Federal Court  Cour fédérale

Date: 20181113

Docket: IMM-4619-17

Citation: 2018 FC 1130

Ottawa, Ontario, November 13, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MARIA LUISA CASTILLO-MALUNES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Maria Luisa Castillo-Malunes, was born in the Phillipines. She became a permanent resident of Canada in January 2013. She has applied for judicial review of a decision [the Decision] of the Immigration Appeal Division [IAD] finding that her spouse is not a member of the family class pursuant to section 117(9)(d) of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [the IRPR]. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] The Applicant seeks an order setting the Decision aside and remitting the matter for redetermination by a different officer. For the reasons that follow the application is allowed.

II. Relevant Legislation

[3] The relevant provisions of the IRPR state the following:

Immigration and Refugee Protection Regulations, SOR/2002-227	Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)
1(1) The definitions in this subsection apply in the Act and in these Regulations.	1 (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement.
common-law partner means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year. (*conjoint de fait*)	conjoint de fait Personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)
2 The definitions in this section apply in these Regulations.	2 Les définitions qui suivent s'appliquent au présent règlement.
[…]	[…]
conjugal partner means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at	partenaire conjugal À l'égard du répondant, l'étranger résidant à l'extérieur du Canada qui entretient une relation conjugale avec lui depuis au moins un an.

least one year. (*partenaire conjugal*)	(*conjugal partner*)
[…]	[…]
117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	117(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
[…]	[…]
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.
(10) Subject to subsection (11), paragraph (9)(d) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.	(10) Sous réserve du paragraphe (11), l'alinéa (9)d) ne s'applique pas à l'étranger qui y est visé et qui n'a pas fait l'objet d'un contrôle parce qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas.

III. Background

[4] The Applicant applied to sponsor her spouse, Dante Jr. Malunes, [Mr.Malunes] from the Philippines. The Applicant and Mr. Malunes met in June 2010 when they were both residing in the same co-ed boarding house close to their university campus and they started dating. On June

9, 2011, Mr. Malunes proposed to the Applicant. Following their engagement they decided they were not ready to settle down because they were both financially dependent on their families and in university. In February 2012, the Applicant found out she was pregnant – she initially kept it a secret from everyone except Mr. Malunes, but eventually told her family. On October 12, 2012, the Applicant gave birth to a son. In December 2012, the Applicant and Mr. Malunes decided to care for their child together, with the help of their parents and relatives.

[5] The Applicant received permanent residence in Canada as an accompanying dependent on her parent's application. She was landed as a permanent resident on January 17, 2013. In her application, the Applicant declared herself as single with no dependents – she did not declare Mr. Malunes or her son as dependents and they were not examined. While in Canada the Applicant continued to communicate with Mr. Malunes and her son. Once she was employed she provided financial support to them. After two years of being apart, the Applicant went to the Philippines and married Mr. Malunes on February 6, 2015. In November 2015, the Applicant submitted an application to sponsor Mr. Malunes for permanent residence as a member of the family class. As part of Mr. Malunes' application, he declared that he cohabited with the Applicant from December 2011 to January 2013 and they had a son born on October 12, 2012.

[6] On February 9, 2016, the Applicant was advised that she is not eligible to sponsor Mr. Malunes because he is not considered a family member as he was not declared when the Applicant received her permanent resident visa as per section 117(9)(d) of the IRPR. In a letter dated February 23, 2016, the Applicant wrote to the visa office in Manila, Philippines and asked for reconsideration. By correspondence dated April 21, 2016, the visa office provided Mr.

Malunes with an opportunity to respond. He submitted a response in a letter dated April 28, 2016. In a decision dated May 4, 2017, the visa office refused the application pursuant to section 117(9)(d) of the IRPR. The visa officer also determined that there were insufficient humanitarian and compassionate grounds to warrant relief. The Applicant filed a notice of appeal of the negative decision with the IAD on May 19, 2017. The Applicant filed written submissions on July 27, 2017, and requested that the IAD consider that she was unaware of the consequences of not declaring that she had a child with Mr. Malunes. In the Decision dated October 2, 2017, the IAD refused the Applicant's appeal.

IV. Decision

[7] The IAD acknowledged that the Applicant was granted permanent residence on January 17, 2013, and at this time she declared herself single with no dependents. On February 6, 2015, the Applicant and Mr. Malunes were married and in the same year the Applicant submitted a spousal sponsorship application for her husband. The IAD noted that in Mr. Malunes' application, he declared that he had cohabited with the Applicant from December 2011 to January 2013 and that they had a son who was born on October 12, 2012.

[8] The central issue before the IAD was whether Mr. Malunes is excluded as a member of the family class pursuant to section 117(9)(d) of the IRPR because he was not declared or examined during the processing of the Applicant's application for permanent residence. The IAD noted that the jurisprudence provides clear guidance on the meaning, scope and application of section 117(9)(d) of the IRPR. The IAD explained a failure to disclose a dependent, which prevents examination by an immigration officer, precludes future sponsorship of that person as a

member of the family class and an individual's reasons or motives do not matter (*Adjani v Canada (Citizenship and Immigration),* 2008 FC 32 [*Adjani*]). The duty on an applicant to declare a dependent begins when the application for permanent residence is filed and runs until the individual is granted permanent residence at the port of entry (*Canada (Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186 [*Dela Fuente*]).

[9] The IAD determined that based on the "undisputed evidence", the Applicant and Mr. Malunes were in a common-law relationship as they cohabitated from December 2011 to January 2013 and had a child who was born on October 12, 2012. The IAD acknowledged that the Applicant provided reasons for why she did not declare Mr. Malunes or her son in her application, but held that the reasons or motive are immaterial. The IAD found that because Mr. Malunes was not examined, he is excluded as a member of the family class.

[10] The IAD noted that pursuant to section 65 of the IRPA, there is no jurisdiction to provide relief on humanitarian and compassionate grounds because Mr. Malunes is not a member of the family class.

V. Issues

A. *Standard of review*

B. *Was the IAD's decision reasonable?*

VI. Discussion

A. *Standard of review*

[11] The Applicant submits that the relevant standard of review with respect to the IAD's Decision is that of reasonableness (*Chen v Canada (MCI),* 2017 FC 814 at para 9 [*Chen*]).

[12] The Respondent argues the question of whether a couple was in a conjugal relationship as defined by the IRPA is a factual finding reviewable on a standard of reasonableness. This standard encompasses a range of possible acceptable outcomes (*Tang v Canada (Minister of Citizenship and Immigration),* 2015 FC 973 at para 25 [*Tang*]; *Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 59). In *Traverse v Canada (Minister of Citizenship and Immigration),* 2014 FC 551 [*Traverse*], Justice Rennie held "[t]here could be different opinions, simultaneously reasonable, based on the facts as found, that the relationship was or was not conjugal" (at para 11).

[13] This Court agrees with the parties that the IAD's assessment of whether the Applicant and Mr. Malunes were in a conjugal relationship is a question of fact that is reviewable on the standard of reasonableness (*Tang* at para 25; *Traverse* at para 11). The Decision must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47).

B. *Was the IAD's decision reasonable?*

(1) Applicant's position

[14] The Applicant submits the determinative issues are whether the IAD applied the correct definition of a conjugal relationship and a common-law relationship, and whether the IAD ignored evidence demonstrating the absence of a conjugal relationship. The IAD found that because the Applicant and Mr. Malunes stated they cohabitated for more than a year and had a child together, the evidence was "undisputed" that a common-law relationship existed. The Applicant submits this evidence is not undisputed and the IAD failed to consider other relevant factors in assessing whether the relationship was conjugal.

[15] The Applicant further argues the Decision is unreasonable because the IAD failed to consider whether she and Mr. Malunes were in a common-law relationship at the time when she received her permanent residence. The Applicant states they were not in a common-law relationship at this time because their relationship did not satisfy the required definition in section 1(1) of the IRPR. The Applicant argues a conjugal relationship is intended to describe a "marriage-like" relationship. The Applicant also submits that the IAD erred by failing to consider other factors that the jurisprudence explains must be considered when determining if two individuals are in a conjugal relationship.

[16] In *M v H*, [1999] 2 SCR 3 [*M v H*], the Supreme Court explained the characteristics of a conjugal relationship include: shared shelter, sexual and personal behaviour, services, social activities, economic support, children, the societal perception of the couple and the intention of the parties to the relationship (at para 59; see also *Chen* at para 26). The Supreme Court recognizes these elements may be present in varying degrees and not all are necessary for the relationship to be conjugal.

[17] Section 5.24 of the Citizenship and Immigration Canada's manual, "OP 2 – Processing Members of the Family Class" [OP Manual], dated November 14, 2006, affirms that the factors identified in *M v H* must be considered in determining whether any two individuals are actually in a conjugal relationship. The OP Manual also notes the following characteristics should be present to some degree in all conjugal relationships at section 5.25:

- Mutual commitment to a shared life;
- Exclusive – cannot be in more than one conjugal relationship at a time;
- Intimate – commitment to sexual exclusivity;
- Interdependent – physically, emotionally, financially, socially;
- Permanent – long term, genuine and continuing relationship;
- Present themselves as a couple;
- Regarded by others as a couple;
- Caring for children (if there are children).

[18] With respect to the birth of their child, the Applicant argues the evidence demonstrates they only decided to mutually care for their son in December 2012. The Applicant submits this factor does not point toward the existence of a conjugal relationship.

[19] The Applicant states that the evidence also showed that neither she nor her husband were ready to settle down when they lived in the Philippines. The Applicant argues this goes to their intention. The OP Manual indicates at section 5.25 that people who are dating or thinking about marriage are not yet in a conjugal relationship. The Applicant also points out that she returned to the Philippines after living in Canada for two years. She argues that this lengthy period of

separation demonstrates that there was not a mutually committed interdependence at the time that the couple was living in the Philippines.

[20] The Applicant maintains that although Mr. Malunes indicated in his permanent residence application that he was "cohabiting" with the Applicant between December 2011 to January 2013, there was other evidence demonstrating that the cohabitation did not take place within the context of a conjugal relationship. There was also evidence that this period was characterized as a period of cohabitation because of the Applicant's and Mr. Malunes' misunderstanding of the term.

[21] The Applicant argues the IAD committed a number of errors by finding that the evidence to establish a common-law relationship was "undisputed." First, the IAD erred in applying the correct definition of a common-law relationship. As explained above, there are a number of factors that must be present in all conjugal relationships and the IAD only considered the Applicant's and Mr. Malunes' cohabitation and their child.

[22] Second, the IAD erred because the evidence of cohabitation was not undisputed. The Applicant explained they described the period when they lived together in the co-ed boarding house as cohabitation due to a misunderstanding of the term. Lastly, the Applicant argues there were other factors which demonstrated that the Applicant was not in a conjugal relationship during the material period. The Applicant argues the IAD erred in ignoring the relevant evidence on file to dispute the existence of cohabitation.

[23] The Applicant also submits the nature of the property where she and Mr. Malunes resided while in university is relevant because it speaks to the nature of the relationship. The Applicant and Mr. Malunes were residing at the same boarding house before meeting and entering into a romantic relationship. The Applicant states there is no evidence that anything changed in the nature of their living arrangements after the romantic relationship began – they continued to reside in the same boarding house. Therefore, the Applicant argues that the fact that they were residing in the same boarding house does not speak to the conjugal nature of their relationship because their living arrangement was independent of the nature of their relationship.

[24] The Applicant also argues that the OP Manual states that fiancés or those who are engaged to be married do not have a conjugal relationship. The Applicant submits there was no evidence that the couple held themselves out to the public as being in a marriage-like relationship or that they were perceived as such.

(2) Respondent's position

[25] The Respondent argues that the finding that Mr. Malunes was excluded from the family class by virtue of section 117(9)(d) of the IRPR was reasonable in light of the evidence. The Respondent states an applicant has an obligation to inform a visa officer of all of their family members at the time of their application and if circumstances change to inform the officer at the port of entry when they obtain their permanent resident visa (IRPA sections 10(2)(a), 51, 117(9)(d)).

[26] The Respondent submits that the record before the IAD supports the finding that at the time of the Applicant's application for permanent residence, she and Mr. Malunes were in a common-law relationship. The Respondent points to the following evidence:

- The couple's relationship started in 2010;
- In June 2011 the couple became engaged to be married and the engagement was known to both families;
- In December 2011 the coupled moved into the same co-ed boarding house where they lived together until the Applicant was landed as a permanent resident in Canada in January 2013;
- In January or February the couple learned that they were pregnant;
- The couple's son was born in October 2012; and
- The couple agreed in December of 2012 that they would both care for their son with the help of their families.

[27] The Respondent agrees that *M v H* and the OP 2 Manual provide factors to be considered in determining whether a relationship is conjugal or common-law.

[28] The Respondent submits the evidence shows the couple was living at the same address and in a conjugal or marriage-like relationship. The Applicant does not dispute that she and Mr. Malunes lived together at the same address for over a year. The Applicant's argument that their living situation did not amount to co-habitation because of the nature of the residence and the presence of other people at the same address is not supported by the case law. The Applicant has not cited jurisprudence for the proposition that shared shelter must be exclusive to a couple to be

a factor toward a finding of a common-law or conjugal relationship. The Respondent maintains it is the nature of the relationship, not the nature of the property, which is determinative. The Respondent argues there is no evidence to show that their cohabitation did not take place in the context of a conjugal relationship. There is also no evidence that Mr. Malunes misunderstood the meaning of the term "cohabitation." In the Applicant's written submissions to the IAD she acknowledged she should have disclosed her child and Mr. Malunes when she landed or included them as non-accompanying dependents. The Respondent also maintains that the Applicant's alleged confusion about the meaning of co-habitation or common-law spouse is not a defence for a finding under section 117(9)(d) of the IRPR (*Adjani* at para 24). The Applicant's motive for not including her spouse is also irrelevant.

[29] The Respondent argues the existence of the common-law relationship was also supported by the couple's engagement prior to living together, the fact that their relationship and engagement were public, and the fact that they had a child together during this time. The claim that they were not ready to settle down when they were in the Philippines does not impugn the finding of the IAD. The couple was engaged to be married and remained engaged for approximately one and a half years before the Applicant became a permanent resident of Canada.

[30] The Respondent submits the fact that the couple initially attempted to hide the Applicant's pregnancy is not relevant to the societal perception of the couple. There is no evidence that the Applicant and Mr. Malunes did not hold themselves out as a couple during the relevant period of time, even in spite of the potential stigma of having a pregnancy outside of wedlock.

[31] The Respondent states that the decision of the couple to mutually care for their son in December 2012 supports the finding of a common-law relationship (*Dela Fuente*).

(3) Analysis

[32] In *Dela Fuente*, the Federal Court of Appeal explained that section 117(9)(d) of the IRPR provides that an applicant has the obligation to declare family members from the time when the application is initiated to the time when permanent resident status is granted at a port of entry (at para 51). If a family member is not declared during this relevant time, they are excluded from the family class. In this case, there is no disagreement that the Applicant did not declare Mr. Malunes or her son as family members when she received her permanent resident status and as a result they were not examined.

[33] The determinative issue before the Court is whether it was reasonable for the IAD to conclude that the couple was in a common-law relationship when the Applicant was granted permanent resident status.

[34] The IAD determined that based on the "undisputed evidence" the Applicant and Mr. Malunes were in a common-law relationship having cohabited from December 2011 to January 2013 and had a child who was born on October 12, 2012.

[35] The meanings of common-law partner and conjugal relationship are defined in the IRPR:

> 1(1) The definitions in this subsection apply in the Act and in these Regulations.

> common-law partner means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year. (*conjoint de fait*)
>
> 2 The definitions in this section apply in these Regulations.
>
> conjugal partner means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year. (*partenaire conjugal*)

[36] The parties agree that the OP 2 Manual provides a list of characteristics that should be present in all conjugal relationships:

> Mutual commitment to a shared life;
>
> Exclusive – cannot be in more than one conjugal relationship at a time;
>
> Intimate – commitment to sexual exclusivity;
>
> Interdependent – physically, emotionally, financially, socially;
>
> Permanent – long term, genuine and continuing relationship;
>
> Present themselves as a couple;
>
> Regarded by others as a couple;
>
> Caring for children (if there are children).

[37] The parties also agree that the Supreme Court explained relevant characteristics of a conjugal relationship in *M v H* at para 59, discussed above at paragraph 15. With respect to shared shelter, the following evidence was before the IAD. In Mr. Malunes "Sponsored Spouse/Partner Questionnaire", he stated, in response to question 27, that he lived with the Applicant from December 1, 2011 until January 17, 2013. The Applicant also provided submissions explaining:

> Admittedly, Dante Malunes, then my boyfriend and I used to live in co-ed boarding house close to our college campus. It was defined to my understanding that cohabiting means have been known each other for that period of time. It was during that period that I got pregnant without the knowledge of my family.

[38] Before the IAD the Applicant's then-immigration consultant provided the following submissions regarding the living arrangements:

> The appellant and the applicant met on June 9, 2010, at a co-ed boarding house where they were both living in the same quarters close-by campus of Romblon State University;

[39] In this Court's view, based on the evidence before the Immigration Division, it was not clear where the Applicant and Mr. Malunes were residing between December 1, 2011 until January 17, 2013 – the period within which Mr. Malunes stated they were cohabitating. In her May 18, 2017 letter, the Applicant stated they were living in the co-ed boarding house when she became pregnant, which was in February 2012. The submissions from the Applicant's representative dated July 20, 2017, stated the couple met in June 2010 at a co-ed boarding house. In this Court's view, the evidence of the living arrangements is of such a nature that it cannot be said that it is "undisputed".

[40] The Applicant also argues the Decision is unreasonable because the Officer failed to assess all of the characteristics of a conjugal relationship as identified in *M v H,* and the factors listed in the OP Manual. The Immigration Division determined the couple was in a common-law relationship based only on the findings that they had cohabited for more than a year and had a child together. The reasoning that because they had a child together, they were in a common-law relationship, was made without regard to the evidence. The evidence before the Immigration

Division was that the couple decided to mutually care for their child in December 2012 – only one month before the Applicant was landed as a permanent resident in Canada. In this Court's view it is not clear whether the Immigration Division took this fact into consideration. In addition, there was no analysis of the other characteristics of a conjugal relationship identified by case law and the OP Manual. In this Court's view, this failure in analysis was unreasonable.

[41] Although some of the characteristics of a conjugal relationship may be met based on the record, including the societal perception of the couple, it is not clear whether all of the characteristics were present. For example, it is not obvious whether the couple shared services or were sufficiently independent. Furthermore, with respect to the "economic support" factor, there was evidence that both the Applicant and Mr. Malunes were still financially dependent on their parents when they were engaged in June 2011.

[42] As the Respondent points out, the reason or motive for why a non-accompanying family member was not disclosed in an application for permanent residence is not relevant (*Adjani* at para 24). Although there was evidence before the IAD that the Applicant did not understand the term "cohabiting", this explanation does not change the fact that Mr. Malunes was not examined by an immigration officer when the Applicant received her permanent resident visa.

[43] However, as explained above, this Court is of the view that the Decision is nonetheless unreasonable because the Immigration Division did not acknowledge that the Applicant and Mr. Malunes only decided to care for their child together in December 2012 and the IAD did not

consider or analyse the other characteristics of a conjugal or common-law relationship. The application for judicial review is therefore allowed.

JUDGMENT in IMM-4619-17

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

There is no question of general importance to be certified. There is no Order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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