Federal Court  Cour fédérale

**Date: 20100331**

**Docket: IMM-4842-09**

**Citation: 2010 FC 353**

**Ottawa, Ontario, March 31, 2010**

**PRESENT: The Honourable Mr. Justice Mainville**

**BETWEEN:**

**SORIN IOAN SAVESCU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), by Sorin Ioan Savescu (the applicant), of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (the panel), dated May 19, 2009, and bearing the number MA7-04791.

[2] The panel dismissed the appeal of a decision of a visa officer who, pursuant to paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* (the Regulations), rejected the application for permanent residence filed by Claudia Ana Alina Savescu (the partner) on behalf of herself, the couple's twins, and her child from a previous marriage, on the ground that she and the children in question were not members of their sponsor's family class within the meaning of the Regulations because they had not been examined.

[3] The applicant is challenging this decision mainly on the ground that the panel disregarded the evidence and the fact that Romanian law does not recognize common-law relationships and assigned paternity of the couple's twins to his partner's former husband.

[4] The application for judicial review will be dismissed for the reasons set out below, which can be summarized as follows.

[5] The immigration regime applicable to the family class is subject to the express condition that the sponsor provide truthful and accurate statements in his or her application for permanent residence, thereby allowing Canadian authorities to examine in advance, by way of a decision with regard to this application, all of the people who are likely to be members of the family class in the event that the prospective sponsor is granted permanent residence. A foreign national who has not been examined is thereby excluded from the family class of the sponsor, regardless of the reasons for the sponsor's incorrect statement.

[6] In this case, the applicant had lived in a common-law relationship with his partner, which he chose not to declare to the Canadian authorities. He also knew that he was the biological father of the twin girls, and he chose not to declare those children either.

[7] The fact that Romanian law does not recognize common-law relationships or that it assigned paternity of the twins to the partner's former husband does nothing to alter the definitions of common-law partner and dependent child set out in the Regulations, which refer to all common-law partners and all biological children, regardless of their status in the domestic law of their country of residence. It should be further noted that, in this case, the applicant was fully aware that, prior to his being granted permanent residence by the Canadian authorities, a judgment denying paternity of the twins had been handed down in favour of his partner's former husband in Romania.

**Background**

[8] The applicant is from Romania and submitted an application for permanent residence in Canada on May 16, 2005. He became a permanent resident on March 11, 2006. In his application for permanent residence, he declared that he had never been married and that he had never lived in a common-law relationship. He listed no family members in the section of the form provided for that purpose. He did not inform the Canadian authorities of any change in these circumstances prior to obtaining permanent residence. On May 20, 2006, only a few days after the applicant was granted permanent residence, his partner submitted her own application for permanent residence for herself and her three children as members of the family class of the applicant.

[9] According to the partner's application for permanent residence, after having dated for awhile, she and the applicant had [TRANSLATION] ''moved in together (the sponsor, my son and myself)'' at the end of 2004.

[10] On November 8, 2005, twin girls were born of this union. On December 18, 2005, the couple became engaged and got married in Romania on April 15, 2006.

[11] The application for permanent residence by the partner and her three children was rejected by the visa officer pursuant to paragraph 117(9)(*d*) of the Regulations referred to below.

**Panel's decision**

[12] In a brief decision delivered orally and subsequently transcribed, the panel found that the partner and the applicant had been living together since 2004, and that the twins were born of their union in November 2005. The panel also found that the applicant failed to declare his partner and children both in his application for permanent residence and upon his arrival in Canada as a permanent resident. Given that paragraph 117(9)(*d*) of the Regulations is clear, the panel dismissed the appeal.

[13] As for the applicant's claims that common-law relationships are not recognized in Romania and that the twins' paternity had been assigned to his partner's former husband under Romanian law, the panel stated that the applicable definitions of common-law partner and dependent child are those found in Canadian law and not those found in Romanian law.

**Parties' positions**

[14] The applicant noted that the residence he declared in May 2005 in his application for permanent residence in Canada was not that of his partner. He states that he had been ''seeing'' his partner at her home, but that they had not lived together. This is why he did not declare that he had a common-law partner when he arrived in Canada in 2006. It was only after he came to Canada that he married his partner in order to sponsor her. Therefore, she would not be excluded under paragraph 117(9)(*d*) of the Regulations, since they had not lived together for one year.

[15] The applicant did not declare the twins because they were, according to his claims, considered as having been adopted by a person other than himself or his common-law partner, thereby excluding them from the definition of dependent children set out in the Regulations. In fact, his partner had left her former husband long before but had only divorced him shortly before the birth of the twins. This is why Romanian law assigned the twins' paternity to the former husband, and why they had been registered in the official registry under the name of the partner's former husband rather than under the applicant's name.

[16] A Romanian court did finally recognize that the partner's former husband was not the father of the twins, but this judgment was only made final on March 2, 2006, a mere nine days before the applicant became a permanent resident in Canada. The applicant submits that it takes at least 10 days for a judgment to be sent by mail, which means that he had not been aware of the decision when he arrived in Canada.

[17] The Minister is of the view that this judicial review procedure is inadmissible due to the fact that the applicant submitted his application for leave under section 72 of the Act after the deadline. Given that the motions judge did not grant an extension of time when he allowed the application for leave, it is now incumbent on this Court to declare the proceeding inadmissible.

[18] With regard to the questions raised by the applicant, the Minister notes that the evidence in the record shows that the applicant and his partner had been living together since 2004 and were therefore common-law partners within the meaning of the Regulations. As for the twins, the Minister is of the view that the evidence shows that the applicant knew he was their biological father from the day they were born. Furthermore, on February 1, 2006, a Romanian court ruled on a motion denying paternity brought by the former husband of the applicant's partner. The applicant was aware of the substance of this judgment when he arrived in Canada. In this case, the provisions of paragraph 117(9)(*d*) of the Regulations apply.

**Applicable standard of review**

[19] This case essentially raises questions of fact and questions of mixed fact and law that are reviewable on a standard of reasonableness according to the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Moreover, neither the applicant nor the Minister are challenging the application of the standard of reasonableness.

**Analysis**

[20] In view of the abundant evidence in the record concerning the cohabitation of the applicant and his partner since 2004, the panel's decision finding that they were common-law partners for the purposes of paragraph 117(9)(*d*) of the Regulations was reasonable.

[21] I note, among other things, that on his sponsorship form, the applicant put down the same address for that time period as the one declared by his partner in her application for permanent residence. The applicant's statement that it was a simple error is simply not credible. In fact, the judgment of the Romanian court, dated February 1, 2006, which the applicant submitted in support of his claims, indicates that the applicant and his partner both testified that they had been cohabiting for several years. Lastly, the written statements by the partner in support of her application for permanent residence indicated that she and the applicant had been living together since 2004.

[22] In these circumstances, the applicant and his partner had been common-law partners within the meaning of the Regulations since 2004. The definition of the expression ''common-law partner'' reads as follows:

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| **1.** (1) The definitions in this subsection apply in the Act and in these Regulations. | **1.** (1) Les définitions qui suivent s'appliquent à la Loi et au présent règlement. |
| "common-law partner" means, in relation to a person, an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year. | « conjoint de fait » Personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. |

[23] The applicant and his partner had been living with each other for several years and had even had children together. Given these circumstances, there is no doubt that they were common-law partners within the meaning of the Regulations. Romanian law matters little in this respect. In fact, the definition of common-law partner is not variable according to any applicable foreign legislative framework. The recognition or non-recognition of common-law relationships by a foreign jurisdiction has no bearing on the implementation of the Regulations.

[24] As far as the twin girls are concerned, the relevant excerpt of the definition of a dependent child set out in the Regulations reads as follows:

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| **2.** The definitions in this section apply in these Regulations. | **2.** Les définitions qui suivent s'appliquent au présent règlement. |
| "dependent child", in respect of a parent, means a child who | « enfant à charge » L'enfant qui : |
| (*a*) has one of the following relationships with the parent, namely,<br>(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or<br>(ii) is the adopted child of the parent; | *a*) d'une part, par rapport à l'un ou l'autre de ses parents:<br>(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,<br>(ii) soit en est l'enfant adoptif; |

[25] It is not in dispute that the twin girls are the biological children of the applicant. However, given that Romanian law had assigned paternity of the twins to his partner's former husband, the applicant was of the view that the twins did not fall under this definition. The paternity assigned to

the former husband under Romanian law would have constituted a form of adoption of the twins, thereby excluding them from the definition of dependent children of the applicant. I do not accept this interpretation.

[26] The definition of dependent child set out in the Regulations is not ambiguous and makes no reference to the concepts of presumed paternity or assigned paternity that may exist in various laws either in Canada or outside Canada. The definition relates to only two situations: a biological child and an adopted child. Presumptions of paternity or assigned paternity are not taken into account in this definition. Therefore, it matters little whether the child's filiation is legally recognized under a foreign jurisdiction's law; the child will be considered to be a member of the family class of the permanent resident within the meaning of the Regulations if it is established that the child is in fact the biological child of that permanent resident.

[27] Parliament has chosen to give preference to biological filiation rather than legal filiation. It is a choice this Court must respect, even if it may lead to unfortunate results in some cases: see *M.A.O. v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1406, [2003] F.C.J. No. 1799, at paragraphs 68 to 75. As we will see, subsection 25(1) of the Act authorizes the Minister to intervene on humanitarian and compassionate grounds when the implementation of the Regulations would lead to unjust results.

[28] I also note that, in this case, the applicant knew before his arrival in Canada that his partner's former husband's paternity had been nullified by a Romanian court. In fact, on February 1,

2006, a Romanian court heard an action brought by the applicant's partner's former husband denying paternity. The applicant and his partner both gave testimony at the hearing, and the court indicated in its written judgment that the denial of paternity was delivered from the bench and in open court. Of course, this decision only became final on March 2, 2006, namely, on the last day allowed for filing an appeal. However, given that the appellant could have been none other than his partner, the applicant knew full well as of February 1, 2006, that a decision denying the paternity of his partner's former husband had been rendered.

[29] In these circumstances, paragraph 117(9)(*d*) of the Regulations applies. The relevant regulatory provisions are as follows:

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| **117.** (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if | **117.** (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes : |
| (*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined. | *d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle. |
| (10) Subject to subsection (11), paragraph (9)(*d*) does not apply in respect of a foreign national referred to in that paragraph who was not examined because | (10) Sous réserve du paragraphe (11), l'alinéa (9)*d*) ne s'applique pas à l'étranger qui y est visé et qui n'a pas fait l'objet d'un contrôle parce |

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| an officer determined that they were not required by the Act or the former Act, as applicable, to be examined. | qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas. |

[30] These provisions have been the subject of numerous judicial decisions, namely, *Azizi v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406, [2006] 3 F.C.R. 118; *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655; *dela Fuente v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186, [2007] 1 F.C.R. 387; *Hong Mei Chen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 678; *Akhter v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 481; *Adjani v. Canada (Citizenship and Immigration)*, 2008 FC 32; and the most recent decision, *Nguyen v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 133.

[31] The case law is unanimous. An incorrect statement that leads to a foreign national not being examined excludes that foreign national from being considered as a member of the family class eligible for sponsorship, regardless of the reasons for the incorrect statement. Therefore, whether the incorrect statement was made in good faith or whether it resulted from exceptional circumstances, the exclusion of the foreign national from the family class of the sponsor will be maintained.

[32] In exceptional cases or where it is justified by humanitarian and compassionate considerations, the Minister may mitigate the legislative and regulatory rigours with regard to incorrect statements on the basis of subsection 25(1) of the Act, which reads as follows:

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| **25.** (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations**.** | **25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient. |

[33] Parliament's intent is clear. The immigration regime applicable to the family class is subject to the express condition that the sponsor provide truthful and accurate statements in his or her application for permanent residence. This allows the Canadian authorities to examine, prior to a decision with regard to the application, all of the people who are likely to be members of the family class in the event that permanent residence is granted. A foreign national who has not been examined is thereby excluded from the family class of the sponsor, regardless of the reasons for the sponsor's incorrect statement. However, the Minister may mitigate the effects of incorrect statements in cases where such mitigation is justified by humanitarian and compassionate

considerations under subsection 25(1) of the Act. This approach is designed to protect the integrity of the Canadian immigration system.

[34] The efficiency of the Canadian immigration system depends in large part on the applicants' good faith and on the truthfulness and completeness of the information they provide. It is for the Minister, and not the courts, to decide if, under subsection 25(1) of the Act, humanitarian and compassionate considerations warrant special dispensation in cases involving statements that are incorrect, incomplete or made in bad faith.

[35] Given my finding with regard to the merits of this case, there is no need for the issue of the extension of time to be addressed.

[36] The parties have raised no questions pursuant to paragraph 74(*d*) of the Act, and no question will be certified.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES** that the application for judicial review is dismissed.

''Robert M. Mainville''
Judge

Certified true translation

Sebastian Desbarats, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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