Date: 20070803

Docket: IMM-6729-06

Citation: 2007 FC 816

Ottawa, Ontario, August 3, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CAI, CHANGBIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an immigration officer's decision dated December 5, 2006, which denied the applicant's application for permanent resident status under the spouse or common-law partner in Canada class.

BACKGROUND

[2] The applicant is a citizen of China and has lived in Canada since June 30, 2001. While studying at Bond International College in April or May 2002, he met his current common law partner, Wen Yang.

[3] Ms. Yang had applied for permanent residence on January 27, 2005 as a dependent of her father. She had not disclosed that she had a common-law partner when she applied. Ms. Yang was granted permanent resident status on June 2006.

[4] The applicant, Ms. Yang and some other students shared a house together in Toronto from May to November 2002. The applicant and Ms. Yang resided together in Ottawa since December 2002 while attending college. They expressed to each other their intention to remain together permanently in July or August 2005. They share expenses, socialize together as a couple, and reside together as an intimate couple.

[5] On September 13, 2006, the applicant applied from within Canada for permanent resident status under the spouse in Canada class. The applicant and Ms.Yang, his sponsor, were interviewed on November 28, 2006. By decision dated December 6, 2006, their application was refused:

> […] In order to become a permanent resident under the spouse or common-law partner in Canada class, you must comply with requirements as specified in the Immigration and Refugee Protection Regulations.
>
> Regulation 125(1)(d) states:
>
> > "A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if,
> >
> > (d) subject to subsection (2), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined".

> In your case, you have not shown that you meet this requirement because at the time of your sponsor's application for permanent residence, she did not list you as a non-accompanying family member and you were not examined. […]
>
> [Emphasis in original]

ISSUE

[6] The only issue raised in this application is whether the immigration officer erred in determining that the applicant was his sponsor's common law partner when the sponsor applied to be a permanent resident of Canada.

RELEVANT LEGISLATION

[7] The legislation relevant to this application is:

1. the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act); and
2. the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[8] In particular, the following provisions of the Regulations apply:

Definitions	**Définitions**
1. (1) The definitions in this subsection apply in the Act and in these Regulations.	**1.** (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement.
"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*) […]
Member	**Qualité**
124. A foreign national is a member of the spouse or common-law partner in Canada	**124.** Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger

class if they

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

(*b*) have temporary resident status in Canada; and

(*c*) are the subject of a sponsorship application.

Excluded relationships

125. (1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if […]

(*d*) subject to subsection (2), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

qui remplit les conditions suivantes :

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

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

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

Restrictions

125. (1) Ne sont pas considérées comme appartenant à la catégorie des époux ou conjoints de fait au Canada du fait de leur relation avec le répondant les personnes suivantes : […]

d) sous réserve du paragraphe (2), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

STANDARD OF REVIEW

[9] The issue raised in this application concerns a question of mixed law and fact, namely whether the legal definition of a "common-law partner" applies to the facts underlying the applicant and his sponsor's applications for permanent residence. Given that the immigration officer is entitled to some deference in respect of factual findings, but not in respect of the determination of

the correct legal test to apply to those factual findings, the appropriate standard of review is one of reasonableness.

ANALYSIS

[10] The immigration officer denied the applicant's application for permanent residence under section 124 of the Regulations because the immigration officer determined that the applicant was a non-accompanying family member of his sponsor when she applied for permanent residence and was not examined at that time. This application turns on whether the applicant's sponsor was required under paragraph 125(1)(d) of the Regulations to declare the applicant as her common-law partner when she applied for permanent residence on January 27, 2005.

[11] There is no dispute that the applicant and his sponsor are currently in a common-law spousal relationship. In her application to sponsor and undertaking, the applicant's sponsor stated that her relationship with the applicant began on June 1, 2002. The applicant argues that, despite the fact that his relationship with the sponsor traces back to 2002, his relationship with his sponsor did not meet the requirements of a common-law relationship as of that date. Indeed, the applicant argues that the requirements for a common-law relationship were met only after his sponsor applied for and obtained permanent resident status. Therefore, the applicant argues, he is not excluded under paragraph 125(1)(d) of the Regulations.

[12] As noted above, a common-law partner under the Regulations "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." 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:

> ¶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.*, <u>it is clear that a conjugal relationship is one of some permanence</u>, where individuals are interdependent -- financially, socially, emotionally, and physically -- where they share household and related responsibilities, <u>and where they have made a serious commitment to one another</u>.
>
> Based on these factors, the following characteristics should be present to some degree in all conjugal relationships, married and unmarried:
>
> - <u>mutual commitment to a shared life</u>;
>
> - 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 added]

[13] The notes prepared by the immigration officer on November 30, 2006 indicate that the applicant and his sponsor were interviewed on November 28, 2006. Based on that interview and "numerous submissions on file", the immigration officer was satisfied that the client and sponsor have been in a common-law relationship since 2003.

[14] The immigration officer did not set out the test applied to determine whether the applicant and his sponsor's relationship fell within the definition of a common-law spousal relationship. Based on my review of the material before the immigration officer, it is apparent that while the interview questions were aimed at determining whether the applicant and his spouse were common-law partners as of the date of his sponsorship application, there was no examination by the immigration officer about whether the applicant and his sponsor shared a "mutual commitment to a shared life" and "enjoyed a permanent long-term relationship" at the relevant time, i.e. January 27, 2005 when Ms. Yang applied for permanent residence.

[15] When Ms. Yang and the applicant began living together they were young students. As such, they may not have made a "mutual commitment to a shared life" when they decided to live together. There was accordingly no basis on which the immigration officer could reasonably conclude that the applicant was the common-law partner of his sponsor as of January 27, 2005 when she

submitted her application for permanent residence and did not identify the applicant as a non-accompanying family member. The evidence is that it was after June 2005 that the couple discussed making a mutual commitment to a shared life, having a permanent, long-term relationship. This is also reflected in the evidence that in late 2005 and early 2006 they started having bank accounts, residential lease and insurance in both their names, and the applicant only met his partner's parents for the first time in June 2005.

[16] As Mr. Justice Paul Rouleau held in *Siev*, above, the meaning of "common-law partner" means that the conjugal relationship is one of some permanence where the couple has made a serious commitment to one another.

[17] For the reasons above, this application for judicial review is allowed. The applicant's application for permanent residence is returned for reconsideration by a different immigration officer.

[18] The Court wishes to note that, regardless of the legal merits of this application, the circumstances of this case raise humanitarian and compassionate considerations which may entitle the applicant and Ms. Yang to an exemption from the legal requirements of the Act.

[19] Neither party proposes a question for certification. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed; and

2. The applicant's application for permanent residence is returned for reconsideration by a different immigration officer.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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