Federal Court  Cour fédérale

Date: 20100325

Docket: IMM-3965-09

Citation: 2010 FC 333

Ottawa, Ontario, March 25, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

HENRY JESUS INFANTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Infante claims his affair with his mistress ended years ago. His mistress says it is still on-going. He says he is in love with his wife although they have lived half a world apart for several years, and there is scant evidence of any communication between them. His mother says he and his wife split up years ago. These are the issues a visa officer had to face in considering Mr. Infante's wife's application to sponsor him as a Canadian permanent resident. The visa officer determined that he was not a "family member" within the meaning of Section 4 of the *Immigration and Refugee*

Protection Regulations as the marriage had broken down years ago and the sponsorship was entered into primarily for the purpose of giving Mr. Infante status or privilege under the *Immigration and Refugee Protection Act*. This is a judicial review of that decision.

THE FACTS

[2] Mr. Infante is a citizen of Columbia who claims to have been in a genuine marital relationship with Mery Veira Diaz since their marriage in 1980, except for a brief period of infidelity with Maria Mercedes Carreno Gomez. Mr. Infante had two daughters, who are now 31 and 28, with Ms. Diaz, and a son, now 19, with Ms. Gomez.

[3] Ms. Diaz left Columbia in 2002 for Canada and made a claim for refugee protection which was granted in 2003. Her two daughters also received refugee protection around the same time.

[4] Shortly after being granted refugee protection, Ms. Diaz applied for permanent residence in Canada and listed Mr. Infante as a family member. Although she became a permanent resident in 2004, Mr. Infante's status as a family member remained outstanding primarily out of concerns for possible criminal inadmissibility, which ultimately were resolved in his favour.

[5] Shortly before Mr. Infante was to be interviewed, the visa officer received an email from Ms. Gomez, who claimed she was currently Mr. Infante's common-law spouse and had been so for the past 22 years. Consequently, she was surprised to learn of his application. She gave considerable

particulars of their relationship over time, including their current address. She asked that her name not be given to Mr. Infante because she feared he would become violent.

[6] During the interview, the visa officer informed Mr. Infante that she had information that he was still in a relationship with Ms. Gomez. She did not identify the informant nor was she asked to. Mr. Infante admitted they had had a relationship and a son together but claimed the relationship was long over, even though they still worked together.

[7] During a break in the interview, the visa officer called Mr. Infante's mother who said that her son only had a brief marriage with Ms. Diaz and that they had separated long ago.

[8] When Mr. Infante returned to the interview, the visa officer passed on the information she had obtained from his mother. She also stated that she was concerned with his nervousness and evasiveness and the lack of evidence that he was still in a *bona fide* relationship with his wife. She said she was going to deny him a visa.

THE ISSUES

[9] The fundamental issue in this judicial review is that of procedural fairness. Mr. Infante takes the position that the informant should have been identified to him so as to enable him to respond. Once procedural fairness has been established, the courts should not speculate about what would have happened had the information been provided. The only recourse is to refer the matter back to another visa officer for redetermination (*Cardinal v. Kent Institution,* [1985] 2 S.C.R. 643). This is

not a case where, in any event, the outcome would inevitably be the same (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1, 163 N.R. 27).

DISCUSSION

[10] Following the visa officer's negative decision, Mr. Infante was inadvertently provided with the entire email from Ms. Gomez, not simply a redacted version.

[11] The general rule is that a court in judicial review bases itself on the record which was before the original decision maker: *Nametco Holdings Ltd. v. Canada (Minister of National Revenue)*, 2002 FCA 149. There are, however, exceptions. A party is entitled to go beyond the record if procedural fairness is in issue: *Jahazi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 242 at para. 37. In this case, Mr. Infante alleged breaches of procedural fairness both with respect to Ms. Gomez and with respect to his mother.

[12] As regards his mother, he submitted that she was addled with age and, in any event, always hated his wife. He later withdrew his allegations of procedural unfairness with respect to her.

[13] Procedural fairness is contextual (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1 Imm. L.R. (3d) 1). The visa officer put it to him that he was still in a relationship with Ms. Gomez, which he denied. Even if it could be argued, and I refrain from comment, that Mr. Infante was not obliged to reveal what he would have said had he known

the identity of the informant, *i.e.* that his former mistress may have been concerned about the future of the business in which they were involved, or continuing financial support for their son, he cannot pick and choose. Having initially alleged procedural unfairness on two counts, and providing new evidence with respect to one, it is completely inappropriate that he then say nothing with respect to the other.

[14] Furthermore, the visa officer also based her decision on other grounds, the information received from Mr. Infante's mother and the lack of communication with Ms. Diaz. Although his apparent nervousness and evasiveness may not have been sufficient in and of itself, it was an additional factor which the visa officer was entitled to take into account.

[15] All and all, the decision was not unreasonable and should not be disturbed.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3965-09
STYLE OF CAUSE:	*Infante v. MCI*
PLACE OF HEARING:	Toronto, Ontario
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