Date: 20081110

Docket: IMM-825-08

Citation: 2008 FC 1250

Ottawa, Ontario, November 10, 2008

Present: The Honourable Mr. Justice Blanchard

BETWEEN:

Bruno MUNGANZA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review against a decision of the Immigration Appeal Division (Appeal Division), dated January 29, 2008, dismissing the applicant's appeal of the refusal of the application to sponsor his wife, his two daughters as well as his adopted son (the sponsored persons).

I. Facts

[2] The applicant is a Congolese citizen who allegedly left that country during the civil conflict there. He became a permanent resident in Canada on October 2, 2002. He was recognized as a refugee by the United Nations High Commission for Refugees (UNHCR) on November 6, 2001.

[3] The applicant married Safi Pungu on February 2, 1998. During the interview for his application for permanent residence in Canada, held in Tanzania on June 5, 2002, the applicant did not declare his wife, his two daughters or his adopted son as members of his family. Following conversations that he had with several persons he contacted in Tanzania, he allegedly believed that they were dead. The evidence also establishes that when the interview was held the applicant claimed that he had never been married.

[4] The applicant was granted permanent residence in Canada on October 2, 2002. He filed a sponsorship application in the family class on July 31, 2006, in favour of his wife, his two daughters as well as his adopted son. The application was refused on October 1, 2007, on the grounds that his wife and children were not members of the family class within the meaning of paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* (the Regulations) since they had not been declared when the applicant filed his application for permanent residence in Canada and they had not been examined.

II. Issues

[5] The applicant is raising the following issues:

A. Did the Appeal Division err in determining that the applicants are excluded from the family class under subsection 117(1) of the *Immigration and Refugee Protection Regulations*?

B. Did the Appeal Division vitiate the principles of natural justice and procedural fairness by failing to hold an oral hearing before making its decision?

C. Did the Appeal Division err in refusing to use its discretionary power to examine the reasons based on humanitarian and compassionate grounds?

III. Standard of review

[6] Where the issue bears on the interpretation of subsection 117(1) of the Regulations and related provisions of the Regulations and the *Immigration and Refugee Protection Act* (the Act), the standard of review is that of correctness. See *Azizi v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406, at paragraph 7. In this case, the first issue bears rather on the application of the relevant sections of the Regulations to the facts. The appropriate standard for such an issue is that of reasonableness. See *Dunsmuir v. New Brunswick*, 2008 SCC 9, 1 S.C.R. 190 at paragraph 51.

[7] In regard to the second issue, it has been consistently held in the case law that issues bearing on a breach of the principles of natural justice are reviewable under the standard of correctness. See *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (Lexis) at paragraph 46, and *Olson v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 458, [2007] F.C.J. No. 631 (Lexis), at paragraph 27.

[8] The final issue essentially raises the issue of the powers of the Appeal Division. The standard of review is that of correctness.

IV. Analysis

[9] The relevant sections of the Act and Regulations are reproduced in the appendix.

[10] The applicant claims that he was genuinely not aware that his wife and children were still alive when he filed his application for permanent residence. Considering the difficult situation prevailing in Congo at that time, we can understand why the applicant may have thought that his family had disappeared. The evidence establishes that he was working in another city when the rebels arrived. The family was separated and they were unaware of one another's fate. The evidence also establishes that the applicant learned for the first time in 2004, from a Congolese priest, that his family members were alive and that they were in Congo. The applicant contacted his family in May 2004 and has provided for them financially since the reunion.

[11] The applicant's counsel explained that the applicant was being followed by his family doctor and a psychiatrist because of his experiences in Congo and the loss of his family, a family he believed had been killed in the war. She argues that the applicant, during his interview, was depressed and wanted to forget about the atrocities which had led to the loss of his family. She submits that this explains the fact that the applicant denied being married during the interview for the application for permanent residence held in Tanzania in 2002.

[12] With respect to the claims relating to the applicant's psychiatric state, there was no psychiatric report filed dealing with the sponsorship application. The applicant's counsel explains that it is difficult to adduce this type of evidence when one is in a refugee camp. The respondent

objected to my receiving a psychiatric report at the hearing of this application for judicial review. Since this evidence was not before the decision-maker, it was not received.

[13] The arguments of the applicant in this case cannot be used as grounds justifying the Court's intervention. I am prepared to accept that the applicant was not aware that his wife and children were still alive when his application for permanent residence was filed. This situation has no effect on the application of paragraph 117(9)(*d*) of the Regulations. The Regulations are clear: paragraph 117(9)(*d*) does not make any distinction with regard to the reason for which there was no mention of the non-accompanying family members in the application for permanent residence. What is important is that result of the non-disclosure was that these members were not examined by an immigration officer. In this case, it is true that the applicant could not disclose what he did not know, but the wording of the Regulations is clear and unequivocal; subjective knowledge regarding a false statement or non-disclosure is contemplated in the Regulations (See: *Azizi v. (Minister of Citizenship and Immigration)*, 2005 FCA 406, *Chen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 678, and *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1276).

[14] The Appeal Division therefore did not err in dismissing the appeal. The Appeal Division correctly determined that the sponsored persons are excluded from the family class considering the application of paragraph 117(9)(*d*) of the Regulations.

[15] Considering the exceptional circumstances of this case, where there are reasons based on humanitarian and compassionate grounds, the applicant may request a ministerial exemption from

the legislative and regulatory requirements for admission to Canada pursuant to subsection 25(1) of the Act; the applicant can still file such an application with supporting evidence.

[16] In regard to the second issue, I am of the opinion that the Appeal Division did not breach a principle of procedural fairness by failing to hold an oral hearing before making its decision. Paragraph 175(1)(*a*) of the Act provides that the Appeal Division must hold a hearing where there is an issue involving the residence obligation under subsection 63(4) of the Act, including when there are false statements. This is not at issue in this case (*Raymond v. M.C.I.*, 2005 FC 1350).

[17] In regard to the third issue raised by the applicant, I am of the opinion that the Appeal Division did not err in not using its discretionary power to examine the sufficiency of the reasons based on humanitarian and compassionate grounds in the matter. Section 65 of the Act clearly establishes that the Appeal Division "may not consider" reasons based on humanitarian and compassionate grounds "unless it has decided that the foreign national is a member of the family class." Here it was determined that the sponsored persons did not belong to this class (*Tse v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 393).

V. Conclusion

[18] For these reasons, I am of the opinion that the Appeal Division did not err in deciding that the sponsored persons are excluded from the family class and in dismissing the appeal. Intervention by this Court is not warranted. Therefore, the application for judicial review will be dismissed.

[19] The parties did not suggest the certification of a serious question of general importance within the meaning of paragraph 74(d) of the Act. I am satisfied that such a question is not raised in this case. Therefore, no question will be certified.

JUDGMENT

THE COURT ORDERS AND DECIDES that

1. The application for judicial review be dismissed;

2. No serious question of general importance is certified.

"Edmond P. Blanchard"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

APPENDIX

Immigration and Refugee Protection Act /
Loi sur l'immigration et la protection des réfugiés

63.(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.

63.(4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate consideration unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations

65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

175.(1) The Immigration Appeal Division, in any proceeding before it,

(*a*) must, in the case of an appeal under subsection 63(4), hold a hearing;

(*b*) is not bound by any legal or technical rules of evidence; and

(*c*) may receive and base a decision on evidence adduced in the proceeding that it considers credible or trustworthy in the circumstances.

175.(1) Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration :

a) dispose de l'appel formé au titre du paragraphe 63(4) par la tenue d'une audience;

b) n'est pas liée par les règles légales ou techniques de présentation de la preuve;

c) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

Immigration and Refugee Protection Regulations /
Règlement sur l'immigration et la protection des réfugiés

117.(1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(*a*) the sponsor's spouse, common-law partner or conjugal partner;

(*b*) a dependent child of the sponsor;

(*c*) the sponsor's mother or father;

(*d*) the mother or father of the sponsor's mother or father;

(*e*) [Repealed, SOR/2005-61, s. 3]

(*f*) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is

(i) a child of the sponsor's mother or father,

(ii) a child of a child of the sponsor's mother or father, or

(iii) a child of the sponsor's child;

(*g*) a person under 18 years of age whom the sponsor intends to adopt in Canada if

(i) the adoption is not primarily for the purpose of acquiring any privilege or status under the Act,

117.(1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

a) son époux, conjoint de fait ou partenaire conjugal;

b) ses enfants à charge;

c) ses parents;

d) les parents de l'un ou l'autre de ses parents;

e) [Abrogé, DORS/2005-61, art. 3]

f) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait :

(i) les enfants de l'un ou l'autre des parents du répondant,

(ii) les enfants des enfants de l'un ou l'autre de ses parents,

(iii) les enfants de ses enfants;

g) la personne âgée de moins de dix-huit ans que le répondant veut adopter au Canada, si les conditions suivantes sont réunies :

(i) l'adoption ne vise pas principalement l'acquisition d'un statut ou d'un

(ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or

(*h*) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the

privilège aux termes de la Loi,

(ii) s’il s’agit d’une adoption internationale et que le pays où la personne réside et la province de destination sont parties à la Convention sur l’adoption, les autorités compétentes de ce pays et celles de cette province ont déclaré, par écrit, qu’elles estimaient que l’adoption était conforme à cette convention,

(iii) s’il s’agit d’une adoption internationale et que le pays où la personne réside ou la province de destination n’est pas partie à la Convention sur l’adoption :

(A) la personne a été placée en vue de son adoption dans ce pays ou peut par ailleurs y être légitimement adoptée et rien n’indique que l’adoption projetée a pour objet la traite de l’enfant ou la réalisation d’un gain indu au sens de cette convention,

(B) les autorités compétentes de la province de destination ont déclaré, par écrit, qu’elles ne s’opposaient pas à l’adoption;

h) tout autre membre de sa parenté, sans égard à son âge, à défaut d’époux, de conjoint de fait, de partenaire conjugal, d’enfant, de parents, de membre de sa famille qui est l’enfant de l’un ou l’autre de ses parents, de membre de sa famille qui est l’enfant d’un enfant de l’un ou l’autre de ses parents, de parents de l’un ou l’autre de ses parents ou de membre de sa famille qui est l’enfant de l’un ou l’autre des parents de

mother or father of that mother or father

(i) who is a Canadian citizen, Indian or permanent resident, or

(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.

[…]

Excluded relationships

117.(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

…

(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

l'un ou l'autre de ses parents, qui est :

(i) soit un citoyen canadien, un Indien ou un résident permanent,

(ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

…

Restrictions

117.(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

[…]

d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

FEDERAL COURT

SOLICITORS OF RECORD:

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