Federal Court  Cour fédérale

Date: 20160310

Docket: IMM-2951-15

Citation: 2016 FC 303

Ottawa, Ontario, March 10, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MIAOCI DENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act] challenging a decision of a member of the Immigration Division of the Immigration and Refugee Board [the Board or the ID]. In the decision under review, dated June 10, 2015, the ID found the Applicant, Miaoci Deng, inadmissible to Canada pursuant to s 40(1)(*b*) of the Act and issued a removal order against her.

[2] For the reasons that follow, the application is dismissed.

I. Background

[3] The Applicant, a foreign national from the People's Republic of China, entered Canada in 2005 to attend college where she met her sponsoring spouse, Mr. Wei Yao.

[4] On October 15, 2006, Mr. Wei Yao married Ms. Kerr, a Canadian citizen, for the purpose of acquiring status in Canada. He obtained permanent residence in October 2007 and subsequently divorced Ms. Kerr in October 2009.

[5] On May 13, 2012, the Applicant married Mr. Wei Yao. In February 2013, he filed an inland spousal application for the Applicant which was put on hold while his first marriage to Ms. Kerr was investigated. A report pursuant to s 44 of the Act was issued in September 2013 against the Applicant alleging she knew of her spouse's fraudulent marriage to Ms. Kerr. In May 2014, a s 44 report was issued against Mr. Wei Yao.

[6] On November 6, 2014, the ID found Mr. Wei Yao inadmissible to Canada on grounds of misrepresentation and an exclusion order was issued against him. While he admitted to the allegations of misrepresentation before the ID, he appealed the decision to the Immigration Appeal Division [the IAD], for which a decision was still pending at the time of the hearing of this application for judicial review. On the day of Mr. Wei Yao's inadmissibility decision, a second s 44 report was issued against the Applicant alleging she was inadmissible on grounds of

misrepresentation pursuant to s 40(1)(*b*) of the Act, owing to the inadmissibility of her sponsoring spouse.

[7] On June 10, 2015, the Applicant was found inadmissible at her own inadmissibility hearing before the ID and a removal order was issued against her. The ID found the Applicant inadmissible on the grounds that her sponsoring spouse was "determined to be inadmissible" under s 40(1)(*b*) of the Act, despite his outstanding appeal to the IAD.

II. Legislative Framework

[8] The following provisions of the Act are applicable in these proceedings:

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection

[…]

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

49 (1) A removal order comes into force on the latest of the following dates:

(a) the day the removal order is made, if there is no right to appeal;

(b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and

(c) the day of the final determination of the appeal, if an appeal is made.

[…]

(2) Les dispositions suivantes s'appliquent au paragraphe (1) :

a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

49 (1) La mesure de renvoi non susceptible d'appel prend effet immédiatement; celle susceptible d'appel prend effet à l'expiration du délai d'appel, s'il n'est pas formé, ou quand est rendue la décision qui a pour résultat le maintien définitif de la mesure.

III. Issues

[9] The following issues arise in this application:

1. Did the Board err in finding the Applicant's spouse had been "determined to be inadmissible" under s 40(1)(*b*) of the Act?

2. Did the Board err in concluding that the Minister had complied with s 40(2)(*b*) of the Act when no evidence was presented that the provision had been considered by the Minister?

IV. Standard of Review

[10] An administrative decision-maker's interpretation of its home statute is presumed to be reviewed on a standard of reasonableness (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46). Seeing that this presumption has not been rebutted, the Court will not intervene if the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

V. Analysis

A. *Did the Board err in finding the Applicant inadmissible on the basis of the determination that her spouse was inadmissible, which is under appeal?*

[11] The Applicant submits the ID erred in concluding that she was inadmissible for misrepresentation under s 40(1)(*b*) of the Act based upon a determination by the ID that her spouse was inadmissible, when that determination was not final and subject to appeal. She argues that the term "determined" in s 40(1)(*b*) should be interpreted to mean "finally determined", so as to link it with her spouse's final determination of his inadmissibility by the IAD.

[12] The Applicant's submission is premised upon an implication of unfairness and impracticality said to arise if she is subject to a removal order based on her spouse's inadmissibility, when his status has not been finally determined by the IAD and could be reversed by its decision.

[13] I am not certain of the practical effect of the ID's decision, because it is quite possible that the Applicant will not be removed before the IAD hands down its decision on her spouse's appeal. There may be procedures available to delay her removal, such as a PRRA application, or perhaps a motion to stay removal before this Court based on exigent circumstances of an imminent overdue decision of the IAD affecting her removal status. Moreover, the ID pointed out that the Applicant did not request an adjournment until the appeal had been heard, which may have been another road not taken to avoid a "premature" removal. These comments are not

intended to be determinative, but are offered in reference to the deference owed to the ID's interpretation of its home statute under a reasonableness standard of review.

[14] More to the point, I reject these arguments because they cannot override the ID's statutory interpretation of the term "determined" in s 40(1)(*b*) as not meaning "finally determined", as that latter phrase is used throughout the Act. It is trite law that "when different terms are used in a single piece of legislation, they must be understood to have different meanings" by the reasoning that "[i]f Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81; my emphasis).

[15] In this respect, I specifically reject the Applicant's attempt to rely upon alternative uses of these terms in ss 49(1) and 40(2) of the Act, which I find support the strictly differentiated interpretations of the terms "determined" and "finally determined".

[16] Within s 40, the term "determined" is used in paragraph (1)(*b*), while "final determination" is found in paragraph (1)(*c*). In paragraph (2)(*a*), the term "determination" is used twice, and that of "final determination" used once. While different French expressions are used which do not necessarily have the same base word of "determine", there is an equivalency of meaning distinguishing between the concept of the proceeding being finally determined or not.

[17] The Applicant's argument is based upon a contextual interpretation of ss 40(2)(*a*) and 49(1), which respectively concern the duration of inadmissibility for misrepresentation and when a removal order comes into force.

[18] The Applicant argues, in the first instance, that the wording "final determination" in s 49(1)(*c*) supports a conclusion that a determination by the ID and the resulting inadmissibility is not final. I do not find that logic holds up under scrutiny. First of all, s 49 pertains to when "a removal order comes into force", not when the Applicant is determined to be inadmissible.

[19] Moreover, the distinctions in s 49 of when a removal order comes into force support a differentiated meaning of "determined" and "finally determined" in their application to the circumstances of the Applicant and her spouse, depending upon whether the decision of the ID is appealable or not. As the Applicant has no right of appeal, her removal order comes into force under s 49(1)(*a*) on "the day the removal order is made" as determined and ordered by the ID. As her spouse had the right to appeal his removal order to the IAD and exercised his right of appeal, his removal order comes into force under s 49(1)(*c*) on "the day of the final determination of the appeal" by the IAD.

[20] Where the Applicant's argument has more force is when the wording in s 40(2)(*a*) is linked with that in s 49(1). As noted, s 40(2)(*a*) treats the issue of the duration of inadmissibility for misrepresentation. To assist in its interpretation, I set out the provision with a structure to minimize confusion, and with my emphasis, as follows:

(2) The following provisions	(2) Les dispositions suivantes s'appliquent au paragraphe

govern subsection (1):	(1) :
(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following,	a) l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort,
in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or,	si le résident permanent ou l'étranger n'est pas au pays,
in the case of a determination in Canada, the date the removal order is enforced; and	ou suivant l'exécution de la mesure de renvoi;

[21] As I understand the Applicant's argument, the emphasized words of the provision govern the duration of the inadmissibility of both the Applicant and her spouse, and do so by using the term "determination", without any reference to a "final determination". However, the provision specifically refers to a "final determination" in respect of a determination outside Canada.

[22] I understand the Applicant to argue that to be consistent and comprehensive in support of the Respondent's submissions, the emphasized portion should have included "or final determination" after the word determination in order to have parallelism with the two provisions governing when the removal order came into force as prescribed by s 49 (paragraph (1)(*a*), no right to appeal) or finally determined (paragraph (1)(*c*), if an appeal is made). But because s 40(2)(a) is said to govern "subsection (1)", which includes the circumstances of the misrepresentation of the Applicant's spouse under s 40(1)(*a*) and that of the Applicant based on

that of her spouse under s 40(1)(*b*), the use of the term "determination" for in Canada situations applies to determinations of both the ID and IAD. Therefore, the term "determined" used in s 40(1)(*b*) should also refer to finally determined removal orders.

[23] I disagree with this interpretation and not simply because the provisions are dealing with different subject matters from that in s 40(1)(*b*). In analyzing s 40(2)(*a*), it is clear that the term "determination" is being used to designate generic circumstances, based upon where the decision is made, either in Canada or outside of Canada. The operative or object purposes of the provision fix the start point for the running of the five-year term of inadmissibility.

[24] In this fashion, the term "determination" has a generic meaning which allows differentiated conditions to govern the commencement of the inadmissibility period. Outside of Canada, the nature of the governing condition is actually that of a determination, but being precisely described as a "final" one. Inside Canada, however, the governing condition has nothing to do with a determination, but relates to an entirely different nature of circumstance pertaining to when the inadmissible person is actually removed. This condition of actual removal applies without regard to how the removal order was made (s 40(1)) or how the order came into force (s 49(1)). The term "determination" in s 40(2)(*a*), therefore, does not reflect in any fashion on the meaning of "determined" in s 40(1)(*b*).

[25] Any doubt about the meaning of determined in s 40(1)(*b*), of which I find none, is surely resolved by the recent amendments to s 14(1.1) of the *Citizenship Act*, RSC, 1985, c C-29

[*Citizenship Act*]. These amendments confirm that Parliament intended a distinction between determinations that are final as opposed to those that are not.

[26] The provision, prior to amendment, explicitly required "a final determination whether … a removal order shall be made …" before a citizenship Judge could determine a citizenship application:

(1.1) Where an applicant is a permanent resident who is the subject of an admissibility hearing under the Immigration and Refugee Protection Act, the citizenship judge may not make a determination under subsection (1) until there has been a final determination whether, for the purposes of that Act, a removal order shall be made against that applicant.	(1.1) Le juge de la citoyenneté ne peut toutefois statuer sur la demande émanant d'un résident permanent qui fait l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés tant qu'il n'a pas été décidé en dernier ressort si une mesure de renvoi devrait être prise contre lui.
[Emphasis added]	[Je souligne]

As amended, the provision in its current form provides as follows:

14 (1.1) Despite subsection (1), the citizenship judge is not authorized to make a determination until	**14** (1.1) Malgré le paragraphe (1), le juge de la citoyenneté ne peut statuer sur la demande :
[…**]**	[…]
(b) if the applicant is the subject of an admissibility hearing under the Immigration and Refugee Protection Act, a determination as to whether a removal order is to be made against that applicant.	b) lorsque celui-ci fait l'objet d'une enquête dans le cadre de la Loi sur l'immigration et la protection des réfugiés, tant qu'il n'a pas été décidé si une mesure de renvoi devrait être prise contre lui.
[Emphasis added]	[Je souligne]

[27] The amendments followed a decision of the Federal Court in *Obi v Canada (Citizenship and Immigration)*, 2011 FC 573, which interpreted the previous wording of "final determination" to extend to appeal rights of the ID's removal order. The Applicant argued that reliance upon this provision implied that where a right to an appeal exists, a final determination concerning a removal order only occurs at the appeal level. However, the *Citizenship Act* was amended on August 1, 2014 to remove the word "final" so as to permit the determination for citizenship purposes to be based merely upon a determination of a removal order in the absence an appeal.

[28] It is common ground that the IRPA may be interpreted in its larger statutory context, which includes the sister provisions of the *Citizenship Act*: *Richi v Canada (Citizenship and Immigration)*, 2013 FC 212 para 13; *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015 at para 61.

[29] Given that every enactment is deemed remedial by s 12 of the *Interpretation Act*, RSC, 1985, c I-21, I conclude that Parliament clearly intended a distinction between a "determination of admissibility" and a "final determination of inadmissibility". This is on all fours with the construction of the term "determined" in s 40(1)(*b*) as not requiring a final determination by the IAD.

[30] Accordingly, for all the reasons above, I find that the meaning of the term "determined" as employed in s 40(1)(*b*) refers to the decision taken by ID concerning her spouse, and does not require the final determination of his appeal. As such, it was reasonable for the ID, following the

Applicant's spouse's inadmissibility finding before the ID, to find the Applicant inadmissible pursuant to s 40(1)(*b*), and order her removal on this basis.

B. *Did the Board err in concluding that the Minister had complied with s 40(2)(b) of the Act when no evidence was presented that the provision had been considered by the Minister?*

[31] Section 40(2)(*b*) stipulates that the Applicant should not be found inadmissible under s 40(1)(*b*) unless "the Minister is satisfied that the facts of the case justify the inadmissibility." The applicability of this provision was not raised before the ID and therefore, there is no ruling on the issue. There is also no evidence in the record that the Minister exercised whatever discretion was conferred upon him by this provision.

[32] The Applicant argues that it was incumbent upon the Board to ensure that the Minister was satisfied that the case justified the inadmissibility finding, and by failing to do so, the matter should be sent back for that determination. To support this point the Applicant argues that there are compelling facts against making an inadmissibility finding when she has lived in Canada for over a decade since the age of 19, has two Canadian-born children, and her husband is appealing his removal order.

[33] I find it a difficult provision to interpret without more assistance, which was not forthcoming from the parties. There appears to be little scope for the Minister to conclude that the Applicant's inadmissibility is not justified under s 40(1)(*b*) where the facts that justify her inadmissibility arise out of the strict operation of the statute and are wholly derived from her spouse's inadmissibility for misrepresentation.

[34] I cannot see how humanitarian and compassionate [H&C] considerations can turn a justification of inadmissibility based on the facts into a sort of exercise of the Minister's discretion. H&C factors only may be considered at the appeal level pursuant to s 67(3).

[35] One might raise the spectre of the Minister exercising a humanitarian and compassionate [H&C] discretion under s 25.1(1). But this is difficult to reconcile with the need to be satisfied about the facts justifying the inadmissibility, which are nowhere set up as being a factor in the determination. This is also in opposition to provisions providing for their consideration in derivative spousal misrepresentation determinations of family class spouses outside Canada where H&C factors may be considered via the appeal rights accorded by ss 63(1), 64(3) and 65.

[36] Perhaps the provision is intended to provide a form of rudimentary backstop where a spouse is being removed and for some reason there has been no formal decision by the ID on the person's inadmissibility because of the derivative nature of the inadmissibility. At that point, it would be incumbent upon the Minister to be satisfied that the requirements for her inadmissibility were met. Otherwise, I agree with the Respondent that by referring the matter to the ID, it would seem axiomatic that the Minister was satisfied that the facts would justify an inadmissibility finding.

[37] In the circumstances where I find that there is no requirement on the ID to decide the issue, unless raised before it, I will exercise my discretion not to make any definitive ruling on an issue first raised at the stage of a judicial review application.

[38] I think it best to await circumstances where the issue is raised before the ID. This will present an opportunity for relevant evidence to be lead along with submissions being made by the parties, such that the Court hearing the matter will have the benefit of the ID's reasons before having to determine the reasonability of its decision. I am fortified in my exercise of discretion not to entertain the issue by the inability of either counsel to provide much direction to the Court and the fact that there was never any suggestion that the issue be certified for appeal.

VI. Conclusion

[39] I find the Board did not err in its decision to find the Applicant inadmissible under s 40(1)(*b*) of the Act and to issue a removal order against her. The Application is dismissed; no questions are certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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