Federal Court  Cour fédérale

Date: 20100629

Docket: IMM-4185-09

Citation: 2010 FC 709

Ottawa, Ontario, June 29, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARIA TERESA CABRERA

Applicant

and

THE 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 the decision of the Immigration Division of the Immigration and Refugee Board (ID), dated August 5, 2009 (Decision), which resulted in an exclusion order being issued against the Applicant pursuant to section 40(a) of the Act.

BACKGROUND

[2] The Applicant is a citizen of the Philippines. She came to Canada in 2000 on a live-in caregiver visa. She applied for permanent resident status in 2002.

[3] An inadmissibility report was issued for the Applicant pursuant to section 44(1) in October, 2006. After being adjourned on two occasions, the hearing took place in August, 2009.

[4] The Applicant filed a Notice of Constitutional Question (NCQ) on July 31, 2009. The timing of this filing was not in accordance with the notice requirements. The Applicant sought a further adjournment at the August, 2009 hearing in order to be able to comply with the NCQ requirements. The ID refused the adjournment request and the admissibility hearing proceeded.

[5] The ID noted that the Applicant had been married in the Philippines and that a marriage contract to this effect was before the ID. However, the Applicant had stated on her application for permanent residence that she had never been married.

[6] Based on this finding, the ID issued an exclusion order against the Applicant pursuant to section 40(1)(*a*) of the Act for allegedly misrepresenting material facts in her application for permanent residence.

DECISION UNDER REVIEW

[7] The ID considered whether, on a balance of probabilities, the Applicant "directly misrepresent[ed] a material fact that relates to a relevant matter that could induce or did induce an error in the administration of the [Act]."

[8] The ID determined that the Applicant was a citizen of the Philippines who had been married in December of 1981.

[9] The ID noted that the Applicant attempted to distinguish between "marriage in the eyes of the church and marriage in the eyes of the government." However, the ID did not accept that because her "marriage took place [in] a city hall in Manila, a bastion of government," the Applicant was not married in the eyes of the government or the law. Furthermore, her marriage contract had been signed by the Administrator and Civil Registrar General of the National Statistics Office. As such, the ID did not accept the Applicant's attempt to distinguish marriage in the eyes of the church from marriage in the eyes of the government.

[10] Evidence before the ID demonstrated that the Applicant understood that she was married, and had a child from that marriage. Accordingly, the ID found it "troubling" that the Applicant described herself as never married on the application for permanent residence.

[11] The ID determined that the Applicant should have sought advice about filling out the form if she was unclear as to how to properly answer the question regarding marital status rather than simply signing the application and swearing it to be true and complete. The ID determined that the Applicant's response to the question of marital status was a direct misrepresentation and that the Applicant had been married and understood that she had been married. Consequently, the situation before the ID was not a "simple misunderstanding."

[12] While counsel attempted to argue otherwise, the ID determined that any applicant's background, marital status and whether they have any dependents is "completely material and…completely relevant to an application for permanent residence." The ID noted that the Applicant's misrepresentation need not have induced an error; the threshold was simply whether or not the misrepresentation could have induced an error.

[13] In summary, the ID held that on a balance of probabilities, "there was a misrepresentation …on a material fact of a relevant matter that could have induced error." As a result, the ID found that it had no option but to make an exclusion order against the Applicant.

ISSUES

[14] The issues on this application can be summarized as follows:

1. Whether the Applicant's right to procedural fairness was breached;
2. Whether a reasonable apprehension of bias existed;

3. Whether the ID erred in its interpretation of the Act;

4. Whether the ID's Decision was made without regard for the evidence before it;

5. Whether section 40(1)(*a*) of the Act is unconstitutional.

STATUTORY PROVISIONS

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

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	*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;

[16] The following provisions of the *Immigration Division Rules*, SOR/2002-229 are also applicable to these proceedings:

43. (1) A party may make an application to the Division to change the date or time of a hearing.	**43.** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une audience.
(2) In deciding the application, the Division must consider any relevant factors, including	(2) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine

notamment :

(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, the existence of exceptional circumstances for allowing the application;

a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

(*b*) when the party made the application;

b) le moment auquel la demande a été faite;

(*c*) the time the party has had to prepare for the hearing;

c) le temps dont la partie a disposé pour se préparer;

(*d*) the efforts made by the party to be ready to start or continue the hearing;

d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre l'audience;

(*e*) the nature and complexity of the matter to be heard;

e) la nature et la complexité de l'affaire;

(*f*) whether the party has counsel;

f) si la partie est représentée;

(*g*) any previous delays and the reasons for them;

g) tout report antérieur et sa justification;

(*h*) whether the time and date fixed for the hearing was peremptory; and

h) si la date et l'heure qui avaient été fixées étaient péremptoires;

(*i*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice.

i) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice.

(3) Unless a party receives a decision from the Division allowing the application, the party must appear for the hearing at the date and time fixed and be ready to start or

(3) Sauf si elle reçoit une décision accueillant sa demande, la partie doit se présenter à la date et à l'heure qui avaient été fixées et être prête à commencer ou à

continue the hearing.

…

47. (1) A party who wants to challenge the constitutional validity, applicability or operability of a legislative provision must complete a notice of constitutional question.

(2) The party must provide notice using either Form 69, "Notice of Constitutional Question", set out in the *Federal Court Rules, 1998*, or any other form that includes

(*a*) the name of the party;

(*b*) the Division file number;

(*c*) the date, time and place of the hearing;

(*d*) the specific legislative provision that is being challenged;

(*e*) the relevant facts relied on to support the constitutional challenge; and

(*f*) a summary of the legal argument to be made in support of the constitutional challenge.

(3) The party must provide

(*a*) a copy of the notice of

poursuivre l'audience.

…

47. (1) La partie qui veut contester la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une disposition législative établit un avis de question constitutionnelle.

(2) La partie établit son avis soit selon la formule 69 des *Règles de la Cour fédérale (1998)* intitulée « Avis de question constitutionnelle », soit selon toute autre formule comportant :

a) le nom de la partie;

b) le numéro du dossier de la Section;

c) les date, heure et lieu de l'audience;

d) la disposition législative contestée;

e) les faits pertinents à l'appui de la contestation;

f) un résumé du fondement juridique de la contestation.

(3) La partie transmet :

a) au procureur général du

constitutional question to the Attorney General of Canada and to the attorney general of every province and territory of Canada, in accordance with section 57 of the *Federal Court Act*;	Canada et au procureur général de chaque province et territoire du Canada, en conformité avec l'article 57 de la *Loi sur la Cour fédérale*, une copie de l'avis;
(*b*) a copy of the notice to the other party; and	*b*) à l'autre partie une copie de l'avis;
(*c*) the original notice to the Division, together with a written statement of how and when a copy of the notice was provided under paragraphs (*a*) and (*b*).	*c*) à la Section l'original de l'avis, ainsi qu'une déclaration écrite indiquant à quel moment et de quelle façon une copie de l'avis a été transmise aux destinataires visés aux alinéas *a*) et *b*).
(4) Documents provided under this rule must be received by their recipients no later than 10 days before the day the constitutional argument will be made.	(4) Les documents transmis selon la présente règle doivent être reçus par leurs destinataires au plus tard dix jours avant la date à laquelle la question constitutionnelle doit être débattue.

STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 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.

[18] Questions of procedural fairness are to be reviewed on a standard of correctness. As such, the issues brought by the Applicant with regard to the alleged breach of procedural fairness will be considered on a standard of correctness. See *Weekes (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 293, 71 Imm. L.R. (3d) 4. The Applicant has also alleged a reasonable apprehension of bias. The existence of a reasonable apprehension of bias is reviewable on a standard of correctness. See *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 7, [2010] F.C.J. No. 12 at paragraph 27.

[19] In *Dunsmuir*, above, the Supreme Court ruled that questions of law may be reviewable on a reasonableness standard if they are not "legal questions of central importance to the legal system as a whole and outside a decision-maker's specialized area of expertise." See *Dunsmuir*, above, at paragraphs 55 and 60. However, I believe that whether the ID erred in its interpretation of section 40(1)(*a*) of the Act should be considered on a standard of correctness. This is so because of the absence of a privative clause in the Act, the relative lack of expertise on the part of an officer to appreciate whether he or she is correctly interpreting the Act, and the importance of ensuring that officers apply the Act as Parliament intended. Based on these factors, I believe that the ID's interpretation of the Act is reviewable on the correctness standard.

[20] Correctness is also the appropriate standard when determining whether section 40(1)(*a*) of the Act is unconstitutional. See *Dunsmuir*, above, at paragraph 58

[21] The Applicant has also brought an issue before the Court with regard to the ID's treatment of the evidence before it. Reasonableness is the appropriate standard upon which to review whether the ID erred in its treatment of the evidence, since the weight a decision-maker chooses to assign to evidence is a discretionary decision which deserves deference. See *Aguebor v. Canada (Minister of Employment and Immigration)*, 160 N.R. 315, [1993] F.C.J. No. 732, and *Dunsmuir*, above, at paragraphs 51 and 53.

.

[22] 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": *Dunsmuir*, above, at paragraph 47. Put another way, the Court should only intervene 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

Procedural Fairness

[23] The Applicant contends that her right to procedural fairness was breached because of the ID's refusal to grant an adjournment to allow her to provide proper notice of a constitutional question to the Attorneys General. In making its determination, the ID failed to take into account all

the circumstances of the case. See, for example, *Calles v. Canada (Minister of Employment and Immigration)*, 131 N.R. 69, [1990] F.C.J. No. 918.

[24] The Applicant contends that her right to a fair hearing was breached. She says the right to a fair hearing "must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have." See *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 at paragraph 23.

[25] The Applicant also says that procedural fairness was breached when the ID failed to provide adequate reasons for its decision not to abridge time or grant a short adjournment. The Applicant submits that in the case of *United States of America v. Taylor*, 2003 BCCA 250, [2003] B.C.J. No. 1018 at paragraph 18, as in the case at hand, the ID's reasons "are conclusory and do not demonstrate that [the member] performed his mandatory duty." Indeed, the reasons provided by the ID do not set out the findings of fact or address the major points as issue, as is required by procedural fairness. See *Thalang v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 743, 2007 F.C.J. No. 1002 at paragraph 15.

Reasonable Apprehension of Bias

[26] The ID refused to grant an adjournment for proper notice of a constitutional question to be sent to the Attorneys General. However, the ID then refused to consider the Applicant's

constitutional arguments because the Attorneys General had not been served in a timely way. The Applicant submits that this is clearly evidence of bias, since “some AGs had already received notice and declined to participate.” The Applicant submits that the ID member “exudes, in his decision, a reasonable apprehension of bias.” For this reason, the Decision cannot stand.

Error in Interpretation of Section 40(1)(*a*)

[27] The Applicant contends that the ID erred in finding that the Applicant misrepresented or withheld a material fact relating to a relevant factor. The Applicant contends that she did neither of these things. Indeed, the Applicant considers herself to have been single since her separation in 1987. This is because “in the Philippines divorce is impossible to obtain.” The Applicant submits that, in the Philippines, one is either divorced or single. Based on her cultural norms, she did not misrepresent or withhold a material fact.

[28] Furthermore, the ID erred in failing to provide adequate reasons on this issue. This constitutes a reviewable error.

Evidence

[29] The ID failed to consider the totality of the evidence in reaching its conclusion. Indeed, its finding was made without regard for the documentary evidence before it. Furthermore, the

Applicant submits that the conclusion of the ID seized on one statement without considering other factors or assertions.

[30] The ID further erred by failing to address the pertinent facts, factors and circumstances of the Applicant's case in its reasons. For this reason, the ID's Decision ought to be set aside. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39.

Constitutionality of Section 40(1)(*a*)

[31] The Applicant submits that section 40(1)(*a*) of the Act is unconstitutional for being overbroad and offending section 7 of the Charter. As determined in *Heywood*, above, the state cannot use "means which are broader than necessary to accomplish [its] objective." See *R. v. Heywood*, [1994] 3 S.C.R. 761, [1994] S.C.J. No. 101. In this case, the principles of fundamental justice were violated because the Applicant's rights were limited for no reason. The Applicant submits that the overbreadth of this section means that the law at hand is arbitrary and/or disproportionate.

[32] Further, the Applicant contends that this section "infringes ss. 7 and 15 of the Charter in not accommodating marital statuses unknown and unrecognized in Canadian law and inducing error in attempting to squeeze and force them into a Canadian context."

[33] In the case at hand, as recited in *R .v. Kapp*, 2008 SCC 41, [2008] S.C.J. No. 42 at paragraphs 14-15,"a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."

The Respondent

Improper Affidavit

[34] As a preliminary matter, the Respondent submits that the Court ought to give little weight to the affidavit of the Applicant's lawyer since it interprets evidence in an attempt to draw a legal conclusion. As stated in the case of *Ly v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1184, [2003] F.C.J. No. 1496 at paragraph 10, an affidavit "must be free from argumentative material and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions… . If an affidavit does not meet these requirements, the application can only succeed if an error is apparent on the face of the record" [citations omitted].

Refusal to Adjourn

[35] The Applicant retained a lawyer several months before her hearing. However, she failed to provide notice of the constitutional question until July 31, 2009 – only days before her August 5th hearing. The Respondent contends that the language of Rule 47(4) is mandatory. According to the Rules, the Applicant's notice of constitutional question "must be received by [its] recipients no later than 10 days before the day the constitutional argument will be made." The Respondent contends

that the *Federal Courts Act*, R.S.C., 1985, c. F-7 includes similar mandatory language in section 57(2).

[36] The Applicant also failed to comply with Rule 47(3)(*c*), since she failed to provide a written statement to the ID indicating when and how the Attorneys General were served with the notice of the constitutional question.

[37] Based on these considerations, the Respondent submits that it was reasonable for the ID not to allow the Applicant to raise the constitutional issue on short notice. This is so because the Applicant did not fulfil the relevant statutory requirements and failed to provide any compelling reason as to why notice of a constitutional question could not have been brought sooner.

[38] The ID has discretion to: a) excuse a party from the requirement of a rule; and b) allow non-compliance with notice requirements for constitutional questions. However, this power is discretionary and any decision made pursuant to it requires deference. The Applicant's failure to meet the mandatory timelines for service and filing does not require the ID to exercise its discretion, since these do not constitute "exceptional circumstances."

Misrepresentation

[39] The Applicant acknowledged that she is still married. Consequently, it was clearly a misrepresentation to say that she had never married. Marital status has been held by the Federal

Court to be a material fact, insofar as a failure to report the change of marital status could have "the effect of foreclosing or averting further inquiries." See *Mohammed v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 299, [1997] F.C.J. No. 605, and *Baro v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299, [2007] F.C.J. No. 1667 at paragraph 15.

[40] The Court has also held that a misrepresentation is not cured simply by admitting to the misrepresentation before the decision on misrepresentation is made. See *Khan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 512, [2008] F.C.J. No. 648 at paragraph 27.

[41] The Applicant admitted that she has not had her marriage annulled and that she has not sought a divorce. She could have chosen to indicate that she was separated but, according to the Respondent, she "wilfully chose not to because she believed she would have to go to court to become separated." Furthermore, the fact that the Applicant lived in Hong Kong from 1992 until she entered Canada makes it difficult to accept that she was "so entrenched in the customs of the Philippines…that she did not understand what 'separated' versus 'never married' meant."

[42] The ID made its findings with regard to the Applicant's explanations very clear. The ID did not accept the Applicant's explanation and gave clear reasons for its findings. The Applicant admitted to misrepresenting a material fact. The ID considered her explanation, but determined that a material representation had indeed been made. The ID was clear in its findings and made no error in this regard.

Constitutional Challenges

[43] The Respondent submits that the Court should not exercise its jurisdiction to hear constitutional arguments where the Applicant failed to bring these arguments at the first instance. The Applicant has asked the Court to determine the validity of a statutory provision in the absence of an ID determination on this issue. However, the Respondent submits that the only issues on which the Applicant can properly seek judicial review are "the preliminary refusal to adjourn and the decision of the Immigration Division to issue an exclusion order based on the Applicant's misrepresentations." Indeed, Courts have refused to consider constitutional arguments were they were not properly raised in the first instance. See, for example, *Bekker v. Canada*, 2004 FCA 186, [2004] F.C.J. No. 819.

[44] Even if the Court does not refuse to exercise its jurisdiction with regard to this matter, the Respondent submits that there are other issues with regard to the relief being sought. For instance, the ID cannot make a general declaration of constitutional invalidity. See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 at paragraph 31. Furthermore, the Applicant is simply objecting to the application of section 40(1)(*a*) in her particular circumstances, and not the statutory provision itself. The Respondent submits that this is not a basis for striking down what is otherwise valid legislation. See, for example, *Khalil v. Canada*, 2007 FC 923, [2007] F.C.J. No. 1221 at paragraph 344.

[45] Moreover, section 40(1)(*a*) does not demonstrate "a lack of sufficient precision by a legislature in the means used to accomplish an objective," as was contemplated in *Heywood*, above. It is clearly the objective of Parliament to exclude from Canada those who are not truthful in their applications with regard to material facts. This is done to protect the integrity and fairness of the immigration system. Furthermore, the Respondent submits that fundamental justice is not compromised "by balancing the state's interest in protecting the integrity of the system over protecting those persons who come to Canada with unclean hands."

[46] Finally, the Respondent submits that the Applicant's argument that section 40(1)(*a*) discriminates against Philippine women simply "trivializes the Charter."

Section 7 and Section 15

[47] The Applicant has alleged no deprivation in this case. Rather, she says that she "felt it was easier to consider myself never married." The Respondent contends that discrimination claims under section 15 of the Charter are confined to "benefits and burdens imposed by law." This is a case where the benefit claimed – the right to misrepresent material facts on an application for permanent residence – is not provided by law. This benefit is not provided to anyone under the Act. As such, there is no distinction between the Applicant and others. See, for example, *Auton (Guardian ad litem of) v. British Columbia*, 2004 SCC 78, [2004] S.C.J. No. 71 at paragraphs 28-35.

[48] Furthermore, the Applicant has not made out discrimination on an analogous ground. See, for example, *Kapp*, above. The Applicant has failed to suggest that the distinction that occurs in this case "can be characterized as an analogous ground relating to marital status." Indeed, a group of potential permanent residents who misrepresent marital status does not amount to an analogous ground under section 15 of the Charter. The Applicant has failed to demonstrate why her alleged inadvertent misrepresentation of her marital status deserves protection under the Charter. Moreover, the Applicant has failed to show how the requirement of full and honest disclosure of material facts "perpetuates disadvantage or stereotyping."

[49] The Respondent contends that section 7 is not engaged by "this sort of trivial claim." Furthermore, even if liberty and security of the person were found to be engaged in this instance, the Respondent contends that "the unfairness is inadequate to constitute a breach of the principles of fundamental justice." Indeed, the right of security of the person does not protect someone from the ordinary stresses and anxieties that a person will suffer as a result of government action. The Respondent submits this is especially so when a non-citizen does not have a right to enter or remain in Canada. See *New Brunswick v. G.(J.)*, 1999 3 S.C.R. 46, [1999] S.C.J. No. 47 at paragraphs 59-60, *Chirelli v. Canada (Minister of Employment and Immigration)*, 1992 1 S.C.R. 711, [1992] S.C.J. No. 27.

[50] The Applicant has also failed to demonstrate that section 40(1)(*a*) of the Act is unconstitutionally overbroad. Indeed, ensuring that applicants are truthful in answering relevant

questions clearly has a legitimate objective. Expecting applicants for permanent residence to answer relevant questions truthfully is neither arbitrary nor disproportional.

ANALYSIS

[51] The Applicant has raised a wide range of issues. However, if reviewable errors have occurred, for instance, as a result of the refusal to adjourn or misrepresentation, then jurisprudence suggests that the Court should not consider the constitutional and Charter arguments before it. See, for example, *Mercier v. Canada (Correctional Service)*, 2009 FC 1071, in which Justice Martineau determined that the constitutional issues ought not to be considered since the administrative law matters at issue were determinative. Furthermore, the constitutional and Charter issues were not before the ID in this case. As such, it is not, in my view, appropriate for the Court to consider these arguments.

Refusal to Adjourn

[52] The Applicant says that, in considering her adjournment request, the Member:

a. Failed to properly entertain the request;

b. Placed the hurdle too high in terms of the test that was applied;

c. Failed to address the factors that need to be taken into account for such a request; and

d. Failed to provide adequate reasons for refusing the request.

[53] Counsel's submissions on the adjournment request and the Member's reasons for refusing are found in the tribunal record. The reasons reveal the following basis for the refusal:

a. There was no written statement as to when and how "notice was provided under sub-rule 4-47(3)(*a*) and (*b*) as is required";

b. The time-limit in subsection (4) that requires that notice be received at least 10 days prior to the hearing had not been met;

c. While acknowledging the discretion contained in Rules 50 and 51 of the Immigration Rules to allow for an extension of time or to shorten the time limit, the Member felt that such exceptions to the time rules required "compelling reasons to allow for that exemption" and that "to simply allow exceptions without a compelling reason … would be to render our rules null and void if anyone could simply just apply for a rule to be extended or not even be followed without a --- some solid anchor or some underlying reason as to why the exception ought to be granted."

d. The Intercede letter which counsel had received on July 31 was a "very general letter" that made almost no reference to the specifics of the case, and there was nothing in the letter to explain, or "compel" the Member to believe, that it "could not have been received earlier than it was in order to meet the time limit for 47 sub (4)."

[54] The Applicant attempts to rely upon *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 408, in which Justice O'Reilly dealt with a Refugee Protection Division (RPD) decision to declare an abandonment of a refugee claim. Mr. Ahmed argued that the

RPD had not proceeded in accordance with the rules governing abandoned claims and, in particular, the RPD had not dealt with the factors contained in Rule 58(3).

[55] In declaring the claim abandoned in *Ahmed*, the RPD said

> But I've heard nothing that tells me that there are exceptional circumstances in this case. The onus is on the claimant to follow the rules or provide such explanation that is satisfactory to me … .

[56] In allowing the application for judicial review in *Ahmed*, Justice O'Reilly commented at paragraph 5 as follows upon the factors that need to be considered under Rule 58(3) and the RPD's use of the words "exceptional circumstances":

> **5** The Rules set out factors that the Board must consider. I have no reason to question whether the Board considered the appropriate factors here. However, from the passage quoted above, it appears that the Board expected Mr. Ahmed to show "exceptional circumstances" before allowing his refugee claim to proceed. As I read the governing rule, the Board must consider the applicant's explanation, whether he has filed his paper work, whether he is ready to proceed, and "any other relevant information". No doubt, the Board will only permit a claim to go forward if the applicant's explanation for the delay is reasonable. I do not, however, see any basis for a requirement that the applicant show "exceptional circumstances". In my view, this standard exceeds that which the Rules provide.

[57] The Applicant also relies upon the general wording and the list of factors found in *Siloch*, above, where the Federal Court of Appeal had the following to say about a refusal to grant an adjournment in a situation where counsel had failed to show up for a hearing:

> It is well settled that in the absence of specific rules laid down by statute or regulation, administrative tribunals control their own proceedings and that adjournment of their proceedings is very much in their discretion, subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial

> functions, the rules of natural justice. (*Prassad v. Canada (M.E.I.)*, [1989] 1 S.C.R. 560 at 569, Sopinka J.) In immigration matters, there is a specific rule laid down by the Immigration Regulations, which reads as follows:
>
> > 35(1) The adjudicator presiding at an inquiry may adjourn the inquiry at any time if the adjournment will not impede or unreasonably delay the proceedings.
>
> It is also well settled that in exercising his discretion to grant an adjournment under subsection 35(1) of the Regulations the Adjudicator must direct his attention to factors such as:
>
> a) whether the applicant has done everything in her power to be represented by counsel;
>
> b) the number of previous adjournments granted;
>
> c) the length of time for which the adjournment is being sought;
>
> d) the effect on the immigration system;
>
> e) would the adjournment needlessly delay, impede or paralyze the conduct of the inquiry;
>
> f) the fault or blame to be placed on the applicant for not being ready;
>
> g) were any previous adjournments granted on a peremptory basis;
>
> h) any other relevant factors.

[58] I note in *Siloch*, above, that the Federal Court of Appeal was careful to point out that any conclusions about refused adjournment requests must be examined in the particular circumstances of each case.

[59] In the present case, it seems to me that the Applicant's request for an adjournment fell to be considered under section 43 of the *Immigration Division Rules*.

[60] In assessing the reasons given for the refusal of an adjournment in this case, it is important to be clear about the justification put forward as the basis for the adjournment request and, of course, the factors listed in section 43 of the *Immigration Division Rules*.

[61] Counsel's request for an adjournment is recorded as follows in the Tribunal Record:

> Counsel: As the member has aptly noted that the rules – the Immigration Division rules require 10 days notice, the rules also allow you to exercise your discretion and grants you jurisdiction to waive any requirement of a rule. I would state that you exercise such discretion to either waive the requirement of the 10-day rule to truncate it to 5 days and/or grant an adjournment to allow us to meet the requirements of that rule. I would say that the rule has its origin in section 57 of the Federal Court Act.
>
> The Federal Court Act requires that any federal tribunal or board, if a constitutional question and/or charter arguments are raised before any federal tribunal or board, and the Immigration Division is such a federal tribunal and that there should be appropriate notice given to all the attorney generals of the provinces and the territory – I am sorry – and that there is a very important purpose and objective behind that 10-day notice, namely that it gives the opportunity for the attorney generals of each of the provinces and most importantly the Attorney General of Canada and the minister – counsel for the minister of Citizenship and Immigration to be able to respond to matters that directly concern it.
>
> I would submit that given the notice was formulated on July 31st, it could only be served on that date. The reason for why it was only formulated on July 31st is that the – while the – while the – I will call her the applicant, Ms. Cabrera did intend to dispute the allegation of the minister under the section 44 report did not have the necessary evidentiary basis to raise a constitutional action – a constitutional

challenge to the provision of IRPA section 40 sub (1) sub (a) until July 31st.

On July 31st, she received an expert opinion from an organization called Intercede and that is very credible, highly authoritative organization that has been involved with both provincial and federal government with respect to shaping legislation and policy concerning live-in caregivers. They were brought into prominence most recently with, I will refer to as the "Ruby Balla affair" and in the opinion of the Executive Director, Ms. Agatha Mason, I would bring your attention to the last three paragraph of her letter dated July 31st, 2009, wherein she talks about live-in caregivers as a group. As you know, Ms. Cabrera is in fact a live-in caregiver who was admitted to Canada under the program and has continued to be a live-in caregiver and is currently still has that status.

I would also bring your attention to my letter of July 31st wherein I made submissions requesting an adjournment. That request includes reference to a Supreme Court of Canada case which is in fact a part of a long line of cases, which has recognized importance of charter arguments, the gravity with which they must be dealt with by federal tribunal, and the necessity of a full evidentiary record as well as proper legal submissions, so that the federal tribunal can make informed decisions and not rash decisions based on "factual vacuums."

The federal court of appeal and the federal court have recognized this principal. On page 2 of my letter is a quote from Justice Letterno's (ph) decision wherein he reiterates that charter arguments are indeed very important, require proper evidentiary foundation, and in particular that challenges under section 15 which is the anti-discrimination provision of the charter, in particular ought to be properly canvasses.

I would submit that that includes the right of attorney generals to participate if they so wish. I have only received a response from one attorney general and I – in writing. I did receive a response from the Department of Justice by telephone, Mr. Bernand Assam (ph), and unfortunately I was not in my office when he called. He left me a message to the effect that he would like to talk to me about this. It may have been to see if we could mutually agree to an adjournment. He was not aware of my adjournment request. I am not sure what the nature of his call was. Unfortunately, time did not permit us to reconnect prior to this hearing today, and so my concern is that he

> may or may not have an opportunity to participate and respond to the questions that we have raised, which questions include and I would now turn your attention to the actual notice, which was also sent by fax to the Board, and in the notice, you will see that Ms. Cabrera has raised – on page 6 has raised issues concerning section 15 of the charter. I think this speaks to the principal in the Bether (ph) decision and Justice Letterno's (ph) warning that any such arguments concerning section 15, given their complexity, be given a fulsome record, and therefore I would respectfully request that this hearing be briefly adjourned to give sufficient time to the attorney generals including the counsel at the Department of Justice to participate in these proceedings and to continue their arguments, so that you would have an opportunity to make an informed determination about these very important issues.

[62] The ID specifically raises with counsel for the Applicant the fact that the letter from Intercede and the application request do not explain anything about time sensitivity or why the time-lines could not have been met in this case.

[63] Counsel explained that she had anticipated receiving the information from Intercede "before the 10-day deadline which is July 12" but the information was not received "due to circumstances beyond my [control]… ."

> I was anticipating receiving that a lot earlier and unfortunately I did not. I am not in control of that. I know Ms. Mason (ph) is extremely busy… . I am sure she is extremely diligent but a very busy person… .

[64] A fuller explanation is also provided by Applicant's counsel at pages 5 and 6 of the transcript:

> Because I was anticipating receiving it then and unfortunately I did not receive it and I kept asking her when I could receive it. Unfortunately, she is very busy and I only received it by fax on the 31st, so the applicant, Ms. Cabrera, has made all efforts that are

> within her control to be able to canvas the evidentiary basis in order to be able to raise arguments. She does not – she does not want to raise frivolous charter arguments, so she did – she made her best efforts to canvas as much as she could the possibility of whether or not she has merit on her charter arguments. That evidence unfortunately was not received until the 31st, so I – I would just submit that it is not fair at this point to punish Ms. Cabrera and to circumvent the possibility of proper constitutional arguments based on the rigidity of rule 47 when in fact you do have discretion to waive it and I would submit that in fact it is in the interest of justice that we adjourn the matter for five days to give the attorney generals an opportunity to respond if they so wish and that way you will be in a better position to make determinations on the issues that are raised today.

[65] The arguments provided by Minister's counsel on this issue also provide helpful context for the ID's reasons in refusing the adjournment request:

> Minister's Counsel: 3(c). The notice must be provided to the Division along with the written statement as to how …
>
> Counsel: To the Division but not to the CBSA.
>
> Minister's Counsel: The – the Division in possession of that statement, Mr. Member.
>
> Counsel: That is what I said. It is – my assistant faxed a copy of the affidavit of service.
>
> Minister's Counsel: Okay. I – I do not have that.
>
> Counsel: Okay. I am just… - well, you are welcomed to make copy of mine.
>
> Minister's Counsel: If I may …
>
> Counsel: The purpose of an affidavit of service is to prove that all the attorney generals have in fact been served and that purpose can be accomplished by giving you a copy of the affidavit of service.

> Minister's Counsel: My point essentially, Mr. Member, is that rule 47 has not been complied with in two regards. Firstly, counsel has not complied with the requirement that the notice be provided with a 10-day timeframe as you have pointed out already and the fact that the written statement as to how the notice was served and when the notice was served on the attorney generals was not provided to the Division, so there are two breaches here of rule 47.
>
> In addition – in regards to the information of the constitutional argument, counsel has submitted today that she only received the article from the Intercede organization on the 31st of July and that is the reason why she only submitted the notice of constitutional argument on the 31st of July which was of course this past Friday. If counsel was anticipating the receipt of such information, she could have advised the Board before – at least 10 days in advance before the hearing that she was intending on raising a constitutional argument, but in that regard, she also failed to do that.
>
> The minister is objecting to this request of adjournment and the minister is requesting that we proceed with the admissibility hearing today. Information on the file as you have also pointed out, Mr. Member, is that counsel has been retained since the 16th of June and has had ample opportunity to formulate her arguments in relation to the constitutional question and to have served such a notice in compliance with rule 47 of the Immigration Division rules.

[66] This issue is important because, later in the Decision, the Member rejects the constitutional arguments of the Applicant on the basis of non-compliance with Rule 47 of the *Immigration Division Rules*.

[67] Essentially, then, the Applicant's request for an adjournment was based upon the following grounds:

a. The Intercede letter was needed as an evidentiary basis upon which to raise the constitutional arguments;

b. It was needed before notice under Rule 47 was given because the Applicant did not wish to “raise frivolous charter arguments”;

c. The evidence was not received until July 31st;

d. Applicant’s counsel kept asking Ms. Mason at Intercede for the letter;

e. The time of delivery of the letter on July 31st was outside counsel’s control;

f. It would not be fair to punish the Applicant by not granting the request for an adjournment and by circumventing the possibility of proper constitutional arguments when there is a discretion;

g. Only a very brief adjournment was required (5 days) to allow the Attorneys General to respond.

[68] It seems to me that if Applicant’s counsel can be faulted in this situation it is because she allowed the time-limits to lapse and should have alerted the Member and the Minister beforehand that the Intercede letter had not been received in time so that an adjournment request would have to be made.

[69] There is also the problem, as pointed out by the ID, that the Intercede letter is very general and it fails to deal with the specifics of this case. However, that does not mean that Applicant’s counsel had unreasonable expectations about the contents of the letter.

[70] The other problem is that there is no explanation from Intercede as to why the letter did not arrive in time. On its face, the letter looks like a form letter and it is difficult to see why such a letter

that does not deal with the specifics of the Applicant's case, should have taken so long to prepare and send. Ms. Mason may well be a busy person but it is difficult to see why this kind of letter would have taken much time at all to prepare.

[71] Be that as it may, it seems to me that the ID was obliged to consider the Applicant's adjournment request in accordance with section 43 of the *Immigration Division Rules*. Section 43(2) makes it mandatory for the ID to consider "any relevant factors" and then lists the factors that must be considered in all cases. If I look at the more obvious "relevant factors" in the present case, the following suggest themselves for consideration:

a. The length of time for which the adjournment was being sought was very short;

b. The adjournment would have had no detrimental effect on the immigration system;

c. The adjournment would not have needlessly delayed, impeded or paralyzed the conduct of the inquiry;

d. The Applicant herself was not to blame for any delay. Her counsel offered a legitimate reason for needing the intercede opinion and she also indicated that she had made efforts to get the letter on time: "I kept asking her when I could receive it";

e. Another relevant factor would be that any adjournment would not have resulted in any prejudice to the Minister or unreasonably delay the proceedings, while the failure to grant the adjournment prevented the Applicant from raising her constitutional and Charter arguments, and the fact of her non-compliance with the time limits became a significant aspect of the Decision.

[72] All in all, I can see that the ID had some reasons for refusing the request but there were other factors – some of them raised by Applicant's counsel and some of them quite obvious in the circumstances – that do not appear to have been considered. In fact, it appears that the Member did not properly address section 43 of the *Immigration Division Rules* when considering the adjournment request.

[73] I do not place much store by the ID's use of the term "compelling reasons," and I do not think this meant the bar was set too high. The reasons make clear what factors the ID considered to be important and that it refused to exercise its discretion on this issue because exceptions to the Rules should not be allowed as a matter of course and the Intercede letter did not seem that important, given its contents, and it also did not really explain why it could not have been prepared and delivered in time.

[74] On the other hand, counsel for the Applicant put forward other reasons – the need for the letter before the constitutional issues could be properly framed; her repeated attempts to get the letter in time; having no control over when it was received; that it is not fair to punish the Applicant and circumvent proper constitutional arguments; the shortness of the time needed, etc. – that were not really addressed in the Decision.

[75] I would also add that, in the circumstances, there were some other obvious factors – e.g. no prejudice to the Minister but extreme prejudice to the Applicant given the ID's reasons for rejecting

her constitutional and Charter arguments; no real detrimental impact upon the system and/or the particular proceedings – that should also have been considered on the facts at hand.

[76] All in all, I think I have to say on these particular facts, and given the exclusion of constitution and Charter arguments that was an inevitable consequence of the refusal, the ID's decision on this issue was too narrowly based, failed to take into account highly material factors and considerations as required by section 43, and was incorrect in all circumstances of the case.

[77] Questions for certification were put forward by the Applicant but they do not impact my reasons, so that I believe there is no point in considering them.

[78] In my view then, for reasons given, this matter must be returned for reconsideration.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The Decision is quashed and returned for reconsideration by a different member.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-4185-09
STYLE OF CAUSE:	***MARIA TERESA CABRERA*** ***v.*** ***THE MINISTER OF CITIZENSHIP AND IMMIGRATION***
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	April 1, 2010
REASONS FOR JUDGMENT And JUDGMENT:	RUSSELL J.
DATED:	June 29, 2010

WRITTEN REPRESENTATIONS BY:

Rocco Galati	FOR THE APPLICANT
Jamie Todd Hillary Stephenson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rocco Galati Law Firm Professional Corporation Toronto, ON	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT