Date: 20080618

Docket: IMM-5109-07

Citation: 2008 FC 755

Toronto, Ontario, June 18, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

ROMEO MEJIA DOMANTAY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for leave for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision rendered on November 7, 2007 by the Immigration Appeal Division of the Immigration and Refugee Board (Board), wherein the Board determined that the applicant's deliberate and sustained abuse of the Canadian immigration system outweighed the humanitarian and compassionate considerations, and thus the appeal of his deportation order was dismissed.

I. The Facts

[2] Citizen of the Philippines and a former Roman Catholic Priest, the applicant entered into an intimate relationship with one of his parishioner who later gave birth to his daughter. In 1997, the applicant left the Roman Catholic Church and visited Canada and the United States for several months. While in Vancouver, he met a woman with whom he entered into a fraudulent marriage for the purpose of immigrating to Canada, as he admitted. They were later divorced.

[3] On January 24, 2001, the applicant married his parishioner and attempted to sponsor her to Canada. The applicant included the daughter of the couple, who was listed as an accompanying dependent but not as the applicant's daughter.

[4] The applicant was found to have breached section 40(1) (a), and it was later determined that he was excluded from Canada. The applicant did not challenge these findings in any manner. He admitted his misrepresentations but was seeking a stay of his removal order based on humanitarian and compassionate grounds.

[5] In a decision dated November 7, 2007, the applicant's appeal was denied.

II. Issue

[6] The sole issue raised by this application, is whether by allowing the applicant's former representative, allegedly someone who was not a "member in good standing of a bar of a province, Chambre des notaires du Québec or the Canadian Society of Immigration Consultants", as required by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), to represent the applicant, the Board committed a breach of procedural fairness or natural justice.

III. The Regulations

[7] With respect to any duty incumbent upon the Board to monitor those who appear before it, it is useful to examine the provisions which relate to "authorized representatives" which include sections 2, 10(2) and 13 of the Regulations. Section 2 defines an authorized representative as:

… member in good standing of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants incorporated under Part II of the *Canada Corporations Act* on October 8, 2003.	(Un) membre en règle du barreau d'une province, de la Chambre des notaires du Québec ou de la Société canadienne de consultants en immigration constituée aux termes de la partie II de la *Loi sur les corporations canadiennes* le 8 octobre 2003.

[8] Pursuant to s.13.1(1) of the Regulations:

…no person who is not an authorized representative may, for a fee,	**…** il est interdit à quiconque n'est pas un représentant autorisé de représenter une personne dans toute affaire devant

represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.	le ministre, l'agent ou la Commission, ou de faire office de conseil, contre rémunération.

[9] This provision though is subject to two exceptions found at s.13.1 (2) and (3) of the Regulations: The first being a four year grace period after the coming into force of the provision for persons who were already providing those services, if both the client and the application are the same as before the coming into force of the section. The second exception concerns students-at-law, who are permitted to represent clients if acting under the supervision of a member in good standing of a bar of a province or the Chambre des notaires du Québec who represents, advises or consults with the person who is the subject of the proceeding or application.

[10] Finally, s.10(2) of the Regulations sets out the information that is required to be contained in applications made under the Regulations. This provision was also the result of the same amendment which established s.13.1 and the definition of "authorized representative" set out in s.2 of the Regulations. More particularly, the provision indicates that the application shall include, unless otherwise provide by the Regulations, the contact information of the applicant's representative, whether a fee is being charged, and a declaration that the information provided is accurate. Further, if a fee is being charged, the applicant is asked to include the name of the organization of which the representative is a member and the membership identification number issued by that organization to the representative.

[11] The Court note that the *Canada Gazette Extra* Vol. 138, No 4 is particularly relevant to the present case in that it contains the Regulatory Impact Analysis Statement of the amendments to the Regulations which resulted in the current form of the provisions noted above. Instructively it states that:

Amendments to sections 2 and 13 and subsection 10(2) of the Immigration and Refugee Protection Regulations are necessary to encourage the immigration consulting industry to self-regulate. These amendments are intended to protect applicants from unscrupulous representatives while preserving the integrity of Canada's immigration system	Il est nécessaire de modifier les articles 2 et 13, ainsi que le paragraphe 10(2) du Règlement sur immigration et la protection des réfugiés (RIPR) afin de protéger le public contre les consultants en immigration sans scrupules ainsi que pour encourager l'industrie des consultants en immigration à s'autoréglementer.

[12] Further the document contains a Regulatory impact Analysis Statement. Although not part of the Regulations this Statement explains the purpose of this amendment as follows:

The purpose of this provision is to prescribe which immigration representatives may or may not represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer, or the IRB	Ces dispositions ont pour but de préciser quels représentants en immigration peuvent ou ne peuvent pas représenter, contre rémunération, une personne dans toute affaire devant le ministre, un agent ou la CISR.

[13] Finally, the section of the Statement entitled "Compliance and Enforcement" (Respect et execution) reads as follows:

Consultants and lawyers will need to be members in good standing of CSIC	Les consultants et les avocats devront être des membres en règle de la SCCI

or one of the provincial or territorial law societies to conduct business with CIC, the CBSA or the IRB. The IRB will not deal with a non-member as counsel, but will continue processing the case and treat the person who is the subject of the proceeding as represented. […]	ou d'un ordre professionnel de juristes d'une province ou d'un territoire pour traiter avec CIC, l'ASFC ou la CISR La CISR refusera de traiter avec un conseil qui ne sera pas member de la SCCI. Dans ce cas, elle considèrera la personne faisant l'ofjet d'une procédure comme une personne non représentée. […]

III. Standard of Review

[14] Pursuant to *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28 (QL), at paragraph 100, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Accordingly, questions of procedural fairness do not undergo a pragmatic and functional analysis, it is solely the ultimate decision that is subject to the standard of review (*C.U.P.E.*, above, at paragraph 100).

IV. Analysis

[15] The crux of the applicant's argument is based on the fact that his representative at the hearing was not a "member in good standing of a bar of a province, Chambre des notaires du Québec or the Canadian Society of Immigration Consultants", and as such, was not an authorized representative pursuant to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). Given that the applicant's counsel was not an authorized representative; the Board

would have violated the principles of procedural fairness and natural justice by permitting this individual to represent the applicant in a proceeding before it.

[16] The applicant submits that incompetence of counsel may constitute a breach of natural justice (*Sheik v. Canada (Minister of Employment and Immigration)* (1990), 11 Imm. L.R. (2d) 81), and further that where an applicant has been left without counsel through no fault of his own, this may also constitute breach of natural justice (*Abasalizadeh v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1714 (QL)). According to the applicant, a counsel who is not a "member in good standing of a bar of a province, Chambre des notaires du Québec or the Canadian Society of Immigration Consultants" is not competent to represent an applicant at a hearing.

[17] Further, the applicant contends that the Board's obligation in this regard is similar to that of the Court in relation to its officers. The Court has a duty to uphold the principles established in the *Federal Courts Act*, R.S., 1985, c. F-7, and its Rules, which includes ensuring that counsel who appear before it are officers of the Court (*Parmar v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1000 (QL), at paragraph 7; *Al-Koutsi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1005 (QL), at paragraph 7).

[18] According to the applicant, the Board has explicitly undertaken to actively monitor that only authorized or unpaid representatives act as counsel before all its tribunals. The applicant cites the "Policy for Handling IRB Complaints Regarding Unauthorized, Paid Representatives". However,

given that this policy became effective April 10, 2008, and thus post-dates the decision in question, it is not relevant to the present judicial review.

[19] Based on the foregoing, the Court shares the view that there is a duty incumbent upon the Board to verify that those individuals representing clients with whom it has dealings are authorized representatives pursuant to the Regulations, or that they are not receiving a fee for their services. This duty envisions the protection of applicants and the preservation of the integrity of Canada's immigration system.

[20] Given that a duty exists, it remains to be determined how far that duty extends, and if in reality the applicant's counsel at the hearing before the IAD was not an authorized representative or not someone who was not receiving a fee.

[21] The applicant states that he retained the office of Max Chaudhary to act on his behalf in his appeal before the Board and that a certain Ms. Akhbari was sent by Mr. Chaudhary's office to act on his behalf at his hearing on November 7, 2007. This is consistent with the tribunal record in which Mr. Chaudhary's office is the point of contact for Immigration Canada during the relevant time period.

[22] Based on the evidence produced by the applicant, the Court is satisfied that the applicant's former counsel, Mr. Chaudhary, was indeed receiving a fee, and that Ms. Akhbari was neither a

member of the Law Society of Upper Canada (LSUC) nor a member of the Canadian Society of Immigration Consultants (CSIC).

[23] However, the information given by the applicant through his affidavit is minimal. There is nothing in his affidavit to outline the relationship that he had with his representative and has not even outlined that he was unaware of his chosen representative qualifications, or that any misrepresentation occurred, or that any financial compensation was paid. He does not also indicate when he became aware that she was not authorized to represent him and the circumstances surrounding that realization.

[24] This would be pertinent information to know when deciding a case of this nature. Since if for any reasons the applicant knew, at the time of his hearing before the Board, that Ms. Akhbari was not authorized to act as his representative, why wait after the Board's decision to raise the issue? If he knew and he accepted, that we do not know, then what is his prejudice? It is abundantly clear from a review of the transcript that the applicant had no issues regarding Ms. Akhbari representation at the hearing before the Board. She might have been unqualified but still competent to represent the applicant, and this with his full knowledge and acceptance. The Court does not know since the evidence does not say.

[25] While the file indicated to the Board that the applicant was represented by Mr. Chaudhary's firm, a member in good standing of LSUC, on the other hand the applicant's representative's, Ms. Akhbari, from Mr. Chaudhary's firm, was always addressed during the hearing as the applicant's

counsel. How was the Board, under these circumstances, to know that Ms. Akhbari was not qualified to represent the applicant, or a student-at-law, who was permitted to represent clients if acting under the supervision of a member in good standing of a bar? Certainly not from the applicant's silence.

[26] The onus is on the applicant to choose his representative. It is not the obligation of the Board to police the applicant's right to counsel, while the applicant bears the onus of establishing the circumstances surrounding his allegation that any duty owed him was not met, and that as a result he suffered a breach of natural justice.

[27] The Court finds that the applicant's record establishes that Mr. Chaudhary, who was held out by the applicant as his counsel, underwent the necessary verifications to determine that he was indeed an authorized representative. In view of the apparent applicant's acceptance of the representative's delegated to him by Mr. Chaudhary's firm for the Board's hearing, and the circumstances of this case, the Court is satisfied that the Board fulfilled any verification duties that are incumbent upon it, and that the applicant has not established that the Board failed to meet its verification obligation pursuant to the Regulations, or that it committed a breach of procedural fairness or natural justice. Therefore, the application will be dismissed.

[28] No question of general importance was put forward for certification, and none will be certified.

JUDGMENT

FOR THE FOREGOING REASONS THE COURT dismisses the application.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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