Federal Court  Cour fédérale

Date: 20240423

Docket: IMM-11616-22

Citation: 2024 FC 609

Ottawa, Ontario, April 23, 2024

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

THANH DUY NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Thanh Duy Nguyen (the "Applicant") seeks judicial review of a decision of an immigration officer (the "Officer"), dated November 4, 2022. In that decision, the Officer refused the Applicant's application for permanent residence under the spousal class. The Officer determined that the Applicant entered into the marriage primarily for the purpose of acquiring

status under the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") and did not cohabit with his spouse.

II. Facts

[2] The Applicant is from Vietnam and arrived in Canada in 2018 to study at Algonquin College. In 2019, he changed schools and began studying at George Brown College.

[3] Around January 2020, the Applicant met Mariela Ascencio (the "Sponsor") in Toronto. The two began communicating and meeting in person, including at the Sponsor's birthday party on March 13, 2020.

[4] Later that month, due to the pandemic restrictions, the Applicant and the Sponsor were unable to meet in person. By June 2020, the Applicant asked the Sponsor to be his girlfriend. As the pandemic restrictions eased, the Applicant and the Sponsor attended events together, and the Sponsor introduced the Applicant to her mother.

[5] Around September 2020, the Applicant proposed to the Sponsor and by the end of the year, the Sponsor's mother invited the Applicant to move in with them. Previously, the Applicant lived in Hamilton with his uncle. On April 24, 2021, the Applicant and the Sponsor were married.

[6] On September 21, 2021, the Applicant applied for permanent residence under the Spouse or Common-Law Partner in Canada Class.

[7] Upon review, *Immigration, Refugees and Citizenship Canada* ("*IRCC*") raised concerns about the Applicant's application, after determining that there was insufficient evidence to assess the level of interdependence between the parties.

[8] On October 27, 2022, *IRCC* sent the Applicant a procedural fairness letter. The letter asked for several documents from the Applicant and the Sponsor. In response to the *IRCC*'s request, the Applicant submitted further documentation.

[9] On November 4, 2022, *IRCC* rejected the Applicant's application.

III. Issue

[10] The issue is whether the Officer's decision was reasonable and procedurally fair.

IV. Standard of Review

[11] The standard of review is reasonableness. When a court reviews administrative decisions, there is a rebuttable presumption that the reasonableness standard will apply. This presumption has not been rebutted in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[12] For the procedural fairness issue, the applicable standard of review is correctness: Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69 at para 54; Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship), 2020 FCA 196 at para 35.

A. *Preliminary Issue*

[13] Following the Officer's decision, the Applicant filed an affidavit with this application. The affidavit explains the relationship between the Applicant and Sponsor, including when they began cohabiting. However, as noted by the Respondent, the Applicant's affidavit is not admissible on judicial review. Similar to *Chakhnashvili v Canada (Citizenship and Immigration)*, 2024 FC 5, the Applicant's affidavit goes to the merits of the Officer's decision (at para 16). Moreover, the affidavit does not fall within any exceptions to the general rule, which limits the evidentiary record before this Court to materials before the decision-maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20; *Brink's Canada Limited v Unifor*, 2020 FCA 56 at para 13. For that reason, I will give no weight to any information in the Affidavit that was not before the decision maker.

V. Analysis

[14] The following provisions of the *IRPA* are applicable:

> **Family reunification**
>
> **12 (1)** A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.
>
> **Bad faith**
>
> **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 marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

Obtaining status

72 (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that

(a) they have applied to remain in Canada as a permanent resident as a member of a class referred to in subsection (2);

(b) they are in Canada to establish permanent residence;

(c) they are a member of that class;

(d) they meet the selection criteria and other requirements applicable to that class;

(e) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,

(i) they and their family members, whether accompanying or not, are not inadmissible,

(ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and

(iii) they hold a medical certificate — based on the most recent medical examination to which they were required to submit under paragraph 16(2)(b) of the Act and which took place within the previous 12 months — that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand; and

(f) in the case of a member of the protected temporary residents class, they are not inadmissible.

Member

124 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;
>
> **(b)** have temporary resident status in Canada; and
>
> **(c)** are the subject of a sponsorship application.

[15] In this case, the Officer rejected the application on two grounds. First, the Officer found the Applicant entered into a marriage with the Sponsor primarily for the purpose of acquiring status under the *IRPA*. Secondly, the Officer was not satisfied that the parties cohabited together.

[16] In relation to the first ground of refusal, I find the Applicant's arguments largely amount to a disagreement with the weighing of the evidence. I note the Applicant bears the onus of proving the *bona fide* nature of a marriage on a balance of probabilities (*Singh v Canada (Citizenship and Immigration)*, 2024 FC 158 at para 33 [*Singh*] citing *Kaur Nahal v Canada (Citizenship and Immigration)*, 2016 FC 81 at paras 4-5). Additionally, section 4(1) of the *IRPR* is disjunctive, "there is no specific test for assessing the purpose of entering into a marriage or whether it is genuine, and it is for the visa officer to determine the weight assigned to the evidence" (*Singh* at para 33).

[17] The Applicant argued that the Officer erred in determining that the marriage was entered into for the primary purpose of obtaining an immigration advantage. The Applicant in their submissions further explained the relevance and context of the text messages between the parties, the Sponsor's Facebook account, knowledge of and contact with extended family members, the length of the relationship and the amount of time spent together. For instance, the Applicant states that the Sponsor's Facebook account, which shows the same friends as the Applicant, should "weigh more in favor of a genuine and legitimate relationship." Additionally, the

Applicant asserted the Officer "misapprehended the contextual basis" of the parties' text messages. On this point, I find the Applicant is asking the Court to reweigh and reassess evidence that was before the Officer. This is not the role of the Court on judicial review.

[18] However, in relation to the second ground of refusal, I find the Officer's decision was unreasonable. The Officer determined that the parties were not cohabiting. The Officer raised concerns with the Applicant's bank statements, which showed transactions taking place a considerable distance from his claimed residence, before proceeding to send the parties a procedural fairness letter. After receiving the Applicant's reply, the Officer stated that, "The applicant submitted additional supporting documents including tax documents, a lease agreement signed by the sponsor and her mother only, a letter from the sponsor's mother stating that the applicant lives with them, cell phone bills, bank statements, text messages, screenshots from Facebook and photos. The only objective proof of cohabitation is the applicant's cell phone bill" (emphasis added).

[19] However, a review of the Certified Tribunal Record shows the Sponsor, her mother, and the Applicant signed an initial lease agreement on April 21, 2021. The Officer does not refer to this lease at all. Instead, the Officer refers solely to the lease renewal, dated March 25, 2022, which shows signatures from the Sponsor and her mother and with total disregard for the original lease signed by all the parties.

[20] The lease agreement from 2021 was relevant to the Officer's decision, and could have assisted the Officer in determining whether the parties cohabited. As the Applicant signed the document, it represents objective evidence of cohabitation. Yet, the Officer not only fails to

mention the agreement, but also fails to provide reasons for disregarding it and relying on the renewal lease only. Although an immigration officer is presumed to consider all of the evidence, due to the contradictory nature of the agreement, and its relevance to a central issue, the Officer should have analyzed the evidence and explained why it was not accepted.

[21] Given my finding regarding reasonableness, I will not deal with the procedural fairness issues.

[22] No question for certification was presented.

JUDGMENT in IMM 11616-22

THIS COURT'S JUDGMENT is that:

1. The Application is granted and sent back to be redetermined by a different officer.

2. No question is certified.

"Glennys L. McVeigh"
Judge

Appendix A

The following provisions of the *IRPA* are relevant:

Family reunification

12 (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

Regroupement familial

12 (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Bad faith

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 marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

Mauvaise foi

4 (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :

a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

Obtaining status

72 (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that

(a) they have applied to remain in Canada as a permanent resident as a member of a class referred to in subsection (2);

(b) they are in Canada to establish permanent residence;

(c) they are a member of that class;

Obtention du statut

72 (1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) il en a fait la demande au titre d'une des catégories prévues au paragraphe (2);

b) il est au Canada pour s'y établir en permanence;

c) il fait partie de la catégorie au titre de laquelle il a fait la demande;

(d) they meet the selection criteria and other requirements applicable to that class;

(e) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,

(i) they and their family members, whether accompanying or not, are not inadmissible,

(ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and

(iii) they hold a medical certificate — based on the most recent medical examination to which they were required to submit under paragraph 16(2)(b) of the Act and which took place within the previous 12 months — that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand; and

(f) in the case of a member of the protected temporary residents class, they are not inadmissible.

d) il satisfait aux critères de sélection et autres exigences applicables à cette catégorie;

e) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés :

(i) ni lui ni les membres de sa famille — qu'ils l'accompagnent ou non — ne sont interdits de territoire,

(ii) il est titulaire de l'un des documents visés aux alinéas 50(1)a) à h),

(iii) il est titulaire d'un certificat médical attestant, sur le fondement de la visite médicale la plus récente à laquelle il a dû se soumettre en application du paragraphe 16(2) de la Loi et qui a eu lieu au cours des douze mois qui précèdent, que son état de santé ne constitue vraisemblablement pas un danger pour la santé ou la sécurité publiques et, sauf si le paragraphe 38(2) de la Loi s'applique, ne risque pas d'entraîner un fardeau excessif;

f) dans le cas de l'étranger qui fait partie de la catégorie des résidents temporaires protégés, il n'est pas interdit de territoire.

Member

124 A foreign national is a member of the spouse or common-law partner in Canada class if they

Qualité

124 Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :

(a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;

(b) have temporary resident status in Canada; and

(c) are the subject of a sponsorship application.

a) il est l’époux ou le conjoint de fait d’un répondant et vit avec ce répondant au Canada;

b) il détient le statut de résident temporaire au Canada;

c) une demande de parrainage a été déposée à son égard.

FEDERAL COURT

SOLICITORS OF RECORD

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