Federal Court  Cour fédérale

Date: 20120919

Docket: IMM-6028-11

Citation: 2012 FC 1094

Ottawa, Ontario, September 19, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

XIAO LING DU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by the Immigration Appeal Division (the Board), dated August 11, 2011, wherein the applicant's appeal of the decision denying her application to sponsor her daughter was dismissed.

[2] This decision was based on the Board's finding that as she was not examined at the time of her mother's permanent residence application, the applicant's daughter was not a member of the

family class pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[3] The applicant requests that the Board's decision be set aside and a declaration be issued that the applicant's daughter is a member of the family class. Alternatively, the applicant requests that the Board's decision be set aside and the matter referred back for redetermination by a differently constituted Board.

Background

[4] The applicant, Xiao Ling Du, is a citizen of China. In 1991, she married Jie Zhang. On January 25, 1995, the couple had a daughter named Xiao Wen Zhang. After the birth of their daughter, the applicant was ill and the couple experienced financial problems. They therefore decided that their daughter should live with her paternal grandparents.

[5] In 2004, the couple separated. The applicant's daughter continued to live with her paternal grandparents. The couple divorced in January 2005. They agreed that their daughter would continue living with her paternal grandparents and that the applicant's ex-husband would have custody over her.

[6] The applicant remarried in May 2005. In 2001, prior to their marriage, Tie Jun Zhang (the applicant's second husband) had applied for Canadian permanent residence status under the skilled worker category. After their wedding, Tie Jun Zhang filed a spousal sponsorship application for the

applicant. As part of this application process, the visa office forwarded a declaration with regard to non-accompanying dependent who is not examined (the declaration) form to the applicant. The applicant signed and returned the declaration. On this signed copy, the applicant signed in the space for the witness and her husband signed in the space for the principal applicant.

[7] On November 16, 2006, the applicant became a permanent resident in Canada.

[8] In 2008, the applicant's first husband remarried. In July 2008, the applicant obtained legal custody over her daughter. Throughout 2008 and 2009, the applicant became increasingly concerned about her daughter. She therefore decided to apply to sponsor her to Canada.

[9] In March 2010, the applicant filed a family class sponsorship application for her daughter. On June 15, 2010, this application was denied under paragraph 117(9)(d) of the Regulations because the daughter was not examined during the processing of the applicant's permanent residence application.

[10] On December 2, 2010, the applicant submitted a second family class sponsorship application that included a request for humanitarian and compassionate (H&C) considerations pursuant to section 25 of the Act. This application was denied on March 8, 2011. An application for leave and judicial review of this decision has been filed.

[11] On April 15, 2011, the applicant appealed the June 15, 2010 decision to the Board. The Board requested submissions on whether the appeal should be dismissed as a result of the daughter

not being a member of the family class pursuant to paragraph 117(9)(d) of the Regulations. The Board rendered its decision in chambers based on the written submissions filed by the parties.

[12] On June 29, 2011, the applicant became a Canadian citizen.

Board's Decision

[13] On August 11, 2011, the Board dismissed the applicant's appeal.

[14] The Board first summarized the facts including the visa officer's forwarding of the declaration to the applicant during the processing of her permanent residence application. The Board noted that this form is often used by visa officers to obtain acknowledgment from a permanent resident applicant that he/she is aware of the effect of paragraph 117(9)(d) of the Regulations. The Board observed that the applicant signed the declaration on the witness line while her husband signed it on the principal applicant line (where she should in fact have signed it).

[15] The Board noted that the applicant's submissions on the declaration were three-fold: the applicant did not understand what she was signing; the visa officer had an obligation to counsel her about the consequences of not having her daughter examined; and the signed declaration was a nullity because the applicant signed it as a witness and not as the principal applicant.

[16] First, the Board noted that the mere fact that the applicant signed the declaration in the wrong place did not confirm that she did not understand its contents nor did it undermine the

proposition that she was intending to communicate to the visa officer her wish not to have her daughter examined and understood the consequences of that decision. The Board noted that visa officers must be able to rely on documents put before them and permitting applicants to resile from the contents of such documents would undermine the operation of the Act.

[17] Second, the Board noted that the visa officer did not advise the applicant to the extent implicit in the Overseas Processing Manual (the OP Manual). Nevertheless, a refusal may still be valid in law, notwithstanding that the visa officer did not fully comply with the process outlined in the OP Manual. Rather than being a mandatory provision, the Board noted that the OP Manual should be viewed as an indication of best practices that officers should aspire to. The Board held that the applicant bears the onus of understanding the content of documents she signs and cannot later avoid the implication of her signature by claiming she did not understand what she was signing.

[18] The Board also noted that although the applicant submitted that she did not have legal advice, the declaration was sent to a consultant acting as her husband's advisor who then forwarded it to the applicant and asked her to sign a form about her daughter. The Board found that the visa officer cannot be held accountable for the quality of advice given to an applicant. In addition, there is no breach of natural justice when a visa officer forwards a document to the address requested by an applicant. The Board noted that it would not be appropriate for a visa officer to interfere with an applicant's decision about the form of representation employed in dealing with a visa office.

[19] Third, the Board noted that the obligation to have her daughter examined is contained in the Regulations and the declaration is merely a manner of proof that the applicant has acknowledged awareness of paragraph 117(9)(d). The Board highlighted that in the applicant's statutory declaration, she stated that she thought the form she signed was to acknowledge that her daughter would not be coming to Canada for the time being. She did not understand that it would permanently prohibit her from sponsoring her daughter. The Board found that this statement confirmed the applicant's intention to sign the declaration as the principal applicant, not as a witness.

[20] The Board also noted that *Chen v Canada (Minister of Citizenship and Immigration)*, [2009] IADD No 1933, a case relied on by the applicant, was distinguishable. In *Chen* above, the signed document bore both the Roman alphabet and the Chinese characters for the applicant and the witness. Conversely, in this case, the sole signatures were in Chinese characters and it was thus not readily apparent that the declaration was erroneously signed.

[21] The Board noted that the applicant bears the onus of completing forms correctly. She should not gain an advantage from erroneously completing forms that are relied on by visa officers in good faith and later resiling from the contents of those forms after having obtained permanent residence status.

[22] The Board also noted the applicant's submissions that the circumstances surrounding the signing of the declaration indicated that, in effect, no real choice was presented to the applicant. Rather, it was the visa officer's decision not to have the applicant's daughter examined. Thus,

subsection 117(10) of the Regulations applied. However, the Board held that this argument was not established on the evidence before it. Rather, if the visa officer had believed that the applicant wanted to sponsor her daughter in the future, the Board found it likely that the daughter would have been examined.

[23] Finally, the Board cited jurisprudence that has emerged on the interpretation of paragraph 117(9)(d) of the Regulations. The Board noted that regardless of whether it is intentional, the jurisprudence has confirmed that non-disclosure is enough to bar an applicant from sponsoring her/his child. In this case, the applicant's daughter was not examined at the time of her immigration application to Canada. While the applicant might have failed to understand the consequences of not having her daughter examined, notwithstanding the visa officer's efforts to ensure that understanding, it did not exempt the applicant from the application of paragraph 117(9)(d) of the Regulations.

[24] In conclusion, the Board found that the applicant's daughter was not a member of the family class. It therefore dismissed the appeal. The Board did note that the facts alleged in this case would lend themselves to an H&C application to the Minister under section 25 of the Act.

Issues

[25] The applicant submits the following points at issue:

1. Whether or not the Board's decision was reasonable; and

2. Whether or not the Board properly interpreted subsection 117(10) of the Regulations.

[26] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in determining that the applicant's daughter was not a member of the family class pursuant to paragraph 117(9)(d) of the Regulations?

3. Did the Board err in finding that subsection 117(10) of the Regulations did not apply to this case?

Applicant's Written Submissions

[27] The applicant submits that in her written submissions to the Board, she argued that the declaration she filed with the visa officer was a nullity because her husband signed it as the principal applicant. As he was merely the daughter's step-father, he did not have the authority to waive the applicant's right to sponsor her daughter in the future. In support, the applicant referred to *Chen* above.

[28] The applicant submits that the Board unreasonably distinguished *Chen* above, on the basis that it was not readily apparent that the declaration was erroneously signed. The applicant notes that paragraph 10(1)(b) of the Regulations provides that an application under the Regulations shall "be signed by the applicant". Thus, proper applicants must sign the relevant forms.

[29] Further, there was clear evidence before the Board of the applicant's and her husband's different signatures on documents before the visa officer who processed their immigration applications. Their signatures would also have been easily distinguishable on the passports they provided to obtain visas.

[30] Thus, there was ample evidence that the visa officer dealing with the applicant's permanent residence application in 2005 should have recognized that the declaration was erroneously signed, indicating some misunderstanding thereof and alerting the officer that the declaration was defective. The applicant submits that the Board's reasoning on this point was flawed and it ignored relevant evidence contradicting its own conclusions. The Board also erred in not reading the declaration restrictively.

[31] The applicant submits that the Board improperly assessed the issue of whether the declaration was a nullity. The applicant notes that under paragraph 67(1)(b) of the Act, the Board has the authority to allow an appeal when it is satisfied that "a principle of natural justice has not been observed". In assessing whether there was a breach of natural justice, the Board was limited to considering the evidence before the visa officer in 2005. The Board therefore improperly relied on the applicant's 2010 statutory declaration.

[32] Further, the applicant submits that the Board failed to address the applicant's argument that she was not given a choice as to whether to have her daughter medically examined and also ignored relevant evidence on this issue. In her submissions to the Board, the applicant stated that she made no choice to waive her right to sponsor her daughter. She also made no choice not to have her

daughter examined. The Board erred by not responding to this, but rather restricting itself to the visa officer's obligation to advise the applicant about the consequences of not having her daughter examined.

[33] The applicant notes that her submissions to the Board were not limited to the visa officer's failure to follow the guidelines set out in the OP Manual, but also pertained to the lack of instructions provided by the visa officer to the applicant regarding the declaration. The visa officer provided no explanation about the medical examination for the applicant's daughter. These facts indicated a breach of natural justice, an issue that the Board failed to consider.

[34] The applicant submits that in exercising its lawful jurisdiction, the Board should not have been blind to, or dismissive of, the particular circumstances of the case before it. Here the Board refused to exercise its jurisdiction by placing the Regulations above all else and essentially refusing to assess whether a breach of natural justice occurred.

[35] The applicant also submits that the Board erred in its interpretation of subsection 117(10) of the Regulations. The Board failed to consider the fact that the visa officer provided the declaration to the applicant and relied on it in determining that the applicant's daughter was not required to be examined. As indicated previously, this declaration was defective and the Board failed to consider this.

[36] In summary, the applicant submits that the Board's decision was flawed. The circumstances of the case indicate that a breach of natural justice occurred in the processing of the applicant's

immigration application in 2005. This led to her daughter not being examined. As a result, the applicant has been unable to sponsor her daughter. The applicant submits that the Board's decision is not justified based on the evidence and is therefore unreasonable.

Respondent's Written Submissions

[37] The respondent submits that the Board's consideration of the facts and their application under paragraph 117(9)(d) of the Regulations is a finding of mixed fact and law that is reviewable on the standard of reasonableness. The question to be determined on issues of natural justice and procedural fairness is whether the impugned procedure was fair.

[38] The respondent submits the decision was reasonable. The respondent notes that the purpose of paragraph 117(9)(d) of the Regulations is to ensure that foreign nationals seeking permanent residence do not omit non-accompanying dependent members from their applications, thereby avoiding their examination for admissibility at that time and benefiting at a later time from the preferential processing and admission treatment granted to members of the family class.

[39] Through the declaration, applicants acknowledge the impact of paragraph 117(9)(d) of the Regulations. The respondent notes that the Immigration Appeal Division has consistently found that the signing of the declaration is *prima facie* evidence that an applicant has chosen not to have a dependent child examined, therefore barring future sponsorship. This is true even where an applicant has received possibly poor advice. The respondent submits that the intention of the Regulations cannot be overcome despite poor advice.

[40] The respondent notes that applicants are deemed to know the content and requirements of the Regulations. As such, the applicant's claim that she did not know the consequences of her actions or did not intend her actions is irrelevant.

[41] The respondent notes that the obligation to have her daughter examined is contained in the Regulations. As the declaration merely served as proof of the applicant's acknowledgement of her awareness of paragraph 117(9)(d) of the Regulations, the fact that the signatures were erroneous is irrelevant. Moreover, visa officers are under no obligation to ensure that signatures are correct and applicants bear the onus of ensuring that they understand the content of any documents they sign.

[42] Further, the respondent submits that Board reasonably found that the applicant's 2010 statutory declaration confirmed that she intended to sign the declaration as the principal applicant making an acknowledgment, not as the witness thereof. The respondent submits that it is established jurisprudence that where natural justice is at issue, reference can be made to evidence that was not necessarily in existence at the time of the decision. As the Board's hearing is *de novo*, the Board can implicitly hear evidence that was not before the original decision maker and rely on it in making decisions, provided it finds the evidence credible and trustworthy.

[43] In addition, contrary to the applicant's submissions, the Board specifically addressed the applicant's argument that she was given no choice about whether to sign the declaration. The respondent submits that this argument is implicitly addressed in the Board's discussion on the visa officer's duty to advise the applicant on the consequences of not being examined.

[44] Finally, the respondent submits that the Board correctly distinguished *Chen* above, on the grounds that the signatures were both in Roman and Chinese characters. Conversely, in this case, the declaration was only signed in Chinese characters and it was thus not readily apparent, as in *Chen* above, to the visa officer that the signatures were mixed up.

[45] The respondent also submits that the Board was correct in its subsection 117(10) analysis. There was nothing in the record to suggest that the visa officer determined the daughter not examinable, as required under subsection 117(10) of the Regulations. Rather, in this case, it was the signing of the declaration that led to the non-examination. Thus, the respondent submits that the Board did not make a reviewable error and this application should be dismissed.

Analysis and Decision

[46] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[47] A Board's determination as to whether an applicant is excluded as a member of the family class pursuant to paragraph 117(9)(d) of the Regulations is a question of mixed fact and law that attracts a standard of review of reasonableness (see *Moudoodi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 761, [2010] FCJ No 932 at paragraph 10).

[48] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[49] **Issue 2**

Did the Board err in determining that the applicant's daughter was not a member of the family class pursuant to paragraph 117(9)(d) of the Regulations?

Paragraph 117(9)(d) of the Regulations excludes foreign nationals as members of the family class if at the time of their sponsor's permanent residence application, the foreign national was a non-accompanying family member of that sponsor and was not examined. The often cited purpose of this provision is to "ensure that foreign nationals seeking permanent residence do not omit non-accompanying dependent members from their applications thereby avoiding their examination for admissibility at that time, and then, once having obtained their own permanent residence status, seek to sponsor their dependents and benefit from the preferential processing as well as admission treatment given to members of the "family class"" (see *Natt v Canada (Minister of Citizenship and Immigration)*, 2004 FC 810, [2004] FCJ No 997 at paragraph 14).

[50] In this case, at the time of the applicant's permanent residence application, her daughter was a non-accompanying family member and was not examined. The applicant's daughter therefore fell directly within the scope of paragraph 117(9)(d) of the Regulations.

[51] At the time of her permanent residence application, the applicant and her husband also signed a declaration acknowledging the effect of not including her daughter and not having her examined for immigration purposes. After citing paragraph 117(9)(d), the declaration explicitly states:

> I therefore acknowledge that, since the above dependent is not being examined, I may not in the future sponsor him/her as long as the above section remains in force.

[52] However, the applicant submits that the declaration is a nullity as both she and her husband incorrectly signed it. In support, the applicant refers to *Chen* above. The following paragraphs from *Chen* above, describes the reasons for that decision:

> 37 Both sets of documents were signed on September 13, 2004. Both sets of documents were signed by Mr. Wu, the appellant's husband, at the time of her application. While Mr. Wu is the biological father of Ms. Yi, he is but a stepfather of the applicant, Mr. Qi. While a biological parent may sponsor a child who was a member of the family class, a step-parent may not sponsor the dependent child of their spouse because their spouse's dependent child is not a member of the family class qua the step-parent.
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> [...]
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> 41 Only the appellant could sponsor the applicant. Since only the appellant had the right to sponsor the applicant, only the appellant could sign away her rights to future sponsorship. Therefore when Mr. Wu signed the Declaration and Separation Statement in respect of the appellant's son, he was signing away the rights of the appellant which he had no power to do.

> […]
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> 43 The content of the Separation Statement signed by Mr. Wu on September 13, 2004 in respect of the appellant's son is significant. The document is essentially a form which must be filled out and signed in order to complete it. At the allotted place on the document following the type written word "I" Mr. Wu's full name was handwritten as were the words "applicant for permanent residence in Canada." This is followed by the type written words "hereby state that I fully understand that should I be granted admission to Canada, this action on the part of the Government of Canada does not oblige said Government to grant admission to my wife/husband/common-law partner/son/daughter/grandchild." The words wife, husband, common-law partner, son, daughter, grandchild were all crossed out and the words "spouse's dependent (son) Yang Zhong Qi" was handwritten in the space allocated for names. The document bears Mr. Wu's signature in both the Roman alphabet and Chinese characters and the witness' signature of a certain Tan Shao Zhen in both the Roman alphabet and Chinese characters.
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> 44 As noted above, the Declarations and Separation Statements for Ms. Yi and the applicant were received by the visa post on September 23, 2004. When these documents were considered, it should have been readily apparent to the reviewing officer that the wrong person signed the Declaration and Separation Statement in respect of the applicant. Nevertheless, the defective documents in respect of the applicant were relied upon as being valid and the visa for the appellant was issued on December 28, 2004.
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> 45 The panel finds, that because the wrong person signed the Declaration and Separation Statement in respect of the applicant, these documents are null and void and have no effect despite the fact that they were relied upon to subsequently issue the permanent resident visa for the appellant on December 28, 2004. Moreover the entire sequence of events comes within subsection 117(10) because the visa officer knew of the applicant and he was not examined as on the basis of the documents it was determined that he was not required to be examined under the circumstances. Subsection 117(10) applies on the face of the facts. [emphasis added]

[53] In this case, the Board noted that the declaration only bore signatures in Chinese characters and it was therefore not readily apparent, as in Chen above, that the declaration was erroneously

signed. The Board also relied on the applicant's 2010 statutory declaration. There, the applicant stated that she thought the effect of signing the declaration was to acknowledge that her daughter would not be coming to Canada for the time being; not that it would permanently prohibit the applicant from sponsoring her daughter. The Board found that this statement confirmed the applicant's intention to sign the declaration as the principal applicant, not as a witness.

[54] The applicant criticizes the Board's reliance on the 2010 statutory declaration as it was not before the visa officer in 2005. However, pursuant to subsection 175(1) of the Act:

175. (1) The Immigration Appeal Division, in any proceeding before it,	175. (1) Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration :
. . .	. . .
(b) is not bound by any legal or technical rules of evidence; and	b) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(c) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	c) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

[55] These provisions clearly empower the Board to consider the 2010 statutory declaration, even though it was not before the visa officer in 2005. The Board's right to consider new evidence was confirmed by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at paragraph 27). It should also be noted that significant deference is owed to the Board in its assessment of the credibility of the witnesses and the evidence (see *Canada (Minister of Citizenship and Immigration) v Kimbatsa*, 2010 FC 346, [2010] FCJ No 389 at paragraph 38).

[56] Thus, the Board did not err by relying on the applicant's 2010 statutory declaration and the statement therein on the applicant's understanding of the effect of signing the declaration.

[57] As shown, the facts in this case are indeed different from those in *Chen* above. Contrary to *Chen* above, the applicant in this case did sign the declaration, albeit in the wrong place. The 2010 statutory declaration further indicated that the applicant intended to sign the declaration, although she misunderstood or was not aware of the effect of so doing.

[58] The issue of an applicant's lack of awareness was addressed in *Jankovic v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1482, [2003] FCJ No 1878 (at paragraph 53):

> The Applicant does not deny that he was excluded from his Father's 1992 application. The Father alleges, rather, that he was not aware of the consequences of that exclusion. But the Father is presumed to be aware of the rules and legislation governing applications which he submits. The legislation is publically [*sic*] available and the onus is on the individual applicant to ensure that they comply with the legislative requirements and are aware of the consequences of their choices. No one misled the Father at the material time or prevented him from seeking advice about the implications of his choices. There was no procedural unfairness and the Respondent was under no obligation to advise the Father about future consequences. In addition, the Father has stated categorically that the son was in his Mother's custody at the time and had no intention of immigrating to Canada. [emphasis added]

[59] As indicated, the applicant is presumed to be aware of the law governing her applications, and thus, her misunderstanding or lack of awareness of the effect of signing the declaration bears no weight on this issue. The visa officer was under no legal obligation to explain the requirements of paragraph 117(9)(d) to the applicant. It is also notable that poor advice cannot be relied on by an

applicant to overcome the effect of paragraph 117(9)(d) and of a signed declaration (see *Cha v Canada (Minister of Citizenship and Immigration)*, [2007] IADD No 2782 at paragraph 9).

[60] It has been well recognized that the effects of subsection 117(9)(d) of the Regulations can be harsh (see *David v Canada (Citizenship and Immigration)*, 2007 FC 546, [2007] FCJ No 740 at paragraph 10; and *Desalegn v Canada (Minister of Citizenship and Immigration)*, 2011 FC 268, [2011] FCJ No 316 at paragraph 4). An applicant's intention cannot mitigate this harsh effect. As noted in *Kimbatsa* above:

> 51 The case law is unanimous. An incorrect statement resulting in a foreign national not being examined prevents that foreign national from being considered under the family class for sponsorship purposes, regardless of the reasons for the incorrect statement. Therefore, whether or not the incorrect statement was made in good faith, the foreign national will be excluded from the sponsor's family class.
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> […]
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> 53 Parliament's intention could not be more clearly expressed. The generous immigration regime applicable to the family class is subject to the express condition that the sponsor make truthful statements in his or her application for permanent residence, enabling the Canadian authorities to examine in advance all of the individuals potentially belonging to the family class in the event that the sponsor is granted permanent resident status. Foreign nationals who are not examined are therefore excluded from the family class of the sponsor, regardless of the reasons for the sponsor's incorrect statement. However, the Minister may overlook incorrect statements in circumstances justified by humanitarian and compassionate considerations, pursuant to subsection 25(1) of the Act. This approach ensures the integrity of the immigration system. [emphasis added]

[61] In summary, I find that the Board came to a reasonable decision based on the evidence before it, including the facts surrounding the applicant's immigration application and the signing of

the declaration. The Board's decision was transparent, justifiable and intelligible and within the range of acceptable outcomes.

[62] **Issue 3**

Did the Board err in finding that subsection 117(10) of the Regulations did not apply to this case?

The applicant also submits that the Board erred in its interpretation of subsection 117(10) of the Regulations. Subsection 117(10) of the Regulations states that 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.

[63] As indicated, subsection 117(10) provides an exception from the harsh effect of paragraph 117(9)(d). However, this exception is only available where the applicant was not examined because an officer determined that they were not required to be examined under the current or former Act.

[64] In this case, the applicant submits that the officer relied on the defective declaration in determining that her daughter did not need to be examined; thus, subsection 117(10) applied. Conversely, the respondent submits that there was nothing in the record to suggest that the visa officer determined that the daughter was not examinable; thus, subsection 117(10) did not apply.

[65] In its decision, the Board held that the applicant's argument was not established on the evidence before it. The Board found that if the visa officer had believed that the applicant wanted to sponsor her daughter in the future, it was likely that the daughter would have been examined.

[66] I agree with the Board that there was no evidence before it to support the applicant's submission. The visa officer sent the declaration to the applicant's immigration consultant that was on file. This consultant forwarded the declaration to the applicant for signature. Both the applicant and her husband signed the declaration in Chinese characters, albeit in the wrong location, and then returned the declaration to the visa officer. The Board reasonably found that the signing error was not readily apparent and that the applicant nevertheless intended to sign the declaration even though she misunderstood its full effect. None of these facts suggest that the visa officer actually determined that the applicant's daughter was not required by law to be examined. I would therefore also dismiss this argument as the Board's decision on this issue was also reasonable based on the evidence before it.

[67] As a result of my findings, the application for judicial review must be dismissed.

[68] Neither party wished to submit a proposed serious question of general importance to me for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
13. (1) A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.	13. (1) Tout citoyen canadien et tout résident permanent peuvent, sous réserve des règlements, parrainer l'étranger de la catégorie « regroupement familial ».
65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve 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 mesures spéciales.

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

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.
(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.	(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.
(11) Paragraph (9)(d) applies in respect of a foreign national referred to in	(11) L'alinéa (9)d) s'applique à l'étranger visé au paragraphe (10) si un agent arrive à

subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,

(a) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination; or

(b) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

la conclusion que, à l'époque où la demande visée à cet alinéa a été faite :

a) ou bien le répondant a été informé que l'étranger pouvait faire l'objet d'un contrôle et il pouvait faire en sorte que ce dernier soit disponible, mais il ne l'a pas fait, ou l'étranger ne s'est pas présenté au contrôle;

b) ou bien l'étranger était l'époux du répondant, vivait séparément de lui et n'a pas fait l'objet d'un contrôle.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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