Federal Court Cour fédérale

Date: 20180511

Docket: IMM-4665-17

Citation: 2018 FC 502

Ottawa, Ontario, May 11, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CHUN TAO ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of the reconsideration decision of an immigration officer [Officer] confirming an earlier decision that the Applicant and her sponsor, Mr.Yu Kei Cheun, were not cohabitating. This resulted in a conclusion that the Applicant did not qualify as a member of the spouse in Canada class under s 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]:

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.

[2] There are two principal issues in this judicial review:

1. whether the translation service was appropriate in the circumstance; and

2. whether the conclusion on non-cohabitation was reasonable.

II. Background

[3] The Applicant, a Taiwanese citizen in her late thirties, came to Canada as a visitor and started a relationship with Mr. Cheun in February 2015. They were married on November 8, 2015.

[4] In May 2016, the Applicant submitted an application for permanent residence as a member of the spouse in Canada class.

[5] In September 2016, the Applicant was issued a two-year work permit which prohibited her from "employment in businesses related to the sex trade, such as strip clubs, massage parlours or escort services". In August 2017 she was caught in a "sting" operation engaging in the sex trade, which resulted in a report under s 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [CBSA Report], that the Applicant was in breach of her work permit.

As a result, an Exclusion Order was issued which declared the Applicant inadmissible to Canada for violating the conditions of her work permit.

[6] In August 2017, the Applicant received a letter notifying her of an interview in respect of her permanent residence application. The letter prominently featured the following translation requirement:

> If both you and your sponsor require an interpreter please bring <u>one certified interpreter</u> who is NOT your family member or representative.
>
> Please ensure the interpreter is fluent and knowledgeable in your native language and in English. (This interview will be conducted in English).
>
> [Emphasis in original.]

[7] The Applicant attended the September 7, 2017 interview with the Officer, Mr. Cheun, her counsel, and her interpreter. The Applicant and Mr. Cheun were interviewed separately.

[8] During the first interview with Mr. Cheun, the Officer engaged in a discussion about the interpreter where it developed that counsel had chosen the interpreter and the interpreter was not certified.

[9] Despite this lack of certification, and after the usual caution given by the Officer to alert him if a party does not understand the interpreter, the interview continued.

[10] Long after the interview and the Officer's reconsideration decision, the Applicant and Mr. Cheun asserted for the first time in their application for leave for judicial review that there were problems with the interpretation.

[11] On October 16, 2017, the Officer determined that the Applicant did not meet the admissibility requirements of s 72(1)(e)(i) of the Regulations as she was under an Exclusion Order.

[12] The Applicant requested reconsideration on the basis of the "Spouse or Common-law partner in Canada Class" [the Policy] which provided an exception to inadmissibility for a member of the spouse or common-law partner in Canada class.

[13] In the reconsideration decision [Decision], the Officer again refused the application. The Applicant could not benefit from the Policy because she was not cohabitating with the sponsor, and was therefore not a member of the spouse in Canada class.

[14] In reaching the conclusion on non-cohabitation, the Decision considered the following:

- the Applicant and Mr. Cheun's lack of credibility;
- the Applicant's lack of knowledge of the "home" address;
- the Applicant's absence on numerous site visits;

- the presence of the Applicant's clothes at the address where she was arrested, despite her claim that she was looking after the place for a friend and on a break from her restaurant job;
- that it was unreasonable for Mr. Cheun to know nothing of the Applicant's involvement in sex work if the couple were cohabitating in a genuine relationship during that time; and
- the explanation for the Applicant's reason to engage in sex work was not credible.

The fact that, at the time of the reconsideration, the couple was cohabitating at the home of Mr. Cheun's parents was of little weight since the Applicant was required to live there as a term of her release by CBSA.

III. Analysis

[15] The standard of review for the interpretation issue is correctness because it is a matter of procedural fairness: *Lin v Canada (Citizenship and Immigration)*, 2015 FC 53, 249 ACWS (3d) 190.

The standard for the cohabitation issue is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

A. *Interpretation*

[16] The Applicant's position is that the Officer breached procedural fairness because he allowed the interview to proceed after the translator's lack of certification was made known.

[17] In effect, the Applicant argues that the Officer should have protected her from the choice of interpreter made by her counsel.

[18] I see no merit in this proposition. A party is bound by the decisions made by their counsel: *Canada (Citizenship and Immigration) v Singh,* 2016 FCA 96 at para 66, [2016] 4 FCR 230. Counsel, as the Applicant's agent, binds her as his principal.

[19] It is not the role of the Officer to question even the dubious choices of an applicant, particularly those made on legal advice. It would be offensive for the Officer to interfere in the solicitor-client relationship.

[20] In this case, the Applicant was notified of the requirements for an interpreter, she was represented by counsel who chose the interpreter, counsel was present throughout the interview, the interpreter's account was paid without protest, and, contrary to the requirements of the jurisprudence, issues in relation to interpretation were not raised at the earliest opportunity.

[21] There is no evidence from the Applicant's former counsel. Therefore, there is no evidence as to when the lack of certification was disclosed or that former counsel had been misled as to certification. There was also no protest then or later, nor a request for a postponement of the interview.

[22] There is no obligation on the Officer, as argued by the Applicant, that he obtain a clear waiver of the Applicant's rights to a certified translator or to a proper interpretation.

[23] None of the Applicant's authorities assist her on this matter. Improper translation cases, where error of translation is proven, or cases involving the absence of translators are generally not applicable here.

[24] However, a more relevant authority is *Baloul v Canada (Citizenship and Immigration)*, 2011 FC 1151, 398 FTR 158, which dealt with the responsibility that falls to an applicant in respect of translation:

> [21] The applicant received a notice to attend the interview in the form of a letter, dated August 10, 2010. The two page letter included the following clear instructions (Respondent's Record, Exhibit C at 2):
>
> > **The Immigration Officer will conduct the interview in English or French.** The information you provide to us during the interview plays an important role in determining your ability to qualify to immigrate to Canada. If you cannot communicate easily in either English or French, you must present yourself at the interview with a **professional interpreter** […] capable of reading, writing and speaking either in English or French.
> >
> > […]
> >
> > If you decide to come to the interview without a professional interpreter and we determine that you cannot communicate easily in English or French, the Immigration officer will make a decision on your application based on the information contained in your file and the information provided at the interview. If you cannot answer the interview questions posed by the Immigration officer, your application may be refused [emphasis in original].
>
> The applicant had sufficient time to obtain an interpreter, but chose not to. The risks associated with this choice were spelled out in unequivocal terms and the applicant chose to assume these risks. I would add that the onus placed on the applicant to provide an interpreter has been upheld by this Court (*Kazi v Canada (Minister*

> *of Citizenship and Immigration)*, 2002 FCT 733 at paras 16 -18, [2002] FCJ 969).
>
> …
>
> [23] When it became apparent the applicant was having difficulties understanding and answering the immigration officer's questions, for the benefit of the applicant and though she was not required to, the officer offered to invite a colleague to interpret. The applicant agreed to this suggestion of her own volition and cannot now question the quality of this interpretation when she was well aware of the consequences of not arranging for her own professional interpreter. Furthermore, it is well established law that where there are translation problems, the complainant must raise the problem at the first reasonable opportunity (*Oei v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 466 at paras 40 and 42, [2002] FCJ 600; *Kompanets v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ 726 at para 9, 196 FTR 61; which the applicant did not do in this case.

[25] In this case, the Officer asked if the interpreter was certified. Former counsel's letter to the translation service is instructive in showing the Applicant's acceptance through counsel of an uncertified translator:

> Thank you for your invoice. I will attend to payment immediately.
>
> In the future, I recommend that you insure that your interpreter be a certified interpreter and that he or she have a business card with them. There was a problem at the beginning of the interview when Ms. Di was asked if she was certified and she said she was not. The interviewer then asked for a business card and she did not have one. The interviewer asked if she was a friend of Ms. Zhang or Mr. Cheun. He also asked how she had been hired. I had to show him a copy of my email to your firm retaining her before he would permit her to translate.
>
> [Emphasis in original.]

[26] I have concluded that the responsibility for translation problems (if any) rests with the Applicant. The Officer did not violate either procedural fairness principles or s 14 of the *Charter*

of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, by proceeding with the interview.

B. *Cohabitation*

[27] I can find nothing unreasonable in the Officer's conclusion that the Applicant had not provided sufficient evidence of cohabitation. While there was evidence consistent with cohabitation, there was evidence which was inconsistent with a genuine cohabitation relationship. Some of that evidence is outlined in paragraph 14 of these Reasons.

[28] The admitted period of non-cohabitation was argued to be short, but the Applicant was not able to satisfy the Officer that this "short" period was, in fact, short. It ended when the Applicant was arrested and required to cohabitate with Mr. Cheun as a term of her release.

[29] The Officer's refusal to apply the Policy was properly grounded in the reasonableness of the finding of non-cohabitation. Absent cohabitation, the Policy was not applicable.

[30] Lastly, on a different point, the Officer was under no obligation to confront the Applicant with his concerns about her evidence before deciding the matter.

IV. Conclusion

[31] For all these reasons, this judicial review will be dismissed.

[32] There is no question for certification.

JUDGMENT in IMM-4665-17

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

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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