

Federal Court



Cour fédérale

**Date: 20181004**

**Docket: IMM-3611-17**

**Citation: 2018 FC 996**

**Ottawa, Ontario, October 4, 2018**

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

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Applicant**

**and**

**ROSALIE JAVIER AMERGO**

**Respondent**

**JUDGMENT AND REASONS**

[1] Rosalie Amergo (the Respondent) came to Canada from the Philippines and worked as a live-in caregiver. After several years, she applied for permanent residence. She said she had never been married. Immigration officials consulted with the authorities in the Philippines who indicated that a document she had provided stating she was not married was fraudulent. The authorities also provided two marriage certificates listing her name. These documents were provided to the Respondent, but she continued to insist that she had never been married and said the marriage certificates were not valid. An immigration officer (the Officer) found her

inadmissible because she had misrepresented her marital status. Following a hearing on the issue, the Immigration Division (ID) of the Immigration and Refugee Board (IRB) overruled the Officer. The Minister (the Applicant) appealed and, following another hearing, the Immigration Appeal Division (IAD) also found in favour of the Respondent.

[2] This is the judicial review of the decision of the IAD. For the reasons that follow, this application for judicial review is dismissed.

### I. Background

[3] The Respondent is a citizen of the Philippines who entered Canada in 2006 and worked as a live-in caregiver. Her work permit was extended several times, and in 2009 she applied for permanent residence. Her application was approved in principle, and she was issued an open work permit, which was also extended several times. In November 2012, she was referred for an investigation into misrepresentation regarding her marital status.

[4] The Respondent indicated on her permanent resident application that she was single, yet the Applicant was able to produce two different marriage certificates from the Philippines bearing her name. The signatures on the certificates appeared similar to the ones on other documents the Respondent had provided, including her application for permanent residence. She denied ever having been married, and said that these marriage certificates must have been obtained fraudulently.

[5] Following an interview, the Respondent's permanent resident application was refused due to misrepresentation. A section 44 inadmissibility report was prepared and the matter was

referred to the ID for a hearing. Following this hearing, the ID found that the Respondent was, in fact, admissible to Canada. The Applicant appealed this to the IAD, which dismissed the appeal on August 3, 2017. The Applicant is seeking judicial review of the IAD decision.

## II. Issues and Standard of Review

[6] The sole issue in this appeal is whether the IAD decision was reasonable.

[7] To assess if a decision is reasonable, the Court looks to whether there is justification, transparency, and intelligibility in the decision making process, and to whether the decision falls within a range of possible, acceptable outcomes defensible on the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Deference is owed to those findings, and it is not the role of the Court to reweigh the relative importance of evidence that was before the decision-maker (*Ali Gilani v Canada (Citizenship and Immigration)*, 2013 FC 243 at para 35).

## III. Analysis

[8] Since the arguments on both sides of this case revolve around the facts, it will be helpful to review the key elements of the IAD decision. The allegation of misrepresentation relates solely to the question of whether the Respondent was married or not, and so that is the focus of this brief summary.

### A. *The Decision Under Review*

[9] The IAD decision begins with a review of the evidence. It notes that the Respondent indicated she was single when she applied for permanent residence. She provided an “official”

Certificate of No Marriage (CENOMAR) to attest to this. The Officer consulted with authorities in the Philippines, who determined that this document was counterfeit. The Officer obtained two marriage certificates from the National Statistics Office in the Philippines, showing that the Respondent had been married twice, in 1994 and 1996. The signatures on the marriage certificates resembled the Respondent's signature on her passport and her application for permanent residence.

[10] The Respondent did not deny that the CENOMAR may be counterfeit. She claimed that her brother had obtained it through a third party, and she admitted it may not be a valid document. The Respondent's ex-boyfriend (and purported second husband) testified that he had obtained the second marriage certificate by fraudulent means, unbeknownst to the Respondent. He described the ease with which a person could obtain fraudulent documents and forgeries of signatures in the Philippines. He testified that the Respondent had not participated in the fraud, that she had not signed the second marriage certificate, and that they had never been married.

[11] The Respondent hired a private detective to try to locate the purported first husband, but without success. The private detective said that she was also unable to locate the person who allegedly performed the marriage. However, the Applicant introduced evidence that this person had been located easily, and that this individual had been registered to perform marriages during the relevant period. The Respondent argued that corruption was widespread in the Philippines and that it would be relatively easy to register a fraudulent marriage.

[12] The IAD noted the contradictory and confusing nature of the evidence regarding the Respondent's marital status. It found that the Applicant had not met its onus of establishing, on a

balance of probabilities, whether the Respondent was previously married or not. One key factor for the IAD is outlined in the following passage:

The panel notes that while the appellant has provided evidence of the apparent existence of two validly registered marriages there is no documentation referring to the dissolution or annulment of the first. Bigamy is not legal in the Philippines. In order for there to be a second marriage legally registered on behalf of the respondent, there would need to be proof of the dissolution of the first (page 18, Exhibit A-1). There is no such evidence before me. The fact that the respondent cannot be legally married to two men at the same time in the face of two marriage certificates leads me to apply less weight to these two documents as proof that the respondent has, in fact, been married two times in the Philippines.

[13] The IAD concluded that the Applicant had not met its onus to establish, on the balance of probabilities, that the Respondent misrepresented herself in regard to her marital status, and dismissed the appeal.

B. *Is the Decision Unreasonable?*

[14] The IAD nicely captures the challenge faced by the decision-makers in this case at paragraph 13 of its decision: “The panel finds much of the evidence before it puzzling, contradictory, and ultimately inconclusive with respect to determining on the balance of probabilities whether the respondent was previously married or not.” The evidence, as described previously, is puzzling to say the least. Faced with that, and considering that the Applicant had the onus to prove misrepresentation, the ID decided the case in favour of the Respondent. The IAD upheld this decision. Now I am asked to find that the IAD decision is unreasonable.

[15] The Applicant advances several arguments, all grounded in the requirements of s. 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

### **Misrepresentation**

**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;

**(b)** for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;

**(c)** on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or

**(d)** on ceasing to be a citizen under

**(i)** paragraph 10(1)(a) of the *Citizenship Act*, as it read immediately before the coming into force of section 8 of the *Strengthening Canadian Citizenship Act*, in the circumstances set out in subsection 10(2) of the *Citizenship Act*, as it read immediately before that coming into force,

### **Fausses déclarations**

**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;

**b)** être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;

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

**d)** la perte de la citoyenneté :

**(i)** soit au titre de l'alinéa 10(1)a) de la *Loi sur la citoyenneté*, dans sa version antérieure à l'entrée en vigueur de l'article 8 de la *Loi renforçant la citoyenneté canadienne*, dans le cas visé au paragraphe 10(2) de la *Loi sur la citoyenneté*, dans sa version antérieure à cette entrée en vigueur,

(ii) subsection 10(1) of the *Citizenship Act*, in the circumstances set out in section 10.2 of that Act, or

(iii) subsection 10.1(3) of the *Citizenship Act*, in the circumstances set out in section 10.2 of that Act.

(ii) soit au titre du paragraphe 10(1) de la *Loi sur la citoyenneté*, dans le cas visé à l'article 10.2 de cette loi,

(iii) soit au titre du paragraphe 10.1(3) de la *Loi sur la citoyenneté*, dans le cas visé à l'article 10.2 de cette loi.

[16] This provision has been interpreted broadly, and applied to misrepresentations which were both direct and indirect, and whether arising from statements or omissions by the person applying for status, or on which that person relied: *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512; *Wang v Canada (Citizenship and Immigration)*, 2006 FCA 345; *Mohammed v Canada (Citizenship and Immigration)*, [1997] 3 FC 299.

[17] A narrow “good faith” exception has been recognized in a few decisions, but this has been limited to situations with quite exceptional facts: *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126; *Khedri v Canada (Citizenship and Immigration)*, 2012 FC 1397 at paras 25-26.

[18] While s. 40(1) has been interpreted broadly, this Court has also emphasized that clear and convincing evidence is required to support a finding that a misrepresentation occurred, on a balance of probabilities. This was recently confirmed in *Hehar v Canada (Citizenship and Immigration)*, 2016 FC 1054:

[35] Finally, the Applicant emphasized that findings of misrepresentation must be made on a balance of probabilities as set

out in departmental Guidelines, not merely on the basis of reasonable grounds to believe as otherwise required by section 133 of the IRPA. I agree, and I also agree that clear and convincing evidence is needed: *Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 416 [*Chughtai*]:

[29] An applicant for a permanent residence visa may be refused if he or she fails to meet the evidentiary burden necessary to satisfy the officer as to his or her eligibility. On the other hand, a finding of inadmissibility is more serious in nature. Under paragraph 40(1)(a) of IRPA, a person is inadmissible to Canada if that person "withhold[s] material facts relating to a relevant matter that induces or could induce an error in the administration of th[e] Act". As my colleague Justice Barnes states in *Xu* at para 16, "[a] finding of misrepresentation under section 40 of the IRPA is a serious matter which should not be made in the absence of clear and convincing evidence [...]" [emphasis added]. Similarly, in *Berlin* at para 21, Justice Barnes states, "[a] misrepresentation is not established by mere appearances. As the Respondent's Operational Manual on Enforcement acknowledges, a misrepresentation must be established on a balance of probabilities." While an applicant for permanent residence has a duty of candour requiring the disclosure of material facts, and while even an innocent failure to provide material information can result in a finding of inadmissibility (*Baro* at para 15), there must still be clear and convincing evidence that an applicant, on the balance of probabilities, has withheld material facts for a finding of misrepresentation to be made.

[19] The Applicant submits that the evidence was clear and that the Respondent misrepresented her marital status on her application. The Respondent stated that she was not married on her permanent resident application. However, this is contradicted by two key pieces of evidence. First, the authorities in the Philippines confirmed that the CENOMAR provided by the Respondent was fraudulent. Second, two official marriage certificates had been provided



directly by the authorities in the Philippines, and these should have been given more weight by the IAD than the documents provided by the Respondent.

[20] The Applicant also argues that the IAD erred in rejecting the two marriage certificates, considering that these documents were provided directly by the authorities in the Philippines, unlike the CENOMAR relied on by the Respondent which was obtained from an unknown third party.

[21] Next, it is contended that the IAD erred when it gave so much weight to the absence of evidence to show that the first marriage had ended in divorce or annulment. Since bigamy is illegal in the Philippines, the IAD concluded that it could not rely on the two marriage certificates because it was unclear how a second one could have been issued by the authorities without evidence that the first marriage had ended. The Applicant argues that even if the absence of proof of divorce or annulment gives reason to doubt the validity of the second marriage, there was no evidence that the first one was invalid. This is sufficient to prove that the Respondent misrepresented her marriage status. Doubts about the second marriage should not have caused the IAD to reject the validity of the first one.

[22] Further, the Applicant points to similarities between the signatures on the marriage certificates and those on the Respondent's other documents and argues that the IAD did not give this sufficient weight. The Applicant also points to a number of other elements: (i) marriage law in the Philippines requires that both parties be physically present, thus rendering it unlikely that the Respondent was not aware of either marriage; (ii) they were easily able to locate the person who performed the first marriage, thus contradicting the evidence of the private investigator

hired by the Respondent; and, (iii) the explanation by the purported second husband about how the second marriage certificate was fraudulently obtained was vague and lacked credibility.

[23] In view of the totality of the evidence, the Applicant argues that the IAD decision is unreasonable.

[24] The Respondent argues that the Applicant is essentially asking me to re-weigh the evidence, and case-law is clear that this is not the role of a judge on judicial review. The decisions of the IAD are owed deference and the Court should only intervene to correct significant errors in the treatment of the evidence such as completely ignoring or misconstruing significant evidence, or taking into account extrinsic evidence or irrelevant considerations:

*Aisikaer v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 708.

[25] In response to the main arguments of the Applicant, the Respondent submits that she has consistently denied being married in the proceedings before the ID and the IAD. She points to the testimony of her purported second husband to the effect that he had arranged for a fraudulent marriage certificate, that her signature had been forged by a professional, and that they had never been married. She argues the evidence demonstrates the extent of corruption in the Philippines and the ease with which fraudulent documents can be obtained. She also pointed to other evidence regarding the evidence produced by a private investigator she had hired to try to find information about the first false marriage certificate.

[26] The Respondent argues that the IAD reached a reasonable conclusion when it found the Applicant had not met its onus to demonstrate misrepresentation.

[27] I have some sympathy for the position of the Applicant – the story of two fraudulent marriage certificates, combined with the evidence of the purported second husband, and the search for the person who allegedly performed the first ceremony appears, on its face, to be difficult to believe. There are many gaps and inconsistencies in the evidence, and it is clear that there are reasons to doubt the validity of at least some of the documentation provided.

[28] The IAD focused in particular on the evidence of the two marriage certificates, since these were essential elements in the Applicant's case for misrepresentation. The Applicant argues that whatever the doubts about the second marriage, there was no basis to question the validity of the first and that the IAD reached an unreasonable conclusion when it found that the absence of evidence of a divorce or annulment of the first marriage was sufficient to cast into doubt the validity of both marriage certificates. I am not persuaded.

[29] It must be remembered that the IAD had before it a variety of purportedly "official" documents, as well as evidence from a witness about how easy it was to obtain forged and fraudulent documents. The absence of evidence of a legal termination of the first marriage is a relevant consideration. However, combined with the evidence of the fraud relating to the second marriage certificate, it was reasonable for the IAD to conclude that the Applicant had not met its onus to establish misrepresentation.

[30] Despite the able submissions of counsel and having considered the submissions and the case-law, I agree with the position of the Respondent. The IAD considered all of the evidence on both sides of the key question. The Applicant was unable to demonstrate that the IAD committed any error of law, or that it ignored significant evidence. The main thrust of the Applicant's

arguments revolves around the weight that was attributed to the evidence, and it is clear that it is not my role to re-weigh the evidence on a judicial review.

IV. Conclusion

[31] I find that the IAD decision falls within the range of reasonable alternatives in view of the law and the facts in this case. The evidence is confusing and ultimately inconclusive; however, the IAD did not err in finding that the Applicant had not met its burden of proof. The decision is reasonable.

[32] Therefore, I am dismissing this application for judicial review. There is no question of general importance to be certified in this case.

**JUDGMENT in IMM-3611-17**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. There is no question of general importance to be certified.

“William F. Pentney”

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Judge

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

**DOCKET:** IMM-3611-17

**STYLE OF CAUSE:** THE MINISTER OF PUBLIC SAFETY AND  
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AMERGO

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