Date: 20080909

Docket: IMM-700-08

Citation: 2008 FC 1008

Ottawa, Ontario, September 9, 2008

PRESENT: The Honourable Mr. Justice Louis S. Tannenbaum

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

Mfuri Unielle YANKNGA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] I have before me an application for judicial review where the Minister of Citizenship and Immigration (hereinafter the Minister) is seeking to have set aside a decision of the Immigration Appeal Division (hereinafter the IAD) delivered by Member Robert Néron on January 16, 2008. The Minister is asking that the decision of Member Néron be set aside and that the matter be referred before the IAD for redetermination before another member.

[2] The Honourable Madam Justice Tremblay-Lamer issued an order on May 13, 2008, granting leave to the Minister and ordering that the application for judicial review be deemed to have been initiated.

[3] In his decision dated January 16, 2008, referred to above, Member Néron determined that the visa officer had no basis under paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* (hereinafter IRPR), for refusing the permanent residence application filed by Branly Martial Oupolo, sponsored by the respondent in this matter, Mfuri Unielle Yanknga (now his wife).

[4] The permanent residence application filed by Mr. Oupolo was refused by an immigration officer on April 12, 2007, on the grounds that he had not been disclosed as a member of the family of Mfuri Unielle Yanknga when her permanent residence application was filed on May 10, 2006, at Lester B. Pearson Airport in Toronto (hereinafter Pearson Airport), and that he had not been examined. Mr. Oupolo, whom Ms. Yanknga sought to sponsor, had had not been disclosed to the Canadian authorities by Ms. Yanknga and had not been examined. Accordingly, the immigration officer dismissed Mr. Oupolo's permanent residence application. However, his marriage was disclosed on May 12, 2006, in Fredericton, i.e. two days after Ms. Yanknga arrived in Canada.

[5] After the application was refused, Ms. Yanknga appealed the immigration officer's decision to the IAD. The appeal hearing took place on November 19, 2007, in Moncton, N.B., before Member Robert Néron.

[6] On January 16, 2008, Member Néron delivered his decision allowing Ms. Yanknga's appeal.

The facts

[7] The respondent was born on July 15, 1982, and lived in Libreville, Gabon with her mother, Munshie Julienne Nfuri.

[8] On February 29, 2004, Munshie Julienne Nfuri filed a permanent residence application for her and for her dependant children, including the respondent.

[9] Ms. Nfuri's permanent residence application was initially submitted as a refugee claim. She told the visa officer in Abidjan that she feared for her safety and the safety of her children because they did not have the protection of a man in the family.

[10] The visa officer then decided that the family did not meet the strict requirements of the class of Convention refugees. However, the officer determined that based on the fact that they were at risk apartheid women the application could be assessed in the context of persons in need of protection on humanitarian and compassionate grounds.

[11] The permanent residence applications of Ms. Nfuri and those of her children were accepted on March 17, 2006, and permanent resident visas were issued to them.

[12] The respondent was given permanent residence status on May 10, 2006, at Pearson Airport in Toronto when she arrived in Canada.

[13] After obtaining her permanent residence status on May 10, 2006; two days later, i.e. on May 12, 2006, the respondent met with an immigration officer at the local CIC in Fredericton, N.B., where she advised the officer that she had been married three weeks before her arrival in Canada.

[14] The respondent was in fact married on April 22, 2006, in Libreville, Gabonese Republic, to Branly Martial Oupolo, i.e. 18 days before her arrival in Canada.

[15] The respondent had never reported her change in marital status to the officers before obtaining permanent resident status in Canada on May 10, 2006. It was only two days after obtaining permanent resident status that the respondent reported her marriage to the CIC officers.

[16] On January 4, 2007, the respondent's spouse, Branly Martial Oupolo, filed a permanent residence application with the Canadian authorities. On January 22, 2007, the respondent filed in support of it a sponsorship application as a member of the family class.

[17] On April 12, 2007, the Abidjan visa officer refused Mr. Oupolo's permanent residence application as a member of the family class. The reasons for the refusal were that Ms. Yanknga had not reported him as a spouse to the Canadian authorities when her permanent residence application had been made, that Mr. Oupolo was a non-accompanying member of the sponsoree's family when she obtained her permanent residence, and that Mr. Oupolo had not been examined.

[18] Following the visa officer's refusal, the respondent filed a notice of sponsorship appeal before the IAD. The appeal hearing was to be held in Moncton, N.B., on November 19, 2007.

[19] Before the hearing, the parties had the opportunity to present their written submissions to the panel in preparation for the hearing. The Minister, through the hearings advisor, sent his written submissions in response to those of the respondent. The Minister's written submissions contemplated the interpretation of paragraph 117(9)(*d*) of the IRPR.

[20] On November 19, 2007, the appeal was heard at Moncton, N.B., before IAD Member Robert Néron.

[21] At the hearing, the respondent recognized the fact that her husband had not been examined. However, she testified that she had reported her marriage to a person named Peggy at the High Commissioner for Refugees in Gabon (hereinafter UNHCR) by providing her with a letter addressed to the Ambassador of Canada in Abidjan, asking the Ambassador to give it to the Canadian Embassy in Abidjan. However, it appears that the Canadian Embassy in Abidjan never received this letter.

[22] At the hearing, Member Néron orally allowed the respondent's appeal and then issued written reasons on January 16, 2008.

[23] Member Néron determined that the evidence in the record supported the fact that the respondent had duly informed the Canadian Embassy in Abidjan through the UNHCR as well as the immigration officer on her arrival in Canada.

[24] Moreover, Member Néron stated in his decision that the immigration officers, in Abidjan as well as in Canada, failed in their obligation of natural justice and fairness to the respondent in failing to advise her that she had the obligation to add the name of her spouse to her application and in failing to explain to her the consequences of not proceeding with the review.

Issues

[25] There are two issues in this matter:

(1) Did Member Néron err in finding that the spouse of the respondent, Branly Martial Oupolo, belonged to the family class and was not contemplated by paragraph 117(9)(*d*) of the IRPR?

(2) Did Member Néron err in determining that the immigration officers in this matter had an obligation of natural justice and fairness?

Analysis

[26] Since *Dunsmuir v. New Brunswick*, 1008 SCC 9, there are only two appropriate standards of review in applications for judicial review. The standards are those of reasonableness and correctness.

[27] The standard of reasonableness will be used to review questions of fact, questions involving discretionary power or policy, and where the facts are not easily severed (i.e., a question of mixed fact and law). On the other hand, the standard of correctness will be used to review questions of law.

[28] The first issue involves an error putting at issue the interpretation of paragraph 117(9)(*d*) of the IRPR and its application to the facts. While initially it may be a question of mixed fact and law generally subject to the reasonableness standard, it would be appropriate to note the remarks of Justice Iacobucci and Justice Major in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. At paragraph 27 of this decision, there is an explanation regarding how an error involving a question of mixed fact and law may amount to an error of law then subject to the standard of correctness. On this point, it would be appropriate to refer to the remarks of Iacobucci J. in *Canada (DIR) v. Southam Inc.*, (1996) S.C.J. No. 116, at paragraph 39, referred to in *Housen* at paragraph 27:

> 39 However, the respondent says that, having informed itself correctly on the law, the Tribunal proceeded nevertheless to ignore certain kinds of indirect evidence. Because the Tribunal must be judged according to what it does and not according to what it says, the import of the respondent's submission is that the Tribunal erred in law. After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

[29] In this case, the Member’s error of law in regard to the first issue is easily distinguished from the facts. To discern it, it is appropriate to refer to paragraph 117(9)(*d*) of the IRPR:

117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	117(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
	…
(d) Subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[30] In this case, paragraph 117(9)(*d*) of the IRPR required the Member to consider the fact regarding whether Mr. Oupolo, at the time Ms. Yanknga's permanent residence application was filed, was a non-accompanying family member and whether he had been examined. The Member considered the fact and properly determined that Mr. Oupolo was a member of the respondent's family and that he was a non-accompanying family member. However, he did not take into account the question as to whether Mr. Oupolo had been examined as required by paragraph 117(9)(*d*) of the IRPR. Therefore, as it is a matter of verifying whether the Member applied the proper legal test and whether he considered all of the elements that this test required of him, this is a question of law reviewable under the standard of correctness.

[31] As stated above, Ms. Yanknga admitted at the hearing that her husband had not been examined. By failing to take this factor into consideration, the Member made an error of law which is subject to the standard of correctness: he failed to take into account the criteria that the law required him to consider, which amounts to a pure error of law.

[32] Further, the Member erred in law in derogating from the principles established in *dela Fuente v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 774 (F.C.A.) regarding the expression “at the time of that application” used in paragraph 117(9)(*d*) of the IRPR. In *dela Fuente, supra*, Noël J.A. stated at paragraph 51:

> 51 I would therefore answer the second certified question as follows: the phrase "at the time of that application" in paragraph 117(9)(d) of the Regulations contemplates the life of the application from the time when it is initiated by the filing of the authorized form to the time when permanent resident status is granted at a port of entry

[33] The Member therefore erred in law. First, in accepting that it was sufficient for the terms of paragraph 117(9)(*d*) of the IRPR and *dela Fuente, supra*, to disclose her marriage only to the UNHCR officers and, second, to disclose her marriage two days after obtaining permanent resident status (at a place other than a port of entry), as well as in disregarding the application of section 51 of the IRPR.

[34] Section 116 of the IRPR points out, in regard to the family class, the necessity and importance of complying with the requirements of Part 7, Division I of the IRPR so that the person in question can become a permanent resident in the family class. Section 116 clearly states that it is a prescribed category of persons:

116. For the purpose of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	116. Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.

[35] Subsection 117(1) of the IRPR defines membership in the family class as the persons described therein:

117(1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is (a) the sponsor's spouse, common-law partner or conjugal partner; …	117(1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants: *a*) son époux, conjoint de fait ou partenaire conjugal; […]

[36] However, paragraph 117(9)(*d*) of the IRPR places restrictions on section 117:

117(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes: […]	117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.	(d) Subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[37] It therefore follows that expressly excluded are the persons referred to at paragraph 117(9)*d*) of the IRPR, i.e. those not examined at the time the application was made. In this case, I am satisfied that the permanent residence application was made by Ms. Yanknga on May 10, 2006.

[38] For the application of paragraph 117(9)(*d*) of the IRPR, however, the Federal Court of Appeal in *dela Fuente, supra*, indicated that the words "at the time of that application" included the period from the date she initially filed the official form until the date the concerned party received permanent residence status at the port of entry. In this case, the port of entry was Toronto and not Fredericton.

[39] In order to determine what constitutes a port of entry within the meaning of section 51 of the IRPR and *dela Fuente, supra*, we must refer to the definitions in section 2 of the IRPR. According to section 2 of the IRPR, "port of entry" is defined as the premises listed in Schedule I of the IRPR. This document indicates that Pearson Airport in Toronto is a port of entry while Fredericton is not a port of entry within the meaning of the IRPR.

[40] Ms. Yanknga's permanent resident visa was issued on March 17, 2006, and she received it shortly thereafter, i.e. on March 21, 2006, when she was still in Libreville, Gabon. However, this visa did not confer her any rights in regard to her permanent residence until she reported to a "port of entry" in Canada, which she did in this case on May 10, 2006. By operation of sections 2 and 51 as well as paragraph 117(9)(*d*) of the IRPR, as well as according to *dela Fuente*, this port of entry was Pearson Airport, where she obtained her permanent resident status, and not Fredericton as Member Néron determined. At the time permanent resident status was obtained on May 10, 2006, the respondent had not disclosed her married status. Therefore, for the immigration officers, the respondent was her mother's dependant.

[41] The consequence of failing to disclose the change of her marital status resulted in Mr. Oupolo not being examined or screened by the officers as required by the IRPR and the IRPA. Moreover, the result was that even Ms. Yanknga's file was not reassessed in regard to her admissibility when she obtained the confirmation of her permanent residence on May 10, 2006, at Pearson Airport.

[42] Ms. Yanknga's obligation to declare the change in her marital status, namely her marriage to Mr. Oupolo, should have been fulfilled "at the time of that application" as interpreted in *dela Fuente*. By the operation of *dela Fuente*, paragraph 117(9)(*d*) and sections 2 and 51 of the IRPR, this change in us should have been reported on May 10, 2006, at the port of entry at Pearson Airport.

[43] At paragraph 5 of her affidavit, filed for the application for leave for judicial review, Ms. Yanknga herself confirmed that she had not advised the officer at the port of entry. It was not until May 12, 2006, namely two days before permanent resident status was conferred to her, that she declared her marriage to officer Wallace at the local CIC office in Fredericton. However, according to *dela Fuente* and sections 2 and 51 of the IRPR, it was too late since Ms. Yanknga had already obtained permanent resident status two days earlier, namely on May 10, 2006.

[44] In his decision, in determining that Ms. Yanknga had reported her husband to officer Wallace, the Member failed to a observe that this disclosure took place two days before the permanent resident status had been granted, thereby resulting in another error in the assessment of the evidence on the very face of the matter, which could not be justified in regard to the facts or the law.

[45] Further, it appears that according to the Member and according to Ms. Yanknga, she advised the UNHCR of her marriage on April 25, 2006, which was supposed to inform the Canadian Embassy for her. Yet, the evidence in the record establishes that the Canadian Embassy in Abidjan never received this letter.

[46] At the hearing on the application for judicial review before the undersigned, Ms. Yanknga filed in the record, under reserve of an objection by the Minister's counsel, a letter sent by mail from Peggy Pentshi-a-Meneng (Angeline.Beli@international.gc.ca) dated 09/05/2008. I allowed this

letter to be filed under reserve of the objection. I determined that this objection ought to be dismissed and the document can therefore be filed. I marked this letter as exhibit J-1.

[47] Exhibit J-1 refers to the letter dated April 25, 2006, which Ms. Yanknga alleges she gave to Peggy Pentshi, advising the Canadian Embassy of her marriage. While Ms. Yanknga states that this letter was sent to the Canadian Embassy in Abidjan, it is clear that the letter was sent to Libreville. The Canadian Embassy is located in Abidjan and not in Libreville. Clearly the Canadian Embassy in Abidjan did not receive this letter because it was not addressed to the correct place.

[48] The intention or the reason underlying the failure to reveal the change in the family situation is not relevant under paragraph 117(9)(*d*) of the IRPR. It is clear in this case that Mr. Oupolo did not accompany Ms. Yanknga and was not examined and that is what matters in this matter. Based on this fact alone, Mr. Oupolo ought to be excluded from the family class, whether or not there was a deliberate false statement or that there was a voluntary or involuntary deception by Ms. Yanknga . On this point, Mosley J. in *Chen v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 852 (F.C.), states at paragraphs 11 and 12:

> 11. … The regulation is clear. Whatever the motive, a failure to disclose which prevents the immigration officer from examining the dependent precludes future sponsorship of that person as a member of the family class.
>
> 12 The sole question before the Board was whether An Bo Xie was or was not examined at the time that his mother applied for permanent residence. Because he was not declared, he could not have been examined, and is not, therefore, considered a part of the family class for the purposes of sponsorship.

[49] The fact alleged by Ms. Yanknga that she had declared her marriage on April 25, 2006, to the UNHCR and had requested the UNHCR to advise the Canadian Embassy is therefore inconsequential under the terms of paragraph 117(9)(*d*) and section 51 of the IRPR. Even though the Canadian authorities quite enjoy working with the UNHCR, the UNHCR is not an officer for Canada and is not a Canadian authority. It is rather the respondent's officer for assistance with her permanent residence application for which the applicant remains responsible. The UNHCR does not have the power to carry out examinations for the Canadian Government, or the power to determine the admissibility to Canada of a foreign national visa holder, and it is not responsible for the administration of the IRPA or its regulations.

[50] The fact remains that the Canadian authorities were not informed of the change in the respondent's status before May 12, 2006. On this basis, the Minister was prejudiced in that he was unable to reassess the respondent's admissibility in light of the changes and unable to proceed to examine her husband in a timely manner. The respondent's intention in her omission has no effect on the interpretation of paragraph 117(9)(*d*) of the IRPR.

[51] When the visa officer reviewed Mr. Oupolo's application, he had no choice but to refuse it. The very wording of paragraph 117(9)(*d*) of the IRPR, through the use of the words "*A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if . . . at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.*" (In French: "*Ne sont pas considérées …*"), did not confer him any discretion on this point. On this basis, the visa officer did not make any error in

refusing the sponsorship application. However, the Member, by setting aside the visa officer's decision, did make an error.

[52] It is well established in law that reasons must be given for a decision of an administrative tribunal like the IAD in this case. The issue in this case involves rather the adequacy of the Members reasons. On this point, Mr. Justice Simon Noël, in *Vennat v. Canada (Attorney General)*, [2006] F.C.J. No. 1251, stated at paragraph 90:

> [90] The courts tend to consider that such reasons are insufficient. Referring to several decisions, Professor Garant aptly summarizes the evolution of the requirement for reasons in his book Droit administratif, 5th ed., Cowansville, Éditions Yvon Blais, 2004, at pages 825 to 832. He explains certain principles for assessing the sufficiency of reasons, at pages 829 and 830:
>
> > [TRANSLATION]
> >
> > The Federal Court of Appeal confirms that this obligation does not suggest that the details of the decision be disclosed in minute detail. This reasoning can be expressed in general terms in accordance with the administrative nature of the decisions and the extent of the decision-maker's discretionary power. It can be brief without being incomplete or capricious; the decision may be "brief and technical ... without being 'bereft of reasons'"
> > …

[53] It is clear in this case that the evidence at the hearing was inconsistent (for example, the date of the disclosure of the marriage to the officers by Ms. Yanknga). Yet the Member simply stated

that he found Ms. Yanknga credible. Further, the Member failed to consider the case law and the submissions made, orally and in writing, by the Minister's representatives on the subject of the interpretation of paragraph 117(9)(*d*). Indeed, *dela Fuente*, *supra*, referred to by the Minister's representatives, was *stare decisis* and the Member failed to analyze them and to specify reasons in regard to how they were distinct, merely finding that the visa officer had not observed procedural fairness.

[54] In adopting such conduct, the Member exceeded his jurisdiction, which in itself is an error of law.

[55] Member Néron based his decision on the fact that the officers had the duty to inform Ms. Yanknga of the serious consequences of the fact that her husband had not been examined.

[56] This obligation, imposed on the officers by the Member, does not exist in law. Such an obligation on the part of the officer to explain the importance to have a spouse examined, if it did exist in law, would not arise until after the officer aware of the existence of this spouse. The evidence, however, establishes that in this case the officers were not in fact aware of the spouse's existence until May 12, 2006, namely two days after she was given permanent resident status. At that time, it was too late for Mr. Oupolo to be examined, as permanent residence had already been conferred to Ms. Yanknga.

[57] The Member, by imposing such an obligation that he qualified as natural justice, created obligations for the officers that do not exist at law. In his decision, he criticized officer Wallace for having failed to adjourn the interview on May 12, 2006, in order to examine the respondent's spouse. At that time, it was too late since Ms. Yanknga had already been conferred permanent resident status at Pearson Airport on May 10, 2006.

[58] In regard to the decision of the officer at Pearson Airport on May 10, 2006, the officer had every reason to sincerely believe that the respondent's marital status was the marital status indicated in the documents that she presented at the border. The applicant had not knowledge of the change in the respondent's marital status and the respondent failed to comply with section 51 of the IRPR, the officer was therefore not able to adjourn the interview with the respondent at the port of entry and proceed as the Member would have wanted.

[59] The Member made enough errors to warrant the intervention of the undersigned.

JUDGMENT

THE COURT ORDERS AND ADJUDGES THAT the application for judicial review be allowed, the decision of Member Néron dated January 16, 2007, be set aside and I order that the matter be referred for redetermination before another member of the IAD.

"Louis S. Tannenbaum"
Deputy Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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