

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20101014**

**Docket: A-48-10**

**Citation: 2010 FCA 267**

**CORAM: EVANS J.A.  
DAWSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**MAHMOUD PEIROVDINNABI**

**Respondent**

Heard at Toronto, Ontario, on October 12, 2010.

Judgment delivered at Toronto, Ontario, on October 14, 2010.

**REASONS FOR JUDGMENT BY:**

**EVANS J.A.**

**CONCURRED IN BY:**

**DAWSON J.A.  
STRATAS J.A.**



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**REASONS FOR JUDGMENT**

**EVANS J.A.**

**A. INTRODUCTION**

[1] This is an appeal by the Minister of Citizenship and Immigration from a decision of the Federal Court (2010 FC 64) in which Justice Campbell dismissed an application for judicial review by the Minister. The Minister had requested the Court to set aside a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Protection Board, dated April 15, 2009,

allowing an appeal by Mahmoud Peirovdinnabi against a removal order, dated May 10, 2007, issued by the Immigration Division of the Board (ID) following an admissibility hearing.

[2] The Court held that the IAD was correct both to conclude that Mr Peirovdinnabi had not made a misrepresentation when he stated on an immigration form that he was living with his spouse, and to decline to consider the genuineness of Mr Peirovdinnabi's marriage "because it was not in play in the IAD decision": para. 6.

[3] The Court certified the following question pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, paragraph 74(d) (IRPA):

Does the IAD have an obligation to determine the genuineness of a marriage on a *de novo* appeal brought with respect to an issue of misrepresentation when the issue of the genuineness of the marriage concerned was not specifically raised for determination in the appeal?

[4] In my opinion, the IAD was obliged to determine the genuineness of the marriage in this case because it was the misrepresentation alleged in the immigration officer's report under IRPA, subsection 44(1), and was closely related to the misrepresentation found by the ID and in issue in the IAD. That is, if the marriage was not genuine, Mr Peirovdinnabi was not living with his wife as his spouse and, as his counsel conceded, his statement on the form that he was living with his spouse constituted a misrepresentation.

[5] This conclusion is sufficient to dispose of the appeal. However, the Minister argued that the IAD's decision should also be set aside under paragraph 18.1(4)(d) of the *Federal Courts Act*,

R.S.C. 1985, c. F-7. The Minister submitted that the IAD based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it when it found that, regardless of the genuineness of his marriage, Mr Peirovdinnabi did not misrepresent or withhold material facts in stating on the form that he was living with his spouse.

[6] In view of my conclusion that the IAD wrongly declined jurisdiction when it failed to consider the genuineness of Mr Peirovdinnabi's marriage, I need not decide the second, factual issue raised by the Minister.

***B. FACTUAL BACKGROUND***

[7] Mr Peirovdinnabi is a national of Iran. In 1996, he made a refugee claim after he arrived in Canada. The claim was rejected, but he remained nonetheless. He seems to have come onto Immigration's radar in December 2001 when he was involved in a motor vehicle accident. He was arrested on December 12, 2001, and detained pending removal. However, he was released on a bond the next day, and married Khandan Jahansooz Shahi, a permanent resident of Canada, on January 6, 2002, in Toronto.

[8] Mr Peirovdinnabi testified that, after they married, he and Ms Shahi were together all the time that they were not working. However, he said, they retained their separate apartments and spent time in both, intending to find an apartment together later.

[9] Ms Shahi went to Iran on January 16, 2002, ten days after the wedding, and returned to Toronto in April or May of 2002. On her return, she told Mr Peirovdinnabi that their marriage was over.

[10] In December 2002, Mr Peirovdinnabi's application for permanent resident status on humanitarian and compassionate grounds was granted, even though Ms Shahi had advised immigration authorities in May 2002, after his application had received preliminary approval, that she was withdrawing her sponsorship because he had only married her to avoid removal. They were divorced in February 2004.

[11] In June 2005, Mr Peirovdinnabi applied to sponsor the admission to Canada of a woman whom he had married in Iran. This revived Immigration's interest in his immigration status. In February 2006, an immigration officer made a report under IRPA, subsection 44(1) to the effect that Mr Peirovdinnabi was inadmissible pursuant to IRPA, paragraph 40(1)(a) for making a misrepresentation of material facts which could have caused a mistaken decision to be made under the IRPA in his favour.

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation  
(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;

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :  
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 ;

The basis of the report was the officer's belief that Mr Peirovdinnabi's marriage was not genuine, since he had never intended to live with his first wife as her spouse, and had only married her in order to avoid removal and to gain permanent resident status in Canada.

[12] The Minister consequently requested an admissibility hearing by the ID pursuant to IRPA, subsection 44(2).

44. (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, ....

44. (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, ...

[13] The ID found that Mr Peirovdinnabi was inadmissible because he had made a material misrepresentation by answering "yes" to the question "Are you living with your spouse?" on the *Supplementary Information Spouse in Canada* form which he had completed on January 16, 2002, the day after Ms Shahi left for Iran. He had submitted the form to support his humanitarian and compassionate application to apply from within Canada for permanent resident status on the ground that he was married to a Canadian citizen or permanent resident.

[14] The basis of the ID's decision was that Mr Peirovdinnabi had failed to disclose that he and Ms Shahi were "living separately". This was a material misrepresentation which could have induced the immigration officer mistakenly to exempt him from the requirement that visas must be obtained prior to entry into Canada, and then to grant him permanent resident status. The ID stated that, while the Minister had raised serious questions about Mr Peirovdinnabi's intentions in marrying Ms Shahi, it was not necessary to determine if the marriage was genuine, since the ID had concluded

that, regardless of the genuineness of the marriage, he had made a misrepresentation respecting their living arrangements. The ID issued an exclusion order, which Mr Peirovdinnabi appealed to the IAD.

[15] The IAD allowed Mr Peirovdinnabi's appeal and cancelled the removal order, on the ground that the question, "Are you living with your spouse?", asks whether the applicant and his or her spouse are living together, as opposed to living separate and apart in the divorce law sense. The IAD found that Mr Peirovdinnabi had intended to live in Ms Shahi's apartment after their marriage and, at the time that he completed the form, he did not intend to withdraw from the marriage.

[16] Hence, the IAD concluded, Mr Peirovdinnabi had not breached IRPA, paragraph 40(1)(a) by answering that he was living with his spouse, even though they retained separate apartments and spent time in both. The IAD also stated that it would not consider the genuineness of the marriage because the ID had not found it necessary to do so.

### ***C. FEDERAL COURT'S DECISION***

[17] The Minister applied to the Federal Court for judicial review of the IAD's decision, alleging that the IAD had made two reviewable errors. First, it had erred by interpreting the question on the form as asking whether the applicant was living separate and apart from his spouse in the divorce law sense. The Court rejected this argument and found the IAD's view on the question to be "appropriate".



[18] Second, the IAD had erred by failing to consider the genuineness of the marriage. Since the jurisdiction of the IAD on appeal is *de novo* it is required to consider all aspects of the marriage. The Court disagreed and found that the only question decided by the ID, and the only question before the IAD on appeal, was whether Mr Peirovdinnabi had made a material misrepresentation: the genuineness of the marriage was “not in play in the IAD decision.”

[19] Consequently, the Judge dismissed the Minister’s application for judicial review and certified the question set out at paragraph 3 of these reasons.

***D. ISSUES AND ANALYSIS***

[20] The central question raised by this appeal is whether the IAD erred in law when it declined to consider the genuineness of Mr Peirovdinnabi’s marriage to Ms Shahi because the ID did not find it necessary to do so.

[21] The IAD regarded the issue before it on the appeal as whether the ID had erred when it found that Mr Peirovdinnabi had made a material misrepresentation in stating on the *Supplementary Information Spouse in Canada* form that he was living with his spouse. However, it is clear from the transcripts of the hearings before both the ID and the IAD that most of both the evidence and the submissions of counsel for the parties were directed to whether Mr Peirovdinnabi had entered into the marriage with Ms Shahi primarily to avoid removal and to enhance his prospects of being granted permanent resident status on humanitarian and compassionate grounds. The genuineness of

the marriage had also been the focus of the immigration officer's report under subsection 44(1) leading to the inadmissibility hearing before the ID for breach of paragraph 41(1)(a).

[22] The ID had not found it necessary to decide this question because it concluded that Mr Peirovdinnabi had made a misrepresentation respecting his living arrangements with Ms Shahi: contrary to his answer on the form, he did not live with her after the wedding. The basis of the ID's decision seems to have been that Mr Peirovdinnabi testified to this effect, because he and Ms Shahi did not live under one roof, but retained separate apartments.

[23] The IAD disagreed with this conclusion: provided that Mr Peirovdinnabi was not living apart from Ms Shahi because he regarded the marriage as over, the fact that they maintained different apartments, and spent time in both, did not mean that he was not living with her. The IAD declined to go on to consider the genuineness of the marriage because the ID had not found it necessary to do so. However, the ID had been able to conclude that Mr Peirovdinnabi had misrepresented his living arrangements without having to consider whether the marriage was genuine.

[24] In my opinion, when the IAD held that the removal order could not be supported on the basis that Mr Peirovdinnabi and Ms Shahi kept separate apartments, it was obliged to consider the underlying issue, namely the genuineness of the marriage. I note that counsel could not point to a provision of the IRPA, other than paragraph 40(1)(a), under which the genuineness of the marriage

could have been made the basis of a belief that Mr Peirovdinnabi, a permanent resident of Canada, was inadmissible.

[25] I agree with counsel for Mr Peirovdinnabi who advised the IAD at the hearing that the genuineness of the marriage was still relevant, even if the only question before the IAD on the *de novo* appeal was whether Mr Peirovdinnabi had made a material misrepresentation when he said on the *Supplementary Information Spouse in Canada* form that he was living with his wife. Thus, if the marriage was not genuine because Mr Peirovdinnabi had entered into it for immigration purposes, he was not living with Ms Shahi as his spouse, and his answer on the form constituted a misrepresentation.

[26] This is because the *Supplementary Information Spouse in Canada* form assumes that the applicant for permanent resident status from within Canada as a spouse is the *bona fide* spouse of a Canadian citizen or permanent resident. Hence, a person who applies for a benefit under the Act as a spouse makes a misrepresentation if his or her marriage is not *bona fide* in the sense that it was entered into for the purpose of obtaining an advantage under the Act. On the other hand, a finding that the marriage was genuine would not settle the misrepresentation issue.

[27] Again, I note that the genuineness of the marriage had been a central issue throughout the hearings before the ID and the IAD in the context of whether Mr Peirovdinnabi had made the misrepresentation alleged. Hence, it should have come as no surprise to Mr Peirovdinnabi if, as his counsel suggested to the IAD, the IAD were to determine whether the marriage was genuine.

[28] Counsel for Mr Peirovdinnabi submitted to this Court that the IAD must implicitly have concluded that the marriage was genuine because it found that Mr Peirovdinnabi had not withdrawn from the marriage when he stated on the form that he was living with his spouse. I do not agree.

[29] While this might seem a logical inference, it is not one that I can draw in the face of the IAD's reasons. First, the IAD stated expressly asserted in its reasons (at para. 36):

The Immigration Member did not find it necessary to consider the genuineness of the appellant's marriage. The panel will not accordingly consider the issue.

This is far too narrow a view of the *de novo* jurisdiction exercisable by the IAD on an appeal against a removal order. Second, the IAD's reasoning is directed throughout to the meaning of the question on the form, and whether Mr Peirovdinnabi and his wife were living together after the wedding. The reasons do not consider whether the marriage was genuine.

[30] Accordingly, since the IAD wrongly declined to exercise its jurisdiction to determine whether Mr Peirovdinnabi had entered into the marriage for immigration purposes, its decision must be set aside and the matter remitted for determination by another IAD Member.

#### ***E. CONCLUSIONS***

[31] Since the question certified by the Federal Court does not quite capture the issue as I have framed it, I would recast it slightly and answer as follows:

**Question:** Does the IAD have an obligation to determine the genuineness of a marriage on a *de novo* appeal from a removal order on the basis of a misrepresentation, when the genuineness of the marriage was the misrepresentation alleged in the subsection 44(1) report and was relevant to a determination by the IAD of whether the person concerned made the misrepresentation in issue before it?

**Answer:** Yes, provided that the person concerned had a fair opportunity before the IAD to address the genuineness of the marriage.

[32] For these reasons, I would allow the appeal, set aside the decision of the Federal Court, grant the Minister's application for judicial review, set aside the decision of the IAD, and remit the matter for redetermination by the IAD, differently constituted, in accordance with these reasons.

“John M. Evans”

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J.A.

“I agree  
Eleanor R. Dawson”

“I agree  
David Stratas”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-48-10

**AN APPEAL FROM THE JUDGMENT OF JUSTICE CAMPBELL, DATED JANUARY 21, 2010, IN FEDERAL COURT, FILE NO.: IMM-3333-09**

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION v.  
MAHMOUD PEIROVDINNABI

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 12, 2010

**REASONS FOR JUDGMENT:** EVANS J.A.

**CONCURRED IN BY:** DAWSON J.A.  
STRATAS J.A.

**DATED:** OCTOBER 14, 2010

**APPEARANCES:**

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