Federal Court  Cour fédérale

Date: 20161019

Docket: IMM-1190-16

Citation: 2016 FC 1168

Ottawa, Ontario, October 19, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALBERT PUNA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION:

[1] The applicant, Albert Puna, seeks judicial review of the decision dated February 11, 2016 by the Immigration Appeal Division of the Immigration and Refugee Board (IAD) wherein the IAD dismissed Mr. Puna's appeal and confirmed the decision of the Immigration Division (ID) that he is inadmissible for misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

II. BACKGROUND:

[2] Mr. Puna is a citizen of Albania. In 1999, he initiated an application from Italy to immigrate to Canada. The following year he visited his sister in Canada for a month. In September 2005, he entered Canada using a fraudulent passport and made a refugee claim under an assumed name. Upon being approached and questioned about his identity, he withdrew the claim. On November 10, 2010, Mr. Puna was granted permanent resident status in Canada under the Family Class category as the spouse of a Canadian citizen, Lori Thomsen.

[3] Mr. Puna met Ms. Thomsen in September 2006 and they married in December 2006. They cohabited between November 5, 2006 and April 20, 2007. The applicant returned to Albania on April 20, 2007. A sponsorship application was submitted on behalf of the applicant by Ms. Thomsen and received by the visa office on June 1, 2007. Ms. Thomsen visited the applicant in Albania on two occasions in August 2008 and August 2010, each visit lasting for ten days.

[4] On November 9, 2010, Ms. Thomsen formally withdrew her sponsorship of the applicant. The visa office in Rome was advised of this the following day but the applicant had already departed for Canada. He arrived before the visa office could issue the formal notification of the withdrawal. Mr. Puna was met by his sister in Vancouver. He says he attempted to contact his wife by telephone, e-mail and skype, but was unable to reach her. In his affidavit, Mr. Puna asserts that he encountered his wife in Vancouver on November 21, 2010, and learned for the first time about the withdrawal of the sponsorship application and that his marriage was over.

[5] In a Notice of Family Claim, filed on November 19, 2010, Ms. Thomsen states that the date of separation was April 23, 2009. However, in her affidavit in support of her divorce petition, filed on October 28, 2011, she indicates that the date of separation was September 19, 2010. The divorce was finalized on January 18, 2012. In January 21, 2014, Mr. Puna married a citizen of Venezuela with whom he has a Canadian born child.

[6] On July 16, 2014, the applicant appeared before the ID. Among the evidence considered by the ID was a statutory declaration from an immigration officer who had interviewed Ms. Thomsen by telephone regarding when she had told the applicant that the marriage was over. Considering all of the evidence, including the applicant's testimony, the presiding Member found that Mr. Puna was inadmissible for misrepresentation pursuant to paragraph 40(1)(a) of the IRPA.

[7] Mr. Puna's appeal to the IAD seeking that the ID's decision be overturned or, in the alternative, that relief be granted on humanitarian and compassionate (H&C) grounds, was heard on February 11, 2016 and the decision of the ID was upheld. This application is for judicial review of the IAD's decision.

III. DECISION UNDER REVIEW

[8] The ID concluded that the applicant is inadmissible for misrepresentation. It did not accept that the applicant and Ms. Thomsen had not discussed the marriage being over during their communications prior to his arrival in Canada. There was no objective evidence to challenge the date of separation set out in the divorce application. That information was withheld

from immigration authorities until the applicant's arrival in Canada. On a balance of probabilities, the ID found that the applicant is a permanent resident who is inadmissible to Canada 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 the IRPA. As such, an exclusion order was issued against the applicant.

[9] The IAD rejected the applicant's testimony regarding his lack of knowledge that his marriage was over or that he did not know the sponsorship application had been withdrawn. The IAD noted that the onus of disclosure is on the applicant who seeks to enter Canada: *Bodine v Canada (Citizenship and Immigration),* 2008 FC 848. The IAD found that the applicant did not discharge his duty to disclose all material facts related to his sponsorship application. Thus, the ID's inadmissibility finding was upheld.

[10] In considering whether there were sufficient H&C grounds to warrant the exercise of discretionary relief, pursuant to paragraph 67(1)(c), the IAD applied the relevant factors set out by Justice O'Keefe in *Wang v Canada (Minister of Citizenship and Immigration),* 2005 FC 1059 at paragraph 11: (1) seriousness of the misrepresentation; (2) expressions of remorse; (3) the length of time spent in Canada and establishment; (4) family relationships in Canada and the impact of the applicant's removal on them; (5) the degree of hardship that would be caused to the appellant by the removal; and (6) the best interests of a child affected by the decision.

[11] Upon considering each of the above factors, the IAD concluded that despite the positive factors, such as best interests of the child and the applicant's level of establishment in Canada,

sufficient grounds did not exist to warrant the grant of special relief. The panel noted that the applicant did not introduce any evidence to show that his son's interests would not be served by living in Albania with him. The child could choose to return to Canada at any time in the future and would be able to take full advantage of the educational and career opportunities available to him in Canada. While his interests were a positive factor, the IAD found that they did not outweigh the other negative factors, particularly the seriousness of the misrepresentation.

IV. RELEVANT LEGISLATION:

[12] The relevant provisions of IRPA read as follows:

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;
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 :
…	…

(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.

V. ISSUES:

[13] The applicant raised several issues. These may be consolidated as follows:

a) What is the standard of review?

b) Did the IAD err in finding that the applicant was inadmissible for misrepresenting a material fact?

c) Did the IAD err in its analysis of the best interests of the child and its ultimate application of humanitarian and compassionate discretion?

VI. ANALYSIS:

A. *Standard of review*

[14] The applicant submits that the standard of review for consideration of the best interests of the child is correctness. Otherwise, the standard is reasonableness. The respondent submits that the standard for all issues is reasonableness.

[15] The Court agrees with the respondent that the IAD's decision to withhold special relief was based on an assessment of the facts of the file. Therefore, the IAD's assessment of the evidence and exercise of H&C discretion attracts a reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Philistin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1333.

[16] The IAD's assessment of the best interests of the child also attracts a reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 44-45.

(1) Did the IAD err by finding that the applicant was inadmissible for misrepresenting a material fact?

[17] The applicant's arguments with respect to this issue consist largely of disagreement over the ID's and IAD's findings of fact about his knowledge of the state of his marriage when he departed for Canada. He contends that he was under no duty to disclose that his marriage was over when he met with an immigration officer upon his arrival at the Vancouver airport if he was unaware of that fact. Further, the applicant argues that the finding that he must have known that his marriage was over was based on hearsay in the form of the interview conducted with his former wife.

[18] The rules of evidence before the ID and IAD are not the same as those which apply before a court of law: see subsection 175(b) of the IRPA. The Immigration and Refugee Board is not bound by any legal or technical rules of evidence, and may rely on hearsay: *Bailey v Canada*

(Minister of Citizenship and Immigration), 2008 FC 938; *Temahagali v Canada (Minister of Citizenship and Immigration),* [2000] FCJ No 2041, 198 FTR 127 (FC); *Bruzzese v Canada (Public Safety and Emergency Preparedness),* 2014 FC 230. The standard for the Board is whether the evidence is credible and trustworthy even if it might otherwise be inadmissible in civil or criminal proceedings: *Jaballah (Re),* 2003 FCT 640, [2003] 4 FC 345.

[19] As set out in paragraph 40(1)(a) of the IRPA, misrepresentation may occur indirectly or through the withholding of material facts relating to a relevant matter, such as when a sponsor delays informing the respondent Minister that there has been a change in the status of the relationship and that the sponsorship has been withdrawn.

[20] In my view, it was open to the ID and IAD to consider the officer's sworn declaration stating that Ms. Thomsen said that she had told the applicant that the marriage was over before he came to Canada. While her recollection of when that conversation occurred was vague, it was reasonable on the evidence for the ID and IAD to find that it had taken place before the applicant departed for Canada. The ID also had the benefit of directly hearing the applicant's testimony. As sponsor, Ms. Thomsen also had a duty to inform the Minister of a material change in circumstances. She chose not to do it until the applicant was enroute. I see no reason to interfere with the finding of misrepresentation.

(2) Did the IAD err in its analysis of best interests of the child and its ultimate application of humanitarian and compassionate discretion?

[21] The applicant contends that the IAD erred in not finding that he and his family would suffer hardship upon his removal from Canada. He relies on *Kanthasamy,* above, to argue that the Supreme Court of Canada has removed the "unusual, undeserved and disproportionate" component from the test for hardship when considering H&C grounds.

[22] In the Court's view, the applicant's interpretation of the Supreme Court's decision in *Kanthasamy,* above, is incorrect. While the principles developed by the Supreme Court in that decision may generally apply to the application of H&C discretion under the IRPA, it is useful to recall that the underlying ruling in *Kanthasamy* concerned the exercise of discretion specifically in the context of an application for H&C relief under subsection 25(1) of the IRPA. The Supreme Court did not eliminate the "unusual and undeserved or disproportionate hardship" standard. Rather, the Court held that the standard should be "treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1)" of the IRPA: *Kanthasamy,* above, at para 33.

[23] In my view, the IAD did not treat the applicant's request for consideration of H&C grounds, including the best interests of his child, as requiring that he meet three thresholds for relief. Rather, the IAD took all the relevant considerations into account in assessing whether the positive factors outweighed those that did not support the grant of relief. While removal will undoubtedly be difficult for the applicant and his family, that is one of the unfortunate consequences of failing to comply with the immigration rules and procedures. And in this instance, the applicant chose to enter a new relationship while he was still engaged in these proceedings.

[24] No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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