Federal Court  Cour fédérale

Date: 20110727

Docket: IMM-5323-10

Citation: 2011 FC 942

Ottawa, Ontario, July 27, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LIAN BO JIANG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision dated 3 August 2010 (Decision) in which the Immigration Appeal Division (IAD) found that the Applicant was inadmissible to Canada for misrepresentation and that there were no grounds to warrant special relief pursuant to paragraph 67(1)(*c*) of the Act.

BACKGROUND

[2] The Applicant is a citizen of China. In December 2001, she married a Canadian citizen in China. It was the Applicant's second marriage. She has an adult daughter, born of her first marriage, who resides with the Applicant here in Canada. The Applicant also has a son, born in China on November 2002 during her second marriage. The son resides with the Applicant and her daughter here in Canada. The son's parentage is in dispute and is the misrepresentation at issue in these proceedings.

[3] In January 2002, the Applicant's Canadian husband filed an application to sponsor her to Canada as a member of the family class. The Applicant's daughter was listed on the application as an accompanying dependant.

[4] The Applicant claims that, in February 2002, she was raped. The Applicant did not inform the sponsor or Citizenship and Immigration Canada (CIC) of the incident; she revealed it later during an admissibility hearing in 2007. In March or April of 2002, the Applicant discovered that she was pregnant.

[5] The sponsorship application was successful and the Applicant and her daughter were landed in April 2003. As the Applicant had claimed that her son was also the biological son of the sponsor, a Canadian citizen, the child was able to immigrate to Canada as a Canadian citizen with his mother and half-sister.

[6] In May 2003, the sponsor took samples himself (they were not witnessed) and arranged for a paternity test. The results of that test determined that he was not the biological father of the Applicant's son. The marriage disintegrated, and the couple divorced in April 2004.

[7] On 15 June 2006, the Applicant was interviewed by CIC. CIC requested DNA results confirming the parentage of the child. The sponsor provided CIC with the results of the paternity test and an affidavit declaring that he was not the father.

[8] The Immigration Division (ID) held admissibility hearings in May, September and November of 2007. Removal orders were issued against the appellant and her daughter in April 2008, pursuant to paragraph 40(1)(*a*) of the Act. These removal orders were based on the finding that the Applicant had intentionally misrepresented that the sponsor was the father of her son and on the finding that the daughter had indirectly made the same misrepresentation.

[9] The Applicant and her daughter appealed these orders, pursuant to subsection 63(3) of the Act. The appeals of both the Applicant and her daughter were heard at the same hearing, which was conducted on four separate dates between August 2009 and June 2010. The appeal was allowed for the daughter and dismissed for the Applicant. This is the Decision under review.

DECISION UNDER REVIEW

[10] The IAD did not find the Applicant's testimony at the hearing concerning the events surrounding the conception of her son to be credible. Although she testified quite readily about some factual matters, she appeared "to be both ambivalent and wilfully blind about confirming who [her son's] father is," and her responses to questions regarding her son's paternity were unsatisfactory. She submitted that the IAD should not rely upon the DNA evidence submitted by the sponsor, but she refused to participate in a DNA test. In the circumstances, the IAD found that the DNA results were reliable evidence that the sponsor was not the biological father.

[11] The IAD recognized that misrepresentation and withholding material information jeopardizes the integrity of the immigration process. Throughout the spousal application process, the Applicant had a duty to answer all questions truthfully, to establish that she and her family members met the statutory requirements and to inform an officer of any change in material facts relevant to the issuance of the permanent resident visa, pursuant to s. 51 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. By concealing the rape from immigration officials, even as a possible conception, she misrepresented her son's parentage and frustrated any further investigation.

[12] The IAD summarized:

> The appellant mother testified that she did not lie about or misrepresent [her son's] paternity to gain entry to Canada. However, her testimony and actions throughout the whole period militate against [the sponsor] being the father. A crucial default in the appellant mother's appeal is that she did so little to confirm the paternity of [her son] when that was the basis of the refusal. Reasonable procedures could have been taken in order to confirm or clarify whether [the sponsor] was [the] father. Considering all the evidence, the panel finds that the appellant mother knew that the

> facts did not accord with [the sponsor's] paternity, she ignored or was deliberately blind to the possibility of other fathers, and she did not mention those other possibilities, so that she and her daughter could gain status in Canada and [her son] could enter as a Canadian citizen.

[13] The IAD recognized that the appeal must be allowed where, considering the best interests of the child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief. It acknowledged that the Applicant has minimal family and community ties in Canada; that she has immediate family and a house in China; and that she expressed concern that it would be hard for her to find work in China. With respect to the child, he has spent most of his life in Canada. He has no relationship with his mother's second husband but does have the option of remaining in Canada with his sister. He is learning to speak Chinese and, although he may have difficulties if he returns to China, these do not amount to hardship sufficient to provide a basis for special relief for his mother. The IAD found that it would not be against his best interests if his mother were removed to China.

[14] Having considered the evidence and submissions, the IAD found that the Applicant had failed to prove on a balance of probabilities that her appeal warranted special relief pursuant to subsection 63(3) of the Act. Therefore, her appeal was dismissed. The IAD also found that the Applicant's daughter had proven on a balance of probabilities that her appeal warranted special relief. Therefore, her appeal was allowed.

ISSUE

[15] The Applicant raises the following issue:

Whether the IAD erred in determining that the Applicant's misrepresentation was material to her admissibility.

STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in these proceedings:

Obligation — answer truthfully	**Obligation du demandeur**
16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	**16.** (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
[…]	[…]
Misrepresentation	**Fausses déclarations**
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;
(*b*) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	*b*) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;

(*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.

[…]

[…]

Inadmissible family member

42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if

Inadmissibilité familiale

42. Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :

(*a*) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or

a) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;

(*b*) they are an accompanying family member of an inadmissible person.

b) accompagner, pour un membre de sa famille, un interdit de territoire.

[…]

[…]

Right to appeal — removal order

63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

Droit d'appel : mesure de renvoi

63. (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

Appeal allowed

Fondement de l'appel

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(*a*) the decision appealed is wrong in law or fact or mixed law and fact;	*a*) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(*b*) a principle of natural justice has not been observed; or	*b*) il y a eu manquement à un principe de justice naturelle;
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[17] The following provisions of the Regulations are applicable in these proceedings:

Examination — permanent residents	**Contrôle : résident permanent**
51. A foreign national who holds a permanent resident visa and is seeking to become a permanent resident must, at the time of their examination,	**51.** L'étranger titulaire d'un visa de résident permanent qui cherche à devenir un résident permanent doit, lors du contrôle :
(*a*) inform the officer if	*a*) le cas échéant, faire part à l'agent de ce qui suit :
(i) the foreign national has become a spouse or common-law partner or has ceased to be a spouse, common-law partner or conjugal partner after the visa was issued, or	(i) il est devenu un époux ou conjoint de fait ou il a cessé d'être un époux, un conjoint de fait ou un partenaire conjugal après la délivrance du visa,
(ii) material facts relevant to the issuance of the visa have changed since the visa was issued or were	(ii) tout fait important influant sur la délivrance du visa qui a changé depuis la délivrance ou n'a pas été

not divulged when it was issued; and	révélé au moment de celle-ci;
(*b*) establish that they and their family members, whether accompanying or not, meet the requirements of the Act and these Regulations.	*b*) établir que lui et les membres de sa famille, qu'ils l'accompagnent ou non, satisfont aux exigences de la Loi et du présent règlement.

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] Justice Judith Snider of this Court held in *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 [*Bellido*] at paragraph 27 that two factors must be present for a finding of inadmissibility under subsection 40(1) of the Act: there must be misrepresentations by the applicant and those misrepresentations must be material in that they could have induced an error in the administration of the Act. Justice Snider determined the standard of review appropriate to these factors to be patent unreasonableness and reasonableness *simpliciter*, respectively. In light of *Dunsmuir*, above, both factors are reviewable on the reasonableness standard. See my decision in *Bodine v Canada (Minister of Citizenship and Immigration*), 2008 FC 848 [*Bodine*] at paragraph 17.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

There Was No Material Misrepresentation

[21] The Applicant contends that the IAD incorrectly determined that the misrepresentation committed by the Applicant was material to her admissibility. As the Applicant immigrated as a spouse of a sponsor, and as the relationship between her and her sponsor was never impugned at the time the Applicant became a permanent resident, the existence of the child was not relevant to the issuance of the visa.

[22] When the subject matter of the misrepresentation has been withdrawn, the misrepresentation is no longer material. The Applicant relies on *Bellido*, above, at paragraph 30, where Justice Snider states:

> Having concluded that the misrepresentations were supported by the evidence before the Visa Officer, I turn to the question of relevance and materiality (*Baseer v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1239). Some of the alleged misrepresentations relate to a job offer from Eastern Packinghouse Brokers that was withdrawn. While I accept that the Applicant was not truthful about this job offer, I do not believe that it is a material representation. Under normal circumstances, I cannot see how misrepresentations with respect to a job offer that no longer exists could be "material" or could induce an error in the administration of the IRPA.

[23] The Applicant submits that *Bellido*, above, provides one example of when a misrepresentation is not material, namely when the source of the misrepresentation no longer exists. Similarly, the finding of misrepresentation in the instant case, although it can reasonably be construed to exist, is nonetheless irrelevant. And, as paragraph 40(1)(*a*) of the Act indicates, only material representations can result in a person being inadmissible to Canada under the Act.

The Respondent

The Applicant's Misrepresentation Led to an Error in the Administration of the Act

[24] The Respondent challenges the Applicant's statement that her misrepresentation did not lead to an error in the administration of the Act. The Applicant's claim that her son was the biological son of a Canadian citizen resulted in the child himself being admitted to Canada as a Canadian citizen and not as a permanent resident. In such circumstances, the admissibility checks that normally take place when a foreign national seeks status in Canada were not undertaken. Under section 42 of the Act, the Applicant could also have been inadmissible if her son, who was a foreign

national, was inadmissible. This misrepresentation is precisely the type of misrepresentation described in subsection 40(1) of the Act.

[25] The cases cited by the Applicant are distinguishable. In those cases, the false statements made by the claimants would not have changed the manner in which the applications of those claimants were processed. This is clearly not the situation here.

[26] Further, the Applicant's interpretation of section 40 runs contrary to the approach outlined by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27, [1998] SCJ No 2 (QL), which states that the words of an Act must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Justice John O'Keefe of this Court held in *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 [*Khan*] at paragraph 25, that section 40 should be given a broad interpretation and that, where an applicant adopts a misrepresentation, even where she clarifies it prior to a decision, section 40 applies. In addition, this Court has repeatedly held that the purpose of paragraph 40(1)(*a*) is "to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada." See *Bodine*, above, at paragraph 44. The Applicant's interpretation of paragraph 40(1)(*a*) is contrary to this purpose and produces an absurd result.

[27] Finally, a visa applicant seeking to enter Canada has a duty of candour, which is codified in subsection 16(1) of the Act. Where an applicant fails in this duty, a visa officer is bound to refuse the application. See *Lan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 770 at paragraph 10.

ANALYSIS

[28] The Applicant attacks the Decision on a single issue. She concedes that a misrepresentation occurred but she argues that it was not material within the meaning of subsection 40(1) of the Act.

[29] The reason advanced for this assertion is that, "[a]s the applicant immigrated as the spouse of a sponsor, and the relationship between her and her sponsor was never impugned at the time the applicant became a permanent resident, the existence of the child was not relevant to the issuance of the visa."

[30] The simple answer to this assertion is the one put forward by the Respondent.

[31] Under subsection 40(1) of the Act, a misrepresentation includes a fact that induces or could induce an error in the administration of IRPA.

[32] The Applicant stated that her son was born to a Canadian citizen and as a result was also a Canadian citizen. As a result of this he was able to immigrate to Canada as a Canadian citizen and did not have to gain permanent residence status. Since it was assumed that the Applicant's son was a Canadian citizen, the normal admissibility checks that would take place when a foreign national seeks status in Canada did not take place. Under section 42 of the Act, the Applicant could have also been inadmissible if her son, who was a foreign national, was inadmissible. As a result the

Applicant's misrepresentation led to an error in the administration of the Act. In the cases cited by the Applicant, the untrue statements by the claimants would not have changed the manner in which the applications of those claimants were processed. This is clearly not the situation in the instant case. As a result, the cases cited by the Applicant are of limited assistance.

[33] The Applicant's interpretation of section 40 runs contrary to the approach outlined by the Supreme Court of Canada. This Court has repeatedly found that a visa applicant seeking to enter Canada has a duty of candour. This duty is codified in subsection 16(1) of the Act, which states:

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	**16.** (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[34] Further, this Court has held that a visa officer is bound to refuse the visa application where the applicant fails to fulfill the requirements of subsection 16(1). See *Lan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 770 at paragraph 10.

[35] With respect to inadmissibility based on misrepresentation, this Court has already given section 40 a broad and robust interpretation. In *Khan*, above, Justice O'Keefe held that the wording of the Act must be respected and section 40 should be given the broad interpretation that its wording demands. He went on to hold that section 40 applies where an applicant adopts a misrepresentation but then clarifies it prior to a decision. In *Wang v Canada (Minister of Citizenship and*

Immigration), 2005 FC 1059, this Court held that section 40 applies to an applicant where the misrepresentation was made by another party to the application and the applicant had no knowledge of it. The Court stated that an initial reading of section 40 would not support this interpretation but that the section should be interpreted in this manner to prevent an absurd result.

[36] This Court has repeatedly held that the purpose of paragraph 40(1)(*a*) of the Act is to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada. The Applicant's interpretation of paragraph 40(1)(*a*) is contrary to this purpose and therefore results in an absurd result. See *Bodine*, above, at paragraph 44; *De Guzman v Canada (Minister of Citizenship and Immigration)* 2005 FCA 436; *Khan*, above; and *Wang*, above.

[37] At the hearing of this application in Toronto, the Applicant also argued that the misrepresentation was not material because it did not induce an error under the Act. The son came to Canada by way of the *Citizenship Act* and not *IRPA*.

[38] Realistically speaking, it seems to me that the misrepresentation induced an error under both statutes. It resulted in the son receiving a benefit under the *Citizenship Act* to which he was not entitled, and it also allowed him to avoid the processes and checks that would have occurred under *IRPA* if the misrepresentation had not been made. As the Respondent has pointed out, the misrepresentation allowed the son, for example, to avoid medical checks that could have resulted in his inadmissibility as well as that of the Applicant.

[39] Both parties agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5323-10
STYLE OF CAUSE:	**LIAN BO JIANG** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	July 27, 2011

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