Federal Court  Cour fédérale

Date: 20110128

Docket: IMM-2367-10

Citation: 2011 FC 101

Montréal, Quebec, January 28, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

TAN DO MAI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant challenges the legality of a decision made by the Immigration Appeal Division, Immigration and Refugee Board (the Tribunal), to uphold the removal order issued by the Immigration Division (ID) for misrepresentation.

[2] The applicant was born in Vietnam on May 3, 1982. He applied for a permanent resident visa on May 7, 2003, under the family class, as an unmarried dependent of his father who lived in Canada and acted as sponsor. He obtained his visa and arrived in Canada on March 22, 2005.

However, in the interim, the applicant married his pregnant girlfriend in a Catholic ceremony on August 17, 2004. The marriage was not registered at the time with the Vietnamese Government. Their child was born on September 18, 2004. The birth was not registered at the time with the Vietnamese Government either.

[3] The applicant did not report either his marriage or the birth of his child to the Immigration officials during the processing of his application, nor upon receipt of his permanent resident visa, nor upon his arrival to Canada. In fact, it is only in 2006 that the existence of the applicant's marriage and the applicant's child became known to the immigration officials. This time, the applicant had decided to sponsor his wife and child and in the application for sponsorship, he indicated that they were married August 17, 2004, and that their son was born September 18, 2004. Furthermore, the applicant's wife indicated that they had lived together from 2000 to 2004.

[4] As per paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations* SOR/2002-227, as amended (the Regulations), the wife and the child were found not to belong to the family class and, consequently, the sponsorship application was rejected. The applicant appealed this decision to the tribunal, on the basis that he had not declared his wife and child because he does not speak English or French. His appeal was rejected on May 27, 2008. That decision is not contested before the Court.

[5] This now brings us to the subject matter of this proceeding. As per paragraph 40(1)(a) of the *Immigration and Refugee Protection Act* (the Act), a permanent resident or a foreign national is inadmissible for misrepresentation, "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 Act".

[6] Indeed, pursuant to subsection 16(1) of the Act, the applicant had the duty to answer truthfully all questions that were asked by the officer who examined him at the port of entry. More particularly, section 51 of the Regulations requires that the foreign national who holds a permanent residence visa report any changes with respect to his or her family situation:

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 not divulged when it was issued; and	(ii) tout fait important influant sur la délivrance du visa qui a changé depuis la délivrance ou n'a pas été 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.

[7] On April 21, 2008, the Minister issued a report as per section 44 of the Act according to which the applicant would be inadmissible in Canada due to “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” (paragraph 40(1)(a) of the Act). The report was submitted to the ID for investigation. One year later, the ID concluded that the applicant had made misrepresentations in the sense of paragraph 40(1)(a) of the Act. A removal order was thus issued on April 20, 2009. The applicant appealed the removal order before the Tribunal as per subsection 63(3) of the Act and asked that the humanitarian and compassionate reasons in the file be taken into account, as per paragraph 67(1)(c) of the Act.

[8] On March 31, 2010, the Tribunal rejected his appeal, finding that the removal order was justified and that the humanitarian reasons claimed by the applicant were insufficient to justify granting the special relief outlined in paragraph 67(1)(c) of the Act. It is the decision to uphold the removal order that is the subject of the application for judicial review today. The Tribunal’s rejection of the humanitarian reasons claimed by the applicant is not contested before this Court.

[9] At issue are two misrepresentations: one regarding the applicant’s “marriage” in 2004 and one regarding the birth of his child in 2004. The applicant does not dispute the misrepresentations themselves. However, he does dispute that his intention was to mislead the immigration officials. Moreover, he submits that the misrepresentations were not material, as they would not have changed the outcome of the applicant’s permanent residence application.

[10] Both before the Tribunal and this Court, the applicant has argued that as his marriage was not legal in the eyes of the Vietnamese Government because it had not been yet registered at the time of his application and entry in Canada. It follows that he was under no obligation to report it (Definition of “marriage”, section 2, *Regulations*). He thus made no misrepresentation of a material fact relating to a relevant matter, as per paragraph 40(1)(a) of the Act.

[11] Second, as for the misrepresentation regarding his child, the applicant argues that as the child was not registered with the Vietnamese Government, he also had no obligation to report the child. In any case, the applicant’s having a child does not disqualify him from obtaining permanent residence as a dependent on his father, so it is not a misrepresentation in the sense of paragraph 40(1)(a) of the Act.

[12] Thirdly, the applicant submits that he had no intention to mislead the immigration authorities and that the Tribunal’s failure to give sufficient weight to the absence of such an intention renders the impugned decision unreasonable.

[13] All these grounds of attack are challenged by the defendant who relies on the findings of fact made by the Tribunal and on the applicable provisions of the Act and Regulations. Indeed, the impugned decision is reasonable and accords with the principles derived from the relevant case law. See *Mohammed v. Canada (Minister of Citizenship and Immigration),* [1997] 3 F.C. 299 (*Mohammed)*; *Azizi v. Canada (Minister of Citizenship and Immigration),* 2005 CAF 406; *Baro v. Canada (Minister of Citizenship and Immigration),* 2007 FC 1299 (*Baro*); *Bodine v. Canada*

(Minister of Citizenship and Immigration), 2008 FC 848; *Ekici v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1133.

[14] The Court finds that the appropriate standard of review in this case is reasonableness. The decision made by the Tribunal relies on the application of paragraph 40(1)(a) of the Act to the facts in evidence. It is therefore a question of mixed fact and law and the Court will only intervene if the decision of the Tribunal does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47; *Ali v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1354, at paragraph 20).

[15] For the reasons that follow, while sympathizing with the applicant and his family, the Court finds the Tribunal's decision reasonable in light of the facts and the applicable law.

[16] There is nothing inherently unreasonable about the general conclusion reached by the Tribunal. Material facts are not restricted to facts directly leading to inadmissible grounds, but are broader. When relevant information affects the process undertaken or the final decision, it becomes material (*Koo v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 931, at paragraph 19). The applicant's failure to mention his wife and child prevented immigration officials from investigating them and their relationship to the applicant. The misrepresentation thus affected the process undertaken.

[17] The Tribunal has found that whether the marriage was technically legal or not in Vietnam, it was still a material fact. This finding is reasonable in the circumstances. The definition of

"dependent child" in the Regulations includes a category of a married child who remains financially dependent on the parent, and marital status of the applicant is clearly relevant to the applicant's belonging to that category. In not declaring his marriage in Vietnam, he prevented the immigration agent from undertaking an investigation to ensure that he was admissible under the category of family reunification.

[18] As for the applicant's child, the Tribunal reasoned that this also prevented the immigration agent from investigating the child. This would prevent the applicant from sponsoring his wife and child in the future under the category of family reunification. It must be remembered that paragraph 40(1)(a) of the Act refers notably to the "withholding [of] material facts relating to a relevant matter that induces or could induce an error in the administration of [the] Act" (my underlining). Therefore, it was not necessary for the Tribunal to make a finding of an actual error caused by the misrepresentation.

[19] Furthermore, the Tribunal's decision fits quite well with the examples of what generally constitutes misrepresentation as per paragraph 40(1)(a) of the Act, listed in section 9.10 of the *ENF2: Evaluating Inadmissibility* guidelines, published by the Ministry of Citizenship and Immigration. Two specific examples relevant to the present case are "An applicant for a visa fails to disclose the existence of family members, even if the family members could satisfy the requirements of the Act [R117(9)(d)]" and "Failure to disclose changes in marital status or changes in material facts since visa issuance abroad".

[20] The guidelines are of course not binding on the Tribunal or any other body involved in the process, but they are a good indication in a judicial review proceeding of what an immigration official might reasonably find to constitute misrepresentation of a material fact related to a relevant issue is. Besides the reference above to the *ENF2: Evaluating Inadmissibility* guidelines, see also, paragraphs 5.10, 5.11 and 10.5 of OP 2 – Processing Members of the Family Class.

[21] The applicant also argues that he honestly believed that his religious marriage was not required to be reported, and as such, he should not be punished by making an inadvertent error. The applicant cites *Baro,* above, at paragraph 15, in support of the claim that if the misrepresentation was truly innocent and inadvertent, then an exception can be made and paragraph 40(1)(a) of the Act need not be applied (*Medel v. Canada (Ministre de l'emploi et de l'immigration)*, [1990] 2 C.F. 345, [1990] A.C.F. No. 318 (C.A.F) (QL) (*Medel*).

[22] This issue was canvassed by my colleague Justice MacKay in *Mohammed*, above, under a similar provision found in the old *Immigration Act* (i.e. paragraph 27(1)(e)). With respect to the comments made by Justice MacGuigan of the Federal Court of Appeal in *Medel*, above, Justice MacKay writes at paragraph 40:

> In my opinion, the principle which arises from the above comments of MacGuigan J.A. in Medel is that the duty of candour owed by the applicant depends on the materiality of the information withheld. A change in marital status has repeatedly been held to constitute a "material fact" for the purposes of paragraph 27(1)(e) of the Act, in so far as the failure to disclose it, as stated in Brooks, supra, [at page 873] may reasonably have "the effect of foreclosing or averting further inquiries".10 In the present case, the information failed to be disclosed by the applicant, his change in marital status, was clearly "material" information in that it potentially would have had a direct or inducing influence on whether or not he was granted landing in Canada.

[23] For the purposes of the Act, “family member” includes, as the case may be, the spouse or “common-law partner”, that is defined in the latter case as “an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year” (paragraphs 1(1) and (3) of the Regulations).

[24] In the case at bar, the facts do not allow the conclusion that the applicant was completely unaware that common law or conjugal history was relevant. When one examines the application for permanent residence form that the applicant completed, one sees that the applicant was expressly asked whether he was in a common-law relationship. He responded that he was not, which could very well have been true in 2003, although even that possibility is in doubt, given the applicant’s wife’s application made in 2006 that they had lived together from 2000 to 2004. The truthfulness of that statement is ultimately immaterial, however, given that the same application form required an undertaking that the applicant would inform the immigration authorities should any information therein changed. The applicant thus had the obligation to report any change in his common law relationship status.

[25] While the general argument could be made that common law marriages can often be difficult to define or prove, this is patently not the case. Even if the applicant believed that his religious marriage was not a real marriage in the eyes of the Vietnamese and Canadian governments, he repeatedly stated that he viewed the marriage as valid, as per his Catholic faith. Indeed, the applicant and his wife supposedly underwent the religious ceremony in 2004 in order to save their families from the shame of an illegitimate child. Furthermore, when the applicant’s wife

applied for permanent residence in 2006, she indicated that she and the applicant had married in 2004, and had been living together since 2000. Given the facts in evidence, the applicant's relationship with his wife clearly qualifies as, at the very least, a common-law marriage. The applicant was thus obligated to report that his spousal or conjugal status had changed, which he did not do.

[26] For these reasons, the Tribunal's decision is thus reasonable and the Court has no grounds to interfere.

[27] The applicant has proposed the following question for certification:

> Does a marriage that does not satisfy the definition of marriage according to the IRPA constitute a material fact and a fact relating to a relevant matter, in the sense of inducing a misrepresentation?

[28] The test for certification is set out at paragraph 74(d) of the Act and section 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. The test states that a question may only be certified if it is a serious question of general importance which would be dispositive of an appeal (*Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365 at paragraph 11).

[29] This standard is not met in the present case.

[30] The first criterion is that the question transcends the particular fact context in which it has arisen. The question must lend itself to a generic approach leading to an answer of general

application (*Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, 357 N.R. 326 at paragraph 6). While the issue is one of significance, the obligation to disclose a marriage that does not satisfy the definition of marriage according to the Act is fact-specific.

[31] In view thereof, it is not necessary to decide whether the proposed question for certification satisfies the second criterion, which is that the question must be dispositive of an appeal. Moreover, even if it were necessary, the question as phrased is not consistent with the obligation to disclose all material facts relating to a relevant matter that induces or could induce an error in the administration of the Act, as per paragraph 40(1)(a) of the Act. The question as phrased is thus not dispositive of an appeal.

[32] For these reasons, the Court declines to certify the proposed question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed and no question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2367-10
STYLE OF CAUSE:	TAN DO MAI and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 2, 2010
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	January 28, 2011

APPEARANCES:

Jean-François Bertrand	FOR THE APPLICANT
Jocelyne Murphy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bertrand, Deslauriers Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Montréal, Québec	FOR THE RESPONDENT