

Federal Court



Cour fédérale

**Date: 20110329**

**Docket: IMM-4956-10**

**Citation: 2011 FC 384**

**Toronto, Ontario, March 29, 2011**

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

**BETWEEN:**

**ANDREI PASICHNIK**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The present Application concerns an appeal by the Applicant to the Immigration Appeal Division (IAD) to be granted humanitarian and compassionate relief from an exclusion order based on his misrepresentation in acquiring permanent resident status in Canada. In response to the Applicant's appeal, the IAD declined to grant humanitarian and compassionate relief. The issue with respect to this decision is whether it is, in part, based on a misapprehension of a critical fact.

[2] The basic fact pattern leading to the present application is as follows. The Applicant's first wife applied to be landed in Canada as a skilled worker and the Applicant was included in her application as a dependant. The first wife's application was approved and a visa was issued. The misrepresentation subsequently found, which has had serious implications for the Applicant, is that prior to being landed in Canada, the Applicant did not disclose that his marriage to his first wife had broken down. Indeed, after being landed, the Applicant and his first wife were divorced and the Applicant then proceeded to marry his second wife, who is a Russian citizen. The Applicant and his second wife have two children: a 7 year-old girl who was born in Russia, and a 3 year-old who is a Canadian citizen.

[3] The humanitarian and compassionate decision rendered by the IAD member shows a thorough and very sensitive concern for the future of the Applicant's children should the Applicant be removed from Canada. In the end result, by balancing the factors in play, the IAD member determined that the best interests of the children would not suffer by removing the Applicant from Canada. With respect to keeping the family together, the IAD member identified two options: the Applicant's wife would remain in Canada with the children and she would re-sponsor the Applicant back to Canada (Decision, paragraphs 40 and 48), or she would leave Canada with the children to accompany her husband (Decision, paragraph 47). It is clear from the decision that the IAD member took some comfort from the fact that, by either option being applied, the children would not be separated from both parents.

[4] It is important to note that, during the course of the hearing before the IAD, Counsel for the Minister of Public Safety and Emergency Preparedness made a representation that the first of the two options available to the Applicant's wife is viable;

The Appellant's removal from Canada does not mean he is permanently banished from Canada and has no means of recourse. The Appellant's wife may, at any time, sponsor him as a spouse – as per the provisions of the Act-, if she wishes to do so. However it defeats the purpose of the immigration system – and the integrity of the Act, including the provisions of full disclosure – to ignore or mislead provisions in the person's own benefit.

(Tribunal Record, p. 119)

However, Counsel for the Applicant acknowledges that, at the time of the hearing before the IAD, the Applicant's wife was in jeopardy of removal from Canada pursuant to s. 40(1)(b) of the *Immigration and Refugee Protection Act*. That section reads as follows:

Misrepresentation	Faussees déclarations
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40. (1) Empoentent 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;
<u>(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;</u>	<u>b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;</u>
(c) on a final determination to vacate a decision to allow the	

claim for refugee protection by the permanent resident or the foreign national; or

c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;

(d) on ceasing to be a citizen under paragraph 10(1)(a) of the Citizenship Act, in the circumstances set out in subsection 10(2) of that Act.

d) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la Loi sur la citoyenneté dans le cas visé au paragraphe 10(2) de cette loi.

[Emphasis added]

Nevertheless, it appears that because no action had been taken against the Applicant's wife prior to the hearing before the IAD, given the representation of Counsel for the Minister, her jeopardy was not an issue. However, during the course of the oral argument of the present Application it was established that, post-the IAD hearing, the Applicant's wife's jeopardy has been actualized. The IAD Member's decision is dated August 4, 2010. By letter dated September 1, 2010, the Canada Border Services Agency commenced a process against the Applicant's wife pursuant to s. 40(1)(b) (Applicant's Application Record, p. 307).

[5] The representation to the IAD by Counsel for the Minister of Public Safety and Emergency Preparedness, and the deviation from this representation by Canadian Border Services, which operates under the auspices of the Minister, only days after the IAD rendered its decision, causes me to conclude that the representation was ill-conceived. In my opinion, given that the IAD Member's decision with respect to the future of the Applicant's children relies, in part, on the representation, I find that the IAD's decision is made in reviewable error for misapprehension of critical fact, but obviously, not for any failure on the part of the IAD Member.

**ORDER**

Accordingly, I set aside the decision under review and refer the matter back to a differently constituted panel for redetermination.

There is no question to certify.

“Douglas R. Campbell”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4956-10

**STYLE OF CAUSE:** ANDREI PASICHNIK  
v. THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 29, 2011

**REASONS FOR ORDER  
AND ORDER BY:** CAMPBELL J.

**DATED:** MARCH 29, 2011

**APPEARANCES:**

Wennie Lee FOR THE APPLICANT

Neeta Logsetty FOR THE RESPONDENT  
Mahan Keramati

**SOLICITORS OF RECORD:**

Wennie Lee & Associates FOR THE APPLICANT  
Barristers & Solicitors  
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Toronto, Ontario