Federal Court Cour fédérale

Date: 20100409

Docket: IMM-3432-09

Citation: 2010 FC 378

Ottawa, Ontario, April 9, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

PRITPAL SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] What is truth? Depending on the answer to this philosophical question, Mr. Singh may be able to remain in Canada, his home for the past 17 years. He was recently found to be inadmissible for misrepresenting or withholding a material fact when he immigrated to Canada in 1993. At that time he did not disclose that he had fathered a child who remained in India. His defence is that he did not know he had fathered a child. Paternity has now been scientifically established by DNA

tests. As a result, the Immigration Division of the Immigration and Refugee Board of Canada issued an exclusion order and he was ordered removed from Canada. His appeal to the Immigration Appeal Division was dismissed. This is a judicial review of that decision.

[2] Mr. Singh arrived in Canada in 1993 as the accompanying dependent of his parents who had been sponsored by another sibling. At the time, unmarried children of any age were permitted to be accompanying dependents. He acquired permanent residence that day, but has not taken out Canadian citizenship.

[3] He did not disclose that he had a five-year old daughter, Shilpa, the issue of a long standing affair he had with a married woman. Some years later, after the woman divorced, he returned to India, married her, and adopted her daughter.

[4] He then attempted to sponsor them. Suspicions were aroused. A DNA test established that Shilpa was his biological daughter. His sponsorship was unsuccessful and so his wife and daughter remain in India.

[5] An officer then invoked Section 44(1)(a) of the *Immigration and Refugee Protection* Act and prepared a report opining that Mr. Singh was inadmissible on the basis that:

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	*a*) directement ou

misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	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;

[6] At the subsequent hearing, Mr. Singh took the position that he was not aware that he was the biological father of his adopted daughter until the DNA tests were conducted in 2000. The Minister submitted that he had actual knowledge that he was the father, but that even if he did not, the facts were objectively misrepresented. It is beyond doubt that the existence of a child is a material fact that related to a most relevant matter, the admissibility of them both.

[7] It is beyond dispute that a material fact was not disclosed, a fact relating to a relevant matter which could or did induce an error in the administration of IRPA. Certainly avenues of inquiry were closed.

[8] The Member of the Immigration Division who issued the exclusion order did so on the basis that a material fact was misrepresented or withheld. She did not consider it necessary to decide whether Mr. Singh knew, or should have known, that he had fathered a child. In accordance with Section 2 of the *Immigration and Refugee Protection Regulations* (which, in this respect, is identical to those in force at the time Mr. Singh came to Canada), Shilpa is Mr. Singh's dependent child as she is his biological child and has not been adopted by someone else.

[9] Mr. Singh appealed to the Immigration Appeal Division which, under Section 62 and following of IRPA, was entitled to take humanitarian and compassionate considerations into account. The appeal was *de novo*.

[10] Although the ID member, who rendered the decision in first instance, did not consider whether or not Mr. Singh's statement that he did not know he had fathered a child until the DNA test was credible, the Immigration Appeal Division Member did consider credibility. The evidence was that Mr. Singh and the mother of his daughter enjoyed a lengthy sexual relationship in the 1980s while her husband was employed outside India. He stated:

> The Panel did not find credible the appellant's and the applicant's testimony that they had no suspicions or reason to believe that the appellant might be the father of Shilpa, despite the extent of their lengthy sexual relationship.

This finding was not unreasonable.

[11] The Panel then considered the humanitarian and compassionate aspects of Mr. Singh's situation. He had worked as a truck driver in India, and in countries outside India, before immigrating here. Perhaps the inference is that Mr. Singh would have no difficulty finding employment in India. However no analysis was done in that regard taking into account job prospects in India and that Mr. Singh is 55 years of age. Mr. Singh has siblings in both Canada and India. His parents are dead. The Panel concluded that there were insufficient humanitarian and compassionate considerations to warrant the granting of special relief and concluded:

> Family reunification and the best interests of a child would be best served by reuniting the appellant, his wife and daughter in Canada. However, the applicant's sponsorship of his wife was refused and the

> appeal to the IAD dismissed. Given this reality, the best option of reuniting this family in one place is for the appellant to return to India to live with his wife and daughter in his ancestral home in his village.

ISSUES

[12] There are two issues in this judicial review. The first is whether Mr. Singh misrepresented or withheld material facts. The meaning of misrepresentation or withheld as set out in Section 40 of IRPA is a question of law. No deference is owed to the Panel below. However, the findings of fact in Mr. Singh's case, and the application of the law to those findings, are reviewed on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[13] The second issue is whether the Panel's determination with respect to humanitarian and compassionate considerations was reasonable.

WAS THERE A MISREPRESENTATION OR WITHHOLDING OF FACTS?

[14] Mr. Singh's submission is that he could not have misrepresented or withheld facts within the meaning of Section 40 of IRPA, or its predecessor, since subjectively he had no knowledge at the time that he was Shilpa's biological father. The Minister's position is that it does not matter what Mr. Singh knew or did not know. It is a scientifically proven fact that he is Shilpa's biological father, and that is the end of the matter.

[15] The Minister's counsel contrasted Section 40 with Section 127(a) of IRPA which provides:

127. No person shall knowingly	127. Commet une infraction quiconque sciemment :
(*a*) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	*a*) fait des présentations erronées sur un fait important quant à un objet pertinent ou une réticence sur ce fait, et de ce fait entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[16] Given that the word "knowingly" does not appear in Section 40, it follows, the submission goes, that knowledge is not a prerequisite to a finding of misrepresenting or withholding material facts. Undoubtedly, the existence of a child is a material fact.

[17] I do not find this comparison helpful. Section 127 is in the "General Offences" section of IRPA. A misrepresentation could lead to imprisonment for a term of up to five years. If the word "knowingly" had not been employed, Parliament ran the risk of establishing an absolute liability offence, without the need for *mens rea*, and might have run afoul of the constitutional prohibition on imprisonment for absolute liability offences (see, e.g., *R. v. Sault Ste-Marie*, [1978] 2 S.C.R. 1299 and *R. v. Raham*, 2010 ONCA 206).

[18] In this case the alleged misrepresentation was a misstatement of fact. Such misrepresentations may be fraudulent, negligent or innocent. A leading case in the tort context is *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*, [1964] A.C. 465, [1963] 2 All ER 575 (H.L.).

[19] The Panel found that Mr. Singh was not credible. Even if he did not actually know he was Shilpa's father, the circumstances, i.e. his long sexual relationship with Shilpa's mother, while her husband was out of India, should, at the very least, have put him on inquiry. He had a duty of candour which required him to disclose, upon his arrival in Canada in 1993, the strong possibility that he had fathered a child.

[20] In my opinion, the meaning of Section 40(1)(a) of IRPA was clearly explained by Mr. Justice O'Reilly in *Baro v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299, where he stated at para. 15:

> Under s. 40(1)(*a*) of IRPA, a person is inadmissible to Canada if he or she "withholds material facts relating to a relevant matter that induces or could induce an error in the administration" of the Act. In general terms, an applicant for permanent residence has a "duty of candour" which requires disclosure of material facts. This duty extends to variations in his or her personal circumstances, including a change of marital status: *Mohammed* v. *Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 299 (F.C.T.D.) (QL). Even an innocent failure to provide material information can result in a finding of inadmissibility; for example, an applicant who fails to include all of her children in her application may be inadmissible: *Bickin v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No.1495 (F.C.T.D.) (QL). An exception arises where applicants can show that they honestly and reasonably believed that they were not withholding material information: *Medel* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 345, [1990] F.C.J. No. 318 (F.C.A.) (QL).
>
> [My emphasis.]

[21] Mr. Justice Russell applied the same reasoning in *Boden v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 848.

[22] The Panel's assessment of the facts was not unreasonable and so it follows that Mr. Singh, a permanent resident, is inadmissible for misrepresentation.

HUMANITARIAN AND COMPASSIONATE CONSIDERATIONS

[23] One of the objectives of IRPA, as set out in Section 3, is "…to see that families are reunited in Canada," not to remove someone against his will so that he may be reunited with his wife and daughter in India.

[24] The Panel noted that Mr. Singh has been here for many years, and has been gainfully employed. However, it made no assessment of the job prospects of a 55-year old man in India, taking into account his obligation to support his wife and child. How the Singhs manage their affairs is their business. It would appear that they would prefer that Mr. Singh work in Canada. There is nothing preventing him from visiting his wife and daughter in India on a regular basis. Perhaps after he has saved more money, he will return to and retire in India. It was not for the Panel to say that they would be better off if reunited in India now. This smacks of big brotherhood.

[25] I find this aspect of the decision unreasonable.

CERTIFIED QUESTION

[26] During the hearing I suggested that this was a case which might well justify certifying a serious question of general importance which would support an appeal to the Federal Court of Appeal. Mr. Singh has suggested that a question might be framed as to whether a permanent

resident is inadmissible for indirectly misrepresenting a material fact if he had no knowledge of that fact.

[27] The Minister saw no need for a question to be certified, but, in the alternative, suggested a question which was better framed than the one submitted by Mr. Singh. That question is:

> Is a permanent resident inadmissible for indirectly misrepresenting a material fact if at the time of filing his/her application for permanent residence or at the time of granting permanent residence he/she had no knowledge of the material fact that constituted such misrepresentation?

[28] The word "indirectly" is misleading. When one compares the old Act with the new one, it is clear that an "indirect misrepresentation" is a representation by someone else. In this case, the misrepresentation was Mr. Singh's own.

[29] In *Wang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, 47 Imm. L.R. (3d) 299, Mr. Justice O'Keefe certified the following question:

> Under s. 40(1)(a) of the *Immigration and Refugee Protection Act*, which reads:
>
> 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 . . .
>
> is a permanent resident inadmissible for indirectly misrepresenting a material fact if they are landed as the dependant of a principal applicant who misrepresented material facts on his application for landing?

[30] The Court of Appeal, in a decision reported at 2006 FCA 345, 56 Imm. L.R. (3d) 176, did not find it necessary to answer the question having come to the view that Ms. Wang had made a direct misrepresentation.

[31] However, a certified question as to the proper meaning of Section 40(1)(a) of IRPA is inappropriate in this case, as it cannot support a successful appeal, given that the decision of the Immigration Appeal Division was set aside on other grounds.

COSTS

[32] Mr. Singh's submission that he is entitled to costs is misplaced. Section 22 of the *Federal Courts Immigration and Refugee Protections Rules* provides:

> 22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

There are no special reasons in this case. Mr. Singh focused on the meaning of Section 40(1)(a) of IRPA, while the decision was set aside on the basis that the humanitarian and compassionate analysis carried out by the Immigration Appeal Division was unreasonable.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The decision of the Immigration Appeal Division of the Immigration and Refugee Board dismissing the applicant's appeal against the exclusion order is set aside.
2. The matter is referred back to a differently constituted Panel for reconsideration;
3. There is no serious question of general importance to certify.
4. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jaswant Singh Mangat	FOR THE APPLICANT
Nadine Silverman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mangat Law Professional Corporation Barristers & Solicitors Brampton, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT