Federal Court  Cour fédérale

Date: 20140606

Docket: IMM-7254-13

Citation: 2014 FC 551

Ottawa, Ontario, June 6, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MARGARET MONICA TRAVERSE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant sponsored Mr. Deloof for a permanent resident visa as a member of the conjugal partner class. However, the visa officer found that the applicant and Mr. Deloof were not in a "conjugal relationship" within the meaning of section 2 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*IRPR*). The applicant appealed that decision to the Immigration Appeal Division of the Immigration and Refugee Board (the Board). The Board

dismissed the appeal, similarly, on the basis that the applicant's relationship with Mr. Deloof was not a conjugal relationship. The applicant brings this judicial review application to set aside that decision of the Board.

[2] The judicial review is granted. Though I conclude that the Board reasonably found no conjugal relationship, I ultimately grant the judicial review for a breach of procedural fairness relating to the manner in which the Board handled one aspect of the hearing.

II. Key Facts

[3] The applicant is a Canadian citizen. Mr. Deloof, whose visa application she sponsored, is a citizen of Belgium. The applicant identifies Mr. Deloof as her partner in her application.

[4] The applicant and Mr. Deloof met online in July 2008 and in person in September 2008. At the time, Mr. Deloof had been working in Canada as a driver of heavy trucks under a work permit that was valid from May 2008 – May 2010. However, in October 2008, Mr. Deloof was convicted for impaired driving. As a result of his conviction (and the corresponding two-year prohibition from driving), he was no longer able to work as a truck driver. Further, a section 44 *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) report was prepared, alleging that he was inadmissible to Canada for criminality. A deportation order was issued on December 19, 2008.

[5] Given his conviction, the applicant suggested that Mr. Deloof live with her in her home in Truro, Nova Scotia. He did so from mid-November 2008 until January 2, 2009, when he left Canada.

[6] Since his departure, the applicant has been to visit Mr. Deloof in Belgium three times: in April 2009, for about four weeks; in 2010, for about three months; and from December 2011 to the end of January 2012. This last visit was cut short due to the death of the applicant's mother.

[7] Throughout their five year relationship the applicant and Mr. Deloof have cohabited for approximately seven months. They are not married and have no children. The applicant has significant physical limitations and reduced mobility, as a result of which she has been unable to work since 2000. This condition explains her lack of travel in recent years. Friends and family perceive them to be a "couple," and the applicant was significantly involved in Mr. Deloof's legal proceedings.

[8] In dismissing the appeal the Board wrote:

> What are even more significant and alarming are the appellant's statements about the possibility of marrying the applicant. Aside from the issue of the procedures in Belgium, the appellant stated that there had been no question of marriage because her personal preference would be to live with the applicant for at least one year before marrying him.
>
> […]
>
> [T]he most relevant factors for assessing an individual's level of commitment to their partner are still the financial commitment and the effort made to spend as much time as possible with that partner, despite the difficulties and obstacles encountered. Given the evidence, the panel is not at all satisfied that within the context

> of a five-year relationship, the effort made by the appellant and the applicant reflects the level of commitment of a married couple.

[9] However, in coming to that conclusion, the Board also summarily dismissed one of the applicant's witnesses from providing testimony (described in greater detail below).

III. Issues

[10] There are two issues in this case.

1. Whether or not the Board made a reviewable error in its assessment of the alleged conjugal relationship between the applicant and Mr. Deloof.
2. Whether or not the Board violated the applicant's procedural rights by not permitting one of her witnesses to provide testimony.

IV. Standard of Review

[11] Reviewing the Board's decision regarding the conjugal relationship is subject to a standard of reasonableness. There could be different opinions, simultaneously reasonable, based on the facts as found, that the relationship was or was not conjugal. A reasonable decision must be defensible in respect of the facts and the law, and reflect an intelligible, transparent justification and application of the law to those facts: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

[12] However, a violation of procedural fairness – the second issue – is subject to a standard of correctness: *Turner v Canada (Attorney General)*, 2012 FCA 159 at para 38.

V. Analysis

A. *The Board Reasonably Assessed the Absence of a Conjugal Relationship*

[13] "Conjugal partner" is defined at section 2 of the *IRPR* and means:

> [I]n 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.
>
> 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.

[14] The Board approached the issue of whether the parties were in a conjugal relationship by following *M v H*, [1999] 2 SCR 3, which specifies seven non-exhaustive criteria, namely:

a) shared shelter;

b) sexual and personal behaviour;

c) services;

d) social activities;

e) economic support;

f) children; and

g) societal perception of the couple.

[15] The applicant takes issue with these criteria because they were established in the context of conjugal partners who live in the same country (*M v H* arose under the *Ontario Family Law Act*). In particular, the applicant argues, convincingly, that the Board failed to tailor them to the unique circumstances of this case where the applicant cannot travel to Belgium by reason of her disability, and Mr. Deloof cannot travel to Canada because of the outstanding section 44 order.

That being said, applying these established principles, with adequate sensitivity to the unique context of partners living in separate countries, is reasonable.

[16] The panel relied on the *M v H* criteria and applied them reasonably in their decision.

[17] In this case, the Board considered evidence from the applicant which established that:

a) They are not married;

b) They do not have children;

c) They shared shelter minimally and intermittently for at most seven months during five years;

d) Have been intimate and are perceived by their friends as a couple;

e) Shared some social activities while visiting one another;

f) Provided economic support for visits and these legal proceedings but do not share any assets or rely on each other for financial support;

g) Have not seen one another since January 2012; and

h) That Ms. Traverse had not made significant efforts to obtain any status in Belgium.

[18] In light of that evidence, the Board concluded that the couple's efforts did not reflect the level of commitment of a married couple. In their view, the evidence supported, at best, a *plan* to have a conjugal relationship in the future: *Gibbs v Canada (Minister of Citizenship & Immigration)*, 2004 CarswellNat 6212. Indeed, the applicant's evidence before the Board was that she only wishes to adopt marriage-like attributes, such as combining assets, on the condition

that Mr. Deloof moves to Canada, suggestive of an intention to form a conjugal relationship, rather than one having already crystallized.

[19] I accept the applicant's argument that the underlying decision is not perfect. It appears to mischaracterize the applicant's health condition and reduced mobility, which informs her explanation for not having visited Mr. Deloof in recent years. Additionally, the underlying decision may have placed inordinate emphasis on factors from *M v H* like combining finances and common shelter given that those factors are clearly more difficult for partners living apart to satisfy – especially when those partners have physical and legal barriers to being together. However, perfection is not the controlling standard. Despite these gaps in the consideration of the evidence, when the decision is assessed in the context of the evidence as a whole, no reviewable error arises from the conclusion that they were not in a conjugal relationship. A reasonable test was applied through a reasonable weighing of various factors in the complicated assessment of a conjugal relationship.

B. ***The Board Breached the Applicant's Right to Procedural Fairness***

[20] A second challenge to the decision arises from the summary decision of the Board not to hear a witness. Late in the day, near 6:00 p.m., the applicant asked to call a witness. The witness had been excluded from the hearing throughout the day. The transcript reads:

> BY PRESIDING MEMBER (to appellant)
>
> - Do you want to have your friend in?
>
> BY APPELLANT (to presiding member)
>
> - Yeah.
>
> BY PRESIDING MEMBER (to appellant)

- I don't have any questions for her.

BY APPELLANT (to all)

- Nobody's got questions for her?

BY PRESIDING MEMBER (to appellant)

- I don't have, but I'm not sure if the Minister's counsel would have any questions for her.

BY MINISTER'S COUNSEL (to presiding member)

- No.

BY APPELLANT (to presiding member)

- I have only a few questions, it'll be very quick.

BY PRESIDING MEMBER (to appellant)

- It's about what, because if it's admitted by the Minister's counsel then there is no need to.

BY APPELLANT (to presiding member)

- I'm sorry?

BY PRESIDING MEMBER (to appellant)

- What exactly she will come to say in general?

BY APPELLANT (to presiding member)

- What I want her – well, basically what I want her to say (inaudible) ---

BY PRESIDING MEMBER (to appellant)

- I just want to avoid to repeat information that is on file that you've mentioned, and that he's mentioned.

BY APPELLANT (to presiding member)

- Okay.

- These are my questions I was going to ask her, so you could tell me.

1. How long have you known Margaret? How long has she known me?

2. When did – when did you first meet Marnix Deloof?

3. Where was your first contact with Mr. Deloof?

4. Do you ---

BY PRESIDING MEMBER (to appellant)

- This we all know because you mentioned it.

BY APPELLANT (to presiding member)

- Okay.

- So these three are no's?

BY PRESIDING MEMBER (to appellant)

- No.

[…]

BY PRESIDING MEMBER (to minister's counsel)

- Do you have any concerns about ---

BY MINISTER'S COUNSEL (to presiding member)

- I don't have any concerns that's she's – I believe she's going to come here and say that for her it's a genuine relationship.

BY APPELLANT (to presiding member)

- We don't need her then.

[21] Procedural fairness encompasses a broad range of protection, but its content is informed by the context, statutory and jurisprudential nature of the issues which it is called upon to adjudicate. Accordingly, Board members, sitting in their quasi-adjudicative/investigatory role,

have discretion to direct the proceedings before them. They need not sit passively and listen to repetitive evidence or irrelevant evidence simply because a party wishes to call that evidence.

[22] There are, however, several factors unique to this case which support the finding of a breach of procedural fairness. I note that the applicant was self-represented, and, it is unclear as to why she could not call the witness. In the dialogue between the Minister's counsel and the Board, the applicant was clearly an unequal participant. I note, as well, that the Board readily accepted the initial characterization of the proposed evidence offered by the Minister's counsel to the effect that it was simply to prove that the relationship was genuine. How the Minister's counsel knew this, and whether it was in fact true, remains unknown.

[23] The member pre-emptorily dismissed the witness's testimony. After being told that the applicant wished to call the witness the member said she had no questions for her, although she had no idea as to what the witness would say.

[24] Counsel for the Minister correctly points out that no adverse findings of credibility were made against the applicant and that the witness's evidence was only tangentially relevant to the central legal question. The member accepted that they were perceived as a couple, and that they were in a loving relationship. Nevertheless, she concluded that their relationship did not reflect the degree of commitment one would see in a conjugal relationship.

[25] These observations, while accurate, overlook the fact that the evidence of this witness could have affected the Board's appreciation of the evidence in respect of the *M v H* factors and

reinforced the weight given to aspects of the applicant's evidence. No pressing reason motivated or justified the pre-emptory rejection of apparently relevant evidence. As a consequence, I find a breach of procedural fairness and grant the application for judicial review.

JUDGMENT

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

There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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