Federal Court Cour fédérale

Date: 20170303

Docket: IMM-3023-16

Citation: 2017 FC 261

Ottawa, Ontario, March 3, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

LUCY WANJIKU NJOROGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

I. Overview

[1] The applicant, Ms. Lucy Wanjiku Njoroge, is a citizen of Kenya. She feared persecution on the grounds of her sexual orientation in Kenya. On arrival in Canada, she sought and was granted protection. In May 2016, Ms. Njoroge was granted permanent residence. In applying for permanent residence, Ms. Njoroge identified Emily Karanja as a family member on the basis that Ms. Karanja is her same-sex partner.

[2] Ms. Karanja was interviewed by a Visa Officer [Officer] at the Canadian High Commission in Nairobi in June 2016. The Officer found that her circumstances did not meet the definition of a common-law partner under subsection 1(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], nor did she meet the definition of a conjugal partner.

[3] Ms. Njoroge is now seeking judicial review of the Officer's decision. She submits that the Officer failed to apply the correct definition of a "common-law partner" under the IRPR and that the assessment of her same-sex relationship was unreasonable.

[4] Having considered the parties written and oral submissions, I am unable to find any grounds upon which to intervene in the Officer's decision. The application is dismissed for the reasons that follow.

II. The Law

[5] Subsection 176(1) of the IRPR allows an applicant seeking permanent residence to include the applicant's family members. Subsection 1(3)(a) of the IRPR defines family member as including a spouse or common-law partner.

[6] Subsection 1(1) of the IRPR defines "common-law partner" as follows:

1 (1) The definitions in this subsection apply in the Act and in these Regulations. "common-law partner" means, in relation to a person, an	1 (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement. « conjoint de fait » Personne qui vit avec la personne en

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)	cause dans une relation conjugale depuis au moins un an. (common-law partner)

[7] Subsection 1(2) of the IRPR provides for an exception to the common-law partner cohabitation requirement where a couple has been in a conjugal relationship but unable to cohabit for reasons of persecution or any form of penal control:

(2) For the purposes of the Act and these Regulations, an individual who has been in a conjugal relationship with a person for at least one year but is unable to cohabit with the person, due to persecution or any form of penal control, shall be considered a common-law partner of the person.	(2) Pour l'application de la Loi et du présent règlement, est assimilée au conjoint de fait la personne qui entretient une relation conjugale depuis au moins un an avec une autre personne mais qui, en raison d'une persécution ou d'une forme quelconque de répression pénale, ne peut vivre avec elle.

[8] Section 2 of the IRPR defines a conjugal partner as follows:

conjugal partner means, in relation to a sponsor, a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year. (partenaire conjugal)	partenaire conjugal À l'égard du répondant, l'étranger résidant à l'extérieur du Canada qui entretient une relation conjugale avec lui depuis au moins un an. (conjugal partner)

III. Decision under Review

[9] In concluding that Ms. Karanja did not satisfy the definition of a common-law partner, the Officer noted that she had never cohabited with Ms. Njoroge. The Officer also indicated that

Ms. Karanja had stated that the relationship had started in 2011 when she was a minor of 13 or 14 years of age and that they maintained no communication or contact while she was at boarding school with the exception of some visits during school holidays.

[10] The Officer noted several inconsistencies between Ms. Karanja's story during the interview and her application. The decision indicates that the inconsistencies were put to her during the interview but the responses did not alleviate the Officer's concerns.

[11] In addition to finding there had been no period of cohabitation, the Officer also concluded that there was not a strong enough degree of interdependency to satisfy the definition of conjugal partner. Based on the evidence, the Officer characterized the relationship as one of girlfriend/girlfriend.

[12] The Officer refused the application on the basis that Ms. Karanja did not satisfy the requirements as set out in subsections 176 (1) and (3) of the IRPR to obtain a permanent residence visa as a family member of Ms. Njoroge.

IV. Standard of Review

[13] Ms. Njoroge submits, relying on the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Patel*, 2011 FCA 187, that: (1) the Officer's interpretation of the IRPR, including the definition of common-law partner, is reviewable on a correctness standard; and (2) the Officer's assessment of the same-sex relationship is reviewable on a reasonableness standard. The respondent, relying on *Canada (Minister of Citizenship and Immigration) v Khosa,*

[2009] 1 SCR 339 at para 59 and *Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47 [*Dunsmuir*], submits that the issues raised are questions of fact or mixed fact and law reviewable on a reasonableness standard.

[14] I agree with the respondent. The Officer's consideration of the definition of 'common-law relationship' involves the application of the facts to the prescribed definition. However, even if I am wrong and the issue raised is strictly one of interpretation, the interpretation of a decision-maker's home statute is also owed deference by a reviewing Court except in narrowly defined circumstances. None of those circumstances arise in this case (*Dunsmuir* at paras 54 and 55). A reasonableness standard of review will be applied.

V. Analysis

A. *Did the Officer err in applying the "common-law partner" definition?*

[15] Ms. Njoroge submits that the Officer erred in finding that Ms. Karanja was not her common-law partner on the basis that they had not cohabited for the one year qualifying period set out in subsection 1(1) if the IRPR. She argues that the Officer failed to assess whether cohabitation, as a same-sex couple would have exposed the couple to persecution. She further submits that factors including her fleeing Kenya after the discovery of her relationship and the Refugee Protection Division's, [RPD] finding that she had been in a same-sex relationship in Kenya should have been addressed by the Officer. She submits that the couple's five year relationship should have been assessed against subsection 1(2) of the IRPR and in recognition of

its purpose, to allow individuals in committed and mutually dependent relationships to qualify as family members where cohabitation is not possible due to persecution. I am not persuaded.

[16] Ms. Karanja and Ms. Njoroge acknowledged that they had not cohabited for a one year period. On that basis, the Officer concluded that the common-law partner definition at subsection 1(1) was not satisfied. The Officer then addressed whether Ms. Karanja and Ms. Njoroge were conjugal partners. In doing so, the Officer noted that Ms. Karanja was a minor at school, that while at school there had been minimal contact, and further noted that their affairs had not been combined. The Officer also stated that there "…is still not much proof of contact even since [Ms. Njoroge] contacted [Ms. Karanja] from Canada in 2014." The Officer also noted discrepancies in Ms. Karanja's explanation for the minimal contact. On the basis of these factors, the Officer concluded "I am also not satisfied that you meet the criteria of a conjugal partner as you have not shown a strong enough degree of interdependency to meet the criteria".

[17] Subsection 1(2) of the IRPR interprets the subsection 1(1) definition of a common-law partner. Subsection 1(2) provides that where the individuals are: (1) in a conjugal relationship; and (2) unable to cohabit due to persecution or a form of penal control, they shall none the less be considered common-law partners. In this case, the Officer, having concluded that the first of the two requirements set out in subsection 1(2) had not been satisfied, did not need to address the question of persecution.

B. *Was the Officer's assessment of the same-sex relationship unreasonable?*

[18] The parties agree that where a decision-maker is assessing whether individuals are in a conjugal relationship, one must be guided by the decision of the Supreme Court of Canada [SCC] in *M. v H.*, [1999] 2 SCR 3 [*M. v H.*]. At paragraph 59, the SCC stated:

> *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

[19] Ms. Njoroge notes in her submissions that not all of the factors identified in *M. v H.* need to exist. She further notes that the approach to determining the existence of a conjugal relationship must be flexible as the relationships of couples vary widely (*M. v H.* at para 60). She argues that this approach means that there is no minimum evidentiary threshold that must be met to establish a conjugal partnership. She submits that, in this case, the Officer failed to assess the same-sex relationship in a flexible manner that took into consideration their age, the reasons for separation and Ms. Karanja's ongoing concerns of her family discovering her sexual orientation. I disagree.

[20] The Officer considered Ms. Karanja’s age at the time the relationship was entered into, noted that, at that time, Ms. Karanja was at boarding school and that no communication or contact was maintained apart from school holidays. The Officer also noted that the evidence of contact since 2014 was limited and insufficient to demonstrate consistent ongoing communication. The Officer addressed the paucity of evidence in this regard in the interview with Ms. Karanja and the explanation that communications had been deleted due to a fear that family members would discover the relationship. The Officer rejected this explanation noting “I am having a hard time believing what you are telling me since you have not been living at home…”.

[21] The record demonstrates that the Officer did seek evidence and information to allow for a consideration of the factors set out in *M. v H*. The Officer did not adopt an inflexible approach in addressing the issue rather the Officer weighed the evidence and reached a conclusion. In doing so, the Officer found that while a relationship did exist, it did not rise to the level of a conjugal relationship. This was not an unreasonable conclusion where the Officer had noted that Ms. Karanja was a school-aged girl and attending boarding school at the time Ms. Njoroge remained in Kenya.

[22] Ms. Njoroge also submits that the Officer’s findings are inconsistent with the findings of the RPD, a further indication the decision is unreasonable. This is not the case. While the RPD accepted that Ms. Njoroge had been in a relationship with Ms. Karanja, it did not conclude that the relationship was conjugal or even ongoing.

[23] While Ms. Njoroge might have weighed the evidence differently, her disagreement with the Officer's conclusions does not render the decision unreasonable.

VI. Conclusion

[24] The Officer's decision is justified, transparent and intelligible and falls within the range of possible, acceptable outcomes which are defensible with respect to the facts and law (*Dunsmuir* at para 47).

[25] The parties have not identified a question of general importance, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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