Federal Court  Cour fédérale

Date: 20100823

Docket: IMM-6186-09

Citation: 2010 FC 836

Ottawa, Ontario, August 23, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

JOSEPH STEPHEN DE LARA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Joseph Stephen de Lara applies to this Court pursuant to section 72 of the *Immigration and Refugee Protection Act*, (2001, c. 27) (*IRPA*) for judicial review of an exclusion order made against him November 19, 2009 by the Immigration Division of the Immigration and Refugee Board.

[2] Mr. de Lara is from the Philippines and applied in 2005 for a work permit authorizing him to work in Canada as a live-in caregiver for a family member. He applied for an extension of this

work permit in 2008, which was granted. One month after this work permit was granted he applied to change his employer, which was also approved.

[3] On return from a visit to the Philippines in 2009, Mr. de Lara was interviewed by an immigration officer at the Vancouver Airport. During this interview he admitted he was married to his latest employer. He did not disclose his marriage when he applied to change the employer listed on his work permit in 2008.

[4] The airport immigration officer filed an inadmissibility report pursuant to paragraph 44(1) of *IRPA*. The report was reviewed by the Minister's Delegate who conducted a further interview of Mr. de Lara. Upon Mr. de Lara's confirmation that he had been married to his prospective employer, the Minister's Delegate referred the matter for an admissibility hearing before a member of the Immigration Division as provided by section 44(2) of *IRPA*.

[5] An admissibility hearing was held on November 19, 2009. The Member found Mr. de Lara was inadmissible to Canada for misrepresentation, as set out in paragraph 40(1)(a) of *IRPA*, and issued an exclusion report against Mr. de Lara as provided in paragraph 45(d) of the *Act*.

[6] Mr. de Lara applies for judicial review of Member's decision.

Background

[7] Mr. de Lara first applied to work in Canada as a caregiver for his sister in 2005. This familial arrangement was disclosed and accepted by the Canadian Immigration Centre (CIC). Mr. de Lara began and continued to work under the auspices of the work permit as a Live-in Caregiver from May 2007 to July 2008.

[8] Mr. de Lara married Dorothy Mandonahan in Pasig City, Philippines on March 2, 2007. They had two children together, one born in November 2007 and the other born in September 2008. Ms. Mandonahan also has two older children from a previous marriage.

[9] On February 25, 2008 Mr. de Lara applied for an extension of his work permit. On this application Mr. de Lara put a check in the application box marked “Never Married” and did not list having any family members in spite of being married to Ms. Mandonahan and having one child with her at that time. This extension application was granted.

[10] On March 22, 2008 Mr. de Lara applied to change the employer listed on his work permit from his sister to Ms. Dorothy Mandonahan. He again indicated he was “Never Married”. His request in this application was:

> “TO CHANGE MY EMPLOYER FROM MR. AND MRS. MANUEL AND IRENE TULENTINO TO MS. DOROTHY MANDONAHAN.”

[11] The immigration officer who issued the work permit did not know that the proposed new employer, Ms. Mandonahan, was Mr. de Lara's wife. In her declaration the officer deposes she would have referred the case to a more senior officer for further consideration, had she known about the relationship.

[12] This employer/spousal relationship was not discovered until September 29, 2009 when Mr. de Lara returned from visiting family in the Philippines and was questioned by an immigration officer at the Vancouver Airport about the details of his work permit. At that time Mr. De Lara acknowledged being married to Ms. Mandonahan.

[13] Officer Liang, who interviewed Mr. de Lara, filed a paragraph 44(1) *IRPA* report alleging the Applicant breached the *Act* by misrepresentation and referred the matter for review by the Minister's Delegate.

[14] In the Minister's Delegate review, another immigration officer interviewed Mr. de Lara. The interview included the following exchanges:

> Q: What is your relationship with Dorothy Mandonahan?
> A: She is my wife.

And

> Q: Why did you not disclose your relationship with your employer when you applied for your work permit?
> A: I only continued with what I had when I started with. I was single when I first applied, I didn't know how to change it. It was my intention when I changed it for 24 months to ask the agency how to do it. I didn't know what agency to ask. I applied fro [sic] my new work permit in July 2008, I am not very sure.

And in response to being presented with the airport immigration officer's report:

> Q: … Do you understand this report?
> A: Yes, I misrepresented myself. I have a question, who should I have given this information to?

[15] This exchange led to an admissibility hearing at the Immigration Division to further examine the allegation that Mr. de Lara misrepresented himself and to decide if an order for his exclusion from Canada should be made.

[16] The admissibility hearing was held on November 19, 2009 in Vancouver, where the presiding member decided Mr. de Lara was inadmissible to Canada and ordered his exclusion.

Decision Under Review

[17] The Member's decision and reasons are recorded in the transcript of the hearing and reads as follows:

> I have reviewed the materials and I have heard the submissions of both parties. It's quite clear, Mr. De Lara, that you are inadmissible to Canada for misrepresentation. The law requires that I make an exclusion order against you and I so order. I'll explain my reasons to you.
>
> You were married in March of 2007 and the person that you married was, until recently, your current employer. After being married, you signed two different applications. One was signed on the 25th of February, 2008; the second was signed on the 25th of May, 2008. The first one I believe was simply to extend your employment with a past employer and the one signed on May 25th, 2008, was to apply to change your employer from your previous employer to a person who is now your wife.
>
> Clearly your marital status at that time would have been of interest to the person who was deciding whether or not to issue a work permit. And we have a statement on page 8 form the person who issued the work permit to

you saying that had she known that you were married to Dorothy Mandonahan, she would not have issued a work permit to you at that time.

So you made a misrepresentation and that misrepresentation certainly was one that induced or could have induced an error in the administration of the Act because a work permit was issued to you in a situation where a work permit would not have been issued to you. That makes this a material misrepresentation and accordingly, you are inadmissible for misrepresentation.

Legislation

Immigration and Refugee Protection Act, (2001, c. 27)

40. (1) A permanent resident 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; …	40. (1) Emportent interdiction 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; …
44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister. (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to	44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre. Suivi (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas

comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order. …	respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi. …
45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions: … (d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes : … d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

(emphasis added)

Issue

[18] The Applicant focuses his submissions on the way the first two immigration officers conducted their inquiries into his misrepresentation. He argues the immigration officials breached their duty of procedural fairness.

[19] I do not agree that an issue of procedural fairness arises in the circumstances of this matter. When an applicant believes that there has been a breach of procedural fairness, he is expected to

object at the earliest opportunity: *Uppal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 338 at paras. 49-55 (*Uppal)*. The Applicant had the opportunity to address any perceived procedural unfairness during the review by the Minister's Delegate and again during the admissibility hearing by the Member of the Immigration Board. The Applicant did not raise the issue of procedural fairness earlier and is precluded from doing so now.

[20] In my view, the only issue before me is whether the Member committed a reviewable error in coming to his decision either in regards to his finding of a material misrepresentation or in the issuance of the exclusion order.

Standard of Review

[21] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, two standards of review are recognized at common law: reasonableness and correctness. The Supreme Court provides that a standard of review analysis is not required on judicial review where the appropriate standard is well settled in the jurisprudence.

[22] Other cases involving similar questions as in this judicial review have reviewed decisions on the standard of reasonableness. Those include *Karami v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 788, *Iamkhong v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1349 and *Canada (Minister of Citizenship and Immigration) v. Deol*, 2009 FC 990.

[23] Accordingly, I will proceed on the basis that the standard of review is reasonableness.

Analysis

[24] The Applicant's approach at the admissibility hearing was to admit to the misrepresentation and ask for consideration for a stay of removal on humanitarian and compassionate grounds, relating to the best interests of his children, and to hardship for his wife and for the family as a whole.

[25] The Applicant submits the Member erred in law in failing to have regard for procedural fairness on the part of the immigration officer's at the airport interview and the Minister's Delegate's review.

[26] As I have said, the Applicant did not raise this issue earlier and may not do so now. In *Uppal,* the Court found that the applicant had waived his right to challenge procedural fairness with respect to the paragraph 44(1) report since he had not objected before or at the Immigration Division where he was represented by counsel. *Uppal* has application here and I draw the same conclusion. The Applicant admitted his misrepresentation three times and cannot withdraw that admission now.

[27] The Applicant submits the Board erred by failing to consider that his mistake was innocent and that it had no material effect on the issuance of a caregiver work permit to the Applicant. The Applicant submitted during oral submission that the Member erred in law when he commented on

the fact the Applicant worked as a live-in caregiver stating: “I don’t understand how the arrangement could be characterized as one of employee-employer.”

[28] I consider the Member’s comment quoted above as arising in the course of the hearing and not carried into his decision. The Member clearly considers the statutory definition set out in paragraph 40(1)(a) defining a misrepresentation as one which “directly … misrepresents … material facts relating to a relevant matter that induces … an error in the administration of IRPA.” The Member refers to evidence before him, the affidavit of the immigration officer which indicated that had she known of the marriage to the prospective employer she would not approved the application to change employers and referred it to a senior officer for evaluation. The Member did not err in coming to the conclusion the misrepresentation was material.

[29] The Member’s decision falls squarely into the range of possible, acceptable outcomes that are defensible with respect to the facts and law (*Dunsmuir*, para. 47).

[30] The Applicant argues the Member gave no weight to his attempt to correct an “innocent mistake”, that he failed to consider the humanitarian and compassionate submissions, and that he ignored the objectives of the Live-in Caregiver Program.

[31] All three of these arguments fall outside of the Member’s mandate pursuant to paragraph 45 of IRPA. The Member was concerned with one question alone: Was there a misrepresentation as

understood by section 40(1)(a)? If so, section 45(d) of the *Act* required the Member to make an exclusion order, which he did.

[32] The Applicant proposes five questions of general importance for certification, all of which I find unsuitable for certification.

[33] The first two questions posed by the Applicant relate to the duty of the airport immigration officer and the Minister's Delegate. However, the sole issue before the Court on this judicial review relates to the decision of the Member of the Immigration Division. In that respect, the Applicant seeks to pose hypothetical questions not relevant to this judicial review.

[34] In the remaining three questions posed, the Applicant raises issues of whether the Member is obligated to conduct a hearing into the merits of the report by the Minister's Delegate or obtain further information either with respect to the *bona fides* of the employment contract or the Applicant having an honest and reasonable belief he was not withholding material information. The short answer is that it is for the Applicant or his counsel to provide evidence to support the Applicant's position. It is the Member's role to assess, not marshal, the evidence.

[35] In result, I consider the Applicant's proposed questions unsuitable for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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