Federal Court  Cour fédérale

Date: 20221110

Docket: IMM-5823-21

Citation: 2022 FC 1529

Ottawa, Ontario, November 10, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

VIET QUOC THANG DO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision [the "Decision"] by an Immigration Officer [the "Officer"] of Immigration, Refugees and Citizenship Canada ["IRCC"], dated July 22, 2021, refusing the Applicant's application for permanent residence as a member of the Spouse or Common-law Partner in Canada class [the "SCLPC class"].

[2] The Officer determined the Applicant did not meet the definition of the SCLPC class under paragraph 125(1)(d) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [*IRPR*]. The Officer found the Applicant's sponsor previously made an application for permanent residence and, at the time of that application, the Applicant was a non-accompanying member of the sponsor and was not examined.

II. Background

[3] The Applicant, Viet Quoc Thang Do, is 30-year-old male citizen of Vietnam. The Applicant's wife and sponsor, Tran Bao Ngoc Do, is a 31-year-old female citizen of Vietnam.

[4] The Applicant entered Canada in September 2013 as a student at the University of Manitoba, where he met his wife. They began cohabiting in May 2015, and have not lived apart since. They married on March 22, 2019.

[5] The Applicant's wife filed an application for permanent residence on March 25, 2016. This application was approved on August 11, 2017.

[6] On June 8, 2018, the Applicant's wife submitted an application to sponsor the Applicant under the SCLPC class. This application was denied on March 4, 2019; it was refused pursuant to paragraph 125(1)(d) of the *IRPR* on the grounds that the Applicant's wife failed to declare the Applicant as her common-law partner in her prior permanent residence application.

[7] Following this rejection, the Applicant sought legal counsel and, on June 5, 2021, the Applicant submitted a second application for permanent residency under the SCLPC class. The Applicant and his wife attempted to clarify the nature of their relationship, providing details about the dates they first met, started cohabiting and the date of their marriage.

[8] On July 22, 2021, the Officer refused this application. The Applicant asks the Court to set aside the Decision and return it to the IRCC for reconsideration by a different officer.

III. Decision Under Review

[9] Referring to the Applicant's first rejected attempt at applying through the SCLPC class, the Officer refused the application because the Applicant was not included on his wife's permanent residence application. In doing so, the Officer made the following observations:

i. Under subsection 1(1) a common-law partner is defined as an individual who is cohabiting with the person in a conjugal relationship having so cohabited for a year.

ii. An individual is excluded from the SCLPC class under paragraph 125(1)(d) if their sponsor previously made a permanent residence application and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

iii. The Applicant and his wife had been cohabiting in a conjugal relationship since May 1, 2015 and therefore became common-law partners on May 1, 2016.

iv. The Applicant's wife became a permanent resident on August 11, 2017 as "single" and did not list her common-law partner as a dependent.

IV. Issues

A. *Did the Officer err in his interpretation of the phrase "at the time of that application" in paragraph 125(1)(d) of the IRPR?*

B. *Did the Officer breach the duty of procedural fairness?*

V. Standard of Review

[10] The standard of review for the interpretation of a decision maker's home statute is reasonableness [*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 115].

[11] The standard of review for issues relating to procedural fairness is correctness or a standard of the same import [*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34 to 35 and 54 to 55, citing *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79].

VI. Analysis

A. *Did the Officer err in his interpretation of the phrase "at the time of that application" in paragraph 125(1)(d) of the IRPR?*

[12] Under subsection 125(1)(d) a foreign national is excluded form the SCLPC class if their sponsor has previously applied for permanent residency and did not include them in the

application, though they were a non-accompanying family member at the time of that application:

125 (1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if	**125 (1)** Ne sont pas considérées comme appartenant à la catégorie des époux ou conjoints de fait au Canada du fait de leur relation avec le répondant les personnes suivantes:
…	…
(d) subject to subsection (2), 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 (2), 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.

[13] The term "family member" is defined in subsection 1(3) of the *IRPR* and includes a "common-law partner". Common-law partner is defined in subsection 1(1):

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.

[14] Consequently, if a foreign national is not examined during their common-law partner's permanent residence application, they may become excluded from the SCLPC class.

[15] The relevant facts are not in dispute. The Applicant and his wife became common-law partners on May 1, 2016. The Applicant's wife submitted her permanent residence application on March 25, 2016 and the application was approved on August 11, 2017.

[16] The central dispute in this case is the parties' duelling interpretation of the words "at the time of that application" in paragraph 125(1)(d) of the *IRPR*. The Respondent argues that the phrase refers to the life of the application – in this case from March 25, 2016 to August 11, 2017. The Applicant argues that the phrase refers just to the moment the application is submitted – in this case on the date of March 25, 2016.

[17] The Respondent relies on *dela Fuente v Canada*, 2006 FCA 186 [*dela Fuente*] as authority. In *dela Fuente*, the Court of Appeal interpreted paragraph 117(9)(d) of the *IRPR*, a provision similar to paragraph 125(1)(d). The Court of Appeal found the phrase "at the time of that application" to mean the life of the application [*dela Fuente* at paragraph 47]. At the time relevant to the appeal in *dela Fuente*, paragraph 117(9)(d) read:

117	**117**
(9) No foreign national may be considered a member of the family class by virtue of their relationship to a sponsor if	**(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) the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign	**d)** 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, n'a pas fait l'objet d'un contrôle et était un

national was a non-accompanying family member or a former spouse or former common-law partner of the sponsor and was not examined.	membre de la famille du répondant n'accompagnant pas ce dernier ou était un ex-époux ou ancien conjoint de fait du répondant.

[18] While paragraph 117(9)(d) relates to the family class of permanent residency applicants and not the SCLPC class, the Respondent maintains it is binding authority nonetheless since it is a basic principle of statutory interpretation that the same words be given the same meaning throughout a statute [*R v Zeolkowski*, [1989] 1 SCR 1378 at 1387].

[19] The Applicant distinguishes *dela Fuente* from this case and offers a different interpretation of the statute for two reasons. First, the Applicant argues that a common-law relationship is prone to evolve over time unlike other familial relationships and that it would be unreasonably onerous to expect an applicant to update their permanent residence application when their relationship crosses the one-year threshold.

[20] Second, the Applicant argues that there are other provisions in the *IRPR* that use different language when communicating a relevant period that is over the life of the application and not the moment an application is submitted. Specifically, the Applicant points to section 121 which states:

121 Subject to subsection 25.1(1), a person who is a member of the family class or a family member of a member of the family class who makes an application under Division 6 of Part 5 must be a family	**121** Sous réserve du paragraphe 25.1(1), la personne appartenant à la catégorie du regroupement familial ou les membres de sa famille qui présentent une demande au titre de la section

member of the applicant or of the sponsor both at the time the application is made and at the time of the determination of the application.	6 de la partie 5 doivent être des membres de la famille du demandeur ou du répondant au moment où est faite la demande et au moment où il est statué sur celle-ci.

[Emphasis Added]

[21] According to the Applicant, if Parliament had intended paragraph 125(1)(d) to have a relevant timing of the duration of the application, it would have used the language from section 121.

[22] I find that the Court of Appeal's holding in dela Fuente is binding on this Court and the relevant time for paragraph 125(1)(d) is a continuum, over the life of the application. Paragraph 117(9)(d) is more pertinent to the interpretation of paragraph 125(1)(d) than section 121. Both paragraph 117(9)(d) and paragraph 125(1)(d) are similar in structure and purpose and share nearly identical language. Both relate to excluding an applicant from inclusion in a particular class of permanent residency.

[23] Furthermore, the distinct language of section 121 can be explained by its legislative history. The previous version of section 121 read:

121 The requirements with respect to a person who is a member of the family class or a family member of a member of the family class who makes an application under Division 6 of Part 5 are the following:	**121** Les exigences applicables à l'égard de la personne appartenant à la catégorie du regroupement familial ou des membres de sa famille qui présentent une demande au titre de la section 6 de la partie 5 sont les suivantes :
(a) the person is a family member of the applicant or of	

the sponsor both at the time the application is made and, without taking into account whether the person has attained 22 years of age, at the time of the determination of the application;	**a)** l'intéressé doit être un membre de la famille du demandeur ou du répondant au moment où la demande est faite et, qu'il ait atteint l'âge de vingt-deux ans ou non, au moment où il est statué sur la demande.

[24] The previous section 121 varied the requirements to fit under the family class from the moment of application to the time of determination, with an applicant's age not considered at the latter. The current section 121 removed this distinction, however, appears to have carried over the legacy language of its previous iteration.

[25] Moreover, as the Court of Appeal observed in *dela Fuente*, there are several provisions of the English *IRPR* that use the phrase "at the time", however, the French version is not so equivocal [*dela Fuente* at paragraphs 44 to 45]. Section 121 uses the phrase *"au moment"* which refers to a moment in time whereas paragraphs 117(9)(d) and 125(1)(d) use the phrase "*à l'époque*" which conveys an extended meaning of time, embracing the life of the application [*dela Fuente* at paragraph 45].

[26] I also do not accept the Applicant's argument that the dynamic nature of common-law partnerships requires a distinct interpretation of paragraph 125(1)(d). The distinction between the provisions that the Applicant attempts to make does not stand up to scrutiny, as the family class of sponsorship includes common-law partners as well [*IRPR*, paragraph 117(1)(a)].

[27] I find that the Officer reasonably interpreted paragraph 125(1)(d) of the *IRPR* and applied it to the facts in this case. The Applicant and his wife became common-law partners on May 1, 2016 prior to the end of the life of her application for permanent residency on August 11, 2017. The Applicant's wife failed to disclose this in her permanent residency application, excluding the Applicant from the SCLPC class pursuant to paragraph 125(1)(d).

B. *Did the Officer breach the duty of procedural fairness?*

[28] The Applicant argues that the Officer breached the duty of procedural fairness by denying the application without first allowing the Applicant to address to the Officer's concerns.

[29] An officer that is skeptical about the credibility or authenticity of information provided by an applicant may be under a duty to provide an applicant an opportunity to address these concerns. However, where an officer's concerns arise directly from the requirements of the *IRPR* there is no such duty [*Obeta v Canada (Citizenship and Immigration),* 2012 FC 1542 at paragraph 25].

[30] There was no breach of procedural fairness. The Officer's concerns arose directly from paragraph 125(1)(d) of the *IRPR* and there was no dispute over the relevant facts in this case.

JUDGMENT in IMM-5823-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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