Federal Court  Cour fédérale

**Date: 20150610**

**Docket: IMM-7857-14**

**Citation: 2015 FC 729**

**Montréal, Quebec, June 10, 2015**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**NARTEY SEKINATU**
**GBERBIE WOSILATU LARTELEY**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] The Applicants challenge a decision dated August 28, 2014, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] wherein the principal Applicant's sponsorship application based on humanitarian and compassionate [H&C] grounds was rejected by a visa officer because the principal Applicant, as the sponsor, failed to declare

the co-Applicant as a non-accompanying family member at the time of her sponsorship application.

[2] The Court heard the related matter of the co-Applicant's sister sponsorship application on June 9, 2015, in file IMM-7856-14.

## II. Background

[3] The Applicants are citizens of Ghana. The principal Applicant is the co-Applicant's mother and sponsor to Canada.

[4] Sponsored by her ex-husband, the principal Applicant arrived in Canada on March 1, 2005.

[5] The principal Applicant claims that her ex-husband manipulated her into omitting to declare her two daughters in her sponsorship application.

[6] As a result, on August 28, 2014, a visa officer at the High Commission of Canada in Accra, Ghana, found that the co-Applicant was excluded from the family class by virtue of paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] for the principal Applicant's failure to declare her two non-accompanying daughters.

[7] Moreover, the officer found that there were insufficient H&C grounds to overcome the exclusion.

III. Legislative Provisions

[8] Subsection 11(1) of the IRPA provides for the visa requirement for a foreign national before entering Canada:

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| **Application before entering Canada** | **Visa et documents** |
| **11**. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. | **11**. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi. |
| **Family reunification** | **Regroupement familial** |
| **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. |

[9] Subsection 117(9) of the IRPR enunciates the applicable family class exclusion:

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| **Excluded relationships** | **Restrictions** |
| **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 |

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| | 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. |

## IV. Issues

[10] The visa officer's decision raises questions of fact and questions of mixed fact and law that are reviewable on a standard of reasonableness (*Talbot v Canada (Minister of Citizenship and Immigration)*, 2012 FC 972 at para 41; *Savescu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 353 at para 19; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190).

[11] The determinative issue in the application is whether the officer's decision is reasonable or not.

## V. Analysis

[12] Section 117 of the IRPR delineates those who may be considered members of the family class for the purpose of sponsorship applications.

[13] Subsection 117(9) of the IRPR states that no foreign national may be considered a member of the family class by virtue of his/her relationship with a sponsor if "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".

[14] This Court's jurisprudence has held that the reason or motive behind the non-disclosure of non-accompanying family members, or the fact that such misrepresentation was made in good faith, is irrelevant in applying the provision found in paragraph 117(9)(*d*) of the IRPR:

> [24] The Court of Appeal has therefore decided that the impugned regulation is not *ultra vires* the IRPA particularly in cases where there is a misrepresentation to immigration authorities. Here, however, the Applicant did not know of his son's existence at the time of his application for permanent residence. He cannot, therefore, be said to have concealed this information or to have misrepresented his circumstances. In my view, it matters not whether non-disclosure is deliberate or not. The regulation is clear, paragraph 117(9)(d) makes no distinction as to the reason for which an non-accompanying family member of the sponsor was not disclosed in his application for permanent residence. What matters, is the absence of examination by an officer that necessarily flows from the non-disclosure. This interpretation is consistent with the findings of my Colleague, Justice Mosley in *Hong Mei Chen v. M.C.I.*, [2005] F.C.J. No. 852, 2005 FC 678, where the scope and effect of the impugned regulation were found not to be limited to cases of fraudulent non-disclosure. At paragraph 11 of his reasons, my learned colleague wrote, "... 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."
>
> [25] The provisions of paragraph 117(9)(d) of the Regulations are not inconsistent with the stated purposes and objectives of the IRPA. I am in agreement with the view expressed by Justice Kelen at paragraph 38 of his reasons in *de Guzman*, above, that 'The objective of family reunification does not override, outweigh, supersede or trump the basic requirement that the immigration law must be respected, and administered in an orderly and fair

> manner." Further, in exceptional circumstances where humanitarian and compassionate factors are compelling, an applicant can seek, pursuant to s. 25(1) of the IRPA, a ministerial exemption to the statutory and regulatory requirements for admission to Canada. Such an application remains open to the Applicant. If successful, the Applicant could be reunited with his son.
>
> [Emphasis added.]
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> (*Adjani v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 68 at paras 24 and 25 [*Adjani*]; see also: *Savescu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 353 at para 31)

[15] Subsection 25(1) of the IRPA empowers the Minister to grant an exemption to a legal requirement on the basis of H&C grounds. This provision acts as a mechanism aiming to alleviate the strict application of the law in exceptional cases (*Nguyen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 133 at para 2).

[16] It is relevant to note that the discretionary power embodied in subsection 25(1) of the IRPA is integral to the constitutionality of paragraph 117(9)(*d*) of the IRPR (*Desalegn v Canada (Minister of Citizenship and Immigration)*, 2011 FC 268 at para 4, *De Guzman v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ 2119).

[17] Furthermore, both subsection 25(1) of the IRPA and paragraph 117(9)(*d*) of the IRPR aim at ensuring the integrity of the immigration system. The interrelation between these provisions was discussed by Justice Robert M. Mainville in *Canada (Minister of Citizenship and Immigration) v Kimbatsa*, [2010] FCJ 389 at paras 53 and 54 [*Kimbatsa*]:

> [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.
>
> [54] Canada's immigration system is not open to manipulation by sponsors who adjust their family situations to suit their purposes. The system is primarily based on the principle of true and complete disclosure of information by the applicants. Deviations from this principle cannot be tolerated by the courts. It is for the Minister, not the courts, to decide under subsection 25(1) which exceptional cases involve humanitarian and compassionate considerations justifying a departure from this principle.
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> [Emphasis added.]

[18] In the case at hand, the officer reasonably concluded that the co-Applicant was excluded by virtue of paragraph 117(9)(*d*) of the IRPR. The fact that the principal Applicant concealed her daughters' existence at the time of her permanent residence application is uncontested. Although the principal Applicant provided explanations for the misrepresentation, given the imperative language of the IRPR, the Court does not find that the officer committed a reviewable error in this respect (*Adjani*, above at para 28; *Kimbatsa*, above at para 20).

[19] As stated by Justice John A. O'Keefe in *Du v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1094 at para 60, "an applicant's intention cannot mitigate [the] harsh effect" of the application of paragraph 117(9)(*d*) of the IRPR.

[20] Furthermore, the officer's Computer Assisted Immigration Processing System notes, which form part of the reasons, reveal that the officer considered the evidence provided by the Applicants as well as their particular circumstances, in assessing the Applicants' H&C claim.

[21] Most notably, the officer considered the principal Applicant's explanations for her misrepresentation. The officer noted that the Applicant was allegedly unaware of Canadian immigration regulations and that she was under the manipulative influence of her abusive husband. Moreover, the officer noted that the principal Applicant's daughters were only registered in February 2007, two years after the principal Applicant's arrival in Canada.

[22] The officer also considered the best interests of the co-Applicant and her sister. Among others, the officer considered that the co-Applicant and her sister both live with their grandmother in Ghana, with whom they have lived most of their lives. The officer also found that the Applicants have not provided evidence to support their claim that the co-Applicant's grandmother was unable to continue raising the co-Applicant and her sister.

[23] The officer's decision and reasons reveal that the circumstances surrounding the Applicant's misrepresentation were given full consideration and analysis, leading the officer to find that the minor Applicant was excluded by virtue of paragraph 117(9)(*d*) of the IRPR. Moreover, the best interests of the co-Applicant and her sister were adequately weighed.

[24] It is this Court's view that the officer's finding that the Applicants failed to establish sufficient H&C grounds to overcome the exclusion of paragraph 117(9)(*d*) of the IRPR is reasonable.

[25] The Court finds no basis upon which it may intervene in the officer's exercise of discretionary power.

## VI. Conclusion

[26] The officer's decision is reasonable and does not warrant this Court's intervention. As such, the application for judicial review is dismissed.

## JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-7856-14 |
| **STYLE OF CAUSE:** | NARTEY SEKINATU, YEKPLE ALEXINA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | JUNE 9, 2015 |
| **JUDGMENT AND REASONS:** | SHORE J. |
| **DATED:** | JUNE 10, 2015 |

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| Pavol Janura | FOR THE RESPONDENT |

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