Federal Court  Cour fédérale

Date: 20161114

Docket: IMM-1514-16

Citation: 2016 FC 1262

Ottawa, Ontario, November 14, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JOSE MANUEL LARA DEHEZA
CLARIFEL CAMIT GAPUZAN

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek to set aside a decision of a Visa Officer (the Officer) at the Canadian Embassy in Mexico, dated April 11, 2016, which found that Mr. Deheza was not a member of the family class for the purpose of a spousal sponsorship application for permanent residence and that his exclusion from the family class would not be exempted under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 on Humanitarian and Compassionate (H&C) grounds.

[2] For the reasons that follow, the application for judicial review is allowed.

I. Background

[3] Jose Manuel Lara Deheza is a Mexican citizen seeking permanent resident status in Canada as a member of the family class by way of spousal sponsorship. Clarifel Camit Gapuzan is Mr. Deheza's wife and sponsor.

[4] Ms. Gapuzan met Mr. Deheza in 2009, while she was employed as a live-in caregiver for a family. Mr. Deheza was in Canada awaiting the outcome of his 2008 refugee claim.

[5] On September 1, 2011, Ms. Gapuzan became a permanent resident of Canada. She did not declare Mr. Deheza as her common-law partner at that time, although they had been co-habiting for over one year.

[6] Mr. Deheza's refugee claim was refused in 2010, and he returned to Mexico in August 2012. In or around June 2012, Ms. Gapuzan applied to sponsor Mr. Deheza for permanent residence in Canada as a member of the family class. In March 2013, a Visa Officer found that Mr. Deheza was excluded from the family class under paragraph 117(9)*(d)* of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) because Ms. Gapuzan had not named him as a non-accompanying family member at the time she became a permanent resident, despite the fact that they had been co-habiting for over a year.

[7] In June 2013, Ms. Gapuzan again applied to sponsor Mr. Deheza. This time, the Applicants requested an H&C exemption from the paragraph 117(9)*(d)* exclusion. They noted that they began co-habiting on August 27, 2010, and, as a result, became common-law partners one year later—four days before Ms. Gapuzan attained permanent resident status. They also explained that Ms. Gapuzan was unaware that, by law, she was in a common-law relationship. In January 2014, the sponsorship application was denied again. A visa officer found that Mr. Deheza and Ms. Gapuzan had been common-law partners for five months when Ms. Gapuzan became a permanent resident and the relationship was not disclosed at that time. The officer simply stated that there were insufficient H&C grounds to overcome the exclusion, without any analysis. The Applicants sought judicial review of the decision. On consent of the Respondent, the application was remitted to the visa office for redetermination.

II. The Decision under Review

[8] In the April 11, 2016 decision, the Officer again found that Mr. Deheza did not qualify as a member of the family class and that H&C considerations were insufficient to overcome his exclusion.

[9] The Officer noted the Applicants' argument that Mr. Deheza had become Ms. Gapuzan's common-law partner only four days before she attained permanent resident status. The Officer acknowledged a letter from Ms. Gapuzan's employer, stating that Ms. Gapuzan was a live-in caregiver and resided with her employer until August 27, 2010. However, the Officer relied on two credit card statements that showed Ms. Gapuzan and Mr. Deheza shared an address in March

2010, and that Ms. Gapuzan had changed the address on her driver's licence to Mr. Deheza's address in May 2010.

[10] The Officer concluded that the Applicants had been cohabiting since March 2010 and became common-law partners one year later, in March 2011, five months before Ms. Gapuzan became a permanent resident.

[11] The Officer noted that Ms. Gapuzan had not been intentionally deceitful, but had been negligent in failing to monitor the status of her relationship prior to being declared a permanent resident. The Officer stated that, for these reasons, he gave little weight to the submissions that an H&C exemption was warranted.

[12] With respect to establishment in Canada, the Officer noted that the Applicants purchased their home at a time when Mr. Deheza's status in Canada was uncertain and while they were aware of the risk involved; as a result, the Officer gave this factor low weight.

[13] The Officer rejected Ms. Gapuzan's argument that she would face obstacles, including inability to find employment and language barriers, if she joined her spouse in Mexico, noting that this was no different than the challenges faced by others in similar situations.

[14] The Officer noted that the positive factors were the Applicants' genuine and long standing relationship (including their marriage in September 2013), their social ties to their community and church in Canada, and the fact that Mr. Deheza had a standing job offer in

Canada (although that offer was outdated). The Officer found that these positive factors were not sufficient to overcome the exclusion.

[15] The Officer concluded that none of the H&C considerations assessed individually or globally, warranted an H&C exemption.

III. The Issues

[16] The Applicants raise two arguments; first, the Officer breached the duty of procedural fairness by making findings of credibility and not providing an opportunity for the Applicants to respond; and, second, the Officer's assessment of the H&C considerations, particularly with respect to the Applicants' establishment in Canada, was not reasonable.

IV. The Standard of Review

[17] A breach of procedural fairness is reviewed on the standard of correctness.

[18] Issues of mixed fact and law are reviewed on the reasonableness standard. See *Canada (Citizenship and Immigration) v Kimbatsa*, 2010 FC 346 at paras 26-27; *Gonzalez Ortega v Canada (Citizenship and Immigration*), 2010 FC 95.

[19] The discretionary decision to grant or refuse an H&C exemption is also reviewed on the reasonableness standard (*Terigho v Canada (Minister of Citizenship and Immigration*), 2006 FC

835 at para 6, [2006] FCJ No 1061 (QL); see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57-62).

[20] To determine whether a decision is reasonable, the Court focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker, and the Court will not re-weigh the evidence.

There is no breach of procedural fairness

[21] The Applicants argue that by relying on the March 2010 credit card statements and May 2010 driver's license, rather than on the letter and affidavit of Ms. Gapuzan's employer, the Officer must have doubted the credibility of both Ms. Gapuzan and her employer. The Applicants submit that they should have been afforded an interview or been provided with a fairness letter to respond to the credibility findings.

[22] I do not agree that the Officer made credibility findings. The issue is whether the Officer ignored relevant evidence. The Officer did not acknowledge or properly construe the information in Ms. Gapuzan's affidavit or in the affidavit of her employer. The Officer referred to the "letter" from the employer, but there was also a sworn affidavit from the employer attesting to the fact that Ms. Gapuzan lived in her home as a "live-in" caregiver until August 27, 2010.

The Decision is not Reasonable

[23] The Officer noted that Ms. Gapuzan was negligent in not monitoring the status of her relationship. The Officer assessed the H&C considerations on the basis of his finding that the Applicants had been in the relationship for five months, since March 2011. He stated that for all these reasons ("pour toutes ces raisons"), he attributed little weight to the H&C factors. The Officer's approach fails to appreciate that the purpose of an H&C exemption is to overcome a provision of the Act that the Applicants cannot or fail to meet. The Officer also failed to assess all the evidence on the record with respect to the Applicant's relationship.

[24] The Applicants acknowledge that, regardless of whether they were officially common-law partners in March 2011 or August 2011, Ms. Gapuzan failed to declare Mr. Deheza as her common-law partner when she became a permanent resident in September 2011. However, the date the Applicants met the definition of a common-law partnership is a relevant factual determination in the circumstances of this case.

[25] The Officer made a finding of fact that the Applicants were in a common-law relationship as of March 2011—based on the credit card bills and Ms. Gapuzan's change of address on her driver's licence—without explaining why he rejected the contradictory evidence from Ms. Gapuzan's employer (in the form of an affidavit and the Record of Employment) that supported Ms. Gapuzan's evidence. Nor did the Officer explain how the credit card statements he relied on established that the Applicants' relationship met the definition of a common-law partnership, as set out in the Regulations.

[26] The Regulations provide in subsection 1(1) that:

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. (conjoint de fait)	**conjoint de fait** Personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (common-law partner)

[27] In *Cai v Canada (Minister of Citizenship and Immigration)*, 2007 FC 816, Justice Kelen considered a similar issue where the date on which the sponsor and applicant became common-law partners was determinative. Justice Kelen referred to the Regulation and noted, at para 12:

> […] The Regulations do not provide for the definition of a "conjugal relationship". However, as noted by Mr. Justice Rouleau in *Siev v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 736, the Operating Procedures prepared by the respondent reflect the common law test set out by the Supreme Court of Canada:
>
> Para 15. The guide OP 2 - Processing Members of the Family Class sets out the tests laid down by the Supreme Court in *M. v. H.*, [1999] 2 S.C.R. 3 for determining whether two persons are actually living in a conjugal relationship:
>
> - shared shelter (e.g. sleeping arrangements);
>
> - sexual and personal behaviour (e.g. fidelity, commitment, feelings towards each other);
>
> - services (e.g. conduct and habit with respect to the sharing of household chores)
>
> - social activities (e.g. their attitude and conduct as a couple in the community and with their families);
>
> - economic support (e.g. financial arrangements, ownership of property);
>
> - children (e.g. attitude and conduct concerning children)

> - the societal perception of the two as a couple.
>
> From the language used by the Supreme Court throughout *M. v. H.*, it is clear that a conjugal relationship is one of some permanence, where individuals are interdependent -- financially, socially, emotionally, and physically -- where they share household and related responsibilities, and where they have made a serious commitment to one another.
>
> Based on these factors, the following characteristics should be present to some degree in all conjugal relationships, married and unmarried:
>
> - mutual commitment to a shared life;
>
> - exclusive -- cannot be in more than one conjugal relationship at a time;
>
> - intimate -- commitment to sexual exclusivity;
>
> - interdependent -- physically, emotionally, financially, socially;
>
> - permanent -- long-term, genuine and continuing relationship;
>
> - present themselves as a couple;
>
> (Point 5.25 in the Guide)
>
> [Emphasis in original]

[28] The Respondent's own publicly available material (which is for the information of applicants and is not a legal document) notes that a common-law relationship "[r]efers to a person who is living in a conjugal relationship with another person (opposite or same sex), and has done so continuously for a period of at least one year. A conjugal relationship exists when there is a significant degree of commitment between two people. This can be shown with evidence that the couple share the same home, support each other financially and emotionally, have children together, or present themselves in public as a couple" (Citizenship and

Immigration, Guide IMM 3999, “Sponsorship of spouse, common-law partner, conjugal partner or dependent child living outside of Canada” (22 July 2016)).

[29] With respect to the meaning of cohabitation, Citizenship and Immigration, Operational Manual OP 2, “Processing Member of the Family Class” (14 November 2006) provides at 5.35:

> “Cohabitation” means “living together.” Two people who are cohabiting have combined their affairs and set up their household together in one dwelling. To be considered common-law partners, they must have cohabited for at least one year. This is the standard definition used across the federal government. It means continuous cohabitation for one year, **not intermittent cohabitation adding up to one year**. The continuous nature of the cohabitation is a universal understanding based on case law.
>
> [Emphasis in original]

[30] The Officer’s factual finding that the Applicants were co-habiting in March 2010 was made without acknowledgement or consideration of the definition of “common-law partner” in the Regulations, the Operational Manual, or the jurisprudence, and without any analysis of how the evidence met the relevant criteria.

[31] With respect to the Applicants’ submissions that the Officer failed to conduct the appropriate H&C analysis, I note that there is sometimes a fine line between re-weighing the evidence, which the Court will not do on judicial review, and finding that the analysis was flawed.

[32] In the present case, the analysis was flawed because, first, it was not conducted with a view to determine if the failure to comply with the Act could be overcome, and, second, the evidence of the Applicants' establishment in Canada was misconstrued.

[33] The Officer's unreasonable finding that the Applicants had been in a common-law relationship for five months, and that Ms. Gapuzan had been negligent in monitoring her status, tainted the Officer's H&C analysis to the extent that the Officer pre-determined that little weight would be given to the H&C factors and that the H&C factors could not overcome the exclusion. The error in the Officer's approach to the H&C analysis is sufficient to find that the decision is not reasonable, as it is not justified by the facts and the law.

[34] In addition, the Officer discounted the Applicants' purchase of a house in Canada because the Applicants were aware of Mr. Deheza's precarious immigration status and his pending removal. This suggests that the Applicants purchased the house only to bolster their subsequent application for permanent residence. Coupled with the other evidence of their establishment, including their involvement in their church, their social network, Ms. Gapuzan's employment, and the offer of employment for Mr. Deheza (albeit dating from 2013), the purchase of a home should not have been characterised in this way. Such an approach discourages those seeking status in Canada from establishing themselves. Had the Applicants not sought to establish a long term residence, the Officer could have also made a negative finding.

[35] As noted by Justice Zinn in *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813), albeit in obiter:

> The Officer has taken a perverse view of the evidence of establishment forwarded by the applicants. Is every investment, purchase, business established, residence purchased, etc. to be discounted on the basis that it was done knowing that it might have to be given up or left behind? Is the Officer suggesting that it is the preference of Canadians that failed claimants do nothing to succeed and support themselves while in Canada? Is he suggesting that any steps taken to succeed will be worthless, because they knew that they were subject to removal? In my view, the answers to these questions show that it is entirely irrelevant whether the persons knew he or she was subject to removal when they took steps to establish themselves and their families in Canada. While some may suggest that in establishing themselves applicants are using a back-door to gain entry into Canada, that view can only be valid if the applicants have no real hope to remain in the country. In virtually all these cases applicants retain hope that they will ultimately be successful in remaining here. Given the time frame most of these applicants spend in Canada, it is unrealistic to presume that they would put their lives on hold awaiting the final decision.
>
> The proper question is not what knowledge they had when they took these steps, but what were the steps they took, were they done legally, and what will the impact be if they must leave them behind.

[36] Similarly, in the present case, the Officer failed to consider establishment as a positive factor and failed to consider the impact on the Applicants if Mr. Deheza does not return to his home in Canada and reunite with his wife, or if Ms. Gapuzan is required to leave her home and employment in Canada.

An Award of Costs is not Warranted

[37] The Applicants submit they should be awarded costs because: (i) the Officer made the same error in the re-determination of their application that was made in the first determination in

2014, (ii) two requests to re-open the decision were ignored, and (iii) the Applicants waited a further 18 months for the April 2016 decision.

[38] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provides that "No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders."

[39] In *Adewusi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 75 at para 23, Justice Mactavish noted that the threshold for establishing "special reasons" is high and went on to provide some examples from the jurisprudence where the threshold had been met. Such examples include where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith (*ibid* at para 24, citing *Manivannan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392, [2008] FCJ No 1754 (QL) at para 51) and where there is conduct that unnecessarily or unreasonably prolongs the proceedings (*ibid* at para 25, citing *John Doe v Canada (Minister of Citizenship and Immigration)*, 2006 FC 535, [2006] FCJ No 674 (QL); *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] FCJ No 1523 (QL) at para 26; and *Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1154, [2002] FCJ No 1576 (QL)).

[40] In the present case, the Applicants endured a further delay awaiting the re-determination and the Officer erred in his assessment of the facts and the law. However, there is no evidence of

bad faith or other conduct which prolonged the rendering of the decision that would meet the high threshold of special reasons to support an award of costs.

[41] However, I accept the Applicants' submission that some time frame should be imposed on the Respondent for the second re-determination of the H&C application and that the first stage determination should be made before the Applicants are again required to provide the medical and criminal records information. I acknowledge the Respondent's submissions that a two to three month time frame is not likely feasible. As this will be the third time this application is considered, it must be expedited. Therefore, I direct that the Respondent process the application as expeditiously as possible and provide the Applicants with a determination on the merits of the H&C application no later than four months from the date of this judgment (March 14, 2017).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter shall be re-determined by a different Visa Officer and a decision shall be rendered on the merits of the H&C application no later than March14, 2017.

3. There is no question for certification

4. There is no order with respect to costs

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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