Federal Court Cour fédérale

Date: 20240524

Docket: IMM-2181-23

Citation: 2024 FC 790

Toronto, Ontario, May 24, 2024

PRESENT: Madam Justice Go

BETWEEN:

THI QUYNH NHU NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

I. <u>Overview</u>

[1] Foreign nationals applying for permanent residence in Canada are required to declare certain members of their family, including their non-accompanying spouse or common-law partner, and have them examined. A non-declared family member is excluded from being sponsored under the family class per para 117(9)(d) of the *Immigration and Refugee Protection*

Regulations, (SOR/2002-227) [*IRPR*], or the Spouse or Common-law Partner in Canada [SCLPC] class per para 125(1)(d) of the *IRPR*, as the case maybe.

[2] In the case before the Court, Ms. Thi Quynh Nhu Nguyen, the Applicant, has been found excluded from the SCLPC class.

[3] The Applicant and her sponsor X – both citizens of Vietnam – have lived together in Canada since November 2019. According to the Applicant, she and her sponsor broke up between January 2021 and May 2021, while the two continued to live together due to financial difficulty [breakup period]. The couple reconciled and were married on February 14, 2022

[4] On May 6, 2021, X applied for permanent residence under the Temporary Resident to Permanent Resident pathway [TR to PR application] and marked the Applicant as his former common-law partner. X subsequently became a permanent resident and sponsored the Applicant under the SCLPC class.

[5] An immigration officer at the Case Processing Centre in Mississauga [Officer] found that X's omission of the Applicant in his TR to PR application excluded the Applicant from being a member of the SCLPC class. For this reason, the Officer refused the Applicant's permanent residence application in a decision dated February 2, 2023 [Decision].

[6] The Applicant seeks judicial review of the Decision. I grant the application as I find the Decision lacked intelligibility. I also find the Officer misconstrued the evidence and failed to conduct the necessary analysis before finding the Applicant excluded from the SCLPC class.

II. Analysis

[7] The determinative issue in this case is whether the Officer's finding that the Applicant and X were cohabiting as conjugal partners during the breakup period, and as such they have been common-law partners since November 2020, was reasonable. The parties agree that the presumptive standard of review is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] Prior to rendering their decision, the Officer sent the Applicant a letter asking her to provide proof that she and her sponsor have been cohabiting since November 2019. The Applicant submitted several documents in response to the Officer's request.

[9] After receiving the Applicant's documents, the Officer sent the Applicant a procedural fairness letter on December 15, 2022 relaying their concern regarding the Applicant's eligibility because X did not declare the Applicant as his common-law partner in his TR to PR application.

[10] In response, the Applicant submitted a letter from X, in which X noted the breakup period, and explained that he did not include the Applicant in his TR to PR application in adherence with immigration laws. X further explained that while he was back in a relationship with the Applicant at the time he received his permanent resident status, he did not update his

relationship status because, technically, they were not common-law partners in September 2021, given the previous break in their relationship. X reiterated that he and the Applicant continued to live together and share expenses during the breakup period because it was not financially feasible for either of them to move out at the time.

[11] I pause to note that the Applicant and X were self-represented throughout their communications with the Officer.

[12] The Global Case Management System [GCMS] notes set out the Officer's reasons; the relevant part of is reproduced as follows:

> PFL response received on 2023/01/03 & 2023/01/10 and reviewed. An explanation letter was provided with proof of cohabitation. No documentary proof was provided in regards to SPR & PA's "break up period". In response to the letter: it can be argued that SPR & PA had broken up during January to May 2021, however no documentary proof was provided in support of this claim. SPR states they continued to cohabit together due to financial difficulty and they shared only the rent and utility bills. – There are multiple documents supporting their cohabitation during their "break-up". – There are several joint bank account statements as early as November 2019 to August 2021. There is no indication that they cancelled it at anytime during their four (4) to five (5) month break. – While the exact date of their break-up period was not specified, they provided a screenshot of SPR's social media page dated January 21, 2021 supporting their relationship at this time.
>
> [Emphasis added]

[13] A similar explanation is found in the Decision:

> Although it can be argued that you and your sponsor had broken up during January to May 2021, and therefore you were not considered common-law partners at the time, no documentary proof was provided in support of this claim. You have stated that you

> continued to cohabit with the sponsor during this period, with multiple documents supporting this statement.
>
> ….
>
> As you and your sponsor have been cohabiting in a conjugal relationship since November 2019, you became common-law partners on November 2020.

[14] In coming to this conclusion, I find the Officer committed three reviewable errors.

[15] First, I agree with the Applicant that neither she nor her sponsor ever used the term "cohabit" in their submission, contrary to the Officer's findings. Both the Applicant and her sponsor stated they broke up for a certain period, with the Applicant's sponsor writing that they were living together as "old friends" during the breakup period. Neither the Applicant nor her sponsor said they were cohabiting, let alone cohabiting in a conjugal relationship, yet the Officer made that finding in part by asserting that the Applicant herself stated that she "continued to cohabit with the sponsor." In so doing, the Officer misconstrued the evidence.

[16] Second, as the Applicant submits, and I agree, living together and cohabitation are not the same thing. The Officer did not conduct the necessary analysis before concluding that the Applicant and X were cohabiting, in the context of determining the Applicant's exclusion from the SCLPC class.

[17] The Applicant points to two decisions in support of her position: *Walia et al v Canada (Minister of Citizenship and Immigration)*, 2008 FC 486 [*Walia*] and *Chen v Canada (Citizenship and Immigration)*, 2017 FC 814 [*Chen*].

[18] I find *Walia* to be instructive. As the Court in *Walia* found, the question of cohabitation meant more than simple shared residence. Rather it meant a "marriage-like" relationship characterized by the features of financial interdependence, a sexual relationship, a common principal residence, mutual obligations to share the responsibility of running the home and the "expectation each day that there be continued mutual dependency:" *Walia* at para 7.

[19] In *Chen*, Justice Southcott agreed with the applicant's proposition that cultural context and intentions of the parties to a relationship are relevant indicators. However, Justice Southcott also stressed that subjective intentions need to be assessed alongside objective indicators, which is the test for conjugal relationships set out in *M v H*, 1999 CanLII 686, [1999] 2 SCR 3. These factors include a shared shelter, sexual and personal behaviour, services, social activities, economic support and children, and societal perception: *Chen* at paras 24-26.

[20] In this case, the evidence before the Officer suggested the presence of some, but not all of the elements of cohabitation between the Applicant and X during the breakup period. However, other than referencing evidence of financial co-mingling, the Officer cited no other basis for finding that the Applicant and X have been cohabiting in a conjugal relationship since November 2019. More importantly, the Officer did not engage in the necessary analysis in order to determine the precise nature of the Applicant's relationship with her sponsor during the breakup period.

[21] The Respondent argues the Officer appropriately found that the Applicant and X were cohabiting given that X's letter explained as much. The Respondent submits the Applicant

confuses the concepts of "cohabiting" with "cohabiting in a *conjugal relationship*," a distinction Justice Ahmed explained in *Ocampo v Canada (Citizenship and Immigration)*, 2019 FC 929.

[22] I find the Respondent's argument puzzling to say the least. The Officer clearly stated in the Decision that they determined the Applicant and X to be "cohabiting in a conjugal relationship since November 2019." If, as the Respondent suggests, the Officer "accurately" stated that the Applicant and X were cohabiting, and that the Officer did not take this as an admission they were in a conjugal relationship at the time, then it begs the question of how the Officer determined the Applicant and X were cohabiting in a conjugal relationship since November 2019. I also agree with the Applicant that in the context of this case, "cohabiting" needs to be considered a legal term that comes with certain legal consequences. Indeed, the reasonableness of the entire Decision hinges on whether or not the Applicant and X were cohabiting continuously as conjugal partners since November 2019, including during the breakup period. It would be concerning if the Officer did not use the term "cohabiting" in a legal sense, but instead assigned the word with different meanings in different parts of the Decision.

[23] The third and final reviewable error is that the Officer's reasons lack intelligibility. The Officer stated both in the GCMS notes and in the Decision that "it can be argued that [the Applicant and her sponsor] had broken up during January to May 2021." The Decision went further to state that "therefore [the Applicant and X] were not considered common-law partners at the time." However, the Officer also noted there was no documentary proof provided to support this position. Further, while the Officer noted, "the exact date of their break-up period

was not specified," the Officer went on to state that there were documents supporting their cohabitation during their "break-up."

[24] It is unclear from these reasons whether or not the Officer accepted that the Applicant and X had broken up between January and May 2021, or whether the Officer found the "break-up" did not restart the clock on the period of cohabitation. These issues were key to the Applicant's defence against her exclusion from the SCLPC class. The Officer's undecipherable findings on these central issues makes it impossible for the Court to understand their reasoning on a critical point: *Vavilov* at para 103.

[25] I reject the Respondent's submission that it was clear the Officer found there was insufficient evidence of the break-up between the Applicant and her sponsor. Contrary to the Respondent's submission, the Decision, read as a whole, did not indicate that the Officer found, on a balance of probabilities, that the Applicant and X did not break up. Nor did the Officer note, as the Respondent urges, that the Applicant could have provided other documents to support their claim, and that the "unsworn statements" of the Applicant and X were unaccepted by the Officer. None of these findings could be found anywhere in the Decision. Rather, these are submissions advanced by the Respondent to bolster the Decision after the fact.

[26] Officers' reasons must reflect the stakes, especially where the impact of a decision on an individual's rights and interests are severe: *Vavilov* at para 133. The Officer's finding in this case would forever prohibit the Applicant from being sponsored by X, leading potentially to either permanent separation of the couple or compelling X to leave Canada. Given the severity of the

consequences, the Officer owes a duty to the Applicant to provide reasons that she – and the Court – could understand. Simply put, the reasons in this case fell far short of the yardstick of justification, intelligibility and transparency.

III. Conclusion

[27] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision-maker.

[28] There is no question for certification.

JUDGMENT in IMM-2181-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is referred back for redetermination by a different decision-maker.

3. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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