Date: 20060511

Docket: IMM-2596-05

Citation: 2006 FC 541

BETWEEN:

JEAN-BERNARD DUMORNAY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

PINARD J.

[1] This is an application for judicial review of a decision by the Appeal Division of the Immigration and Refugee Board (the IRB) dated March 18, 2005, dismissing the applicant's appeal against the decision denying his application to sponsor Cristina Dumornay, as the applicant had never declared her as a member of his family.

I. The facts

[2] On January 30, 1995, the daughter of Jean-Bernard Dumornay (the applicant) was born.

[3] On July 22, 1996, the applicant introduced his daughter to the Minister of Culture to get a birth certificate.

[4] On July 31, 1998, the Canadian Embassy in Port-au-Prince, Haiti, received an application for permanent residence in Canada from the applicant. In this application, he wrote [TRANSLATION] "I have no children" and did not fill in any of the boxes provided for children in the family tree.

[5] The applicant has been a permanent resident of Canada since June 21, 1999. He declared that no dependants would follow. On December 22, 2003, he applied to sponsor his daughter, Cristina. On May13, 2004, a visa officer determined that Cristina Dumornay was not a member of the family class. On August 18, 2004, the applicant appealed this decision. On February 8, 2005, the Registry of the IRB wrote him to invite him to submit arguments regarding the application of paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) to his case.

[6] On March 18, 2005, the IRB made a negative finding based on the application of paragraph 117(9)(*d*) of the Regulations.

II. The relevant provisions

[7] The relevant subsections of sections 63, 64 and 65 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), sections 1, 2, 51, 117, 352 and 355 of the Regulations, subsection 25(1) of the *Immigration Appeal Division Rules*, SOR/2002-230 and subsection 2(1) of the *Immigration Regulations, 1978*, SOR/78-172 (repealed) are attached in the Appendix hereto.

III. The analysis

A. *The application of subsections 117(10) and (11) of the Regulations*

[8] The applicant submits that it is clear that on March 18, 2005, the date of the decision at issue, the IRB had to consider the amendments to the regulations and had to decide on the applicant's situation in light of these new sections. The applicant contends that there is nothing to suggest that this was done.

[9] In my opinion, the IRB did not err. It has no obligation to refer to all of the provisions of the Act or the Regulations or to explain why they do not apply, as the case may be.

[10] In this case, the determination would be the same for the applicant, whether subsections 117(10), (11) and (12) had been applied or not, because these subsections were not relevant in his case, as an officer had not advised him that an examination would not be required, pursuant to subsection 117(10).

[11] In fact, no officer could have advised the applicant that an examination would not be required because he had falsely indicated that he had "no children". The situation is similar to the one in *Flores v. Minister of Citizenship and Immigration*, [2005] FC 854, where my colleague Mr. Justice O'Keefe states as follows:

> [42] This is also not a situation in which the exception in subsection 117(10) applies, as there is no evidence or allegation that an officer determined the son did not have to be examined. The applicant simply did not disclose the existence of her son. . . .

B. *Section 51 of the Regulations*

[12] In his memorandum, the applicant also alleges that in deciding under section 51 of the Regulations, the *audi alteram partem* rule is at issue. He considers that the retroactive application of this section amounts to a breach of the right to be heard.

[13] Section 51 of the Regulations provides that a permanent resident must establish, at the examination at the port of entry "that [he] and [his] family members, whether accompanying or not, meet the requirements of the Act and these Regulations".

[14] In the decision, section 51of the Regulations is related to the application of paragraph 117(9)(*d*) of the Regulations. The IRB clearly stated: "In view of the fact that the applicant falls within the scope of paragraph 117(9)(*d*) of the Regulations".

[15] Further, in *De Guzman v. Canada (M.C.I.)*, 2004 FC 1276, my colleague Kelen J. determined that paragraph 117(9)(*d*) is constitutional and that it is consistent with section 7 of the *Canadian Charter of Human Rights and Freedoms* (the Charter).

[16] Accordingly, it cannot be argued that section 51 of the Regulations fetters the right to be heard or that it violates the principles of natural justice.

C. *Reasons given by applicant for not declaring his daughter*

[17] The applicant relies on subsection 117(11) and argues that the IRB erred in finding that the reasons that he raised for not disclosing the name of his daughter are not relevant.

[18] However, subsection 117(11) of the Regulations refers to subsection 117(10) of the Regulations, and above it was established that the applicant did not allege that an officer had advised him that he did not have to submit to an examination.

[19] In *Hong Mei Chen v. Minister of Citizenship and Immigration*, 2005 FC 678, Mosley J. pointed out that choosing not to declare a child is enough even if the omission does not involve an underlying intent to defraud.

[20] In my opinion, the IRB did not err on this point.

D. *Humanitarian and compassionate considerations*

[21] According to the applicant, the matter is of much greater significance since the IRB did not decide the issue of humanitarian and compassionate considerations expressly raised by the applicant.

[22] The applicant contends that the IRB believed that it was automatically implicitly dispensed from addressing it, but that the IRB must respond to all of the considerations under its jurisdiction.

[23] The key section on humanitarian and compassionate matters appears in the Act under section 65:

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	**65.** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire

[24] Yet, paragraph 117(9)(*d*) of the Regulations clearly explains that if 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, the foreign national shall not be considered a member of the family class.

[25] The applicant suggests that the definition in subsection 1(3) of the Regulations applies in interpreting the meaning of "member of the family class" for the purposes of the Act and, accordingly, for the application of section 65 of the Act.

[26] In my opinion, the applicant is incorrect because the definition in subsection 1(3) defines "family member" and because section 65 refers specifically to the "family class", which is addressed under subsection 117(9). Therefore, the IRB cannot exercise its discretion for humanitarian and compassionate considerations bearing on family class applications unless it has been determined that the foreign national indeed had this quality. As the IRB refused to acknowledge that the foreign national belonged to the family class, it could not consider the humanitarian and compassionate considerations raised by the applicant.

[27] This finding is also based on the fact that the applicant may, pursuant to subsection 25(1) of the Act, based on humanitarian and compassionate considerations, considering the best interests of the child, request an exemption from the application of paragraph 117(9)(*d*) (*Flores*, *supra*, and *Azizi v. Minister of Citizenship and Immigration*, 2005 FC 354).

E. *Appeal Division decision based on a judgment under appeal*

[28] The applicant argued that the IRB erred in relying on the decision in *De Guzman v. Canada (M.C.I.)*, 2004 FC 1276, [2004] F.C.J. No. 1557 (F.C.) (QL), when this decision had never been communicated to the parties. He claimed that he was unable to present his arguments on the relevance of this decision and that the *audi alteram partem* rule had been breached.

[29] The applicant refers to two decisions to support his point of view, i.e. *Bell Canada and Challenge Communication Ltd.* (1978), 86 D.L.R. (3d) 351 (F.C.A.) and *Pfizer Co. v. Deputy Minister of National Revenue*, [1977] 1 S.C.R. 456. In my opinion, the applicant was wrong to claim that *Bell Canada* supports his point of view; this decision has nothing to do with the *audi alteram partem* rule. With respect to *Pfizer*, that decision does not concern cases where a tribunal has considered a decision that was not communicated to the parties, but involves other cases where after the hearing a tribunal takes into account evidence when there is no opportunity given to present arguments regarding that evidence. This is a completely different situation from this one.

[30] In my opinion, the IRB did not err. The applicant had to submit the relevant case law. The decision in *De Guzman* was dated September 20, 2004, and the applicant filed his additional submissions on February 25, 2005.

[31] Further, the applicant submits that the IRB erred in failing to mention that on the date of the IRB decision, the appeal of the *De Guzman* decision had been pending since October 18, 2004, and that Kelen J. had certified a question.

[32] In my opinion, the IRB was not obliged to wait for a judgment from the Federal Court of Appeal to be delivered before deciding this matter.

F. *Complete inapplicability of De Guzman to this matter*

[33] With regard to the claim to the effect that this matter is different from *De Guzman* since that was a decision contemplating a person who had applied under the former Act and who had been given a full hearing before the IRB, the applicant is mistaken. Fundamentally, the Federal Court of Appeal decided that the application of paragraph 117(9)(*d*) of the Regulations was not inconsistent with the rights guaranteed under section 7 of the *Charter*.

[34] The applicant is now claiming that this application for judicial review is ultimately intended to secure a hearing before the IRB to raise his arguments. It is a new argument that was not included in the initial memorandum served on May 30, 2005, and therefore cannot be considered.

[35] It is true that I ordered the postponement of the hearing in this matter so that the parties could review the decision of the Federal Court of Appeal in *De Guzman*. Nevertheless, the Order accepting the additional written submissions when the hearing of December 20, 2005, was

postponed, clearly must not be interpreted as permission to raise new arguments and new applications. The additional arguments must be confined to the issues raised by this decision.

[36] With regard to the issue of the application of the transitional provisions 352 and 355 of the Regulations, section 352 refers to subsection 2(1) of these Regulations and to subsection 2(1) set out under the former *Immigration Act*. The two differ on the age of dependant children: under the former regime, the child had to be less than 19 years old while under the new Act, a dependant child must be less than 22 years old.

[37] The transitional measures are not applicable in *De Guzman* or in this matter since in both matters the applicants' children were contemplated by the former Act and the new Act. Further, in both cases, their children had to be included in their applications under each Act. The applicant is incorrect to argue that sections 352 and 355 establish that under the former Act applicants did not have to declare children that were not dependant or that were not accompanying them. Also under the former Act, the dependant children (19 years of age or less under that Act) had to be declared. The applicant is also incorrect in claiming that the Regulations discriminate between two classes of persons who make the same omission. The difference between the two Acts is only a change in the age at which a person no longer qualifies as a "dependant child". This change does not affect the applicant because his daughter is only 11 years old. Therefore, the transitional measures do not apply. The applicant cannot allege discrimination.

[38] Similarly, even if the applicant were treated differently than a person who applied under the former Act, because the age of dependant children differs between the former subsection 2(1) and

the new subsection 2(1) of the Act, Parliament evidently provided transitional measures so that applicants would not be penalized.

[39] In my opinion, the applicant's argument regarding the ground of discrimination pursuant to section 15 of the Charter is without merit.

G. *The issue of jurisdiction*

[40] The applicant claims that the letter at the root of the problem introduced a procedure not contemplated under the Regulations. He argues that it was clearly apparent that he was opposed to the simplified procedure proposed by the IRB. According to the applicant, the letter stated the following:

> [TRANSLATION]
>
> If you believe that the IAD should pursue the regular process for your appeal, you must send a copy of all relevant information or arguments in support of your position.

[41] The applicant argues that this letter was mailed on February 8, 2005, and that it was considered to have been received only on February 15, 2005. He alleges that the letter stated that the documents, information and arguments had to be received by the IRB by March 1, 2005, giving the applicant barely 14 days to file it all in writing. The applicant argues that this manner of proceeding did not in any way respect the general time limits provided under the *Immigration Appeal Division Rules*, SOR/2002-230, or procedural fairness.

[42] In my opinion, this argument must not be taken into account since it is a new argument that was not included in the initial memorandum served on May 30, 2005. Once again, the Order accepting additional written submissions when the hearing of December 20, 2005, was suspended, must not be interpreted as giving the applicant the opportunity to raise new arguments.

IV. Conclusion

[43] As the applicant has not established that the IRB made an error of law or of fact that would justify the intervention of this Court, the application for judicial review is dismissed.

"Yvon Pinard"
Judge

Ottawa, Ontario
May 11, 2006

Certified true translation

Kelley A. Harvey, BCL, LLB

APPENDIX

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class my appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63.** (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.
64. (3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.	**64.** (3) N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire pour fausses déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.
65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	**65.** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

Immigration and Refugee Protection Regulations, SOR/2002-227:

1. (3) For the purposes of the Act, other than section 12 and paragraph 38(2)(*d*), and these Regulations, "family member" in respect of a person means	**1.** (3) Pour l'application de la Loi – exception faite de l'article 12 et de l'alinéa 38(2)*d*) – et du présent règlement, « membre de la famille », à l'égard d'une personne, s'entend de :

(*a*) the spouse or common-law partner of the person;

(*b*) a dependent child of the person or of the person's spouse or common-law partner; and

(*c*) a dependent child of a dependent child referred to in paragraph (*b*).

a) son époux ou conjoint de fait;

b) tout enfant qui est à sa charge ou à la charge de son époux ou conjoint de fait;

c) l'enfant à charge d'un enfant à charge visé à l'alinéa *b*).

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,

(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

(ii) is the adopted child of the parent; and

a) d'une part, par rapport à l'un ou l'autre de ses parents :

(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) soit en est l'enfant adoptif;

(*b*) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and not a spouse or common-law partner,

(ii) has depended substantially on the financial support of the parent since before the age of 22 – or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner – and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student.

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or

b) d'autre part, remplit l'une des conditions suivantes :

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) il est un étudiant âgé qui n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

(A) n'a pas cessé d'être inscrit à un établissement d'enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) y suit activement à temps plein des cours de formation

vocational training on a full-time basis, or

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

générale, théorique ou professionnelle,

(iii) il est âgé de vingt-deux ans ou plus, n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental.

51. A foreign national who holds a permanent resident visa and is seeking to become a permanent resident at a port of entry must

(*a*) inform the officer if

(i) the foreign national has become a spouse or common-law partner or has ceased to be a spouse, common-law partner or conjugal partner after the visa was issued, or

(ii) material facts relevant to the issuance of the visa have changed since the visa was issued or were not divulged when it was issued; and

(*b*) establish, at the time of examination, that they and their family members, whether accompanying or not, meet the requirements of the Act and these Regulations.

51. L'étranger titulaire d'un visa de résident permanent qui, à un point d'entrée, cherche à devenir un résident permanent doit :

a) le cas échéant, faire part à l'agent de ce qui suit :

(i) il est devenu un époux ou conjoint de fait ou il a cessé d'être un époux, un conjoint de fait ou un partenaire conjugal après la délivrance du visa,

(ii) tout fait important influant sur la délivrance du visa qui a changé depuis la délivrance ou n'a pas été révélé au moment de celle-ci;

b) établir, lors du contrôle, que lui et les membres de sa famille, qu'ils l'accompagnent ou non, satisfont aux exigences de la Loi et du présent règlement.

117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

[. . .]

(*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

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) 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

was a non-accompanying family member of the sponsor and was not examined.

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 an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.

(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 qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas.

(11) Paragraph (9)(*d*) applies in respect of a foreign national referred to in subsection (10) if an officer determined that, at the time of the application referred to in that paragraph,

(11) L'alinéa (9)*d*) s'applique à l'étranger visé au paragraphe (10) si un agent arrive à la conclusion que, à l'époque où la demande visée à cet alinéa a été faite :

(*a*) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination; or

a) ou bien le répondant a été informé que l'étranger pouvait faire l'objet d'un contrôle et il pouvait faire en sorte que ce dernier soit disponible, mais il ne l'a pas fait, ou l'étranger ne s'est pas présenté au contrôle;

(*b*) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

b) ou bien l'étranger était l'époux du répondant, vivait séparément de lui et n'a pas fait l'objet d'un contrôle.

(12) In subsection (10), "former Act" has the same meaning as in section 187 of the Act.

(12) Au paragraphe (10), « ancienne loi » s'entend au sens de l'article 187 de la Loi.

352. A person is not required to include in an application a non-accompanying common-law partner or a non-accompanying child who is not a dependent son or a dependent daughter within the meaning of subsection 2(1) of the former Regulations and is a dependent child as defined in section 2 of these Regulations if the application was made under the former Act before the day on

352. La personne qui, avant l'entrée en vigueur du présent article, a fait une demande au titre de l'ancienne loi n'est pas tenue de mentionner dans sa demande, s'il ne l'accompagne pas, son conjoint de fait ou tout enfant -- qui est un enfant à charge au sens du paragraphe 2(1) du présent règlement -- qui n'est pas une « fille à charge » ou un « fils à charge » au sens du

which this section comes into force.

paragraphe 2(1) de l'ancien règlement.

355. If a person who made an application under the former Act before June 28, 2002 sponsors a non-accompanying dependent child, referred to in section 352, who makes an application as a member of the family class or the spouse or common-law partner in Canada class, or sponsors a non-accompanying common-law partner who makes such an application, paragraph 117(9)(*d*) does not apply in respect of that dependent child or common-law partner.

355. L'alinéa 117(9)*d*) du présent règlement ne s'applique pas aux enfants à charge visés à l'article 352 du présent règlement ni au conjoint de fait d'une personne qui n'accompagnent pas celle-ci et qui font une demande au titre de la catégorie du regroupement familial ou de la catégorie des époux ou conjoints de fait au Canada si cette personne les parraine et a fait une demande au titre de l'ancienne loi avant le 28 juin 2002.

Immigration Appeal Division Rules, SOR/2002-230:

25. (1) Instead of holding a hearing, the Division may require the parties to proceed in writing if this would not be unfair to any party and there is no need for the oral testimony of a witness.

25. (1) La Section peut, au lieu de tenir une audience, exiger que les parties procèdent par écrit, à condition que cette façon de faire ne cause pas d'injustice et qu'il ne soit pas nécessaire d'entendre des témoins.

Immigration Regulations, 1978, SOR/78-172 (repealed):

2. (1) The definitions in this section apply in these Regulations.

2. (1) Les définitions qui suivent s'appliquent au présent règlement.

« dependent daughter », means a daughter who

« fille à charge » Fille :

(*a*) is less than 19 years of age and unmarried,

a) soit qui est âgée de moins de 19 ans et n'est pas mariée;

(*b*) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and

(i) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by her parents since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, or

b) soit qui est inscrite à une université, un collège ou un autre établissement d'enseignement et y suit à temps plein des cours de formation générale, théorique ou professionnelle, et qui :

(i) d'une part, y a été inscrite et y a suivi sans interruption ce genre de cours depuis la date de ses 19 ans ou, si elle était déjà mariée à cette date, depuis la date de son mariage,

(ii) d'autre part, selon l'agent d'immigration qui fonde son opinion sur les renseignements qu'il a reçus, a été entièrement ou en grande partie à la charge financière de ses parents depuis la date de ses 19 ans ou, si elle était déjà mariée à cette date, depuis la date de son mariage.

(*c*) is wholly or substantially financially supported by her parents and

(i) is determined by a medical officer to be suffering from a physical or mental disability, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting herself by reason of such disability.

c) soit qui est entièrement ou en grande partie à la charge financière de ses parents et qui :

(i) d'une part, selon un médecin agréé, souffre d'une incapacité de nature physique ou mentale,

(ii) d'autre part, selon l'agent d'immigration qui fonde son opinion sur les renseignements qu'il a reçus, y compris les renseignements reçus du médecin agréé visé au sous-alinéa (i), est incapable de subvenir à ses besoins en raison de cette incapacité.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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