Federal Court  Cour fédérale

Date: 20120612

Docket: IMM-6326-11

Citation: 2012 FC 730

Ottawa, Ontario, June 12, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

FLORENDO CESAR TAN GATUE
VILMA TAN GATUE
CZARINA JOY TAN GATUE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision rendered by the Immigration Division of the Immigration and Refugee Board (the Board) dated August 25, 2011, wherein the Board determined that the applicants were not admissible to Canada pursuant to paragraph 40(1)(*a*) of the Act.

Factual Background

[2] The applicants, Mr. Florendo Cesar Gatue (the father), Mrs. Vilma Tan Gatue (the mother) and Ms. Czarina Joy Tan Gatue (the daughter), are all citizens of the Philippines.

[3] The applicants were sponsored for permanent residency in Canada by their daughter and sister (respectively), Ms. Christine De Lima. The applicants signed their applications for permanent residence on April 4, 2008 or June 16, 2008.

[4] The daughter gave birth to her first child on October 16, 2008.

[5] On January 19, 2010, the daughter signed a declaration in support of her application for permanent residence which required her to immediately inform the Canadian visa post of any changes in the information or the answers provided in her application.

[6] The father and mother were issued visas on August 29, 2010, by the Canadian visa post in Manila, Philippines.

[7] The daughter subsequently gave birth to her second child on September 24, 2010. The daughter was issued her visa on October 8, 2010.

[8] The applicants arrived in Vancouver on January 14, 2011, in possession of their confirmations of permanent residence and permanent resident visas. A report was issued under subsection 44(1) of the Act, dated the same day as their arrival, which stated that the applicants had

directly or indirectly misrepresented or withheld material information by failing to disclose dependents not included in the application for permanent residence. As a result, the report concluded that an avenue of investigation had been foreclosed by the applicants' misrepresentation.

[9] On February 26, 2011, a request for an Admissibility Hearing was made pursuant to subsection 44(2) of the Act in order to determine if the applicants were persons described in paragraph 40(1)(*a*) of the Act.

[10] The applicants' Admissibility Hearing before the Board took place on May 16, 2011.

Decision under Review

[11] The Board concluded that the applicants were persons described in paragraph 40(1)(*a*) of the Act due to the fact that they had misrepresented material facts relating to a relevant matter by failing to disclose the daughter's two minor children on their application for permanent residence.

[12] The Board found that the father's testimony revealed that he had never personally disclosed the birth of his grandchildren. The father claimed that he did not know that he was required to do so. The Board also noted that the mother testified that the daughter had completed a form when she attended the medical examination in the Philippines in 2008 which indicated that she had given birth to a child. The Board also noted that the daughter acknowledged that she had not disclosed her children on her application for permanent residence as it had been submitted before she had children. Although the daughter claimed to have notified the Visa office that she had one child when she completed the required medical forms in 2008, the Board outlined that she acknowledged that

she never made any attempt to disclose her second child to immigration authorities prior to her arrival in Canada.

[13] While the Board noted that it found the applicants to be generally credible, the Board observed that they had not produced any documentary evidence to establish the existence and contents of the form completed by the daughter in 2008. The Board noted that the applicants had testified that they were unable to obtain the missing form. Though the applicants alleged that they had informed the medical examination doctor of the birth of the daughter's first child, the Board was not satisfied that this constituted disclosure of this information to immigration officials. However, the Board noted that even if it had accepted that the daughter had disclosed her first child, the Board found that it was indisputable that she had failed to disclose her second child prior to receiving her permanent residence visa and arriving in Canada. Though the daughter explained that she did not know that she had to disclose this information, the Board affirmed that this requirement was clearly outlined in the application.

[14] The Board also observed that the CIC Medical Report in the file indicated that the daughter had given "vaginal delivery 2008" (Tribunal Record, p 69). However, the Board concluded that this was not sufficient to establish that she had a dependent child in her care. The Board affirmed that the child in question could have died or been adopted and thus this document did not constitute sufficient disclosure of her first child.

[15] The Board held that "by not being forthcoming with immigration officials regarding the birth of her children, she closed off an avenue of investigation that may or may not have affected

her application"… "…this failure to disclose was a material fact as it relates to the analysis that must be undertaken with respect to the definition of "family" under the family class" (Board's reasons, para 23). The Board observed that the mother and the father had not been explicitly asked to disclose the existence of grandchildren, however, the Board declared that they were captured in the inadmissibility as they were subject to the same requirements of duty and candour to disclose information changes for persons included in the application. Thus, the Board held that they had become "complicit in the misrepresentation that occurred" (Board's reasons, para 24).

Issues

[16] The issue raised in this case is the following:

> Did the Board err in its conclusion that the applicants were excluded from Canada on the basis of a misrepresentation in breach of section 40 of the Act?

Statutory Provision

[17] The following provision of the *Immigration and Refugee Protection Act* is applicable in these proceedings:

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

(*b*) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	*b*) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(*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.

Standard of Review

[18] The applicable case law has established that an assessment of a misrepresentation decision under section 40 of the Act involves questions of mixed fact and law, which are reviewable according to the standard of reasonableness (*Berlin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1117 at para 10, [2011] FCJ No 1372 [*Berlin*]; *Ghasemzadeh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 716 at para 18, 372 FTR 247). The Court is in agreement with the respondent in that the credibility findings made by the Board are also reviewable according to the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 4, 59, [2009] 1 SCR 339).

Analysis

[19] In the present case, the applicants take issue with the Board's credibility findings and its treatment of the evidence, specifically a CIC Medical Report. As well, the applicants argue that

there was no evidence to demonstrate that they had deliberately misrepresented. The applicants submit that the Board also failed to conduct a *mens rea* analysis.

[20] After consideration of the Board's decision, the documentary evidence and the applicants' testimony, the Court cannot agree with the applicants' arguments. Rather, the Court concludes as to the reasonableness of the Board's findings in light of the facts of the case and the principles of the applicable jurisprudence. It was reasonable for the Board to conclude that the misrepresentations of the applicants in the present case could not be viewed as innocent or inadvertent.

[21] With respect to the first child born in 2008, the applicants argued that the Board erred in its analysis of the CIC Medical Report. The applicants state that the CIC Medical Report did disclose the fact that the daughter had given birth to a child in 2008. The applicants maintain that the Report clearly shows that the Visa office received it on February 11, 2010, and therefore the Officer had to know that the daughter had given birth before it issued the permanent resident visas to the applicants. On that basis, the applicants advance that the "door was open to them to investigate: it was open to them to ask if the child was still living and was the child still with her". However, and despite the arguments by the applicants, the Court recalls that the onus was on the daughter to advise the Minister of the fact that she had two children which she failed to do in this case.

[22] The applicants also argue that the daughter disclosed the fact that she had two children by informing the Port of Entry Officer at the airport in Vancouver. Thus, the applicants state that both disclosures occurred during the processing of the permanent residency application, not after.

[23] While the Court is assessing without deciding and is prepared to admit that there can be ambiguity over whether the daughter had disclosed the birth of her first child during her medical examination on the face of the Medical Report (Tribunal Record, pp 68 and 69), the Court finds that it is uncontested that the daughter had never reported the birth of her second child (September 24, 2010) prior to arriving in Canada, more precisely in Vancouver (January 14, 2011). The Court also rejects the applicants' argument that the daughter needed not to report the second child and that the declaration of this second child at the Port of Entry (POE) sufficed in and of itself. The Court cannot accept the applicants' reasoning and logic whereby a declaration could always be made at the POE. To the contrary, the applicants were required to disclose such information as per the undertaking that they signed in their application form and the immigration system relied on their "duty of candour". The Officer cannot be expected to guess and investigate the applicants' situations on the basis of the information contained in a Medical Report (Tribunal Record, p 69) as argued by the applicants. It was incumbent upon the applicants to reveal material and relevant facts and the existence of two children can undoubtedly be qualified as such. There is nothing on the face of the record that would allow the Court to conclude that the failure to disclose was innocent or inadvertent.

[24] The Board's comments at para 21 of its decision are relevant in that regard:

> On this very same Declaration clearly states "This declaration covers the information I have provided on this forma and all the information submitted in my application for permanent residence as well as in the attached schedules and accompanying documents". It also states, "I will immediately inform the Canadian visa office where I submitted my application if any of the information or the answers provided in my application forms change". Therefore, by signing this application, Ms. Tan Gatue declared recognition that all information provided to immigration officials that formed part of the immigration application, including the "Additional Family Information" form that was completed in June 2008 and specifically asked about children in

> "Section B" was part of the immigration record. By signing the "Declaration", she also acknowledged her responsibility to advise immigration officials immediately of any changes to her answers."
>
> (Emphasis added)
> (Footnotes omitted).

[25] As such, the Court is of the view that the fact that the daughter disclosed the existence of her two children upon arrival in Vancouver does not amount to proper disclosure (*Haque v Canada (Minister of Citizenship and Immigration)*, 2011 FC 315, [2011] FCJ No 394 [*Haque*]; *Cabrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 709, [2010] FCJ No 864 [*Cabrera*]; *Uppal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 445, [2009] FCJ No 557 [*Uppal*]; *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512, [2008] FCJ No 648 [*Khan*]). In the circumstances, the Court is of the opinion that it was reasonable for the Board to conclude that the daughter had not been forthcoming with immigration officials.

[26] The Court notes that a similar situation was presented in the case of *Mai v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 101, [2011] FCJ No 127, cited by the Board in its reasons, where the applicant in question did not report his marriage or the birth of his child to immigration authorities during the processing of his application or after his arrival in Canada. The applicant argued that his misrepresentations were not deliberate or intentional and that he honestly believed that he was not required to report the changes in question. However, the Board rejected the applicant's arguments and concluded that the applicant had made misrepresentations in the sense of paragraph 40(1)(*a*) of the Act. Justice Martineau concluded as to the reasonableness of the Board's decision.

[27] Furthermore, in the case of *Haque*, above, the principal applicant was found to be inadmissible to Canada under paragraph 40(1)(*a*) of the Act for having omitted and misrepresented certain facts in his application for permanent residence pertaining to his prior studies, residency and work history. Though the applicants argued that the misrepresentations were not intentional, Justice Mosley dismissed the application for judicial review and made the following comments which apply *mutatis mutandis* in the case at bar:

> [13] Reading sections 40 and 16 of the IRPA together, I agree with the respondent that foreign nationals seeking to enter Canada have a "duty of candour" which requires disclosure of material facts: *Bodine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 848, 331 F.T.R. 200 at paras. 41-42; *Baro v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para. 15. Indeed, the Canadian immigration system relies on the fact that all persons applying under the *Act* will provide truthful and complete information: *Cao v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 450, 367 F.T.R. 153 at para. 28. Mr. Haque's omission concerning his year-long study period in the United States, discrepancies in home addresses and work history are material and relevant facts needed in order to properly assess admissibility.
>
> [14] Section 3 of the IRPA points to a number of immigration objectives that should be kept in mind when administering the *Act*. Among others, these objectives include enriching and developing the country through social, economic and cultural means while ensuring the protection and security of Canadians living here. In order to adequately protect Canada's borders, determining admissibility necessarily rests in large part on the ability of immigration officers to verify the information applicants submit in their applications. The omission or misrepresentation of information risks inducing an error in the *Act*'s administration.

[28] In addition, the Court agrees with the respondent’s comments regarding the case of *Maruquin v Canada (Minister of Citizenship and Immigration)* 2007 FC 1349, [2007] FCJ No 1739, in that it presented “special circumstances” where the change (the birth of a son) was

disclosed before the permanent residence visas had been issued. Consequently, this case does not find application in the matter at hand.

[29] The applicants also argued that the Panel erred in law in failing to provide a *mens rea* analysis in its decision.

[30] The issue of *mens rea* was mentioned in the case of *Osisanwo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1126, [2011] FCJ No. 1386, referred to by the applicants. The case of *Osisanwo* involved an application for judicial review of an immigration officer's dismissal of an application for permanent residence on the basis that the applicant made a material misrepresentation with regard to the paternity of her son. However, the applicant in *Osisanwo* was not aware that her husband was not the biological father of her son, which was only revealed after DNA testing. In his reasons, Justice Hughes stated the following with regards to the element of *mens rea*:

> [8] The essential question is whether one takes an "objective" or "subjective" view as to whether what was done was "misleading'. Stated another way, is *mens rea* an essential ingredient?
>
> [9] A review of some of the earlier case law is helpful. In *Hilario v Canada (Minister of Manpower and Immigration)* (1977), 18 NR 529 (FCA), the Federal Court of Appeal considered a situation where information had been withheld. Justice Heald for the Court said at the end of the first paragraph at page 530:
>
> > *To withhold truthful, relevant and pertinent information may very well have the effect of "misleading" just as much as to provide, positively, incorrect information.*
>
> [10] This statement carries with it the implication of "withholding" and "providing", which is to say, *mens rea* is involved.

[31] Ultimately, Justice Hughes determined that the misrepresentations in question were entirely inadvertent and that there was no reasonable basis for concluding that there was any *mens rea* to mislead. However, the Court finds that the case of *Osisanwo*, above, is wholly distinguishable from the case at hand, as the daughter, mother and father all had knowledge of the material fact that constitute the misrepresentation (the children's births) and withheld that information.

[32] Pursuant to the aforementioned jurisprudence, the Court finds the Board's decision to be reasonable, as the misrepresentations committed by the applicants cannot be viewed as honest or reasonable mistakes or misunderstandings (see *Medel v Canada (Minister of Employment and Immigration)* (CA), [1990] 2 FC 345, [1990] FCJ No 318; *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299, [2007] FCJ No 1667; *Berlin*, above).

[33] Rather, the Court finds that, on the basis of the evidence on record, the applicants were not forthright in their dealings with immigration authorities and thereby did not fulfill their "duty of candour". Consequently, the Court concludes that the Board's decision is reasonable and the application for judicial review will be dismissed.

The Proposed Questions for Certification

[34] The applicants proposed the following questions for certification:

1. Is a foreign national inadmissible for withholding a material fact pursuant to paragraph 40(1)(*a*) of IRPA if they have disclosed a material fact to a visa office that opens a door for investigation by the visa office?

2. Is a foreign national inadmissible for withholding a material fact before visa issuance but disclosing that before the permanent resident application process has been completed?

3. Is it incumbent upon a decision maker, making a paragraph 40(1)(*a*) of IRPA misrepresentation finding to first conduct a *mens rea* analysis?

4. Once a foreign national discloses a material fact to a visa office does the onus shift from the foreign national to the visa office to investigate?

[35] The Federal Court of Appeal stated the necessary criteria for certifying a question of general importance in *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (FCA), [1994] FCJ No 1637, 176 NR 4. The proposed questions must transcend the interests of the immediate parties to the litigation, contemplate issues of broad significance or general application and be determinative of the appeal. In the Court's view, the questions formulated by the applicant do not satisfy these criteria.

[36] With respect to the first question, the Court agrees with the respondent that it is not of broad significance or general application as it essentially restates the issue which was before the Court to be determined on its particular facts. More particularly, when a misrepresentation prevents an officer from making a proper determination of one's application in Canada, it equates a material representation (*Bodine v Canada (Minister of Citizenship and Immigration*), 2008 FC 848, [2008] FCJ No 1069).

[37] Concerning the second question, the Court has decided that a misrepresentation of material facts is not cured simply because it is corrected before the decision is rendered (*Haque*, above, at para 17; *Cabrera*, above, at para 40; *Uppal*, above, at paras 30-31; Khan, above, at para

25). Moreover, in this case, the Court found that there was no attempt to inform the visa post of the birth of the children (clearly the second child) before a decision was made to issue the applicants visa.

[38] The third question is not relevant in order to dispose of this case. Indeed, and the Court agrees with the respondent, that the Board asked the applicants to explain why the existence of the children was not disclosed to the Canadian visa post, it analyzed the explanation and reasonably concluded that it was not an innocent misrepresentation.

[39] Finally, it is trite law that the applicants have a duty of candour to disclose all material facts both before and after a visa is issued (*Ghasemzadeth v Canada (Minister of Citizenship and Immigration*), 2010 FC 716, [2010] FCJ No 875, and, in this case, the Court found that the second child was clearly not disclosed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. There is no question for certification.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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