

Federal Court



Cour fédérale

Date: 20130130

Docket: IMM-3352-12

Citation: 2013 FC 92

Ottawa, Ontario, January 30, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

XIU YI XUAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns a decision by a Citizenship and Immigration Officer [Officer] denying an application for permanent residence under the “spouse in Canada” class.

It is a requirement of this class that not only must an applicant be a spouse or common-law partner but they must “cohabit” with the sponsor.

124. A foreign national is a member of the spouse or common-law partner in Canada class if they

124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions

suivantes :

(a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;

a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;

(b) have temporary resident status in Canada; and

b) il détient le statut de résident temporaire au Canada;

(c) are the subject of a sponsorship application.

c) une demande de parrainage a été déposée à son égard.

Immigration and Refugee Protection Regulations, SOR/2002-227 [the Regulations]

II. FACTS

[2] The Applicant came to Canada in December 2000 but lost her refugee claim. She married her husband Dennis in August 2009 and he sponsored her permanent resident application. The couple were interviewed in May 2011 at which time the application was approved in principle.

[3] The couple claimed to live in Markham, both prior to and subsequent to being married. More importantly, it was where they claimed to live together at the time of the home visit by CBSA officers. They had also bought a property in Stouffville in 2010.

[4] The husband/sponsor had an adult daughter from a previous marriage who lives in the Toronto area. The husband/sponsor spent some nights at his daughter's house – the frequency and length of stay were in issue in this proceeding.

[5] The Applicant listed the Stouffville property as her primary address on her driver's licence. She later claimed that she did so to avoid incurring HST on the purchase of the Stouffville property – potentially an issue for the Canada Revenue Agency.

[6] The difference between the addresses listed on the driver's licences of the husband and wife caused CBSA officials to investigate the nature of their relationship.

[7] On August 9, 2011 (a Tuesday) the CBSA officers drove past both houses, there were no cars in either driveway and the Applicant's car was in a one-car garage at the Markham house.

The CBSA officers visited the Markham house and the Applicant let them in. They then questioned the Applicant about her husband's clothes and personal hygiene/grooming supplies. Concluding that the answers were unsatisfactory and that she might be a flight risk, the Applicant was arrested and held in detention for 11 days.

[8] The CBSA officers noted the following salient facts in relation to the home visit:

- The Applicant provided an address in Stouffville to the Ministry of Transportation and her Sponsor provided an address in Markham;
- Neither the Applicant nor the Sponsor's cars were present at either address around 05:00 hrs on August 9, 2011;
- At 10:43 hrs no one answered the door at the Stouffville address, but a dog was present;
- At 11:10 hrs the Applicant answered the door at the Markham address, but the Sponsor was not present;
- When asked to show the CBSA some of the Sponsor's clothing, the Applicant showed a men's coat, one shirt and one pair of pants, in a closet full of women's clothing;
- The ensuite bathroom's shower was recently used and there was a wet toothbrush; the Applicant's hair was still wet and she said the toothbrush was the Sponsor's;

- When asked to show the CBSA her own toothbrush, the Applicant could not find it, then said she shared a toothbrush with the Sponsor;
- When asked to show the Officer some of the Sponsor's socks and underwear, the Applicant had difficulty finding any of his clothing but eventually found a pair of socks from a storage bin she claimed was his; and
- The Applicant had two Ontario driver's licences with two addresses and could not explain why.

[9] The Applicant was later interviewed by a different CBSA officer following her arrest, this time with the assistance of a translator. The salient features of that interview were:

- The Applicant told the CBSA that the Sponsor left at 07:00 hrs but then stated he spent the night at his daughter's home, but stated she did not know where the daughter lived or what the daughter's name or phone number was;
- When asked how long her Sponsor had been living with the daughter, the Applicant stated it may have been a few nights a month but then changed her answer and said that the Sponsor would sometimes spend a few nights a week with his daughter;
- One of the CBSA officers phoned the Sponsor who alleged he left the house at 07:00 hrs that morning and spent the whole night before at home with the Applicant;
- When asked about his toiletries, the Sponsor claimed he kept them all with him in his car;
- When asked about his clothing, the Sponsor claimed they were kept in a different room in the house; and
- When the CBSA advised the Sponsor that they could not find any of his clothing at the house, the Sponsor changed his answer and told the CBSA that most of his clothing was at his daughter's house.

[10] Part of the decision is a record of the questions and answers elicited at an interview two months after the home visit. Both the Applicant and the Sponsor were separately asked the same questions. The Applicant challenges the accuracy and completeness of this interview on a number

of points yet also relies on its accuracy where the answers of the Applicant and Sponsor are the same or substantially the same.

[11] The Officer concluded that the Applicant had not met the requirements for the spousal class because she had not demonstrated that she is in a genuine marriage and that she cohabitates with her Sponsor in Canada. In addition to the evidence of the home visit, and the two subsequent interviews, the Applicant also raised that she was pregnant which seemed to carry no weight with the Officer.

[12] The real issues in this judicial review are:

- (a) is the Decision reasonable?
- (b) was there a breach of natural justice in conducting an investigative visit?
- (c) was there a breach of procedural fairness in not providing the Applicant with an opportunity to prove paternity?

III. ANALYSIS

[13] There is no issue on the standard of review. In regard to issues of credibility, and weight, the standard is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). In regard to breach of natural justice and procedural fairness, the standard is correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392).

A. *Natural Justice/Procedural Fairness*

[14] There is no authority prohibiting such visits. The real issue was the manner in which it was conducted. The Applicant claimed that she felt intimidated, that a CBSA officer placed his hands on

her and that no interpreter was present. The CBSA officers filed affidavits contesting this description of events.

[15] It is impossible for the Court to determine whether one side or other was misdescribing the events surrounding the home visit. There is no evidence that this was a “warrantless search” – the Applicant never objected to the CBSA entering the premises. She showed them the location of clothes and of personal items. She never claimed to insist or ask for an interpreter and she responded to their questions.

[16] There was no breach of natural justice in respect to the home visit. It was legal, entry was consensual, responses were apparently voluntary and questions appeared to be understood.

[17] With respect to proof of paternity, the Applicant did not ask for an opportunity to prove, much less actually provide, proof of paternity. More importantly, the decision did not turn nor was it particularly influenced by the issue of paternity.

[18] The Officer simply concluded that the existence of a child did not itself establish the existence of a *bona fide* marriage. Paternity was, at best in this case, a neutral event establishing neither marriage nor even cohabitation. If the Applicant had sought to establish cohabitation and marriage by reason of paternity, it was incumbent on the Applicant to provide that evidence.

B. *Reasonableness of Decision*

[19] This case turns on the reasonableness of the decision and particularly the conclusions drawn from all of the evidence. The Applicant filed an affidavit establishing that not all of the answers given at the joint interview were accurately recorded or in some cases recorded at all.

[20] The Respondent filed no evidence from the Officer on this point – a dangerous trial tactic. One would expect that the Officer would say the record was accurate.

[21] However, in a contest of facts, the Court must generally accept the evidence given on which there was no cross-examination unless it is so deficient in terms of reality and experience as not to have “an air of truth”.

[22] Mr. Berger did an excellent job undermining some aspects of the joint interview. The Respondent admitted that there were some frailties in the record and in some instances an inaccurate understanding of the facts (the sale price of a house was one clear example).

[23] The Applicant pointed out that the Officer did not address documents which pointed to a married relationship – joint bank accounts, joint insurance, joint donations.

[24] In terms of the test for “cohabitation”, the term is not defined in the Regulations. However, in *Chaudhary v Canada (Minister of Citizenship and Immigration)*, 2012 FC 828, 2012 CarswellNat 2158, Justice Zinn referred to the Respondent’s manual and summarized the term at paragraph 12:

... 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.

The full text of the Manual's excerpt on cohabitation is attached as an annex to this decision.

[25] There is no one controlled test or factor. Documents showing joint interests are consistent with marriage (unless marriage is a construct) but not necessarily of cohabitation.

[26] In the present case, it is evident that the Officer placed greater weight in what was observed or said at the home visit and in the home visit and solo interview of the Applicant than in the answers given at the joint interview two months later.

[27] The choice to assign greater weight to the less prepared, extemporaneous evidence lies within the discretion of the Officer. It is a reasonable choice given the nature of the inquiry which is to determine how a person lives not merely how they say they live.

[28] In relying on that evidence, it was reasonable to conclude that the Applicant had not established cohabitation. Three examples suffice to show that cohabitation was in doubt:

- The Applicant was unable to produce her husband's toothbrush. When she located a toothbrush, she first claimed it was his; when it was shown to be wet (the husband not having spent the previous night with his wife), the Applicant admitted it was hers but that the couple shared a toothbrush. Only in the clearest circumstances would such a notion not send shivers down the spines of most couples.

- The Applicant was at first unable and later contradictory in stating whether her husband used an electrical razor or a disposable razor. It was more than reasonable for the Officer to expect that the Applicant would know the personal preference of her husband.
- The Applicant's explanation that she was a neater person, therefore she hung her clothes in the closets at the Markham house while her husband's were packed away in boxes, invites reasonable scepticism.

[29] Therefore, I conclude that it was reasonable for the Officer to find that the Applicant had not established "cohabitation". It was unnecessary and potentially unreasonable to conclude that the marriage was not genuine. I need not decide this latter point.

IV. CONCLUSION

[30] It is sufficient, looking at the decision as a whole, to conclude that the Officer's decision that cohabitation had not been established was reasonable.

[31] This judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is dismissed.

“Michael L. Phelan”

Judge

ANNEX

OP2: Processing Members of Family Class

5.35. What is cohabitation?

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. The following is a list of indicators about the **nature of the household** that constitute evidence that a couple in a conjugal relationship is cohabiting:

- Joint bank accounts and/or credit cards;
- Joint ownership of residential property;
- Joint residential leases;
- Joint rental receipts;
- Joint utilities accounts (electricity, gas, telephone);
- Joint management of household expenditures;
- Evidence of joint purchases, especially for household items;
- Correspondence addressed to either or both parties at the same address;
- Important documents of both parties show the same address, e.g., identification documents, driver’s licenses, insurance policies, etc.;
- Shared responsibility for household management, household chores, etc.;
- Evidence of children of one or both partners residing with the couple;
- Telephone calls.

These elements may be present in varying degrees and not all are necessary to prove cohabitation. This list is not exhaustive; other evidence may be taken into consideration.

[emphasis in original]

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3352-12

STYLE OF CAUSE: XIU YI XUAN

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: January 30, 2013

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