Federal Court  Cour fédérale

Date: 20151021

Docket: IMM-7866-14

Citation: 2015 FC 1187

Ottawa, Ontario, October 21, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

IRMA SAPIDA INOCENTES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of an Exclusion Order from the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada against the Applicant, Irma Sapida Inocentes, under section 69(2) of the IRPA and section 225 of the

Immigration and Refugee Protection Regulations [IRPR]. The Applicant is seeking to have the decision quashed and referred back to a different panel for reconsideration.

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] The Applicant, a citizen of the Philippines, entered Canada on April 28, 2008 on a work permit issued under the Live-in Caregiver program. Since May 2008, she has been solely employed by Ronnie Sarmiento [Mr. Sarmiento].

[4] In August 2010, the Applicant applied for permanent residence under the Live-in Caregiver category. On September 20, 2012, her permanent residence application was refused based on the officer's findings that the Applicant made material misrepresentations that could have induced an error in the administration of the IRPA and is therefore inadmissible pursuant to section 40(1)(a) of the IRPA. The Officer concluded that the Applicant "misrepresented herself on the history and nature of her employment in order to make the program requirements (full-time live-in caregiver) for the class which could have induced an error in the administration of the IRPA, namely the granting of permanent residence."

[5] On July 30, 2013, an admissibility hearing was held before the Immigration Division [the Board] of the Immigration and Refugee Board. The Board concluded on November 19, 2013, that the Applicant was not inadmissible because she "did not misrepresent herself or withhold material facts." The Board's decision was appealed to the IAD on December 13, 2013 by the

Minister of Public Safety and Emergency Preparedness. The appeal was granted and is the subject of this judicial review.

III. Impugned Decision

[6] On November 4, 2014, the IAD issued an Exclusion Order against the Applicant based on material misrepresentations she made on the relationship with her employer and the financial circumstances of her employment. The IAD concluded that the evidence relied on by the Applicant was neither credible nor reliable.

[7] The IAD found inconsistencies between the Applicant's testimony to the visa officer in Manila and her testimony before the IAD. The Field Operations Support System [FOSS] notes from the interview in Manila, to qualify for a live-in caregiver visa, indicated that the Applicant stated that she was not related to her future employer, and only knew him through an agency. Subsequently, the Applicant testified at the IAD hearing that she was indeed related to her employer, Mr. Sarmiento, as he is married to her cousin. The IAD concluded that the Applicant did not "satisfactorily explain" why she claimed to have no relationship with her employer when he is related to her by marriage.

[8] The IAD further found that the Applicant provided incomplete and inaccurate tax and banking records to support her application for "permanent residency and an open work permit under the live-in caregiver program." The Applicant testified that she was paid cash due to urgent requirements for her to send money for family emergencies relating to her mother and brother. The IAD found no corroborating evidence and concluded that the reasonable inference

for cash payments was to avoid the government tracing the payments. Furthermore, the Applicant's cousin and her employer, her cousin's husband, all gave different versions of what allegedly happened.

[9] As a result, the IAD did not accept the Applicant's evidence and supporting witnesses as credible and reliable. It concluded that the Applicant "misrepresented the financial circumstances of her alleged employment which were material facts relating to a relevant matter that induced or could have induced an error in the administration of the IRPA."

IV. Legislative Framework

[10] The following provisions of the IRPA are applicable in these proceedings:

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(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;	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;

V. Issue

[11] The issue arising in this application is whether the IAD's decision to allow the appeal and render the Applicant inadmissible for misrepresentation was reasonable.

VI. Standard of Review

[12] The IAD's determination of whether the Applicant misrepresented material facts is a matter of mixed fact and law that must be assessed on the standard of reasonableness. So long as the IAD's decision falls within a range of reasonable, acceptable outcomes which are defensible in respect of the facts and law and justified by transparent and intelligible reasons, it is not subject to review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 49).

VII. Analysis

[13] The Applicant argues that the IAD never conducted an analysis of whether the misrepresentations were material. She further argues that materiality only relates to the subject of the Section 44 report, which she characterizes as whether the Applicant actually worked as a live-in caregiver. Accordingly, she argues that the fact that there may have been a misrepresentations about her cousin being married to her employer or that the financial information is not reliable are immaterial to whether on the whole of the evidence it was demonstrated that the Applicant actually worked as a live-in caregiver. Because the IAD failed to focus on the proper issue, a reviewable error occurred and the decision should be set aside.

[14] I reject this submission on a number of grounds. First, on the basis of a fulsome analysis of the Applicant and her relatives' financial records, the IAD found that they were not credible and their evidence not reliable. It therefore concluded that the Applicant misrepresented the financial circumstances of the alleged employment which were material facts relevant to a matter that induced or could have induced an error in the administration of the IRPA. That conclusion is sufficient alone to decide that the Applicant did not meet the issue, as she would narrowly define it, of demonstrating that she actually worked as a live-in caregiver.

[15] Second, I disagree that the Section 44 report can be interpreted so narrowly as to limit the issue as to whether the Applicant worked as a live-in caregiver. The report stated and the IAD concluded that the Applicant misrepresented herself on "the history and nature of her employment in order to meet the program requirements." The essence of the Applicant's misrepresentation is that the nature of her employment was one of an arms-length relationship, rather than being founded on family relations. This distinction is fundamental as to how the immigration officer would react in considering her application.

[16] Even if the evidence established that she was actually working as a live-in caregiver, the misrepresentation was sufficient for the purposes of her being declared inadmissible. In other words, one cannot misrepresent the nature of the employment relationship, whether innocent or not, and thereafter prove that "no misrepresentation occurred," or that it is immaterial by conducting oneself in a proper employment relationship. The issue of the risk of an error in the administration of the Act must be determined <u>at the time of the misrepresentation</u>, not afterwards.

[17] That is so, because as Justice Tremblay-Lamer stated in *Sayedi v Canada (Minister of Cititzenship and Immigration)*, 2012 FC 420 at paras 23-24, the objective of section 40(1)(a) is to deter misrepresentation and to maintain the integrity of the immigration process:

> In determining whether a misrepresentation is material, regard must be had for the wording of the provision, and its underlying purpose.
>
> Section 40(1)(a) is to be given a broad interpretation in order to promote its underlying purpose: *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 at paragraph 25. The objective of this provision is to deter misrepresentation and maintain the integrity of the immigration process – to accomplish this objective the onus is placed on the applicant to ensure the completeness and accuracy of his or her application. Section 40(1)(a) is broadly worded to encompass misrepresentations even if made by another party, without the knowledge of the applicant: [citation omitted]. The applicant cannot misrepresent or withhold any material facts that could induce an error in the administration of the Act.
>
> [Emphasis added]

[18] Similarly, Justice Scott afforded section 40(1)(a) a broad interpretation in *Kobrosli v Canada (Minister of Citizenship and Immigration)*, 2012 FC 757, stating at para 48 that "a risk of an error in the administration of the IRPA is sufficient for paragraph 40(1)(a) to apply in this case." Misconstruing the nature of the relationship as one at arm's length as opposed to being one where family relationships are involved, obviously raises a risk of an error in the administration of the Act.

[19] I also reject the Applicant's argument that it is necessary for the decision-maker to carry out a materiality analysis when the circumstances of the facts make it obvious that

misrepresentation creates a risk of error in the administration of the Act. The decision cited by the Applicant, *Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931 at paragraph 29, would therefore not apply in these circumstances.

[20] In that matter, the Court found that the Applicant did not mislead Citizenship and Immigration authorities regarding his identity because the record contained an extensive number of supporting documents demonstrating that he had used both names throughout the file. This also affected the materiality of the misrepresentation which was not obvious.

[21] Here both the misrepresentation and its materiality are clear. It is obvious that the nature of the employment relationship would affect how the assessment would be carried out depending upon the knowledge of whether it was one of arm's length, or based on family relations. Moreover, the misrepresentation was demonstrated as being material to the administration of the Act. It gave rise to an investigation to determine whether the Applicant and her alleged employer properly and consistently documented the employment relationship, which they failed to do.

[22] In these circumstances, there is no need to conduct a formal materiality analysis. This would introduce a degree of formalism into the administration of section 40(1)(a) that would undermine its general objective of deterrence.

VIII. Conclusion

The application is dismissed. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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