

Federal Court



Cour fédérale

Date: 20200113

Docket: IMM-1907-19

Citation: 2020 FC 33

Ottawa, Ontario, January 13, 2020

PRESENT: Madam Justice Simpson

BETWEEN:

GURPREET KAUR GILL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench in Toronto, Ontario on December 10, 2019)

[1] This application is for judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, dated March 1, 2019, [the Decision] in which the Panel Member dismissed the Applicant's appeal for want of jurisdiction because the Applicant filed an application for permanent residence while barred from doing so due to misrepresentation. This application for judicial review was brought pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

I. Background

[2] The Applicant applied to sponsor her husband, Amandeep Singh Aujla [the Husband] as a permanent resident and the application was made in June 2016 [the Sponsorship Application].

[3] However, on November 18, 2015, the Husband had been found inadmissible for misrepresentation because he had submitted fraudulent bank documents in support of an application for a Temporary Resident Visa.

[4] On March 31, 2017, an Immigration Officer [the Officer] refused the Sponsorship Application for two reasons. First, he was not satisfied that the Applicant and her Husband were in a genuine marriage not entered into primarily for the purposes of immigration and second, he found that the Husband was ineligible to apply for permanent residence for five years from November 18, 2015.

[5] The Applicant appealed the Officer's decision to the IAD.

II. Decision

[6] The IAD found that it did not have jurisdiction to entertain the appeal of the Officer's decision to refuse the Sponsorship Application because the Husband was inadmissible for misrepresentation under section 40(1)(a) of the IRPA, and because section 40(3) of the IRPA applied. It states:

40(3) A foreign national who is inadmissible under this section may not apply for

40(3) L'étranger interdit de territoire au titre du présent article ne peut, pendant la

<p>permanent resident status during the period referred to in paragraph 2(a).</p>	<p>période visée à l’alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.</p>
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[7] The IAD accurately stated that there were no Federal Court decisions that consider the impact of section 40(3) on the right of appeal to the IAD. The IAD therefore referred to four IAD decisions that deal with the issue, acknowledging that while they were not binding, they provided guidance. These cases are *Lefter v. Canada (Citizenship and Immigration)*, 2017 CanLII 10743 (CA IRB); *Keays v. Canada (Citizenship and Immigration)*, 2018 CanLII 54764 (CA IRB); *Dhillon v. Canada (Citizenship and Immigration)*, 2018 CanLII 102071 (CA IRB); and *Josefina v. Canada (Citizenship and Immigration)*, 2018 CanLII 136419 (CA IRB) (referred to in the Decision as Delos Reyes). They all concluded that where the inadmissibility for misrepresentation predated the Application for permanent residence as in this case, there was no jurisdiction in the IAD to hear an appeal from an Officer’s refusal of a Sponsorship Application.

[8] In its decisions in *Lefter* and *Dhillon*, the IAD observed that notwithstanding section 40(3), if an Officer decided a Sponsorship Application, the IAD would have appellate jurisdiction. However, in its Decision the IAD noted that these statements were *obiter dicta* because in neither case, had the Officer in fact, made a decision.

[9] The IAD therefore concluded that all four IAD cases support a finding that the IAD has no jurisdiction to consider an appeal where section 40(3) applies, even when, as in this case, an Officer has made a decision on an application for permanent residence.

[10] To support its conclusion, the IAD reviewed the IRPA and its Regulations and determined that the fact that an immigration officer decides an application for permanent residence that should not have been filed does not create a right of appeal to the IAD.

[11] The IAD found the following:

- Section 40(3) of the IRPA provides that a sponsored applicant who is inadmissible for misrepresentation may not apply for permanent resident status during the five year period referred to in section 40(2)(a).
- Filing a sponsorship application after the spouse is barred by section 40(3), is not in the prescribed form in accordance with Regulation 10(1), as the sponsorship application does not include a valid application for permanent residence.
- Regulation 10(6) then applies. It states “A sponsorship application that is not made in accordance with subsection (1) is considered not to be an application filed in the prescribed manner for the purposes of subsection 63(1) of the Act”.
- Further, Regulation 12 requires an officer to return the application for permanent residence for non-compliance.
- In addition, under section 15(1) of the IRPA, an officer is authorized to proceed with an examination of a sponsorship application only if a person makes an application to the officer in accordance with the IRPA.
- The IAD’s Conclusion: where section 40(3) applies during the five-year period of exclusion for misrepresentation, the applicant is not permitted to make an application for permanent residence. This means that an application for permanent residence filed during that period is not made in accordance with the IRPA, and as such, an officer is not authorized to proceed with an examination of that person’s application for permanent residence.

[12] Lastly, the IAD considered Operational Bulletin 595 [OB 595]. It states:

With the new subsection 40(3), a person is now ineligible to apply for permanent residence during the same period as the inadmissibility for misrepresentation. Therefore, any permanent residence application from a foreign national inadmissible under section 40 that is received within the five-year period of inadmissibility must be returned with the fees as it will not be examined.

[13] The IAD finally concluded that by reason of the IAD decisions and section 40(3) of the IRPA, and OB 595, the IAD was without jurisdiction to hear the appeal.

III. The Issues

[14] Since this application involves a Sponsorship Application which was made and decided by an Officer after the 5 year exclusion for misrepresentation was in place, I will deal only with the issues which arise on these facts.

[15] Against this background the issues are:

1. Do the IAD's statements in *Lefter* and *Dhillon* assist the Applicant?
2. Did the IAD rely too heavily on OB 595?
3. Did the IAD misconstrue section 15(1) and Regulation 10(6) of the IRPA?

I will deal with each issue in turn.

IV. *Lefter & Dhillon*

[16] It is clear from the language that the IAD used in these cases that its statements were *obiter*. That being so, and given my view that an application filed contrary to section 40(3) is null and void *ab initio*, I am not persuaded that simply because an Officer mistakenly decides such an application, his or her mistaken decision gives the application life and creates a right of appeal.

V. OB 595

[17] In my view, the IAD considered this bulletin to see whether it reinforced the decision it also reached based on the IAD's cases and the wording of section 40(3). This was a reasonable use of the bulletin.

VI. IRPA's Section 15(1) and Regulation 10(6)

[18] The provisions read as follows:

Examination by officer

15 (1) An officer is authorized to proceed with an examination if a person makes an application to the officer in accordance with this Act or if an application is made under subsection 11(1.01).

Applications**Form and content of application**

10 (1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall

(a) be made in writing using the form, if any, provided by the Department or, in the case of an application for a declaration of relief under subsection 42.1(1) of the Act, by the Canada Border Services Agency;

Pouvoir de l'agent

15 (1) L'agent peut procéder à un contrôle dans le cadre de toute demande qui lui est faite au titre de la présente loi ou qui est faite au titre du paragraphe 11(1.01).

Demandes**Forme et contenu de la demande**

10 (1) Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement :

a) est faite par écrit sur le formulaire fourni, le cas échéant, par le ministère ou, dans le cas d'une demande de déclaration de dispense visée au paragraphe 42.1(1) de la Loi, par l'Agence des services frontaliers du Canada;

(b) be signed by the applicant;

b) est signée par le demandeur;

(c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;

c) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;

(d) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and

d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;

(e) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.

e) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.

Required information

Renseignements à fournir

(2) The application shall, unless otherwise provided by these Regulations,

(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :

(a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law

a) les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de

partner or conjugal partner of another person;

sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

(b) indicate whether they are applying for a visa, permit or authorization;

b) la mention du visa, du permis ou de l'autorisation que sollicite le demandeur;

(c) indicate the class prescribed by these Regulations for which the application is made;

c) la mention de la catégorie réglementaire au titre de laquelle la demande est faite;

(c.1) if the applicant is represented in connection with the application, include the name, postal address and telephone number, and fax number and electronic mail address, if any, of any person or entity — or a person acting on its behalf — representing the applicant;

c.1) si le demandeur est représenté relativement à la demande, le nom, l'adresse postale, le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique de toute personne ou entité — ou de toute personne agissant en son nom — qui le représente;

(c.2) if the applicant is represented, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the name of the body of which the person is a member and their membership identification number;

c.2) si le demandeur est représenté, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, le nom de l'organisme dont elle est membre et le numéro de membre de celle-ci;

(c.3) if the applicant has been advised, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the information referred to in

c.3) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, les renseignements prévus aux alinéas c.1) et

paragraphs (c.1) and (c.2) with respect to that person;

(c.4) if the applicant has been advised, for consideration in connection with the application, by an entity — or a person acting on its behalf — referred to in subsection 91(4) of the Act, include the information referred to in paragraph (c.1) with respect to that entity or person; and

(d) include a declaration that the information provided is complete and accurate.

...

Invalid sponsorship application

(6) A sponsorship application that is not made in accordance with subsection (1) is considered not to be an application filed in the prescribed manner for the purposes of subsection 63(1) of the Act.

c.2) à l'égard de cette personne;

c.4) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une entité visée au paragraphe 91(4) de la Loi — ou une personne agissant en son nom —, les renseignements prévus à l'alinéa c.1) à l'égard de cette entité ou personne.

d) une déclaration attestant que les renseignements fournis sont exacts et complets

[...]

Demande de parrainage non valide

(6) Pour l'application du paragraphe 63(1) de la Loi, la demande de parrainage qui n'est pas faite en conformité avec le paragraphe (1) est réputée non déposée.

[19] In my view these provisions deal with two different issues. “In a prescribed manner” appears to deal with matters of form and content and I am therefore not persuaded that the IAD was reasonable when it determined that Regulations 10(1) and 10(6) were helpful in reaching its Decision.

[20] However, in my view this error was not material. Section 15(1) speaks of applications made “in accordance with this Act” and therefore, the IAD reasonably considered this provision in its analysis because section 40(3) makes it clear that the Sponsorship Application was not made in accordance with the Act.

VII. Conclusion

[21] Section 40(3) is determinative. The Sponsorship Application was a nullity as was the Officer’s Decision. The IAD therefore had no valid decision to consider and reasonably determined in these circumstances that it had no jurisdiction.

VIII. Certification

[22] No question was posed for certification for appeal.

JUDGMENT IN IMM-1907-19

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

There was no question posed for certification.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Stephen W. Green
Alexandra Cole

FOR THE APPLICANT

Hilary Adams

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT