Federal Court  Cour fédérale

**Date: 20180723**

**Docket: IMM-5208-17**

**Citation: 2018 FC 771**

**Ottawa, Ontario, July 23, 2018**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**KAKHA CHANTLADZE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Kakha Chantladze seeks judicial review of a decision by an officer with Citizenship and Immigration Canada [CIC] to deny his application for permanent residence as a member of the Spouse or Common-law Partner in Canada Class. The officer found that Mr. Chantladze was not

cohabiting with his spouse, contrary to s 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[2] For the reasons that follow, the immigration officer unreasonably denied Mr. Chantladze's application for spousal sponsorship on the sole ground that he was not "primarily residing" with his wife in Ontario between 2015 and 2017. Because the one year period of cohabitation had been previously established, the officer should have examined the reasons why the couple were living apart, whether they still considered themselves to be married, and whether they remained in a conjugal relationship with the intention of living together as soon as possible. The application for judicial review is therefore allowed.

## II. Background

[3] Mr. Chantladze is a citizen of Georgia. He arrived in Canada in 2009 and made a claim for refugee protection. This was ultimately denied, and he is currently subject to a removal order.

[4] On October 1, 2011, Mr. Chantladze married Lioudmila Mikolaenko, a citizen of Canada. On December 28, 2011, he submitted an application to be sponsored from within Canada. The application received stage 1 approval on October 10, 2013, meaning that the marriage was considered to be genuine.

[5] There is no dispute that Mr. Chantladze and Ms. Mikolaenko cohabited as spouses for almost four years from the date of their marriage in 2011 until June 2015, when Mr. Chantaladze

began to pursue employment opportunities in Alberta. He owns and operates a construction company.

[6] In February 2015, Mr. Chantladze informed CIC of a change in his residential address from Mississauga, Ontario to Edmonton, Alberta. In June 2017, he informed CIC of another change of address, this time from Edmonton, Alberta to Etobicoke, Ontario.

[7] On November 9, 2017, CIC officials visited Mr. Chantladze's address in Etobicoke. His wife's son explained that he was away on business.

[8] On November 22, 2017, Mr. Chantladze attended an interview with an immigration officer. He candidly admitted that he had resided in Alberta from June 2015 to June 2017.

[9] Mr. Chantladze presented the immigration officer with a range of documentation to confirm that his relationship with his wife had continued throughout the period June 2015 to June 2017. This included a shared lease on the Ontario rental property, joint bank account statements and other financial records, and evidence of travel between Ontario and Alberta. Two acquaintances vouched for the couple's ongoing conjugal relationship.

## III. Decision under Review

[10] The immigration officer refused Mr. Chantladze's application for permanent residence because he had not been "primarily residing" with his wife since 2015. The officer noted

Mr. Chantladze's changes of address, and that he had obtained a temporary Ontario driver's licence shortly after the immigration official's visit to his Ontario address in November, 2017. The officer expressed doubt that Mr. Chantladze intended to permanently resume his residence in Ontario, given that he had booked a return flight to Edmonton. In his interview, Mr. Chantladze acknowledged that he was unaware of the cohabitation requirement for spousal sponsorship.

## IV. Issues

[11] The sole issue raised by this application for judicial review is whether the immigration officer's conclusion that Mr. Chantladze was not cohabiting with his wife was reasonable.

## V. Analysis

[12] A finding of cohabitation is a factual determination that is reviewable against the standard of reasonableness (*Said v Canada (Citizenship & Immigration)*, 2011 FC 1245 at para 18 [*Said*]). The Court will intervene only if the decision falls outside the "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).

[13] Section 124 of the Regulations requires an applicant to demonstrate that he or she is the spouse of a sponsor, and that he or she cohabits with the sponsor in Canada. A failure to meet the cohabitation requirement is fatal to a sponsorship application under the Spouse or Common-law

Partner in Canada Class (*Manbodh v Canada (Citizenship & Immigration)*, 2010 FC 190 at para 11).

[14] Sections 5.35 and 5.36 of Chapter 2 of the CIC Overseas Processing Manual [Manual] provide a list of indicators of cohabitation. While the criteria do not have the force of law, a failure to consider them may be an indication that the resulting decision was unreasonable.

[15] In this case, there is no dispute that the following factors identified in the Manual suggest that Mr. Chantladze continued to cohabit with his wife between June 2015 and June 2017, even though he maintained a second residence in Alberta while he pursued employment opportunities there:

(a) joint bank accounts and/or credit cards;

(b) joint residential leases;

(c) joint rental receipts;

(d) evidence of joint purchases; and

(e) correspondence and other documents confirming the couple at the same address.

[16] Some significant documents, such as a driver's licence and health card, were not provided by Mr. Chantladze. It is reasonable to infer from his application for an Ontario driver's licence in 2017 that he held an Alberta licence previously.

[17] Importantly, Mr. Chantladze's construction company was registered in Ontario, and he and his wife submitted joint tax returns in Ontario. As previously noted, two acquaintances vouched for the couple's ongoing conjugal relationship.

[18] The Respondent relies on this Court's decision in *Chaudhary v Canada (Citizenship & Immigration)*, 2012 FC 828 at paragraph 12 [*Chaudhary*], where Justice Russell Zinn stated: "[w]hile cohabitation means living together continuously, from time to time, one or the other partner may have left the home for work or business travel, family obligations, and so on. The separation must be temporary and short". Similar language is found in the Manual, but only in connection with meeting the initial threshold for establishing a common law relationship:

> 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.
>
> While cohabitation means living together continuously, from time to time, one or the other partner may have left the home for work or business travel, family obligations, and so on. The separation must be temporary and short.

[19] Later in the Manual one finds a discussion of what constitutes "ordinarily cohabiting" after the one year period has been established. This is a less stringent test:

> 5.36 […] After the one year period of cohabitation has been established, the partners may live apart for periods of time without legally breaking the cohabitation. For example, a couple may have been separated due to armed conflict, illness of a family member, or for employment or education-related reasons, and therefore do

> not cohabit at present. […] Despite the break in cohabitation, a common-law relationship exists if the couple has cohabited continuously in a conjugal relationship in the past for at least one year and intend to do so again as soon as possible. There should be evidence demonstrating that both parties are continuing the relationship, such as visits, correspondence, and telephone calls.
>
> This situation is similar to a marriage where the parties are temporarily separated or not cohabiting for a variety of reasons, but still considers [*sic*] themselves to be married and living in a conjugal relationship with their spouse with the intention of living together as soon as possible.

[20] The jurisprudence relied upon by the Respondent, namely *Chaudhary*, *Said*, *Oziegbe v Canada (Citizenship and Immigration)*, 2015 FC 360 and *Ally v Canada (Citizenship and Immigration)*, 2008 FC 445, all concerned circumstances where the spouses were alleged never to have cohabited at all. That is not the case here. Mr. Chantladze and his wife cohabited for almost four years from the date of their marriage in 2011 until he began pursuing employment opportunities in Alberta in 2015. There is ample evidence that between June 2015 and June 2017, the couple continued their relationship through visits and other forms of contact, shared leases and other financial arrangements, and by filing joint tax returns.

[21] I therefore conclude that the immigration officer unreasonably denied Mr. Chantladze's application for spousal sponsorship on the sole ground that he was not "primarily residing" with his wife in Ontario between 2015 and 2017. Because the one year period of cohabitation had been previously established, the officer should have examined the reasons why the couple were living apart, whether they still considered themselves to be married, and whether they remained in a conjugal relationship with the intention of living together as soon as possible.

[22] The application for judicial review is therefore allowed, and the matter is remitted to a different immigration officer for reconsideration in accordance with these reasons.

[23] The Respondent asks to be identified in this proceeding as the Minister of Citizenship and Immigration, rather than the Minister of Immigration, Refugees and Citizenship Canada. Mr. Chantladze does not oppose this request. The style of cause is amended accordingly.

## JUDGMENT

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed, and the matter is remitted to a different immigration officer for reconsideration in accordance with these reasons.

2. The style of cause is amended to substitute the Minister of Citizenship and Immigration for the Minister of Immigration, Refugees and Citizenship Canada.

"Simon Fothergill"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5208-17 |
| **STYLE OF CAUSE:** | KAKHA CHANTLADZE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | CALGARY, ALBERTA |
| **DATE OF HEARING:** | JULY 17, 2018 |
| **JUDGMENT AND REASONS:** | FOTHERGILL J. |
| **DATED:** | JULY 23, 2018 |

**APPEARANCES:**

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|---|---|
| Ram Sankaran | FOR THE APPLICANT |
| Maria Green | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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