F ederal Court		Cour fédérale

Date: 20100127

Docket: IMM-2251-09

Citation: 2010 FC 95

Toronto, Ontario, January 27, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ERICK GUSTAVO GONZALEZ ORTEGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rejecting Erick Gustavo Gonzalez Ortega's application for permanent residence as a member of the spouse or common-law partner in Canada class. The Officer determined that Mr. Ortega's sponsor, Elvia Patricia Rodriguez

Martinez, failed to declare their common-law relationship at the time that she became a permanent resident and that as a result her subsequent sponsorship of Mr. Ortega was barred.

[2] For the reasons that follow, this application is allowed.

BACKGROUND

[3] Although there are some facts in dispute, many are not.

[4] Erick Gustavo Gonzalez Ortega and Elvia Patricia Rodriguez Martinez are both Mexican citizens. She came to Canada in October 2004. Her claim for refugee status was successful and she was examined and became a permanent resident on October 24, 2006. As part of that process she was required to list all "family members" that are in or outside Canada. She did not list Mr. Ortega nor did she mention her relationship with him at her examination.

[5] Mr. Ortega came to Canada in August 2004. His claim for refugee status was rejected on January 23, 2006, and a subsequent pre-removal risk assessment application was rejected on January 29, 2007. Mr. Ortega failed to appear for removal in March 2007, and a warrant was issued for his arrest. He was never removed from Canada; he remains in Canada without status.

[6] Ms. Martinez and Mr. Ortega met on December 24, 2004, and they began dating in February 2005. Shortly thereafter, Ms. Martinez became pregnant. In May 2005, the couple began living together. On December 28, 2005, their daughter Katherine Astrid Gonzalez Rodriguez was born.

Ms. Martinez did not name Mr. Ortega as the father of this child on the birth certificate she filed on February 16, 2006. The certificate has subsequently been amended listing him as the father.

[7] In April 2007, Ms. Martinez applied to sponsor her husband under the spouse or common-law partner in Canada class. This application was rejected in April 2009, and it is from this decision that Mr. Ortega seeks judicial review.

[8] The basis for the rejection of the Applicant's application is found in the decision letter dated April 20, 2009, which reads as follows:

> Regulation 125(1)(d) states that 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, subject to subsection (2), the sponsor previously made an application for permanent residence and became a permanent resident and, a [sic] the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined. In your case, you have not shown that you meet this requirement because your sponsor did not disclose that you were in a common law relationship with her at the time she became a permanent resident.

ISSUES

[9] The Applicant raises two issues:

1. Whether the Officer erred in her recording of the evidence given by the Applicant and his wife concerning their relationship at his interview on April 20, 2009; and
2. Whether the Officer erred in her assessment of the Applicant's relationship with his wife prior to their marriage.

ANALYSIS

[10] Under the Regulations, a couple are in a common-law relationship only if they are in a conjugal relationship and have so cohabitated for 12 months. This follows from subsections 1(1) and 125(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. Those provisions read as follows:

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.	1.(1) « conjoint de fait » Personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an.
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.

[11] The question of whether a couple's relationship amounts to cohabitation within the meaning of the Regulations, so as to make the couple common-law partners, is a question of mixed fact and

law, and therefore attracts a reasonableness standard of review: *Cai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 816; *Walia v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 486.

[12] Operating Procedures prepared by the Respondent for officers to use when examining a couple's relationship directs an officer to examine the facts of each case when there is a question of when or whether a common-law relationship has ended. It reflects the common law test that a common-law relationship is deemed severed or ends when "at least one partner does not intend to continue with the conjugal relationship."

[13] In my view, the same sort of analysis is required when a couple have lived together in a conjugal relationship, separated, and then resumed living together in a conjugal relationship. Under the Regulations it is only a relevant common-law relationship if it is one of 12 months. The issue that arises when there is a break in the relationship is whether, when the parties reconcile, the 12 month clock starts back at zero or whether it picks up and continues from the point when it stopped. In order to answer that question, one must examine the nature of the break and the intention of the parties.

[14] In this case it is not clear that such an examination was done by the Officer.

[15] The first issue raised by the Applicant arises from a dispute as to what the couple told the Officer at the meeting in April 2009. That interview was conducted based on the Questionnaire the

Applicant completed. One of the questions asks ‘Are you currently living with your sponsor?’ and if the response is “Yes”, as the Applicant’s was, it then asks for ‘Period of Cohabitation’. The Applicant wrote that their period of cohabitation was from 10/05/2005 to 04/2007, a period of some 23 months – no break is indicated. In the application form he was asked to list all of the addresses where he lived for the past 10 years. He listed living at Exbury Road from May/June 2005 to October 2006, on New Seabury Drive from October 2006 to March 2007, on Brady Crescent from March 2007 to September 2007, and since then on Forge Drive. The Exbury Road property was his spouse’s residence and this record supports that they moved in together in May 2005. The Forge Drive property is a residence that the two purchased together and where they currently reside. The Applicant lists no other addresses where he has lived despite his and his wife’s assertion that they were separated for a period of time commencing in February 2006.

[16] The Officer’s notes indicate that she asked them why Mr. Ortega’s name was not listed on their daughter’s birth certificate. The sponsor responded that “we had problems and separated when she was born.” One might conclude, as was urged upon the Court by the Applicant, that the sponsor choosing not to name the Applicant as the father of their child is evidence of her intention not to continue, or resume, the conjugal relationship.

[17] When asked when “exactly” the separation was, the Officer notes that she was told it was for two months, until March 2006, when they moved to New Seabury Drive together. The file before the Officer indicates that they moved into New Seabury Drive in October 2006, not March 2006. This becomes of some relevance when considering the parties disagreement as to how long

the Applicant and his wife were separated in 2006. The Applicant was asked where he lived while they were separated and he stated that he stayed with friends. As noted, this was not reflected in his application.

[18] Both the Applicant and his wife have filed affidavits in support of this application for judicial review in which they swear that they told the Officer that they had been separated until September 2006, when they moved in together again, i.e. a period of 7 and not 2 months. The September 2006 date of their reconciliation accords, more or less, with the residence dates the Applicant indicated in his application and the information provided to the Officer concerning their residences.

[19] The Applicant submits that the Officer erred in her note taking and that their affidavit evidence is to be preferred. He asserts that if it is accepted, then their period of cohabitation cumulatively during the two periods was 11 months at the date of his sponsor's interview and thus did not meet the definition of common law spouse in the Regulations. This analysis is relevant only if one concludes that the 12 month period of cohabitation in the Regulations may be cumulative periods and need not be consecutive periods.

[20] The Respondent submits that the notes made contemporaneously with the events ought to be preferred. It was submitted that the affidavit evidence ought to be examined with scepticism as both affiants have self-interest in the result, whereas the Officer does not. If the Officer's notes are accurate, and the couple indeed reconciled in March 2006, then one must ask why the officer did not

seek clarification on their previous statement that moved into the New Seabury Drive location in October 2006, given the evidence that they moved when they reconciled. In my view, the Officer's notes do provide some support for the evidence of the affiants that she erred in taking down this response to this question.

[21] In light of my finding below, I do not need to decide the issue as to whether their separation was for 2 months or 7 months or whether the decision must be reviewed as a result of the "battle of the facts" as counsel described it.

[22] As noted, the Officer concludes that the Applicant and his sponsor were in a common law relationship in October 2006 when the Applicant's wife was interviewed. That conclusion could only have been reached if the Officer found that they had cohabitated for a period of 12 months. In order to make that finding, the Officer had to find one of the following:

1. The Applicant and his wife never separated at all, as they alleged;
2. The separation did occur but it did not end their relationship and the period continued when they reconciled; or
3. The separation brought the relationship to an end but that the 12 months of cohabitation in the Regulations need not be continuous and the two periods of cohabitation broken by the two month hiatus amount cumulatively to more than 12 months.

[23] The difficulty facing the Court is that it is impossible to determine which of these findings the Officer made. The Officer's reasons, as reflected in her notes, are as follows:

> I note that the applicant and sponsor stated during the interview that they severed their relationship for a month or two around the time that the sponsor submitted her application for permanent residence. However, the applicant and sponsor also stated that the separation was for a short period of time, and was due to the stresses related to raising a new born child in a new country. The couple resumed cohabitation after the brief interruption and is currently residing together.
>
> Therefore since the sponsor and applicant were cohabitating in a common law relationship at the time the sponsor became a permanent resident, and the sponsor did not disclose this fact at the time of being granted permanent residence, the applicant is excluded from the family class.

[24] I am mindful of the decision of the Federal Court of Appeal in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.) that the adequacy of reasons is determined by examining the function of reasons in the particular case. One of the functions for reasons was described by the Court as follows:

> 19 In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

[24] In this case, as I have already stated, it is impossible from the reasons to determine whether this Officer erred in her decision. The Officer's reasons, although they need not be extensive given the nature of the proceeding, are simply inadequate. The Court cannot determine on what basis the decision was made and thus cannot assess whether it was reasonable.

[25] For these reasons the application must be returned to be considered, after another interview, by an officer who has no previous involvement with this application.

[26] Neither party proposed a question for certification and, in my view, there is no certifiable question in this application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed; the Applicant's application for permanent residence as a member of the spouse or common-law partner in Canada class is remitted back to be determined by a different officer after interviewing the Applicant and his wife; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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