Date: 20071220

Docket: IMM-4836-06

Citation: 2007 FC 1349

Ottawa, Ontario, December 20, 2007

PRESENT: THE CHIEF JUSTICE

BETWEEN:

CESAR ANUA MARUQUIN, SOFRONIA TAGANAS MARUQUIN AND CHERYL TAGANAS MARUQUIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Cheryl Maruquin (Cheryl) is a daughter of the other two applicants (Mr. and Mrs. Maruquin), all of whom are citizens of the Philippines seeking sponsored permanent residence in Canada. The applicants completed their application forms in April 2003.

[2] In early March 2006, the applicants' application was approved and their visas were printed.

[3] On March 21, 2006, the applicants' Canadian sponsor faxed this message to the appropriate immigration officer: "… Cheryl Maruquin, gave birth to Jhon Lloyd Maruquin during the processing of her immigration paper. She is a single mother. At this time, the family has decided to leave the baby in the Philippines and she will petition him in the near future." Cheryl Maruquin's son was born in July 2004.

[4] When the birth of Cheryl's son was disclosed to the immigration officials, the applicants' visas had been approved but had not been delivered to the applicants. According to the CAIPS notes of March 22, 2006:

> VISA PACKAGE HAS NOT BEEN DELIVERED, RETRIEVED THIS DATE FROM DCU. SPOKE TO DEP, CHERYL. REQUESTED HER TO SUBMIT [DOCUMENTATION CONCERNING THE BIRTH OF HER CHILD] ADVISED HER THAT WE WILL NOT ISSUE VISAS YET AS CHILD NEEDS TO BE EXAMINED. SHE ALSO HAS TO INFORM US IN WRITING WHETHER CHILD IS ACCOMPANYING OR NOT (Emphasis added).

[5] On July 5, 2006, Ms. Maruquin was interviewed, together with her parents, by the immigration officer whose CAIPS notes read as follows:

> CHERYL GAVE BIRTH TO JHON LLOYD MARUQUIN IN JULY 2004. IT WAS ONLY WHEN VISAS WERE ISSUED THAT SHE DECLARED HIM, 21 MONTHS AFTER HIS BIRTH. PRINCIPAL APPLICANT AS WELL AS SPOUSE WERE VERY WELL AWARE OF CHERYL'S CONDITION AND FAILED TO INFORM US, TO DELCARE THAT CHERYL WAS PREGNANT AND LATER, THAT CHERYL GAVE BIRTH. APPLICANTS HAD ALMOST 2 TWO YEARS TO DECLARE HIM AND FAILED TO DO SO.
>
> REASONS WHY NOT DECLARING CHILD: CHERYL SAID DID NOT KNOW SHE HAD TO DECLARE. SHE SAID THAT WHEN UNDERWENT MED, TOLD THE PERSON. WHEN ASKED WHY NOT INFORM US, SHE

> SAID SHE DID NOT KNOW BUT THAT IT IS OK NOW IF THE CHILD IS LEFT BEHIND.

[6] Another immigration officer, on the same date as the preparation of the above-mentioned CAIPS notes, stated as follows:

> Based on the information obtained at interview, I am of the opinion that the applicants deliberately witheld [*sic*] the information regarding the additional dependant until the visas were issued. By witholding [*sic*] this crucial information, the decision of issuing the visas was in fact an error in law.

[7] On July 14, 2006, each of the two immigration officers wrote to the principal applicant advising that the application for permanent residence was refused "… 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", pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*. The basis of the misrepresentation was the failure of the principal applicant and his daughter, Cheryl, to disclose the birth of her son in a timely fashion. In the words of both immigration officers, the information was only provided "after we have finalized and issued your visas."

[8] The applicants' principal position is that the birth of the child was disclosed on their own initiative after the printing but prior to the delivery of the visas and, in any event, prior to any of them being landed in Canada. Accordingly, in their view, the disclosure of the child's birth on March 21, 2006, some twenty-one months after the fact but prior to the delivery of the visas,

rendered impossible any misrepresentation or withholding of a material fact that induced or could have induced an error in the administration of the Act.

[9] The respondent's main submission is that each applicant undertook to inform the Canadian visa office "immediately" where information provided in the application forms changes. Also, according to the respondent, the regulations required that the birth of Cheryl's dependant child be disclosed.

[10] On April 29, 2003, Cheryl signed her application form directly beneath a declaration that she "… will immediately inform the Canadian visa office where I submitted my application if any of the information or the answers provided in my application forms change." This particular form did not request her to advise whether she had dependents or children (tribunal record, pages 74-77).

[11] On September 11, 2003, Cheryl completed the "Additional Family Information" form which asked whether she had any children. At this time, she had no children and answered "not applicable". The form signed on this date did not contain an undertaking that required Cheryl to notify immigration officials of any change in the information provided (tribunal record, the sheet after page 50).

[12] On August 5, 2005, in a seemingly identical form to the one filled out on April 29, 2003, there is no request for Cheryl to identify any children she may have and she undertakes to advise of changes to the information she was asked to provide (tribunal record, pages 33-36).

[13] Similarly, both Mr. and Mrs. Maruquin signed forms requesting details of family members and notification to immigration officials of subsequent changes in the information provided. There is no instruction to list grandchildren or to indicate whether their dependent Cheryl has any children (tribunal record, pages 25-32, 64-69 and 70-73).

[14] As noted earlier, the form in which Cheryl stated she had no dependent children did not require her to notify immigration officers of any changes. From the respondent's perspective, her duty to do so flowed from the initial form she signed on April 29, 2003. The respondent would have expected Cheryl to remember a boilerplate undertaking she had made on a different form approximately fifteen months earlier and to report the birth of her child "immediately". In my view, it was unreasonable in this case to invoke paragraph 40(1)(a), particularly where there exists no apparent reason for the applicants not to disclose.

[15] Also, the statement of each of the two immigration officers, in their letters of July 14, 2006, that the disclosure of the birth of Cheryl's son was only made after the visas had been "issued" does not withstand scrutiny. The CAIPS notes of March 3, 2006 indicate that: "Application approved. Visas printed". Those of March 22, 2006 state: "… we will not issue visas yet as child needs to be examined." The visas were never delivered to the applicants. At all

relevant times, they remained in the possession of immigration officials. In my view, they had yet to be “issued”. Without possession of the visas, it was not possible for the applicants to land in Canada and become permanent residents.

[16] Subsections 70(1) and (5) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, are relied upon by the respondent to establish the materiality of the non-disclosure of the birth of Cheryl’s son.

[17] According to these provisions, the immigration officer is not required to issue a permanent resident visa if it is established that a family member, even non-accompanying, is inadmissible. However, no visa was delivered or issued to Cheryl and there is no evidence suggesting that her new-born child might be inadmissible. Again, any such determination is made, in the words of the regulation, “following an examination”. In this case, the immigration officer chose not to examine Cheryl’s son.

[18] In summary, in the special circumstances of this case, the non-disclosure of the information concerning the birth of Cheryl’s son until March 21, 2006 cannot be said to be the withholding of a material fact relating to a relevant matter that induced or could have induced an error in the administration of the Act. The forms made available in this proceeding cannot be the basis of a requirement, in any practical sense, that Cheryl report the change of information immediately. In the end, the birth of the son was disclosed prior to any legal requirement to do so in the regulations.

[19] It is also my view that the decision was made by the decision-makers without regard to the material before them, within the meaning of paragraph 18.1(4)(d) of the *Federal Courts Act*. There is no evidence in the tribunal record upon which the more senior of the two immigration officers could have concluded that the information was “deliberately” withheld. There is no information in the CAIPS notes to suggest that the applicants had any incentive not to disclose the birth of the child, let alone that the non-disclosure was deliberate.

[20] The immigration officer had a discretion to exercise. The officer could have examined Cheryl’s son, as suggested in the CAIPS notes of March 22, 2006, or invoke the statutory ground for inadmissibility based on misrepresentation. The discretion to do the latter could not have been properly exercised once the officer characterized, unjustifiably in my view, the non-disclosure as deliberate.

[21] For these reasons, the decision of July 14, 2006 to refuse the applicants’ application for permanent residence on the grounds of paragraph 40(1)(a) of the Act will be set aside. The application for permanent residence will be referred for redetermination, in a manner consistent with these reasons for judgment, by an immigration officer other than the two who wrote the letters of July 14, 2006.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is granted.

2. The decision made on July 14, 2006 to refuse the applicants' application for permanent residence is set aside and the matter referred for redetermination by a different immigration officer in a manner consistent with these reasons for judgment.

"Allan Lutfy"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4836-06
STYLE OF CAUSE:	CESAR ANUA MARUQUIN ET AL v. MCI
PLACE OF HEARINGS:	Toronto, Ontario and Ottawa, Ontario
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