Federal Court  Cour fédérale

Date: 20200707

Docket: IMM-4983-19

Citation: 2020 FC 747

Ottawa, Ontario, July 7, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

LINTON ALEXANDER MCLEISH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Linton McLeish is a citizen of Jamaica. In July 2018 he applied for permanent residence in Canada as the common-law partner of his sponsor, Cynthia Mitchell, a Canadian citizen. On July 25, 2019, an officer with Immigration, Refugees and Citizenship Canada [IRCC] refused the application because Mr. McLeish had failed to establish that he and Ms. Mitchell satisfied the

definition of common-law partner set out in subsection 1(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[2] Mr. McLeish has now applied for judicial review of this decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. He contends that the decision does not comply with the requirements of procedural fairness and that it is unreasonable.

[3] For the reasons set out below, I agree that the decision is unreasonable. As a result, it is not necessary to address the argument that the decision was made in a procedurally unfair manner. The decision will be set aside and the matter remitted to another decision maker for redetermination.

II. BACKGROUND

[4] Mr. McLeish was born in Jamaica in July 1979. He first arrived in Canada in August 2012 on a work permit. In September 2012, he began working as farm worker in British Columbia. He also did construction work.

[5] Mr. McLeish returned to Jamaica in November 2014 but then re-entered Canada in March 2015. It appears that he returned on a work permit and then remained as a visitor under subsection 183(6) of the *IRPR*. He appears to have been without status in Canada since April 2016.

[6] In November 2014, Mr. McLeish married N.F., a Canadian citizen. They lived together in Maple Ridge and then Surrey, British Columbia. Ms. F. applied to sponsor Mr. McLeish for permanent residency as her spouse. However, their relationship ended acrimoniously with Mr. McLeish charged with having assaulted Ms. F. with a weapon on or about June 7, 2017. (On October 30, 2018, Mr. McLeish pled guilty to the charge and received a conditional discharge.) At some point Ms. F. withdrew her sponsorship of Mr. McLeish. It appears that the two divorced in or about July 2018.

[7] Mr. McLeish was previously in a common-law relationship in Jamaica from May 2004 until May 2011. He has three children – ages 15, 13, and 10, respectively – who live in Jamaica with their mother. Mr. McLeish's parents and siblings also live in Jamaica.

[8] Ms. Mitchell was born in Vancouver in June 1963. She had been married from 1991 until 2011, when she and her husband divorced. She is the mother of three adult children. At the relevant time, she was living in Mission, British Columbia.

[9] In support of the sponsorship application, Ms. Mitchell provided a letter in which she describes the origin and evolution of her relationship with Mr. McLeish. Mr. McLeish himself did not provide any information about the relationship apart from what is recorded on the application forms.

[10] Ms. Mitchell states that she first met Mr. McLeish in October 2016 at her mother's house in Burnaby, British Columbia. Mr. McLeish was there with his then-mother-in-law (Ms. F.'s mother).

[11] Subsequently, Ms. Mitchell saw Mr. McLeish at her mother's home "a couple of more times." Mr. McLeish confided in Ms. Mitchell about his personal problems, particularly his ongoing marital issues and his pending spousal sponsorship application. Ms. Mitchell states that at one point (evidently around Christmas 2016) she and her mother paid Mr. McLeish's outstanding account with his immigration consultant as a gift. Although Mr. McLeish wanted to work, he was unable to as he did not have a work permit. He spent his days looking after Ms. F.'s children and grandchildren. Ms. Mitchell gave Mr. McLeish her cell phone number in case he needed any help in the future.

[12] Ms. Mitchell states that on June 10, 2017, Mr. McLeish called her and told her that his wife had "thrown him out of the house, and that he had nothing except the clothes he was wearing." She states that she drove to Surrey and brought Mr. McLeish back to her home in Mission. After he had been staying with her for a few weeks, on July 3, 2017, their relationship became intimate. Ms. Mitchell states that the two have been cohabiting as common-law partners since then.

[13] Mr. McLeish applied again for permanent residency under the Spouse or Common-Law Partner in Canada Class, this time with Ms. Mitchell as his sponsor. His application was received by IRCC on July 30, 2018. Since Mr. McLeish and Ms. Mitchell indicated they were

living together when the application was submitted, to qualify as a common-law partner of his sponsor, Mr. McLeish had to establish that he and Ms. Mitchell had cohabited in a conjugal relationship during at least the preceding 12 months.

[14] Mr. McLeish and Ms. Mitchell were guided in the gathering of supporting materials and the completion of the application by an IRCC document checklist (IMM-5589). (They also retained a lawyer to assist them.) The checklist sets out the requirements for sponsorship of a common-law partner and identifies various documents that are required from the principal applicant (in this case, Mr. McLeish) and from the sponsor (in this case, Ms. Mitchell).

[15] One part of the checklist concerns "proof of relationship to sponsor." It states that, as the principal applicant, Mr. McLeish "must provide evidence that the relationship between you and your sponsor is genuine." The checklist then states that an applicant who is currently living with their sponsor "must provide the following documentation as proof of current cohabitation" – namely,

> - Proof of joint ownership of residential property.
> - Rental agreement showing both you and your sponsor as occupants of a rental property.
> - Proof of joint utility bills (e.g. electricity, gas, telephone, internet), joint credit card accounts, or joint bank accounts. (Submit a minimum of 1 joint bill.)
> - Vehicle insurance showing that both you and your sponsor have been declared to the insurance company as residents of the insured's address.
> - Copies of government issued documents for you and your sponsor showing the same address (e.g. driver's licenses). (Submit a minimum of 1 government issued document for each person.)

> - Other documents issued to you or your sponsor showing the same address, whether the accounts are held jointly or not (e.g. cell phone bills, pay stubs, tax forms, bank or credit card statements, insurance policies). (Submit a minimum of 1 document for each person.)

[16] The checklist states that the principal applicant should pick at least two of these sets of documents and check off the corresponding boxes to show which documents were being submitted. However, the checklist also provides another box which an applicant may check instead. It states the following:

> I am unable to provide documents from a minimum of two of the above sets of options. I am instead submitting a detailed written explanation of why these are not available. I am also providing any other evidence of cohabitation that I have.

[17] Mr. McLeish checked this latter box.

[18] In support of his application, Mr. McLeish submitted the following in addition to the required forms:

- An undated letter from Ms. Mitchell describing how she and Mr. McLeish met, the evolution of their relationship, and their relationship as a couple. The letter describes the other documents that were being submitted in support of the application (as set out below). The letter also states the following, evidently by way of explanation for why the sorts of documents called for on the checklist were not being provided:

> Linton does not work, as he does not have a work permit, so I pay all the bills, including utility bills for the property. For this reason, Linton also does not have documents addressed to him at our home.

- Letters from Ms. Mitchell's mother, aunt, two daughters, and a next-door neighbour confirming the relationship between Ms. Mitchell and Mr. McLeish.

- Receipts for money transfers – dated June 2017, August 2017, December 2017, April 2018, and June 2018 – from Ms. Mitchell to Mr. McLeish's mother and/or children in Jamaica totaling $840.00 CAD.

- Itemized bills for two different home phone numbers (both in Ms. Mitchell's name) for several months between June 2017 and July 2018. (It appears that Ms. Mitchell changed service providers in early 2018.) The bills for both numbers show numerous calls to Jamaica which Ms. Mitchell states reflect Mr. McLeish's regular calls to his mother and other members of his family. Notably, the first call to Jamaica was on the morning of June 11, 2017 (for 26 minutes). This was the day after Ms. Mitchell states Mr. McLeish arrived at her home after separating from his wife.

- A prototype brochure for the bed and breakfast Ms. Mitchell hoped to operate from her home.

- Three photographs of Ms. Mitchell and Mr. McLeish together.

[19] Over the next few months, IRCC requested and received various additional documents or information from Mr. McLeish but none are material to the present matter.

[20] On March 12, 2019, an IRCC officer sent Mr. McLeish a procedural fairness letter. The letter stated that the officer, having reviewed the application, had "concerns" that Mr. McLeish

"may not meet the requirements for immigration to Canada." More particularly, the officer advised Mr. McLeish that, based on the "limited evidence" that had been provided, they were "not satisfied that you and your sponsor have been cohabiting in the same residence in a conjugal relationship for a period of at least one year prior to the filing of your application." The officer explained that a conjugal relationship involves "a mutual commitment to a shared life and a relationship of some permanence where the two parties are interdependent and have combined their affairs economically, socially, emotionally and physically." The officer stated that, based on "the limited evidence relative to your mutual cohabitation for a period of one year," they were "not satisfied that you and your sponsor meet the definition of a common-law partnership." The officer cautioned that failure to disabuse them of this concern with additional information "may result in the refusal of your application."

[21] The letter went on to state that the following information is required:

> Proof of cohabitation: Documents proving that you were cohabiting in the same residence with your sponsor for a period of at least one year prior to your application submission date.
>
> Evidence of cohabitation: Evidence of cohabitation that could be used to confirm whether a sponsored spouse or partner is cohabiting with their sponsor which may include: Joint bank accounts or credit cards, Joint ownership of residential property, Joint residential leases, Joint rental receipts, Joint utilities accounts (electricity, gas, telephone), Important documents of both parties show the same address, for example, identification documents, driver's licenses, insurance policies, etc. (*sic* throughout).

[22] The letter gave the date by which the requested information or documents must be submitted. It then added the following: "If you are unable to provide any or all of the requested documents/information, please explain why they are not available." Finally, the letter stated:

"Failure to provide the required documents may result in the refusal of your application for permanent residence."

[23] On April 5, 2019, Mr. McLeish submitted the following additional documentation to IRCC:

- A letter from Ms. Mitchell dated March 28, 2019. Among other things, in the letter Ms. Mitchell describes her relationship with Mr. McLeish again. She also attempts to respond to the concern expressed in the procedural fairness letter about the lack of documentation. She reiterates her earlier explanation for why Mr. McLeish's name does not appear on any utility bills, stating: "As to the question of blended finances, Linton's name is not on any bill that comes to our house. All bills have been in my name since 1994. I have no idea how he is expected to have monthly bills in his name without an income." She also adds: "As I own my home, there are no rental agreements or leases in place. I do not carry insurance policies other than homeowners and vehicle insurance. Since my children are no longer minors, I have no need of life insurance, as my estate will settle any debts I might have in the event of my death. I will not be putting Lintons [*sic*] name on my property that I have owned since 1994. I raised my children there and it is planned that they will inherit it someday." Finally: "As to driver's licenses and identification documents for Linton, again, with no status, he cannot apply for a driver's license or any Canadian identification. To my knowledge, I can't get him medical coverage."

- A statement from TD Canada Trust dated April 3, 2019, indicating that Ms. Mitchell and Mr. McLeish held two joint bank accounts there – a chequing account and a savings

account. The balance of the chequing account was slightly over $50. The balance of the savings account was just under $20. The statement did not indicate when the account was opened or by whom. It did, however, give different home addresses for Mr. McLeish and Ms. Mitchell.

- Four additional letters of support from Ms. Mitchell's friends confirming her relationship with Mr. McLeish.

- Six additional photographs with handwritten dates of 2017 and 2018 showing Ms. Mitchell and Mr. McLeish together.

- Information concerning the resolution of the criminal charge against Mr. McLeish.

- Three more receipts – dated March 10, 2019; March 12, 2019; and March 21, 2019 – for two international money transfers from Ms. Mitchell to Mr. McLeish's mother and one to his father totaling $400.00 CAD.

III. DECISION UNDER REVIEW

[24] The decision on the sponsorship application was communicated to Mr. McLeish by letter dated July 25, 2019.

[25] After setting out the requirements Mr. McLeish had to meet to qualify as a common-law spouse in Canada under the *IRPA* and the *IRPR*, the substance of the decision is found in the following two paragraphs:

> I have reviewed your file including the additional information that was submitted on April 5, 2019. Your application was received on July 30, 2018 and proof of in-Canada cohabitation with your sponsor is required for at least 1 year prior to this date (from July 30, 2017, to July 30, 2018). You have indicated on your application submission forms that you and your sponsor started cohabiting in a conjugal relationship on July 3, 2017. Notwithstanding the proof of relationship submitted, no evidence of cohabitation has been provided. It is noted that the TD Canada Trust bank statement dated April 3, 2019 for a jointly held chequing account does not indicate when you were added to the account and lists a different address for you [giving an address in Surrey, BC] and your sponsor [giving Ms. Mitchell's address in Mission, BC].
>
> I am not satisfied that you and your partner have been cohabiting in a conjugal relationship for a period of at least one year at the time your application was submitted. As a result, you do not meet the definition of common-law partner.

[26] The officer also entered notes concerning the application in the Global Case Management System [GCMS]. After noting that a procedural fairness letter was sent to Mr. McLeish on March 12, 2019, the officer itemized the material sent in response (as described above). The officer then noted the following: "The additional documentation provided in response to the [procedural fairness letter] does not provide sufficient evidence of cohabitation for at least 1 year prior to lock-in. Application was locked-in on 2018/07/30 and PA [i.e. Mr. McLeish] and SPR [i.e. Ms. Mitchell] did not provide proof of cohabitation for at least one year prior to this date. As such, cohabitation is less than 1 year." On this basis, the officer concluded that Mr. McLeish was ineligible as a member of the spouse or common-law partner in Canada class under paragraph 124(a) of the *IRPR*.

[27] The sponsorship application was refused accordingly.

IV. STANDARD OF REVIEW

[28] The parties submit and I agree that the officer's determination of the merits of the sponsorship application should be reviewed on a reasonableness standard.

[29] Following *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65, reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (at para 10). In my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here. Further, the reasonableness standard reflects the fact that a reviewing court owes deference to the decision maker because of the largely fact-based nature of decisions on family sponsorship applications.

[30] An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The decision maker's reasons should be read in light of the record and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-95). When considering whether a decision is reasonable, "the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification,

transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[31] In a family sponsorship application, the decision maker is not required to give extensive reasons but they must be sufficient to explain the result. As the Supreme Court stated in *Vavilov*, "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (at para 86, emphasis in original).

[32] Further, where "the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov* at para 133). As the Court explained: "The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood" (*ibid.*). In the language of *Vavilov*, the IRCC officer who decided this matter was entrusted with an extraordinary degree of power over the lives of Mr. McLeish and Ms. Mitchell (*cf.* para 135). A corollary to this power a "heightened responsibility" on the part of the officer "to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law" (*ibid.*).

[33] The burden is on the applicant to demonstrate that the officer's decision is unreasonable. To succeed in this application for judicial review, he must establish that "there are sufficiently

serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

V. ANALYSIS

A. *Preliminary issue*

[34] In support of the present application, Mr. McLeish filed an affidavit from Ms. Mitchell affirmed on December 3, 2019. The affidavit contains information that was not before the decision maker – in particular, paragraphs 8, 9, 10, 11, and 12, Exhibits B and C, and substantial parts of Exhibit D. The general rule, subject to exceptions that do not apply here, is that only material that was before the original decision maker is admissible on an application for judicial review: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20, and *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28. Consequently, new information such as that found in Ms. Mitchell's affidavit cannot be relied upon to impugn the reasonableness of the officer's decision. Accordingly, I have not considered that information in assessing the merits of this application.

B. *Is the decision unreasonable?*

[35] As set out above, to qualify as a member of the common-law partner in Canada class, Mr. McLeish had to demonstrate that he and Ms. Mitchell had cohabited as conjugal partners for at least a year prior to when the application for permanent residence was submitted – i.e. since at least July 30, 2017. No issue is taken with the officer's understanding of the applicable

definitions or criteria. Rather, this application for judicial review turns on the reasonableness of the officer's adverse assessment of the evidence of cohabitation. As I will explain, the officer's decision fails to meet the requirements of justification, intelligibility and transparency.

[36] I begin by noting that there is an inconsistency in the officer's reasons when one compares the decision letter sent to Mr. McLeish and the officer's GCMS notes. On the one hand, the decision letter states: "Notwithstanding the proof of relationship submitted, no evidence of cohabitation has been provided" (emphasis added). On the other hand, the GCMS notes state: "The additional documentation provided in response to the [procedural fairness letter] does not provide sufficient evidence of cohabitation for at least 1 year prior to lock-in" (emphasis added). If the officer decided the application on the basis that there was "no evidence" of cohabitation, this would be a clear error since evidence to demonstrate cohabitation was filed in support of the application. Of course, whether that evidence is sufficient or not is a different question. For present purposes, I am prepared to give the officer the benefit of the doubt and proceed on the basis that the sponsorship application failed because of the insufficiency of the evidence of cohabitation. The difficulty, however, is that the officer provided no explanation for why this was so.

[37] To succeed in his application for permanent residence, Mr. McLeish had to establish, among other things, not only that he and Ms. Mitchell were in a conjugal relationship but also that they had been living together in that capacity for at least a year: see subsection 12(1) of the *IRPA*, subsection 1(1) of the *IRPR*, and paragraph 124(a) of the *IRPR*. Mr. McLeish contends that the officer decided both of these issues against him and challenges both of those

determinations. However, I agree with the respondent that, as set out above, the decision turns on the issue of the duration of Mr. McLeish's cohabitation with Ms. Mitchell as opposed to the genuineness of their relationship. Notably, nowhere in the decision letter or the GCMS notes does the officer cite paragraph 4(1)(b) of the *IRPR*, which provides the basis for finding that a foreign national is not a common-law partner of a person on the basis that the relationship is not genuine.

[38] With respect to the issue of cohabitation, Mr. McLeish did not provide the sorts of things one might normally provide to demonstrate where one is living – e.g. a bill in one's name sent to the address in question – and that one has combined one's affairs with those of another – e.g. joint ownership of a residential property. He did, however, offer an explanation for why he was unable to provide such evidence. He offered this explanation (through Ms. Mitchell) in his original application and in response to the procedural fairness letter. This is something that both the document checklist and the procedural fairness letter contemplated yet the officer never explains why, as must have been the case, this explanation was judged to be insufficient. While the officer notes the explanation in the GCMS notes, the officer never engages with it in the notes or in the decision letter. The officer was not required to accept the explanation but the officer was required to explain why it was not accepted and why, as again must have been the case, the failure to provide the usual sorts of proof of residence or combining of affairs counted against the application. This is especially so considering the importance of the matter for both Mr. McLeish and Ms. Mitchell and the significant implications of an adverse decision (cf. *Vavilov* at paras 133-35).

[39] Further, although Mr. McLeish did not provide the sort of evidence that might typically be used to establish one's place of residence, he did provide other evidence that he and Ms. Mitchell were living together in her home. In addition to the two statements from Ms. Mitchell, he provided letters from, among others, two of Ms. Mitchell's daughters and a next-door neighbour. The authors all attested to their personal knowledge that Mr. McLeish had been living with Ms. Mitchell since June 2017. The long-distance telephone records he provided were capable of corroborating (at least to some degree) this evidence of cohabitation. Importantly, most of this information was provided with the original application. Even though the procedural fairness letter requesting proof of cohabitation alerted Mr. McLeish to the fact that the officer had "concerns" that he may not meet the requirements for immigration to Canada, the basis of these concerns – presumably, the insufficiency of the evidence of cohabitation that had been provided – is not explained. (The GCMS notes relating to the procedural fairness letter do not shed any additional light on the basis of the officer's concerns.) As a result, even if one considers the final decision in light of the procedural fairness letter, one is no further ahead in understanding why the evidence initially provided by Mr. McLeish was found to be insufficient. Once again, the officer was not required to conclude that that evidence was sufficient to establish that, in fact, Mr. McLeish and Ms. Mitchell had been cohabiting for the requisite period of time but the officer was required to explain why that evidence was found to be insufficient. This was not done, leaving the decision lacking justification, intelligibility and transparency.

[40] Mr. McLeish certainly did not help his own cause when he submitted documentation from TD Canada Trust showing that, while he and Ms. Mitchell had joint bank accounts, the bank had different residential addresses for the two of them. On the other hand, Mr. McLeish

had clearly indicated in his Schedule A – Background/Declaration form that the Surrey address that appears on the bank statement had been his residential address from October 2015 until July 2016 (which was when he was living with Ms. F. and before he and Ms. Mitchell met). He had also indicated on the same form that he had lived at another address from August 2016 until June 2017 before moving in with Ms. Mitchell. Against this backdrop, it was unreasonable for the officer to conclude that the information from the bank alone suggested that Mr. McLeish and Ms. Mitchell were not living together at the material time.

[41] As noted, the decision on the sponsorship application turned on the sufficiency of the evidence of cohabitation for the requisite length of time. The flaws in the officer's decision I have identified require that the decision be set aside and the matter redetermined by a different decision maker.

VI. CONCLUSION

[42] For these reasons, the application for judicial review is allowed, the decision dated July 25, 2019, is set aside, and the matter is remitted for reconsideration by a different decision maker.

[43] The parties have not suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4983-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the IRCC officer dated July 25, 2019, is set aside and the matter is remitted for reconsideration by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4983-19
STYLE OF CAUSE:	LINTON ALEXANDER MCLEISH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON JUNE 11, 2020 FROM OTTAWA, ONTARIO (COURT) AND VANCOUVER, BRITISH COLUMBIA (PARTIES)

JUDGMENT AND REASONS:	NORRIS J.
DATED:	JULY 7, 2020

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