

**Date: 20080408**

**Docket: IMM-3112-07**

**Citation: 2008 FC 451**

**BETWEEN:**

**IMMACULÉE MUKAMUTARA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT**

**PHELAN J.**

**I. OVERVIEW**

[1] The decision challenged is a refusal by a Visa Officer (Officer) to grant an application for permanent residence to the Applicant's adopted daughters. The basis for the decision is that the Officer found the two girls to be untruthful about the date of their father's death, although only one had been interviewed. The effect of the decision is to keep the daughters away from their adoptive mother.

## II. BACKGROUND

[2] The Applicant is the adoptive mother of two girls, Vanessa (born 1989) and Sabrina (born 1991). The Applicant is a Rwandan national who was granted refugee status in October 2003. In March 2004, she sought permanent residence status for her two adopted daughters.

[3] The girls' birth mother -- the Applicant's sister -- died in 1995. The girls were then adopted in July 1996 by Ms. Mukamutara.

[4] After the permanent resident visa applications were filed in October 2005, the Officer interviewed Vanessa but not Sabrina.

[5] This case turns on the confusion surrounding the date of death of the girls' father. On the application it was listed as July 12, 1990. An undated death certificate was provided with the July 12, 1990 date of death filled in.

[6] Vanessa was interviewed and she clarified that her father died on August 2, 1992. A corrected and dated death certificate was provided to the Officer.

[7] Following the interview, the Applicant faxed the Officer a letter explaining the incorrect death certificate which she had received from Burundi where the father was said to have died. The

Applicant said that when she saw the number of errors in the death certificate she had received from Burundi, she obtained a certified copy of the death certificate which she provided to the Officer.

[8] The Applicant went on to explain that, when filling in the application, she had used the July 12, 1990 date of death from the erroneous certificate.

[9] The Officer concluded that she had been faced with three dates of death for the father. The Officer had a number of other concerns about the documents including the absence of the birth mother's death certificate. In the end, the Officer did not believe that the girls' father had died or at least not on the dates in issue, that they had lied on their application and concluded that neither of them fit within the class of persons who could be sponsored.

### III. ANALYSIS

#### A. *Standard of Review*

[10] Although the Applicant did not address the standard of review, the Respondent relied on case law to the effect that a visa officer's decision is highly discretionary and therefore the standard was patent unreasonableness. The standard has now been clarified in *Dunsmuir v. New Brunswick*, 2008 SCC 9, to be reasonableness applied by taking into account all the relevant circumstances. However, this judicial review includes issues of law and procedural fairness which are to be assessed on a correctness standard.

B. *Requirements of the Immigration and Refugee Protection Act*

[11] The Applicant argues that the Officer erred in law in deciding that the application should be denied because of the misrepresentations as to the father's death. The Applicant contends that s. 176 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, is mandatory and that a family class application must be issued so long as the application is filed within one year and the person is not otherwise inadmissible under s. 176(3) (e.g. serious criminality, etc.). Section 176 reads:

**176.** (1) An applicant may include in their application to remain in Canada as a permanent resident any of their family members.

(2) A family member who is included in an application to remain in Canada as a permanent resident and who is outside Canada at the time the application is made shall be issued a permanent resident visa if

(a) the family member makes an application outside Canada to an officer within one year after the day on which the applicant becomes a permanent resident; and

(b) the family member is not inadmissible on the grounds referred to in subsection (3).

**176.** (1) La demande de séjour au Canada à titre de résident permanent peut viser, outre le demandeur, tout membre de sa famille.

(2) Le membre de la famille d'un demandeur visé par la demande de séjour au Canada à titre de résident permanent de ce dernier et qui se trouve hors du Canada au moment où la demande est présentée obtient un visa de résident permanent si :

a) d'une part, il présente une demande à un agent qui se trouve hors du Canada dans un délai d'un an suivant le jour où le demandeur est devenu résident permanent;

b) d'autre part, il n'est pas interdit de territoire pour l'un des motifs visés au paragraphe (3).

<p>(3) A family member who is inadmissible on any of the grounds referred to in subsection 21(2) of the Act shall not be issued a permanent resident visa and shall not become a permanent resident.</p>	<p>(3) Le membre de la famille qui est interdit de territoire pour l'un des motifs visés au paragraphe 21(2) de la Loi ne peut obtenir de visa de résident permanent ou devenir résident permanent.</p>
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[12] The Applicant contends that even if there had been misrepresentation as to the father's date of death, even deliberate misrepresentation, the landing application must be granted because the conditions precedent of time and admissibility had been met.

[13] As a general proposition, I have serious doubts about such a categorical statement. Such an interpretation does violence to the obligations of truthfulness in the Act (s. 40):

<p><b>40. (1)</b> A permanent resident or a foreign national is inadmissible for misrepresentation</p> <p><i>(a)</i> 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;</p> <p><i>(b)</i> for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;</p>	<p><b>40. (1)</b> Emportent interdiction de territoire pour fausses déclarations les faits suivants :</p> <p><i>a)</i> 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;</p> <p><i>b)</i> être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;</p>
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(c) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or

c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;

(d) on ceasing to be a citizen under paragraph 10(1)(a) of the Citizenship Act, in the circumstances set out in subsection 10(2) of that Act.

d) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la Loi sur la citoyenneté dans le cas visé au paragraphe 10(2) de cette loi.

(2) The following provisions govern subsection (1):

(2) Les dispositions suivantes s'appliquent au paragraphe (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

a) l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

b) l'alinéa (1)b) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

[14] The issue of misrepresentation comes down to the materiality of the representation or withholding. The date of death in this case may have been material, particularly if it had any relevance to the validity of the adoption. However, there is insufficient clarity in the record to consider that the Officer was questioning the validity of the adoption on the basis that the father was not dead at the time of adoption. Rather, the issue that troubled the Officer was more related to the *timing* of death than the *fact* of death.

[15] Therefore, it is not possible to determine if there was some materiality to the misrepresentation other than that the Officer may have felt that persons who misrepresent in any circumstance should not be admitted to Canada.

[16] As such, the Officer erred in law in concluding that she had a discretion to refuse the application because of a misrepresentation, the materiality of which was never addressed. The Officer never directly challenged the validity of the adoption – a most material fact.

[17] There are other factual and procedural difficulties with the decision under review which affect the conclusion that there had been a misrepresentation.

### C. *Reasonableness of Decision*

[18] The Officer's conclusion that the daughters were untruthful rests principally on the confusion surrounding the father's death. The Officer concluded that three different dates of death had been advanced. This is actually incorrect. One document referred to August 29, 1992, but this

was readily acknowledged to be a typographical error which should have read August 2, 1992, a date which is listed in other documents.

[19] There were only two dates “in play” – July 12, 1990 and August 2, 1992. The Officer was provided with an explanation as to how the date of July 12, 1990 arose and that it was in error. The Officer obviously rejected that explanation but without indicating the reason for that conclusion.

[20] In that regard, the Court must conclude that the Officer either ignored relevant evidence or rejected the evidence without foundation or explanation. In either event, the decision is flawed.

[21] In addition to the Officer’s concern about the father’s death, the Officer expressed concern about the birth mother’s death – the fact that it had not been raised in the application and that it was unsupported by evidence. This finding is inconsistent with the evidence that the birth mother’s death certificate was in the application package.

[22] Under these circumstances and on the face of the record, the Officer’s concerns about truthfulness are unreasonable. Moreover, the conclusions were reached in a procedurally flawed manner.

#### D. *Procedural Fairness*

[23] The Officer concluded that both daughters were untruthful, in part on the basis of the interview with Vanessa. While Vanessa’s procedural rights may have been exercised in that she was



confronted by the issue of her father's date of death, Sabrina never had that opportunity, yet she was also found not to be credible.

[24] While interviews are not always required, generally where there are credibility issues, a person is entitled an opportunity to address the issues which may form a credibility finding in some meaningful way. There may be circumstances where an interview of the other person affected may not be required but that is not the case here.

[25] Sabrina was to suffer the same consequences and on the same basis as her sister, yet she had no opportunity to explain the situation. An interview could conceivably have made a difference. Her procedural rights were breached and she suffered a serious consequence.

#### IV. CONCLUSION

[26] For all these reasons, the Court concludes that this judicial review should be granted. The Court will not order that visas be granted, although on this record there is no material basis for a refusal. While this case will be referred back to a different visa officer to be processed expeditiously, absent new material facts, this Court expects that the permanent resident applications will be approved.

[27] Counsel both submitted proposed questions for certification. In light of these reasons, the Court will permit each party seven days from the date of the decision to make submissions on a

question. The parties will not be held to their initial submissions. After the expiry of the seven days, an Order will issue in due course.

Ottawa, Ontario  
April 8, 2008

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3112-07

**STYLE OF CAUSE:** IMMACULÉE MUKAMUTARA

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** March 18, 2008

**REASONS FOR JUDGMENT:** Phelan J.

**DATED:** April 8, 2008

**APPEARANCES:**

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