Federal Court  Cour fédérale

Date: 20120227

Docket: IMM-3585-11

Citation: 2012 FC 269

Vancouver, British Columbia, February 27, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

GEMMA ABONITA AZURIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought forth under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], seeking to set aside a decision made by an immigration officer [the officer] of the Case Processing Centre [CPC] in Vegreville, Alberta, dated February 4, 2011. The officer rejected the applicant's application for permanent residence in Canada as a member of the Live-in Caregiver Class pursuant to subparagraph 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

I. Background and Decision under Review

[2] Ms. Gemma Abonita Azurin [the applicant] is a citizen of the Philippines who moved to Canada in 2002 to work as a member of the Live-in Caregiver Program. The applicant has not returned to the Philippines since her arrival, nor has she seen any of her family members in that time.

[3] On April 1, 2005, the applicant submitted an application for permanent residency in Canada as a member of the Live-in Caregiver in Canada Class. In it, she identified four children and a husband, Mr. Napoleon Azurin (Trial Record [TR] at 154).

[4] In a letter dated January 30, 2006, the CPC informed the applicant that she met the eligibility requirements for permanent residence as a member of the Live-in Caregiver Class, but that a final decision would not be made until all remaining requirements were met, including background checks of all her family members, irrespective of whether they planned to join her in Canada (Applicant's Record [AR] at 100).

[5] In a letter dated September 13, 2007, the applicant informed the CPC that she had recently discovered her marriage to Mr. Azurin was null and void because he was already married to someone else at the time. The applicant indicated that she was shocked and devastated by this news and that it was her intention to remove Mr. Azurin from her application (AR at 102). Also included with this letter was an affidavit in which the applicant specified that Mr. Azurin married another woman on March 19, 1988, a little over a month before he married the applicant on April 24, 1988. She also stated that she was cancelling her sponsorship of Mr. Azurin and putting herself as head of the household (AR at 103). The applicant now adds that she informed Mr. Azurin that their

relationship was over in September of 2007 and that they have not been in a marital-like relationship since that time (AR at 86, Applicant's Affidavit [AA] at paras 8-9).

[6] The CPC followed up with the applicant in a letter dated October 21, 2008, where after providing the definition of a 'common-law partner' as set out in subsection 1(1) of the Regulations, it asked her to advise it as to whether Mr. Azurin met the definition of a common-law partner or not and to provide details (AR at 104).

[7] The applicant responded in a letter dated October 30, 2008, where under a heading entitled "Common-law relationship history", she included the following table:

Relationship History	Address	Comments
April 24, 1988 – October 09, 2002 I left the Philippines to work as a live-in caregiver on October 10, 2002. Napoleon stayed to look after our four children. He was unable to work for over a year due to a motor vehicle accident in 2003. I sent funds on a regular basis to support Napoleon and my four children and ensure that my children continue with their studies.	Sta. Cruz, Nabus, Camarines Sur, Philippines ~~3444~~ *4434*	Napoleon Azurin and I has been living as husband and wife since April 24, 1988. We lived in one roof and were blessed to have four children: 1) Erwin Azurin born on September 08, 1988; 2) Beverly Azurin born on June 04, 1990; 3) Brenda Azurin born on April 28, 1992; 4) John Paul Azurin born on February 03, 2001.

The applicant acknowledges that this table is "somewhat confusing" (AR at 143, Applicant's Memorandum of Argument [AMA] at para 16). She also explains in her affidavit that she had not understood the contents of the CPC letter, specifically "what a common-law partnership was" or the words 'cohabitating' and 'conjugal' found in the definition in subsection 1(1) of the Regulations (AR at 86, AA at paras 11-12). Whatever the case may be, the notes from the Computer Assisted

Immigration Processing System [CAIPS] make clear that the CPC thought the applicant's letter confirmed the common-law partnership (TR at 35).

[8] On July 7, 2010, the CPC sent the applicant a letter [the fairness letter] advising her of the following (AR at 116):

> In the course of reviewing your file, it appears that your application for permanent residence may have to be refused as you and/or your family member(s) do not appear to meet immigration requirements […]
>
> Specifically, in response to your letter dated October 30th, 2008, we have received confirmation from the visa post in Manila that they believe a genuine, common-law relationship exists between you and Napoleon Azurin. Therefore, as an eligible family member, he is subject to examination and his inadmissibility, as outlined below, may render you inadmissible which could result in a refusal of your application for permanent residence.
>
> Regulation 72(1)(e)(i) states a foreign national in Canada becomes a permanent resident if, following an examination, it is established that they and their family members, whether accompanying or not, are not inadmissible.

The CPC went on to cite paragraphs 36(1)(c) and 36(2)(c) of the IRPA regarding criminality before saying that "[t]he information we have been given regarding your common-law spouse's inadmissibility is as follows […]" and then enumerates charges of bigamy, perjury, and 'reckless imprudence' while driving. The fairness letter went on to inform the applicant that she had the opportunity to make any submissions related to this matter, in writing, within 60 days (AR at 116).

[9] On August 19, 2010, the applicant responded to the fairness letter by stating she would like to continue with her application for all eligible members of her family and as for Mr. Azurin, she realized she wouldn't be able to include him in her application as it may result in a delay and refusal for her and her children's permanent residence. She concluded by repeating her request to continue

her and her children's application (AR at 119). The applicant now adds that because the fairness letter stated that the CPC had confirmation from the Manila visa post that she was in a genuine common-law relationship, and because she did not understand what that term meant, she assumed the CPC must have been correct that she was indeed in a common-law partnership (AR at 87-88, AA at 16).

[10] On February 4, 2011, the officer rendered the decision at issue in the present judicial review. For the same reasons highlighted in the fairness letter, the applicant's application for permanent residence was refused as a result of the requirement under subparagraph 72(1)(e)(i) that all family members, whether accompanying the applicant or not, must not be inadmissible. The letter explains that Mr. Azurin, identified as the applicant's "common-law husband," was determined to be inadmissible for bigamy, perjury, and operating a vehicle in a dangerous and negligent manner resulting in an accident (AR at 4-5).

[11] On June 30 2011, the applicant received the result of an Access to Information and Privacy Request, the results of which contained an e-mail from the Manila visa post to the CPC dated November 28, 2007. In the e-mail, in which a Designated Immigration Officer was apparently responding to a CPC enquiry, the officer informed the CPC of the allegations of bigamy, perjury, and reckless driving committed by Mr. Azurin. The officer also writes the following (AR at 125):

> D. VOID MARRIAGE vis-a-vis CONTINUOUS MARITAL RELNS WITH AFL
>
> In [the applicant's September 2007 affidavit], the [applicant] stated that her marriage to [Mr. Azurin] having been contracted in the subsistence of another should be considered void. Consequently, she further stated that she would like to "cancel her sponsorship" for Napoleon. <u>As established from respective interviews of spouse and eldest son, marital reins are clearly intact</u>. This only appears to be an attempt by [the applicant] to exclude spouse from processing in order

> to facilitate landing for herself and her children. Without any judicial declaration of nullity, every marriage should be deemed valid. At the very least, [Mr. Azurin] can be considered [the applicant's] common-law partner and would still be an eligible family member who requires examination. Any future attempt of [the applicant] to [establish] separation or initiate divorce should be looked into very closely.
>
> E. CONCLUSION: Spouse, Napoleon, is inadmissible to Cda based on grounds cited above. This also renders AFL inadmissible under A42 [emphasis added].

[12] The applicant alleges that both the e-mail and the fact the Manila visa post's conclusions were based on interviews conducted with Mr. Azurin and one of the applicant's children were not disclosed to her. The applicant was also informed by an Access to Information and Privacy Assistant on July 19, 2011, that the contents of either interview could not be disclosed to her without their consent and the applicant states that she still does not know what was said during these interviews that would have led the Manila visa post to conclude marital reins between the applicant and Mr. Azurin were still intact.

II. Parties' Positions

[13] The applicant raises three issues. The first is that the officer breached the principle of procedural fairness by failing to disclose to the applicant the existence and content of interviews conducted by the Manila visa post with Mr. Azurin and her son. The second is that it was unreasonable for the officer to conclude the applicant and Mr. Azurin were in a common-law partnership when she had stated in her September 2007 letter and accompanying affidavit that she severed her common-law partnership. The third is that the officer breached the duty of procedural fairness in this case by not conducting an interview with her.

[14] For its part, the respondent contends the officer had no duty to advise the applicant that the Manila visa post would conduct interviews, that she was advised her husband and son had been interviewed, and that she was given an opportunity to respond to the conclusion that she was in a common-law partnership, but simply failed to do so. The respondent submits the officer's finding regarding the common-law partnership was therefore reasonable. As to the issue of not having conducted an interview with the applicant, the respondent argues that foreign nationals are entitled to a minimum degree of procedural fairness, that there is no obligation to offer an interview, and that the officer is under no obligation to apprise the applicant of concerns unless they are based on extrinsic evidence (*Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815, [2002] FCJ 1098 [*Qin*]). The respondent asserts that the interviews cannot be considered extrinsic evidence since they were held with family members as part of the same application.

III. Issues

[15] This matter raises three issues:

1. Did the officer breach the principles of procedural fairness by failing to inform the applicant of the interviews or their content?

2. Did the officer breach the principles of procedural fairness by not conducting an interview with the applicant?

3. Did the officer err in concluding the applicant was in a common-law partnership with Mr. Azurin?

IV. Standard of Review

[16] The first two issues concern procedural fairness and must be reviewed on a standard of correctness. If it is found that the officer committed an error by failing to inform the applicant of the contents of the interviews with her husband and son or by not conducting an interview with her, the decision will be set aside (*Batica v Canada (Minister of Citizenship and Immigration)*, 2006 FC 762 at para 5, [2006] FCJ 951 [*Batica*] and *Chitterman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 765, [2004] FCJ 955 [*Chitterman*]).Whether the applicant was in a common-law partnership is a question of mixed fact and law and calls for the application of the reasonableness standard of review (*Ortega v Canada (Minister of Citizenship and Immigration)*, 2010 FC 95 at para 11, [2010] FCJ 107). Reasonableness requires the existence of justification, transparency and intelligibility within the decision-making process and asks whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

V. Analysis

A. *Did the officer breach the principles of procedural fairness by failing to inform the applicant of the interviews or their content?*

[17] I first note that while the applicant acknowledges the CPC afforded her numerous opportunities to provide submissions regarding whether she was in a common-law partnership, she claims never having understood what was being asked of her as she did not understand the terms ‘common-law partnership’, ‘conjugal relationship’, or ‘co-habitating’. This court cannot hold the CPC or the officer responsible for the applicant’s potential ignorance of these terms. Concerned with determining the status of the applicant’s relationship with Mr. Azurin, the CPC provided her

with the definition of a ‘common-law partner’ as set out in subsection 1(1) of the Regulations and asked her to advise as to whether Mr. Azurin met that definition or not and to provide details (AR at 104). If the applicant did not understand the definition set out in the Regulations, it was her responsibility to inform herself or to seek clarification from the CPC prior to answering.

[18] Even the applicant acknowledges in her submissions that “it is not the [CPC’s] fault that the applicant did not understand what was being asked of her”, yet she accuses the CPC of exacerbating the situation by indicating the Manila visa post had confirmed that the she was in a common-law partnership. She also blames the officer for not revealing the information received in the interviews or that this was the reason for the Manila visa post’s confirmation. She contends that because she did not understand what a ‘common-law partnership’ was, and because she did not know why the Manila visa post concluded that she was in such a partnership, “she simply assumed that she must have been in a common-law partnership since the [CPC] said that it was ‘confirmed’ that she was” (AR at 153, AMA at para 38). This reasoning does not stand the test of scrutiny.

[19] First, in a letter dated January 30, 2006, the CPC informed the applicant that a final decision concerning her application would not be made until all remaining requirements were met, including background checks of all family members, irrespective of whether they planned to join her in Canada. The letter also notified the applicant that “[the] office in Manila <u>will be contacting your family members</u> [emphasis added]” (Applicant’s Record [AR] at 100). The fact the Manila visa post contacted Mr. Azurin and her son should therefore not have been a surprise to her.

[20] Second, while the applicant claims she only became aware of the interviews and their role in the Manila visa post’s finding regarding her common-law partnership after receiving a copy of the November 28, 2007 e-mail, I have difficulty reconciling this with a letter written by the applicant to

the CPC, received on June 9, 2008. In it, the applicant writes the following: “I would like to enquire as to the status of our application. I understand that the Canadian embassy in Manila has already forwarded the results of the interview on November 28, 2007 [emphasis added]” (TR at 117). Clearly the applicant was aware of at least one interview conducted by the Manila visa post, that the status of her application was related to the interview results, and that these results had been forwarded to the CPC on November 28, 2007. Whether the applicant was aware of only one interview or both changes little since the Manila visa post makes clear both interviews led to its finding: “As established from respective interviews of spouse and eldest son, marital reins are clearly intact” (AR at 125). The applicant’s allegations are thus inconsistent with the evidence above.

[21] The applicant argued the officer breached the principle of procedural fairness by failing to disclose to her the existence and content of the interviews. As confirmed by the evidence, the applicant was aware of at least one interview and was told of the results of the Manila visa post interview. She had information that the Manila visa post concluded that the relationship was a genuine common-law relationship.

[22] The applicant also contended that she was denied an opportunity to fully respond to concerns on the determinative issue of whether the applicant and Mr. Azurin were in a common-law partnership and to correct or contradict any statements made during the interviews (*Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205, 66 NR 8 (FCA) [*Muliadi*]; *Batica*, above; *Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 818, [2011] FCJ 1022). I am not swayed by these cases as they address extrinsic evidence provided by third parties, which I do not agree is the case here. The applicant included Mr. Azurin and her eldest son in her application and she appears to have maintained contact with them throughout the application

process. The evidence shows the applicant was aware of at least one interview, was aware her application was dependent on its results, and had been given the opportunity to respond and to clarify the status of her relationship. The applicant failed to do so. Even if the interviews were considered to be extrinsic evidence, in *Muliadi*, the Federal Court of Appeal believed it was the officer's duty to inform the applicant of the negative extrinsic evidence and to give him a fair opportunity of correcting or contradicting it before making a decision (*Muliadi*, above, at paras 14 and 16). I am of the opinion this requirement was met when the applicant was informed of the Manila visa post's conclusion and given the opportunity to correct or contradict it. As a result, I find no breach of procedural fairness arose as a result of not informing the applicant of the content of the interviews with Mr. Azurin or her son.

B. *Did the officer breach the principles of procedural fairness by not conducting an interview with the applicant?*

[23] The applicant argues the officer breached the duty of procedural fairness in this case by not convoking her for an interview. She relies on *Chitterman*, above, where this court found that while there is no general requirement for an oral hearing, under the special circumstances of determining the *bona fides* of a relationship, the only fair way to resolve an immigration officer's concerns may be for the officer to convoke a hearing. For its part the respondent contends that foreign nationals are entitled to a minimum degree of procedural fairness, that there is no obligation to offer an interview, and that the officer is under no obligation to apprise the applicant of concerns unless they are based on extrinsic evidence (*Qin*, above).

[24] In the circumstances, I agree with the respondent that it was not incumbent on the officer to conduct an interview with the applicant. The applicant was not entitled to a full hearing (*Muliadi*,

above, at para 16). The applicant was given sufficient opportunity to clarify the status of her relationship, but simply failed to do so. When an adequate response was not provided, the onus did not shift to the officer to pursue the matter further.

C. *Did the officer err in concluding the applicant was in a common-law partnership with Mr. Azurin?*

[25] The applicant argues the officer never seriously considered whether the applicant's September 2007 letter and accompanying affidavit severed her common-law partnership, a possibility acknowledged in section 5.37 of Citizenship and Immigration Canada's Operation Manual, OP 2 – Processing Members of the Family Class [the manual]. The manual indicates a common-law relationship is deemed severed when at least one partner does not intend to continue the conjugal relationship and that the facts of the case must be examined to determine if the intent of at least one partner is to stop such a relationship. The applicant contends that the officer appears to have disregarded her letter and affidavit from September 2007, instead relying almost exclusively on the interviews.

[26] I must reject the applicant's argument. First, after receiving the applicant's correspondence from September 2007, the CPC must have considered whether she had severed her relationship since it enquired with her in the October 21, 2008 letter as to whether Mr. Azurin met the definition of a common-law partner or not. From her response, the CPC concluded that the relationship continued: December 31, 2008 CAIPS notes describe the applicant's letter as "confirming the common-law relationship" (TR at 35). After receiving further information from the Manila visa post that interviews with the applicant's son and Mr. Azurin confirmed the common-law relationship continued, the CPC provided the applicant a second opportunity to respond. The applicant did not

refute the finding regarding her relationship and acknowledges in her submissions that she understood herself to be in such a relationship (AR at 153, AMA at para 38). In light of the applicant's failure to refute the Manila visa post's finding of a continued common-law partnership, it was reasonable for the officer to reach the same conclusion.

[27] No question for certification arises and none was suggested by the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question will be certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-3585-11**
STYLE OF CAUSE:	**GEMMA ABONITA AZURIN v MCI**
PLACE OF HEARING:	**Vancouver, BC**
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