Federal Court		Cour fédérale

Date: 20100610

Docket: IMM-5324-09

Citation: 2010 FC 631

Ottawa, Ontario, June 10, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

NIURKA MERION-BORREGO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Protection Board dated October 15, 2009 denying the applicant's appeal from a removal order issued against her because she is now described in paragraph 40(1)(a) *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 , as an "inadmissible person" for having willfully misrepresented a material fact upon coming to Canada as a permanent resident.

FACTS

Background

[2] The thirty eight (38) year old applicant is a citizen of Cuba. She was landed as a sponsored permanent resident under the Family Class on November 16, 2002 at the Dorval Airport of Montreal.

[3] The applicant has three children born in 1989, 1991, and 1997. The applicant met a Canadian citizen in Cuba in 2000 and subsequently married him on August 9, 2001 in Cuba. Following the marriage, an application for permanent residence under the Family Class was prepared for her by the applicant's husband who acted as sponsor. The applicant did not read the application before signing it since she had no knowledge of English or French at the time.

[4] The permanent resident application failed or omitted to declare the existence of her two eldest children because their Cuban father disapproved of their emigration to Canada. The applicant claims to have declared the remaining two children upon her landing on November 16, 2002. The "Confirmation of Permanent Residence" document, completed upon landing at the port of entry (Dorval airport in Montreal) states:

> FAMILY STATUS: 1
>
> 14. ACCOMANYING FAMILY MEMBERS:
>
> HAVE YOU ANY DEPEDENTS OTHER THOSE LISTED HERE? YES

[5] The applicant resided with her sponsor in Montreal from November 16, 2002 until January 2003 when she left him. The applicant moved to Toronto where she resided ever since. On March 25, 2003 the applicant's husband and sponsor obtained a Judgment of the Superior Court of Québec (Cour Supérieure) declaring the marriage to be annulled.

[6] After the applicant left her husband, and moved to Toronto on January 2003, she worked very hard, took courses, learned English, paid her income taxes, did not go on welfare or government support, and regularly sent money to her children and family in Cuba. Two years, 10 months after leaving her husband, on November 24, 2005, the applicant filed an application to sponsor her three children as permanent residents. The respondent then became aware of the applicant's earlier misrepresentation about these children and denied the application. The applicant was subsequently referred to an admissibility hearing. On April 18, 2008 a Member of the Immigration Division of the Immigration and Refugee Protection Board determined that the applicant misrepresented the number of her children on her application for permanent residence, and at the port of entry, was therefore "inadmissible" as per paragraph 40(1)(a) of IRPA. The applicant appealed to the IAD.

Decision under review

[7] On May 11, 2009 the IAD denied the applicant's appeal.

[8] The decision first focused on whether the applicant was exempted from the application paragraph 40(1)(a) of the IRPA pursuant to subsection 117(10) of the *Immigration and Refugee Protection Regulations* (IRPR) S.O.R./2002-227.

[9] The IAD stated at paragraph 22 of the decision that the test which the applicant must meet is to show that her disclosure at the port of entry allowed the visa officer at the port of entry to make a "conscious decision" not to examine the applicant's two oldest children who were not declared on her application for permanent residence which was examined by Canadian immigration officials in Cuba:

> ¶22 At the time of this decision the panel noted that in order for the exemption to apply an officer must determine that there is no requirement for an examination. In the panel's opinion, in order for an immigration officer to determine such an outcome there must be sufficient, reliable and trustworthy evidence available, that on a balance of probabilities, it would be able to be determined that the visa officer made a conscious decision not to require an examination. In the panel's opinion, a conscious decision is necessary. This derives from the ordinary meaning of the English word "determined" which in the panel's opinion requires a conscious decision.

[10] The IAD found the applicant to not be credible and therefore assigned little weight to her testimony of the events that occurred at the port of entry on November 16, 2002. The IAD drew an adverse finding of credibility from the nature of her relationship with her sponsor which the IAD assessed as a marriage of convenience, for the following reasons:

1. there was no evidence of cohabitation between November 16, 2002 and the separation in January 2003;

2. it was not credible that two people married in Cuba would not have fully discussed the future of the applicant's three children in the relationship, and if they would join the couple in Canada;
3. the applicant could not explain why the marriage was terminated by annulment and not ordinary divorce;
4. the fact that the marriage was terminated by annulment gives credence to a conclusion that the marriage was not *bona fide*.

[11] The IAD further found that it was highly unlikely that the a visa officer would allow the applicant to be landed without setting out in the record the fact that she had two previously undeclared children. The IAD held that there was insufficient trustworthy evidence to determine that the visa officer made a conscious decision not to require the examination of her undeclared children.

[12] The IAD determined that special relief was not warranted after taking into account the best interests of the children and the humanitarian and compassionate (H&C) considerations in this case. The IAD set out the following factors in deciding whether to exercise its discretion at paragraph 29:

> ¶29 In analysing this discretion the panel is guided by the factors outlined in *Ribic* which have been approved by the Supreme Court of Canada in its decision in *Chieu*. These factors…are as follows:
>
> a. the seriousness of the misrepresentation leading to the exclusion order;
>
> b. the length of time spent in Canada;

c. family in Canada, and dislocation to the family the removal would cause;

d. support available to the appellant, within the family and in the community; and

e. potential foreign hardship the appellant would face in her likely country of removal, in this case Cuba.

[13] The IAD held that the misrepresentation in issue was serious because the applicant would have known that it was false, and because the misrepresentation was combined with a marriage of convenience which the applicant used to qualify for sponsorship.

[14] The IAD determined that the applicant has not been in Canada for a lengthy time, has no family or community support, and is not established. Any skills, education or experience the applicant gained in Canada could be used in Cuba to applicant's benefit.

[15] The IAD noted that two of the applicant's children are no longer eligible for sponsorship but nevertheless considered that the children's best interests was better served by having their mother closer to them as opposed to having her stay in Canada for the purpose of maintaining her financial remittances. There were therefore insufficient H&C factors to outweigh the applicant's misrepresentation and consequent inadmissibility.

LEGISLATION

[16] Section 67 of the IRPA sets out the grounds on appeal to the IAD and its powers:

67. (1) To allow an appeal, the	67. (1) Il est fait droit à

Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	l'appel sur prevue qu'au moment où il en est disposé:
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de measures spéciales.

[17] Subsection 127(a) of IRPA designates misrepresentation as a statutory offence:

127. No person shall knowingly	127. Commet une infraction quiconque sciemment :
(*a*) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	*a*) fait des présentations erronées sur un fait important quant à un objet pertinent ou une réticence sur ce fait, et de ce fait entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[18] Subsection 40(1) of the IRPA deems permanent residents who made a misrepresentation to be inadmissible for Canada:

40. (1) A permanent resident	40. (1) Emportent interdiction

or a foreign national is inadmissible for misrepresentation (*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;	de territoire pour fausses déclarations les faits suivants : *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;

[19] Subsection 117(10) of the IRPR exempts unexamined foreign nationals from exclusion to the family class the applicant can demonstrate that an officer determined that an examination was required:

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if (*a*) the foreign national is the sponsor's spouse, common-law partner or conjugal partner and is under 16 years of age; (*b*) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended; (*c*) the foreign national is the sponsor's spouse and (i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or	(10) Sous réserve du paragraphe (11), l'alinéa (9)*d*) ne s'applique pas à l'étranger qui y est visé et qui n'a pas fait l'objet d'un contrôle parce qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas. (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes : *a*) l'époux, le conjoint de fait ou le partenaire conjugal du répondant s'il est âgé de moins de seize ans; *b*) l'époux, le conjoint de fait ou le partenaire conjugal du répondant si celui-ci a déjà pris un engagement de parrainage à

(ii) the sponsor has lived separate and apart from the foreign national for at least one year and (A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or (B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor; or (*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.	l'égard d'un époux, d'un conjoint de fait ou d'un partenaire conjugal et que la période prévue au paragraphe 132(1) à l'égard de cet engagement n'a pas pris fin; *c*) l'époux du répondant, si, selon le cas : (i) le répondant ou cet époux étaient, au moment de leur mariage, l'époux d'un tiers, (ii) le répondant a vécu séparément de cet époux pendant au moins un an et, selon le cas : (A) le répondant est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre étranger, (B) cet époux est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre répondant;
117(10) Subject to subsection (11), paragraph (9)(*d*) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be 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.

ISSUES

[20] The applicant raises the following issues:

1. Whether the panel erred in law when it concluded that subsection 117(10) of the IRPR did not apply to the applicant's case?

2. Whether the panel denied the applicant the right to a fair hearing, when it proceeded to examine and make a determination on the *bona fides* of the applicant's marriage of 2001, at the applicant's removal order appeal, without notice to the applicant that it intended to do so?

3. Whether the panel unduly fettered its discretion when it concluded that there were insufficient humanitarian and compassionate factors to allow the appeal of the removal order pursuant to subsection 67(1)(c) of the IRPA?

4. Whether the panel's decision is unreasonable?

STANDARD OF REVIEW

[21] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[22] The applicant raises issues of law and procedural fairness which are reviewable on a standard of correctness: see my decision in *Natt v. Canada (MCI)*, 2009 FC 238, 80 Imm. L.R. (3d) 80, at para. 14; *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392; *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650; *Khosa*, supra, at para. 43. The balance of the issues concern findings of fact or mixed fact and law by the IAD which are reviewable on a standard of reasonableness: *Bodine v. Canada (MCI)*, 2008 FC 848, 331 F.T.R. 200, per Justice Russell at para. 17; *Singh v. Canada (MCI)*, 2010 FC 378, per Justice Harrington at paras. 12-13.

[23] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir*, *supra*, at paragraph 47; *Khosa*, *supra*, at paragraph 59.

<u>Issue No. 1</u>: **Whether the panel erred in law when it concluded that subsection 117(10) of the IRPR did not apply to the applicant’s case?**

[24] The applicant submits that:

1. the applicant’s testimony before the IAD where she stated that she declared the names of her three children at the port of entry is reasonable and consistent with the landing document;
2. the IAD unreasonably assumed that the visa officer would not consciously decline to require the examination of the previously undeclared two children, and admit the applicant into Canada; and
3. Subsection 117(10) of the IRPR applies to exempt the applicant from inadmissibility by misrepresentation pursuant to subsection 40(1).

[25] Whether the applicant is inadmissible for having misrepresented a material fact must be decided by reference to subsection 40(1). The meaning and test for inadmissibility under subsection 40(1)(a) of IRPA was set out by Justice O'Reilly in *Baro v. Canada (MCI)*, 2007 FC 1299, at paragraph 15:

> ¶15 Under s. 40(1)(*a*) of IRPA, a person is inadmissible to Canada if he or she "withholds material facts relating to a relevant matter that induces or could induce an error in the administration" of the Act. In general terms, an applicant for permanent residence has a "duty of candour" which requires disclosure of material facts. This duty extends to variations in his or her personal circumstances, including a change of marital status: *Mohammed* v. *Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 299 (F.C.T.D.) (QL). <u>Even an innocent failure to provide material information can result in a finding of inadmissibility; for example, an applicant who fails to include all of her children in her application may be inadmissible: *Bickin v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No.1495 (F.C.T.D.) (QL).</u> <u>An exception arises where applicants can show that they honestly and reasonably believed that they were not withholding material information: *Medel* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 345, [1990] F.C.J. No. 318 (F.C.A.) (QL).</u>
>
> [Emphasis added]

[26] The applicant relies on the fact that her reason for intentionally not declaring her two eldest children was their father's objection and her sponsor's faulty advice that it was not necessary to do so. The IAD concluded on the evidence that the applicant withheld material information that induced an error in the administration of the IRPA. The fact that the applicant says she declared her remaining children at the port of entry, after her visa was issued, is not credible.

[27] The panel member stated his preliminary views of the applicant's credibility at page 57, lines 37-42 of the hearing transcript:

> MEMBER: […] The evidence now would show that the when the Appellant came into Canada, she did -- was asked the question "Do you have any other dependants" and she answered "Yes". Now, in her testimony she said there were follow up questions and she indicated there were two other children, and I would believe that that would be credible evidence because clearly someone – an

> Immigration Officer is going to ask follow-up question once they realize that there's further dependants.

[28] In my view, on the evidence, it was reasonably open to the IAD to find the applicant not credible. Accordingly, the Court cannot intervene on this issue.

<u>Issue No. 2</u>: **Whether the panel denied the applicant the right to a fair hearing, when it proceeded to examine and make a determination on the *bona fides* of the applicant's marriage of 2001, at the applicant's removal order appeal, without notice to the applicant that it intended to do so?**

[29] The applicant submits that the IAD proceeded to inquire and make a determination on the *bona fides* of the applicant's marriage without notice to the applicant that it was going to do so. Furthermore, there was no basis in evidence for the IAD to determine that the applicant entered into a marriage of convenience on August 9, 2001. The IAD's adverse credibility finding is therefore unreasonable.

[30] It is trite law that the rules of natural justice apply to inadmissibility proceedings before the IAD: *Chieu v. Canada (MCI)*, 2002 SCC 3, [2002] 1 S.C.R. 84, per Justice Iacobucci at para. 70. The right of the applicant to know the case against her and to be given the opportunity to respond is a basic rule of natural justice.

[31] In this case the applicant was referred to an inadmissibility hearing based on the misrepresentation with respect to the number of her children. The applicant received no notice that the genuineness of her marriage will be questioned. The genuineness of the marriage was briefly

questioned by an immigration officer in the section 44 Report dated June 15, 2006 but the referral itself was based on the misrepresentation with respect to her children.

[32] The applicant based her appeal to the IAD under section 67 of IRPA on both:

1. the decision is wrong about whether she declared her two remaining children at the port of entry (Dorval); and
2. sufficient H&C considerations warrant "special relief" for the applicant from her inadmissibility for misrepresentations.

The applicant had the onus of proof to persuade the IAD on the balance of probabilities. She should have foreseen that the extraordinary briefity of her marriage after she arrived in Canada on November 16, 2002 would be a relevant issue. She was sponsored by her Canadian husband, but left him two months after gaining entry into Canada as a sponsored wife. Moreover, nullity of marriage in Québec is governed by Articles 380 – 390 of the Civil Code. Article 380 states:

> 380. A marriage which is not solemnized according to the prescriptions of this Title and the necessary conditions for its formation may be declared null upon the application of any interested person, although the court may decide according to the circumstances.

Generally, you can get an annulment of a marriage celebrated up to three years prior to applying to the Court for "bad faith" on the part of one or more of the parties. Bad faith is a broad concept which can include many factors. The existence of bad faith on the part of one of the parties will impair the consent of the other party, and thus entitle them to an annulment.

[33] Accordingly, the Court concludes that the genuineness of the applicant's marriage was an obvious issue when the applicant raised H&C as a ground for appeal in this case, and there was no breach of natural justice by the IAD for not giving the applicant notice to this effect.

<u>Issue No. 3</u>: Whether the panel unduly fettered its discretion when it concluded that there were insufficient humanitarian and compassionate factors to allow the appeal of the removal order pursuant to subsection 67(1)(c) of the IRPA?

[34] The applicant submits that the IAD's assessment of the applicant's H&C factors was clouded by its adverse credibility finding which was based on the assessment of the applicant's marriage.

[35] The IAD heavily relied on its determination of credibility in assessing the first H&C factor, "the seriousness of the misrepresentation leading to the exclusion order". The IAD discussed at length the genuineness of the applicant's marriage under this factor at paragraphs 34-42

> ¶34 Further, in the panel's opinion based on the evidence before it on a balance of probabilities, her marriage to her ex-husband which was the trigger to get the appellant into Canada was not a *bona fide* relationship.
>
> ¶35 The evidence surrounding her original marriage to Pierre Joseph Lalonde in the panel's opinion is simply not credible. The appellant testified that she met her ex-husband in Cuba and they had a relationship for some four years, before he sponsored her.
>
> ¶35 The evidence establishes that they were married on 9 August 2001. According to the appellant, they did cohabitate until sometime in January 2003 where *(sic)* she left her husband and moved to Toronto.

> ¶36 The panel notes that there is no evidence of cohabitation. The appellant testified at the hearing that the argument that led to their split up was about the children. She stated that her ex-husband indicated that he had no obligation to these children and did not want to have anything to do with them.
>
> ¶37 In the panel's opinion this evidence is not credible. In the panel's opinion, it is not credible that two people getting married in Cuba would not have discussed fully the future of the three children of this appeal and what role they would play in this new marriage relationship.
>
> ¶38 Further, the panel notes that at page 7 of the Record contains *(sic)* a document from the Superior Court of Quebec dated 25 March 2003. The panel notes that this document shows that the marriage in question was annulled and that there was no divorce.
>
> ¶39 The appellant was unable to explain to the panel why her ex-husband would have sought an annulment and not an ordinary divorce.
>
> ¶40 The panel notes that the onus is on the appellant to prove her case. She should have been able to provide documentation or give a reasonable explanation as to why this marriage was annulled as opposed to a regular divorce. An annulment certainly gives credence to a conclusion that this marriage was not *bona fide*.
>
> ¶41 Therefore, we have a situation of an appellant who has come to Canada on false pretences in regard to her initial marriage, in regard to the misrepresentation on her application; and in regard to her failure to fully disclose all three children on her landing document.
>
> ¶42 In the panel's opinion, this appellant is not a credible witness and she is only in Canada with landed immigrant status because of the fruits of her misrepresentations.

[36] The Court is of the view that the IAD's assessment of the applicant's lack of credibility and bad faith was also relevant to the H&C ground of appeal, and the IAD's decision was reasonably open to it.

<u>Issue No. 4</u>: **Whether the panel's decision is patently unreasonable?**

[37] It is not necessary to address this issue in view of the Court's determination on the previous issues.

CERTIFIED QUESTION

[38] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

CONCLUSION

[39] For these reasons, the Court will dismiss this application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Adetayo Akinyemi	FOR THE APPLICANT
Ms. Marina Stefanovic	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Adetayo Akinyemi Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles Kirvan, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT