Federal Court Cour fédérale

Date: 20221208

Docket: IMM-4711-21

Citation: 2022 FC 1696

Ottawa, Ontario, December 8, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SHAOBIN CAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision dated June 25, 2021 refusing the Applicant's spouse or common-law partner in Canada class permanent resident application because they did not cohabit with one another, a fact admitted by the Applicant.

II. Facts

[2] The Applicant is a Chinese national. After he arrived in Canada he applied for refugee status. His application was dismissed in 2013.

[3] He met his wife online in 2014.

[4] The Applicant lived and continues to live in Toronto and his wife lived and continues to live in British Columbia.

[5] In October 2019, an immigration warrant was issued against him because he had been twice scheduled for removal and failed to appear for removal.

[6] He and his wife married in Toronto in October, 2019.

[7] They did not cohabit.

[8] In December 2019, the Applicant applied for permanent residence in Canada as a member of the spouse or common-law partner in Canada class.

[9] A requirement of the spouse of common-law partner in Canada class is that the parties “cohabit.” However, the Applicant never cohabited with his sponsor wife.

[10] In this connection, section 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] states that, in order for the foreign national to be considered a member of “the spouse or common-law partner in Canada class”, he or she must not only be the Canadian sponsor’s spouse or common-law partner, but must also “cohabit with that sponsor in Canada” [emphasis added]:

> Member - A foreign national is a member of the spouse or common-law partner in Canada class if they:
>
> (a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;
>
> [Emphasis added]
>
> IRPR, Can. Reg. 2002-227, s.124

[11] It appears the wife sponsor was working and attending courses in Vancouver.

[12] It is not clear what the Applicant was doing in Toronto except he claims he was attending to his refugee claim in Toronto (which ended in 2013). It appears he might also have been working, but if so, he was working illegally.

[13] The Applicant says he planned to move to Vancouver to live with his sponsor once he received his permanent residence, but as noted, this he never did.

[14] In any event taking that position was to put the cart before the horse.

[15] Under the law, he could not obtain permanent residence status unless and until he cohabits with his wife. He has not seen his wife since they were married in October 2019.

[16] On June 8, 2021, the Immigration Division [ID] sent the Applicant a procedural fairness letter advising him of its concerns that he does meet the eligibility requirements for sponsorship. On June 17, 2021, in response to the letter, the Applicant and sponsor provided supplemental information and documents.

III. Decision under review

[17] The Immigration Officer refused the Applicant's application on the basis the Applicant and sponsor did not cohabit, as required by Rule 124 of the *Regulations*. The Officer found an insufficiency of credible and valid reasons to justify the Applicant's non-cohabitation with his wife sponsor.

[18] The Applicant and sponsor stated in their evidence their plans to move-in together were delayed due to restrictions on the sponsor's employment and education, the COVID-19 pandemic and the high cost of moving during that time. The Officer rejected these arguments and found little information and evidence to conclude that the Applicant and sponsor have the intention to carry out their plans for relocation. The Officer considered the explanations were just "excuses".

[19] The Officer found insufficient credible and valid reasons to conclude the couple did not or could not make a plan to live together before they decided to get married or that they could not move in the months following their wedding and before the pandemic began in February, 2020 – i.e., in the 4 months between marriage and pandemic.

[20] Despite acknowledging the COVID-19 outbreak made moving difficult, the Officer found that the couple had sufficient time and opportunity to move in together and cohabit. They just never did.

IV. Issues

[21] The only issue is whether the Officer's decision was reasonable.

V. Standard of Review

[22] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and

> intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[23] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[24] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the

> Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Analysis

[25] The Applicant submits the Officer erred in referencing the relevant dates in the documentary evidence. Specifically, the Applicant notes a discrepancy in the dates on the Refusal letter. The Officer noted in one part of their reasons the letter was dated on June 17, 2021, and then later noted that it was dated June 10, 2021. Similarly, the Applicant notes that the Officer's reasons are also dated as June 8, 2021. The Applicant submits that there are obvious errors. I agree.

[26] However, this is not a basis on which judicial review may be granted. The Applicant simply points out obvious typographical errors. The obviousness of the typographical errors is clear from the Officer's GCMS notes which confirm the correct date of the Refusal letter is June 25, 2021. Notably, the date June 25, 2021 is shown not only in the Officer's time-stamped GCMS notes setting out their Decision, but also in a separate document dated June 25, 2021 setting out the Decision and Rationale. Given the Refusal letter itself refers to documents that post-date the erroneous date on the letter, it is clear the date on the letter is an inadvertent

typographical error in respect of which no reviewable error arises: *Evans v Canada (MCI)*, 2015 FC 259 at paras 30-31.

[27] I decline the Applicant's invitation to review the factual findings made by the Officer, as directed by both *Vavilov* at para 125, and by the Federal Court of Appeal's decision in *Doyle*, at paras 3 and 4, both cited above.

[28] In addition, failure to cohabit is fatal to a spouse or common-law partner in a Canada class application, such as this: *Oziegbe v Canada (MCI)*, 2015 FC 360 at para 13; *Mandbodh v Canada (MCI)*, 2010 FC 190 at para 11; *Ally v Canada (MCI)*, 2008 FC 445 at paras 27-28, 34; *Said v Canada (MCI)*, 2011 FC 1245 at paras 34-35; and *Attaallah v Canada (MCI)*, 2014 FC 522 at para 30.

[29] On these bases, the application for judicial review must be dismissed.

[30] A second argument was also submitted by the Applicant. With respect, it too is without merit.

[31] There are three documents in this matter. The first is the short Refusal letter sent to the Applicant. The second is a document entitled Decision and Rationale, several pages long, setting out the Decision and its detailed Rationale, also dated June 25, 2022. The third are the time-stamped Officer's notes taken from the online case management system GCMS confirming the previous two and setting out the history of this immigration file.

[32] Upon receipt of the Refusal letter the Applicant filed a Notice of Application for leave to apply for judicial review. A month or so later he filed his Application Record based only on the Refusal letter. The Applicant submitted then, as he does now that the Refusal letter provides inadequate reasons.

[33] Notably, the Refusal letter did not contain either the Decision and Rationale or copies of the Officer's system notes in the GCMS.

[34] The Applicant did not file request the underlying documentation pursuant to Rule 9 of *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (SOR/93-22)) [*Immigration Rules*]. He simply relied on the Refusal letter and his allegation it is inadequate.

[35] However, underlying material in this respect was included in the Respondent's Response filed March 15, 2022. At that time an application under Rule 9 could have been made, but was not, to verify the Applicant had the full Decision record in the Officer's system files. This more fulsome record was ignored by the Applicant.

[36] The application for leave judge issued a production order on July 7, 2022 requiring the tribunal to send its full record to the Court, which arrived a week later. That record – the Certified Tribunal Record - contained the GCMS notes, the Decision and Rationale document as well as the Refusal letter. This was the second opportunity the Respondent had to see the full Decision record.

[37] The Applicant did not change his submission.

[38] Thereafter, the leave judge granted leave on September 2, 2022, which gave the Applicant the rights to file additional material and make additional submissions, neither of which he did.

[39] The Respondent was given the same rights, and filed a replacement memorandum addressing both this process issue and the cohabit issue.

[40] As noted, the Applicant did not file a replacement memorandum, instead persisting in relying on his original submission the Refusal letter was inadequate, notwithstanding the Court had by then the full tribunal record before it for judicial review.

[41] The foregoing was canvassed at the hearing.

[42] At the hearing, the Applicant took the position he was under no obligation to request the record under Rule 9 because the Refusal letter set out an explanation for the Decision (albeit an inadequate one). He said applicants are under no obligation to seek out (or review) anything else unless the Refusal letter contained no reasons at all. He submitted his case should be argued on the basis of the inadequacy of reasons in the Refusal letter, without regard to the underlying record including the Decision and Rationale and Officer's notes in the GCMS file setting out why his application was dismissed. He raised a concern whether the Minister's Decision might

be updated or changed – in respect of which, and with respect, there is no air of reality nor shred of evidence.

[43] I am unable to accept these submissions for several reasons.

[44] First, it is well established that reasons for a decision found in the Officer's GCMS notes are a constituent part of an administrative decision maker's decision: *Wang v MCI*, 2006 FC 1298 at paras 21 – 23 and *Singh v MCI*, 2006 FC 1428 at para 2.

[45] Secondly, if the Applicant was dissatisfied with the reasons for decision found in the Refusal letter, it was incumbent upon him to seek further elaboration under Rule 9 rather than bring an application for leave and judicial review claiming that the reasons are inadequate: *Marine Atlantic Inc. v Canadian Merchant Service Guild*, 2000 CanLII 15517 (FCA) at paras 4-8 and *Hayama v MCI*, 2003 FC 1305 at para 15.

[46] I note this has been the law for more than two decades.

[47] Also as the Respondent points out, this Court has on many occasions found an applicant waives his or her rights to receive the equivalent to the GCMS (formerly CAIPS) notes where no application is made under Rule 9: see *Toma v Canada (MCI)*, [2006] FCJ No 1000 at para 13:

> [13] The officer can also not be said to have erred in failing to provide the applicants with a copy of his CAIPS notes. The applicants stated in their Application for Leave and for Judicial Review that they had "received written reasons from the Canadian Embassy, Damascus, Syria on 4 June 2005". As a result, the applicants waived their right to receive the CAIPS notes reasons

> for decision under Rule 9 of the Federal Courts Immigration and Refugee Protection Rules (see also *Mensah v. Canada (Secretary of State)*, [1994] F.C.J. No. 1082 (T.D.) (QL) and *Paul v. Canada (M.E.I.)*, [1994] F.C.J. No. 1018 (T.D.) (QL)).

[48] Given this longstanding jurisprudence, I agree with the Respondent that the Applicant's decision not to initiate a request under Rule 9 of our *Immigration Rules* amounts to a waiver of his right to receive the report, which was in any event provided to him in the Certified Tribunal Record. The Applicant may not now complain about the adequacy of reasons: *De Hoedt Daniel v Canada (MCI)*, 2012 FC 1391 at para 51 and *Ikhuiwu v Canada (MCI)*, 2008 FC 344 at para 18.

[49] While applicants are free to present their case as they wish, the Court on judicial review may not ignore the record.

VII. Conclusion

[50] In my respectful view, the Applicant has not established the Officer's decision was unreasonable, nor that his second argument has merit. Therefore, the Application for judicial review will be dismissed.

VIII. Certified Question

[51] Neither party proposed a question of general importance, none arises and therefore none will be certified.

JUDGMENT in IMM-4711-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4711-21
STYLE OF CAUSE:	SHAOBIN CAO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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