Federal Court Cour fédérale

Date: 20130125

Docket: IMM-3859-11

Ottawa, Ontario, January 25, 2013

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

JANILEE REYES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON an application for judicial review of the July 22, 2010 decision of the Immigration and Refugee Board (Immigration Appeal Division) (IAD);

AND UPON reading the Certified Tribunal Record and the materials submitted by the parties;

AND UPON hearing the submissions of counsel for the parties;

AND UPON the parties being in agreement that the style of cause should be amended by substituting the Minister of Citizenship and Immigration for the Minister of Public Safety and Emergency Preparedness as Respondent;

AND UPON having considered the following in reaching my decision:

The first issue is whether a permanent resident, who makes a misrepresentation on an application to sponsor a family member is inadmissible pursuant paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act). The Applicant submits that this provision only applies to a permanent resident's misrepresentation on their own application for admission to Canada and does not apply to a permanent resident's misrepresentation in an application to sponsor a member of the family class.

Although neither party addresses the appropriate standard of review in their written submissions, the Applicant contends that as the first issue is a question of statutory interpretation, the standard of review is correctness. In post-hearing submissions, the Applicant relies on the decision in *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 in support of this position. I note, however, that this decision predates the Supreme Court of Canada's decision in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 in which the Supreme Court held that an administrative tribunal's interpretation of its home statute is reviewable against a standard of reasonableness. In *Tian v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1148, at paragraph 21, Mr. Justice James Russell applied the decision in *Smith* above, and held that the IAD's interpretation of paragraph 67(1)(c) of the Act is reviewable on a standard of reasonableness. His reasoning is equally applicable to the IAD's interpretation of paragraph 40(1)(a) of the Act. As to the additional issues raised by the Applicant, it is not disputed that the standard of review is reasonableness.

In her submissions, the Applicant does not identify any reviewable error in the decision at issue. Instead, as she acknowledged before the IAD and in the present proceeding, she relies on the analysis in *Minister of Public Safety and Emergency Preparedness v Niaz*, 2008 CanLII 46296, a decision of the Immigration Division of the Immigration and Refugee Board (ID). In that decision, the ID concluded that paragraph 40(1)(a) only applies to misrepresentations made by permanent residents in relation to their own applications for admission to Canada unless the circumstance in paragraph 40(1)(b) applies.

In *Niaz* above, the ID observed that under the former *Immigration Act*, a permanent resident was inadmissible for misrepresentation only if the misrepresentation at issue related to their own application for admission to Canada. The ID found that although subsection 40(1) of the Act is not cast in the same language as its predecessor, the changes were insufficient to upset the well-entrenched principle that permanent residents could not be removed from Canada for misrepresenting facts in sponsorship applications. The ID also noted the undesirable consequences that could result if permanent residents could be removed for misrepresentation in sponsorship applications.

This decision was subsequently overturned by the same IAD Member whose decision is at issue in this proceeding. In the decision at issue, on the question of the interpretation of paragraph 40(1)(a), the Member essentially incorporates his earlier reasoning in the *Minister of Citizenship and Immigration v Niaz*, 2009 CanLII 72218. His conclusion that paragraph 40(1)(a) applies to the Applicant is based on a key finding, namely, that:

> . . .subsection 40(1) of the Act refers to inadmissibility for misrepresentation, regardless of the misrepresentation was made by or on behalf of permanent residents and foreign nationals with respect to their own applications for status in Canada, unless the special circumstance described in paragraph 40(1)(b) applies.

The language of the provision is clear and unambiguous. The provision deals with misrepresentations made by both permanent residents and foreign nationals. It provides that both permanent residents and foreign nationals are inadmissible for misrepresentation. Further, it does not in any way distinguish the nature of the matter in relation to which the misrepresentation occurs between permanent residents and foreign nationals. Indeed, it is broadly framed as a misrepresentation in relation to "a relevant matter" that "could induce an error in the administration" of the Act. The applicant's interpretation would in effect replace "relating to a relevant matter" with "in an application for permanent residence". This restrictive and narrow interpretation is at odds with the very broad language adopted by Parliament and its clear intention.

The Applicant also raises additional errors on the part of the Member. The Applicant submits that the Member acted unreasonably by concluding, notwithstanding the genuineness of her relationship with Mr. Reyes, that the misrepresentation at issue "could have induced an error in the administration of the Act." She states that she and her husband "were in a committed relationship [in 2008, and] had intended to marry and to live together." As well, they re-solemnized their union in 2010 after the Philippine courts nullified the first marriage. This argument is rejected. Permanent residents may sponsor their spouses for immigration to Canada as members of the family class. However, it is uncontested that at the time of the sponsorship application and undertaking, the Applicant and Mr. Reyes were not "married" as defined in section 2 of the *Immigration and Refugee Protection Act Regulations* SOR/2002-227. Accordingly, if Mr. Reyes had been granted permanent residence notwithstanding that he was not married to the Applicant, it would have constituted an error.

The Applicant also submits that the Member failed to properly consider the humanitarian and compassionate factors, in particular, her level of remorse. The Applicant submits that she consistently expressed her remorse throughout her testimony, reiterating that the fault lay with her and Mr. Reyes for their lack of attention to the contents of the affidavit of cohabitation. Having reviewed the transcript, while there is an instance in the cited passages of an expression of remorse, her statements reflect fear and an explanation as to why the couple signed the affidavit of cohabitation. In light of the inconsistencies and contradictions in the record, the Member's rejection of the explanation and his consideration of the degree of remorse were reasonable.

Lastly, the Applicant claims that the Member did not properly consider the significance of her Canadian resident family ties, the expense of trans-Pacific travel and the extent of her integration into Canadian society. A review of the Member's reasons disclose that he had regard for the Applicant's family relationships in Canada, for her degree of establishment and for the dislocation her removal would occasion her and her family and that these considerations weighed in the Applicant's favour. However, he found that these considerations were

outweighed by the seriousness of her misrepresentation and by the need to maintain the integrity of the immigration system. It is well established that on a judicial review, the Court is not to engage in a reweighing of the evidence. This is in effect what the Applicant is asking the Court to do in relation to the Member's consideration of the humanitarian and compassionate factors.

For the above reasons, I conclude that the decision under review was reasonable. The Applicant submits the following as a serious question of general importance for certification:

> Is a permanent resident, who makes a misrepresentation on an application to sponsor a family member, inadmissible under paragraph 40(1)(a) of the Act?

In support of the certification, the Applicant points out that there are divergent views regarding the interpretation of paragraph 40(1)(a). In particular, another IAD member considered the question in *Devantes v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] IADD No. 576 and agreed with the ID's reasoning in *Niaz* above. I note, however, that the statement relied upon in *Davantes* above, was made in the context of a consideration of a falsified birth certificate submitted by the spouse the appellant was sponsoring (or her brother) and not the appellant himself. Further, there is no indication in the reasons that the question of interpretation was raised or was the subject of any submissions. Accordingly, it cannot be said that there are divergent views on the issue within the IAD.

At its core, the question for determination in relation to the interpretation of paragraph 40(1)(a) is whether the provision should be given a restrictive interpretation or construed more broadly. Given the recognition of the broad interpretation in the Court's jurisprudence and in the absence of any jurisprudential or other support for the restrictive interpretation, the proposed question does not raise a serious issue.

THIS COURT ORDERS that:

1. The style of cause is amended by substituting the Minister of Citizenship and Immigration for the Minister of Public Safety and Emergency Preparedness as Respondent.

2. The application for judicial review is dismissed.

3. No serious question of general importance is certified.

"Dolores M. Hansen"

Judge