Report] on September 19, 2016 and recommended, pursuant to subparagraph 44(3)(b)(i) of the CHRA, that the Commission dismiss the complaint because further inquiry was not warranted.

[22] On January 31, 2017, after reviewing the Investigator's Second Report, which had previously been disclosed to the Applicant, as well as the submissions from the parties filed in response to the Second Report, the Commission dismissed the complaint.

III. Impugned Decision

[23] The Commission decided, pursuant to subparagraph 44(3)(b)(i) of the CHRA, to "dismiss the complaint because having regard to all the circumstances of the complaint, further inquiry is not warranted". The Second Report highlights that the evidence does not support that CIC treated the complainant any differently because of his sexual orientation and/or disability:

80. The evidence gathered reveals that in the course of determining the genuineness of the relationship, the visa officer did ask [Mr. R. L.] questions pertaining to his sexual relationship with the complainant, as well as details about the complainant's disability. However, this appears to have been contextually specific to their individual circumstances. The respondent is required by law to do an assessment of the genuineness of the stated relationship between the Sponsor and the foreign national applicant. Intimate personal questions are asked of all applicants regardless of their sexual orientation and/or disability. Moreover, the respondent has shown that it was a totality of factors that failed to satisfy the visa officer that Mr. R. L. and the complainant had a genuine conjugal relationship, and this is what ultimately led to the rejection of [Mr. R. L.'s] permanent resident visa.

81. The evidence gathered also reveals that assessing the genuineness or *bona fides* of a relationship are required as per section 4(1) of the respondent's Regulations. One of the respondent's objectives with respect to the family class applications is family reunification. Not requiring sponsors and applicants to prove that their relationship is genuine could jeopardize the integrity of the family class program. In the present case the evidence gathered does not support that the respondent treated the complainant any differently on the basis of his sexual orientation and/or disability.

IV. Legislative Framework

[24] Subparagraph 44(3)(b)(1) of the CHRA is applicable in these proceedings, as well as subsection 4(1) of the *Immigration and Refugee Protection Regulations* [IRPR] , SOR/2002-227.

CHRA, Section 44(3)(b)(i)	LCDP, Paragraphe 44(3)(b)(i)
44 (3) On receipt of a report referred to in subsection (1), the Commission	44 (3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission
	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
[...]	[...]
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
[...]	[...]
IRPR, Section 4.1	RIPR, Paragraphe 4
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 foreign national has begun a new conjugal relationship with that person after a previous marriage, common-law partnership or conjugal partnership with that	4.1 Pour l'application du présent règlement, l'étranger n'est pas considéré comme l'époux, le conjoint de fait ou le partenaire conjugal d'une personne s'il s'est engagé dans une nouvelle relation conjugale avec cette personne après qu'un mariage antérieur ou une relation de conjoints de fait ou de partenaires

person was dissolved primarily so that the foreign national, another foreign national or the sponsor could acquire any status or privilege under the Act.

conjugaux antérieure avec celle-ci a été dissous principalement en vue de lui permettre ou de permettre à un autre étranger ou au répondant d'acquérir un statut ou un privilège aux termes de la Loi.

V. Issues

[25] The following issues arise in this application:

1. Whether the Commission's Decision is reasonable in concluding that the Officer did not treat the Applicant in an adverse differential manner because of his disability and/or sexual orientation, to wit:
 - a. Whether the Officer's application of the standard criteria for the existence of a conjugal relationship between the Applicant and Mr. R. L. Mr. R. L. resulted in adverse discrimination because of his disability?
 - b. Whether the Officer discriminated against the Applicant because of his disability and sexual orientation with discriminatory questions put to Mr. R. L.?
 - c. Whether the Officer failed to consider the Applicant's complaints regarding breach of his right to privacy regarding his disability in rendering its decision?

VI. Standard of Review

[26] There being no longer any issue of procedural fairness, while thoroughness of the investigation is similarly not being questioned, the standard of review to be applied to the Decision is reasonableness. The analysis will consider “the existence of justification, transparency and intelligibility within the decision-making process” as well as if the Decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: see *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47.

[27] Mr. Justice Diner, in the recent decision of *Southern Chiefs Organization Inc v Dumas*, 2016 FC 837 at paras 26–28, described the wide discretion and low threshold of review applying to consideration of the Commission’s decision not to refer the matter to the Tribunal as follows:

[26] The Commission is “not an adjudicative body... [r]ather, the role of the Commission is to carry out an administrative and screening function” (*Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 (CanLII) at paras 60-61 [*Air Canada*]). In the words of the Supreme Court in *Cooper v Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854 at para 53 [*Cooper*]:

...the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts.

[27] This is a low threshold, requiring only that the Commission determine whether there is a reasonable basis in the evidence for proceeding to the next stage (*Cerescorp* at para 51). Importantly, in suggesting that further inquiry into the complaint is warranted, the Commission is “not making any final determination about the complaint’s ultimate success or failure” (*Halifax (Regional*

Municipality v Nova Scotia (Human Rights Commission), 2012 SCC 10 (CanLII) at para 24).

[28] The Commission is also entitled to a significant degree of latitude in the performance of its functions: “it may be safely said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission” (*Bell Canada v Communications, Energy and Paperworks Union of Canada*, 1998 CanLII 8700 (FCA), [1999] 1 FCR 113 at 137 (FCA)).

VII. Analysis

A. Procedural Fairness

[28] As noted, the Applicant abandoned his procedural fairness arguments, with good reason in the Court’s opinion. There was no basis for the Applicant’s failure to file an affidavit from Mr. R. L., which the Federal Court indicated would be appropriate to correct the procedural fairness failure of the first investigation. It is also not clear that Mr. R. L. would have cooperated with the Applicant since they no longer considered themselves a couple. The result is that there is no evidence to challenge the Officer’s conclusions based on the issues referred to in the Federal Court 2015 FC 835 decision that the Officer was hostile towards Mr. R. L., that Mr. R. L. advised the Officer that he and Mr. S. L. had been sexually intimate with each other, and that Mr. S. L. had been providing Mr. R. L. with financial support. The Investigator did not err in failing to take up any of the Applicant’s evidentiary challenges regarding, for example, the probative value of the Computer Assisted Immigration Processing System [CAIPS] notes.

[29] Even if this is not the case, it is highly doubtful that the Investigator or the Court would have preferred the affidavit evidence of Mr. R. L. over that contained in the CAIPS notes without some corroborative reason to reject their accuracy. The notes appear to constitute proper business records, and therefore are accepted for the truth of their contents. Generally, decision-makers prefer the evidence of independent witnesses with no self-interest in the outcome, unless there is good reason not to accept it over the evidence of the self-interested parties. The one-page screenshot, which on its face is somewhat ambiguous and lacking other pages of the post-interview discussion to provide context, even if corroborated by Mr. R. L., would at best only raise some concerns.

[30] The Court points out that this type of dispute, as to what occurred during interviews, could be largely eliminated if interviews were recorded and transcripts were available. The CIC Procedure Policy indicates that there is no requirement to accept the request by an interviewee to record the interview, which the Court understands to mean that recordings are not generally made of these interviews. In the Court's view, this policy should be reconsidered, at least for face-to-face interviews which may be determinative of a spousal sponsorship application and be subject to judicial review. This would eliminate, or at least diminish, much of the controversy over the reliability of the evidence.

B. Reasonableness of the Decision

(1) Did the Applicant suffer a discriminatory adverse impact by the application of factors used to determine a genuine conjugal relationship of some permanence?

(a) *The Applicant did not advise the Officer that his travel abroad was limited by the risk of loss of disability benefits*

[31] The Court concludes that the Applicant did not present evidence to the CIC Officer that the limitation on travel due to potential loss of entitlement to disability benefits was a factor in limiting the time spent abroad with Mr. R. L.

[32] A collateral question arose on this issue during the hearing concerning whether there was evidence in the record confirming that the Applicant was in receipt of disability payments during the relevant period in question. The only evidence of disability payments in the record commenced at the beginning of 2011, after the decision rejecting the application. As the Applicant was unrepresented, he was provided with an opportunity to file further evidence. He did so, and although the evidence of residency in British Columbia, for the period up to the application in April 2010 lacked particularity, it is considered sufficient for its purpose.

[33] Despite this evidence, the Court is satisfied that the Applicant did not bring to the CIC's attention that his travel time abroad had to be limited to avoid loss of his entitlement to disability payments. It appears that these facts were first brought to light in the Federal Court matter. At that time, the Applicant contended that he suffered adverse discrimination because it was

impossible for him to cohabit with Mr. R. L. or to visit him for more than 30 days in a year due to the requirements associated with the continued receipt of provincial disability benefits.

[34] There is no evidence of the risk of travel abroad compromising the Applicant's disability benefits being raised before the Officer. Neither the CAIPS interview notes, nor the screenshot evidence makes any mention of limitations on travel caused by the potential loss of disability benefits.

[35] On the related point of the Applicant's disability generally, there is no mention in the CAIPS notes of disability, *simpliciter*, being a factor limiting his time spent abroad with Mr. R. L. Rather, the notes indicate that Mr. R. L. told the Officer that the Applicant was healthy during his visits. The CAIPS notes indicate that health issues were mentioned by Mr. R. L. only as a reason why the Applicant did not work in Canada. The Applicant claims that this evidence is contradicted by the screenshot evidence of internet messages between Mr. R. L. and him, in which Mr. R. L. stated that he advised the Officer that the Applicant could not stay longer in the Philippines because of health conditions due to his liver problem. This version is contradicted by other statements that the Applicant was healthy.

[36] Even if the screenshot evidence is accepted over the CAIPS notes, there is no mention that the Applicant's travel was limited because of the risk of loss of disability benefits, which was the focus of the Second Report following the Federal Court decision.

[37] The Applicant attempts at paragraphs 85 to 88 of his memorandum to marry three facts to make a case by inference that the provincial disability rules prevented him from spending more time with Mr. R. L: (1) travel outside British Columbia and Ontario placed his disability benefits at risk; (2) the Officer was aware that he was in receipt of disability benefits; and (3) his health was a factor in determining the length of his trips. The three comments do not, however, add up to a conclusion that the Officer was aware, or should have been aware, that conditions attaching to disability benefits limited the conjugal time together.

[38] In particular, the culminating evidence in support of the Applicant's failure to mention to CIC the loss of disability payments as limiting the couple's time spent together is demonstrated by its glaring omission in the Applicant's initial complaint letter of January 25, 2011 to CIC. Rather, he contested the sponsorship refusal based upon the limited time spent together arguing that "as a result of my disability I suffer from extreme fatigue and long trips are not possible for me". If the potential loss of disability benefits was the cause for the Applicant spending so little time with Mr. R. L., the Court is of the view that it should have been front and centre in the first complaint letter, where no mention of it is to be found. There is also no evidence corroborating the Applicant's medical condition as a factor limiting his travel abroad.

[39] Without the evidence that the risk to disability payments was made to the CIC, there is no basis for the Applicant to claim discrimination on the basis of the CIC failing to consider this issue as a factor bearing on its decision. The Applicant had the onus of providing evidence concerning restrictions on travel relating to his disability. Disabilities do not necessarily entail limitations on travel or spending time together with the person being sponsored. If not raised by

the sponsor or person being sponsored, there is no reason for CIC to take cognizance of them in applying the factors normally considered in determining the genuineness of a relationship.

[40] Nevertheless, the Investigator does not appear to have recognized that the explanation of the potential loss of disability payments was not provided to the CIC. Presumably, she was proceeding based upon the Federal Court decision. She appears to adopt the conclusion that “the requirements associated with the continued receipt of these benefits prevented him from being absent from the province for more than 30 days per year”. It is to be noted that the Applicant challenged her finding of 30 days per year, condemning that 7 days per year was the applicable time, even though the Officer was relying upon the Federal Court facts. Whatever the limit on time abroad, the Investigator concluded that the evidence “suggests that there may be a link between the respondent’s refusal of Mr. R. L.’s application and the complainant’s disability”.

[41] Given that the Second Report proceeded on the factual foundation of the Applicant’s discrimination complaint of time the couple spent together relating to his potential loss of disability payments, the Court will consider the Applicant’s submissions on this premise.

(b) *Adverse impact by failing to consider limitations on travel due to a potential loss of disability benefits*

[42] The Court finds no error in the Second Report citing the decision of *M(K) v M(H)*, [1992] 3 SCR 6 at paras 59 and 61 and the factors described therein as being relevant to demonstrating a “conjugal relationship of some permanence”. This finding must be established on a balance of probabilities of the evidence in relation to the factors of whether and to what extent the

individuals are financially, socially, emotionally and physically interdependent and share household related responsibilities, and where they have made a serious commitment to one another.

[43] The Court further accepts that assessing the genuineness or *bona fides* of a relationship is a legal and valid requirement, necessary to protect the integrity of the family class permanent residency program. Deception may be practiced on the system by “marriages of convenience”, or “relationships of convenience”. They can be the result of either collusion between a Canadian sponsor and the foreign national, or deception of the sponsor by a foreign national, using the relationship to gain status in Canada. Accordingly, CIC officers are required to assess the *bona fides* of a relationship contextually considering all the circumstances pertaining to the relationship.

[44] The principal issue in this case, as described in the Federal Court decision, is whether the Officer relied upon factors normally applied to assess the genuineness of a marriage that adversely impacted the Applicant in a discriminatory fashion due to his disability which limited the time the couple could spend together.

[45] The Investigator in the Second Report appears not to have specifically addressed whether the Officer’s reliance on the limited physical time together as a ground to reject the sponsorship application qualified as a discriminatory adverse impact on the Applicant, beyond the comment described above that “there may be a link between the respondent’s refusal of Mr. R. L.’s application and the complainant’s disability”. The extent of time spent together that is normally

available to them would be a pertinent factor in a conjugal relationship. There is an expectation that the couple in a genuine relationship would want to spend as much time as possible together because of their mutual affection, and on a practical basis, to get to know each other in terms of their compatibility of being able to live together.

[46] It is the Court's view that once it is explained that a sponsor must limit his time spent with the foreign national abroad because of a disability, which would include indirect limitations of loss of essential disability benefits, the brevity of time spent together should not be cited as a negative factor in rejecting the sponsorship application. Based upon the Applicant's proven explanation, time spent together should have been instead disregarded as a factor having any bearing on the decision.

[47] By this latter point the Court is expressing its view that every sponsorship application requires evidence demonstrating the genuineness of the relationship. The *bona fides* of the relationship of a disabled sponsor that affected the time the couple spent together would be evaluated against the same threshold as any other couple in a sponsorship application. The Court recognizes that to a certain extent this could make the proof of establishing a genuine relationship more challenging where disability prevents time spent together. The contextual evidentiary reality is that the physical time spent together provides greater opportunities to demonstrate the genuineness of a relationship of some permanence. However, this can be made up for by other means, such as through interviews with CIC which allow the applicant and sponsor to convey the sincerity and genuineness of their relationship, bearing in mind that time spent together is not a factor.

[48] While the Investigator did not specifically address the issue of limited time together, she nevertheless implicitly took stock of it and concluded that it was not a discriminatory factor in the Officer's decision, as described at paragraph 74 of the reasons as follows:

Nevertheless, the evidence gathered reveals that it was not simply the lack of time spent together that led to the visa officer to refuse the application, but rather Mr. R. L.'s disingenuous responses to some of her questions (i.e. "...this is his opportunity to go to [Canada] and find employment, he wants to grab this opportunity.").

[49] The Investigator's conclusion is consistent with the Officer's decision in the CAIPS notes: "Based on all/all information provided, I am not satisfied Subj [identified as Mr. R. L.] meets the definition of a Conjugal Partner, and as such, he is not considered a member of the Family Class. The application is refused." Given the direct evidence out of the mouth of Mr. R. L. raising significant concerns as to the genuineness of the relationship, such evidence would weigh very heavily against accepting the sponsorship application, and not for any reason relating to the Applicant's disability.

[50] The Court agrees with the Second Report that the Applicant failed to demonstrate that he and Mr. R. L. were in a genuine conjugal relationship largely because Mr. R. L. was using the relationship to gain an immigration status in Canada, along with other reasons unrelated to the Applicant's disability. As such, the Investigator's conclusion is reasonable in that the Officer's decision cannot be considered discriminatory.

(2) Adverse differential treatment due to sexual orientation and disability

[51] The Investigator summarized her conclusions with respect to discrimination in relation to sexual orientation and disability at paragraph 80 of the Second Report, which has been cited at paragraph 23 above.

[52] The Applicant complains that the factors used were discriminatory as being heteronormative and inappropriate to a same-sex conjugal relationship, including being embarrassing regarding the parties' sexual intimacy. He also challenges the evidence in the CAIPS notes that they did not have sexual relations or that HCV was not mentioned as an issue in the degree of the couple's physical intimacy. The Investigator did not take up this issue. The Court finds no error in failing to respond to this last issue, as the evidence does not support that it was raised before the Officer.

[53] The Applicant takes particular exception to the question to Mr. R. L. of whether they had "consummated" the relationship, to which he answered no. He argues that the term, when restricted to anal sex, (which he also describes as sexual intercourse in his submissions), has no relevance to the gay male experience, which is marked by versatility and negotiation between the parties. In this context, he argues that using terms such as "consummate" and "married-like" were discriminatory to gay males. The Investigator's response was that the questions were contextually specific to their individual circumstances.

[54] The Applicant provided no objective evidence to support his contentions on the meaning of the terms and their applicability to a gay male conjugal relationship. Admittedly, degrees of intimacy in terms of sexual relations as evidence of commitment to the relationship, with sexual intercourse recognized as the most intimate, is obviously a controversial subject without the assistance of objective evidence that can provide some normative standards to judge the issue. However, the individuals in this matter appear to have recognized the concept of degrees of sexual intimacy in terms of commitment. Mr. R. L. indicated that they had not taken it to the next level, which the Applicant recognized was sexual intercourse, because the Applicant wished to delay this until marriage, a symbol of the commitment to the intended long-lasting nature of the relationship. It also appears that Mr. R. L. had no difficulty understanding the question concerning consummation, even if its meaning had to be explained to him, as the Applicant contends was the case.

[55] In any event, the Officer's conclusion was based upon the lack of any physical intimacy and is reasonably supported by the CAIPS notes. The Applicant's submission that their physical relationship was complicated by his HCV status is not supported by the notes. There is no indication that Mr. R. L. was aware of the Applicant's HCV disability, referring only to his childhood liver condition as an explanation why he was not employed.

[56] The Applicant also objected to the use of the term "married-like" as a summary comparator of factors by the Officer. It would appear that there are many similarities in the factors across the different regimes of conjugal relationships, whatever the nature of the relationship. Indeed, marriages occur between same-sex partners who have claimed

discrimination in the past when denied this right. Mr. R. L. referred to marriage as a reason why the Applicant wanted to delay proceeding to the next level with regard to sexual relations.

[57] Comparing same-sex conjugal relationships to marriages as an analogy, i.e. by use of the term “like”, would appear to speak to the requirement to demonstrate a likelihood of permanence in the relationship. This is proven by evidence of mutual commitment through the various shared activities and conduct of the couple, (shared personal behaviour, shared social activities, mutually agreeable financial arrangements and economic support, and perceptions in the community that the two are a couple) many of which, by analogy, are found in marriages. In the context of demonstrating a *bona fides* conjugal relationship, the Court does not find the term “married-like” to constitute an unreasonable generalized comparator that discriminated against the Applicant to determine the genuineness of a gay male conjugal relationship.

[58] In discussing conjugal relationships, the Court further agrees with the conclusion of the Second Report that personal questions are asked of all applicants regardless of their sexual orientation and/or disability, and that in this case they were contextually specific to the circumstances of the parties. Intimate questions are to be expected, and indeed, the Officer advised Mr. R. L. at the commencement of the interview that he would be posing personal and sensitive questions.

[59] The Court also finds no error in the Respondent being unable to provide statistics on the number of applicants accepted as permanent residents whose sponsor is a person with a disability. Having a disability does not appear to be a factor playing often into whether a

Canadian citizen or permanent resident is eligible to sponsor. Moreover, as indicated there is no error in concluding that the genuineness of the relationship must be established in all conjugal relationships, whatever the nature. The evidence also does not support a conclusion that any systemic discrimination exists regarding same-sex conjugal relationships.

[60] The Applicant also objected to the questions put to Mr. R. L. concerning finances related to his disability, particularly regarding the Applicant's financial means to travel abroad when unemployed. The Applicant contends that he was indirectly being accused of fraud in relation to his disability.

[61] The Court agrees with the conclusions in the Second Report that the questions were contextually specific and appropriate. The questions were relevant, if for no other purpose than establishing Mr. R. L.'s knowledge of the financial elements of their relationship, which could be either a positive or negative factor in establishing the relationship's genuineness.

[62] Moreover, one of the concerns in sponsored partner applications is collusion by sponsors to assist sponsored individuals to obtain permanent residency in Canada. Questions pertaining to the circumstances which appear out of the ordinary, such as the Applicant being able to travel abroad and provide financial assistance to Mr. R. L. while on social assistance, are not inappropriate. Indeed, issues of genuineness and *bona fides* require detailed and inferential questioning, such that a fair degree of leeway should be allowed, so long as the questions have some possible relevance to these issues.

(3) Complaints regarding breach of right to privacy

[63] The Second Report did not include discussion of complaints involving the CIC's alleged failure to disclose certain documents to the Applicant following an access to information request. These were dealt with and rejected in the First Report.

[64] The Court agrees that the proper recourse for an alleged misapplication of exemptions under the *Privacy Act, supra* is a complaint with the OPC. It was therefore, reasonable for the Commission not to investigate these allegations.

VIII. Costs

[65] No costs are awarded since there were relevant aspects of the Applicant's case regarding restrictions on travel arising from the receipt of disability benefits that were not specifically addressed in the Second Report and which merited bringing the application.

IX. Conclusion

[66] The Court concludes that the Commission's decision, namely that according to all the circumstances an inquiry was not warranted, is reasonable.

[67] The application is dismissed without costs.

JUDGMENT for T-283-17

THIS COURT'S JUDGMENT is that the application is dismissed without costs. The style of cause is hereby amended for the purpose of maintaining the anonymity of the parties.

"Peter Annis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-283-17

STYLE OF CAUSE: S. L. v. THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 17, 2017

JUDGMENT AND REASONS: ANNIS J.

DATED: DECEMBER 8, 2017

APPEARANCES:

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FOR THE APPLICANT
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