Federal Court  Cour fédérale

Date: 20230314

Docket: IMM-1850-21

Citation: 2023 FC 336

Ottawa, Ontario, March 14, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

HELENA DE CASSIA MARTINS LIMA

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 of an Immigration Officer [Officer], dated February 27, 2021, refusing the Applicant's application for permanent residence as a member of the Spouse or Common-Law Partner in Canada Class. The Officer refused the application because they were not satisfied that the Applicant had been cohabitating with her

spouse and that the marriage was not entered into primarily for the purpose of acquiring immigration status and privilege in Canada.

II. Facts

[2] The Applicant is a Portuguese citizen. She came to Canada as a visitor in November 2014. Her status was extended until June 2016. Upon the expiry of her visitor status, she applied for permanent residence on humanitarian and compassionate [H&C grounds]. That application was refused in March 2017.

[3] The Applicant and her spouse, who is also her sponsor, married in March 2018. In March 2019, the Applicant submitted an application for permanent residence under the Spouse or Common-Law Partner in Canada Class. The refusal of that application on February 27, 2021 is the subject of this application for judicial review.

III. Decision under review

[4] By letter dated February 27, 2021 [Decision Letter], the Officer refused the Applicant's permanent resident application on two grounds. First, the Officer found the Applicant did not meet the eligibility requirements outlined in subsection 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] because the Officer was not satisfied the Applicant was in fact cohabitating (did not "cohabit") with her sponsor. Second, the Officer was not satisfied that the Applicant was a "spouse" pursuant to paragraph 4(1)(a) of the Regulations

because they were not satisfied the Applicant's marriage to her spouse was not entered into primary for the purpose of acquiring immigration status and privilege in Canada.

[5] In their Reasons, which accompanied the Decision Letter, the Officer outlined the documentary evidence tendered to substantiate the Applicant's alleged cohabitation with her sponsor. However, the Officer found there to be significant shortcomings with the evidence such that it could not, without more, be accepted as credible and substantive evidence to establish cohabitation.

[6] To the Officer, the most important factor in reaching a negative determination of cohabitation was the "total and complete absence of a substantive and verifiable document from the Toronto Housing Authority [Authority]" confirming that the Applicant and sponsor cohabited or resided together.

[7] The Officer found the sponsor had been residing in a Toronto Rent-Geared-to-Income [RGI] subsidy housing community, to which laws and rules apply. One such law is that households are required to report changes to their household composition (i.e., if someone moves in or out of the unit) by completing an annual Household Income and Assets Review Form. That this is required was not disputed.

[8] The Officer noted that, while the sponsor tendered a blank annual Household Income and Assets Review Form, she did not provide a copy of a different Form to confirm she had reported a change in household composition when her the Applicant moved in with her. Because the

sponsor was required to submit a Form if the Applicant had moved in with her, the Officer drew a negative inference and found there to be no credible ground to believe the Applicant cohabited with the sponsor.

[9] While the Applicant submitted the Authority refused to add the Applicant to the sponsor's household lease because she did not have status in Canada, the Officer found this statement to be untrue. The Officer noted the Form submitted into evidence by the Applicant contained a question asking whether the citizenship or immigration status in Canada has changed for any household member during the past twelve months, and that if it had an explanation and documentation were required. In the Officer's view, this statement confirmed that the Authority does not prohibit foreign nationals without permanent residence status or Canadian citizenship from residing with their families in the Community as long as the householder follows the guidelines in such circumstances.

[10] The Officer next outlined concerns regarding the credibility of the Applicant and sponsor's relationship. The Officer noted that they had provided contradictory information about important aspects of their alleged spousal relationship, such as where and how they met.

[11] Finally, the Officer analysed the *bona fides* of the marriage. The Officer noted the Applicant had submitted little information or documentary evidence to substantiate she and her sponsor are in a committed conjugal relationship.

IV. Issues

[12] The Applicant submits that there are five issues raised in this application:

A. Whether the Officer erred in its finding that there was no credible ground to believe that the Applicant is cohabitating with the sponsor?

B. Whether the Officer erred in its finding of the credibility of the relationship and *bona fides* of the marriage between the Applicant and the sponsor?

C. Whether the Officer erred in their overall finding that the marriage between the Applicant and the sponsor was not genuine and was entered primarily for the purpose of acquiring any status or privilege?

D. Did the Officer engage in a microscopic analysis of the credibility of the relationship?

E. Did the Officer err when they did not conduct an interview with the Applicant and/or the sponsor?

[13] In my view the issue in this case is whether the Officer's decision is reasonable, and in respect of the fifth issue, whether the decision was procedurally fair.

V. Standard of Review

A. *Reasonableness*

[14] 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 [*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*).
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> [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).
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> [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).
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> [Emphasis added]

[15] *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.
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> [Emphasis added]

[16] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] 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.
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> [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.
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> [Emphasis added]

B. *Correctness*

[17] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 per Binnie J at paragraph 43.

That said, I wish to note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160

[*Bergeron*] per Stratas JA at paragraph 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Rennie JA]. In this connection I note the Federal Court of Appeal's decision which held judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[18] I also understand from the Supreme Court of Canada's teaching in *Vavilov* at paragraph 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[19] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Analysis

[20] As noted above, the Decision Letter outlined two distinct bases for refusing the application: (1) a negative determination on whether the parties met the statutory test of cohabitation, that is, did they "cohabit", and (2) the determination the Applicant is not a spouse for the purposes of the Regulations.

[21] As explained below, in my view the Officer's finding that the parties did not "cohabit" is reasonable. Therefore in my view this application for judicial review should be refused, and it is unnecessary to address the Applicant's arguments on the improper purpose of this alleged marriage. Also as explained later, there is no merit in the allegation of procedural unfairness: the Applicant was advised by letter of the Officer's concerns and simply refused to supply documents to establish cohabitation. There was no need for an oral hearing.

[22] At the outset, it is important to note findings concerning whether or not parties "cohabit", which is the legal situation to meet as set out in the legislation, are findings of fact (*Nzau v Canada (Citizenship and Immigration)*, 2013 FC 74 at para 8).

[23] In challenging the reasonableness of the Officer's determination on cohabitation, the Applicant submits that the Officer erred by relying solely on the absence of a substantive and verifiable document from the Authority confirming the Applicant resided in the sponsor's household, and therefore failed to consider the rest of the evidence tendered.

[24] There is no merit in this submission. In the Reasons accompanying the Decision Letter, the Officer expressly notes the Applicant and sponsor tendered copies of documents to substantiate their cohabitation, but essentially gave them no weight finding them unreliable because none were verified by the institutions issuing them. All the documents the Applicant and sponsor submitted could be obtained by anybody providing any address:

> The documentary evidence Ms. Martins Lima and her sponsor Ms. Ribeiro provided to substantiate their cohabitation is limited to an Ontario photo ID card for Ms. Martins Lima, sponsor's cell phone bill, the couple's correspondence with the bank where they have a joint account, and the address on their tax filings and some shipping labels. These documents, if combined with some substantive document such as a lease or rental contract or confirmation from residential management authority, would be considered additional evidence to substantiate their cohabitation. However, photo ID car and correspondences with institutions alone could not be accepted as credible and substantive evidence to establish cohabitation. It is a known fact that the address submitted by a person for the purpose of obtaining a photo ID or driver's license in Ontario or for setting up a bank account or for filing tax returns are not verified by the institutions issuing the documents.

[25] As such, and contrary to the Applicant's submission, this is not a case where the Officer failed to consider evidence. The Officer instead placed little weight on the evidence in light of the shortcomings in the evidence tendered. This is evidence by the portion of the above excerpt where the Officer says: "These documents, if combined with some substantive document such as a lease or rental contract or confirmation from residential management authority, would be

considered additional evidence to substantiate their cohabitation". The Applicant's arguments are simply a disagreement on the weight afforded to evidence. However, it is not the role of this Court is to reweigh and reassess the evidence or inferenced unless there are exceptional circumstances, which do not apply in this case (*Vavilov* at para 125; *Doyle* at para 3).

[26] Irrespective, in my view, it was open and reasonable for the Officer to draw a negative inference from the Applicant not providing proof of residency with the sponsor such as that documentation required to be filed annually by the sponsor to obtain the benefit of continued subsidized housing. Another type of documentary evidence that could have been but was not filed was the Form the sponsor would have filed if and when the Applicant moved in with her. Either would be a substantive and verifiable document: others would include a lease or rental contract or statement from the housing authority. While these were requested, nothing verifiable was filed.

[27] Indeed, given the importance of a substantive and verifiable to show the parties cohabited, the Officer sent a letter to the Applicant on January 18, 2021 requesting, among other things, a "Lease or Rental contract of your current residence signed with the building management or landlord (hand-written document on a real estate form is not acceptable)". In response, on February 8, 2021, the Applicant submitted, among other things, the first page of a lease (with a term of June 2017 to May 2018) signed between the sponsor and the Authority, and a blank Form from the Authority.

[28] Nothing they filed evidenced the allegation the Applicant and sponsor cohabited. Given concern the Applicant was not on the lease, and whether the housing authority knew of the Applicant's presence in the sponsor's household, the Officer then contacted the Applicant's counsel requesting an updated lease with the Authority.

[29] On February 11, 2021, Applicant's counsel informed the Officer the sponsor had contacted the Authority and was advised the Applicant could not be added to the lease because she did not have status in Canada. The Officer indicated their concern with this response, and advised that any confirmation from the Authority of its awareness of the Applicant's residence in the sponsor's household would be acceptable as proof.

[30] In response, the Applicant submitted three screen shots. The first was of a portion of a text message conversation between, presumably, the Applicant or sponsor and an unidentified individual. The unidentified individual states, "I will not be able to provide anything in writing". The second screen shot is of an email from a "Site Administrator" to the sponsor. The individual notes that "we cannot give a letter", that they "spoke with your friend …. and explained the situation to her" and that the sponsor's friend is "well aware of TCHC [Toronto Community Housing] policy regarding addition and issuing of letters". The final screen shot is another portion of an email between the sponsor and an individual. In this email, the individual simply states, "As per our conversation we will not be able to provide you a written response with the required information."

[31] In light of the evidentiary record, it was reasonable for the Officer to reject the sponsor's explanation that she was unable to add the Applicant to her lease because of the Applicant's lack of status in Canada. As reasonably noted by the Officer, the difficulty with the screen shots is that they were provided without any surrounding context – the screen shots are isolated portions of a conversation and do not show what was originally requested from each individual. They also do not confirm the sponsor's reason for why she was unable to add the Applicant to her lease. Second, the Officer reasonably noted a housing authority Form asked whether the citizenship or immigration status in Canada has changed for any household member in the past twelve months, and if so, to explain and provide documentation. In my respectful view, it was reasonable for the Officer, in the absence of evidence to the contrary, and notwithstanding reasonable requests for such information, to interpret this statement as confirming the Authority does not prohibit foreign nationals without permanent resident or Canadian citizenship status to reside with families in the housing community as long as the householder follows the guidelines.

[32] Overall, I am not persuaded the Decision is unreasonable.

[33] I also note the Applicant raised a procedural fairness argument with respect to the Officer's second and independent ground for refusing her application, namely the lack of genuineness of her marriage to the sponsor. She submits in light of the Officer's concerns, the Officer had a duty to interview the Applicant and Sponsor separately to clarify the Officer's suspicions.

[34] While this may or may not be the case, I need not deal with it because the finding the Applicant did not "cohabit" with her sponsor was determinative of the matter before the Officer. That finding alone was sufficient to support the dismissal of the Applicant's claim by the Officer, and for the same reason, its reasonableness is sufficient basis for dismissing this application.

[35] Even if there was a breach of procedural fairness, I will add that there is a very important exception to the general rule that "the denial of a right to a fair hearing must always render a decision invalid" (see *Cardinal v Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 SCR 643 at para 23). The exception applies when the outcome is "legally inevitable". The Federal Court of Appeal in *Canada (Attorney General) v McBain*, 2017 FCA 204 [*McBain*] [Boivin JA] summarizes the jurisprudence:

> [8] The question of whether an administrative decision-maker complied with the duty of procedural fairness is reviewed for correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79).
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> [9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
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> [10] Exceptions to this rule exist where the outcome is legally inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [*Mobil Oil*] or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards*), 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).
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> [Emphasis added]

[36] In this case, I find the same result would be “legally inevitable” per *McBain*. Stated another way, I am of the view that the breach of procedural fairness has no impact on the Decision.

[37] As outlined above, given the Officer’s reasonable finding that the Applicant did not “cohabit” with her sponsor, only outcome possible is that her application would be refused, as indeed it was.

VII. Conclusion

[38] In light of the foregoing, the application for judicial review will be dismissed.

VIII. Certified Question

[39] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-1850-21

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

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