Date: 20071126

Docket: IMM-1896-07

Citation: 2007 FC 1241

Ottawa, Ontario, the 26th day of November 2007

Present: the Honourable Mr. Justice Blais

BETWEEN:

FRANC CASTOR LINARES

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), from a decision by Robert Néron (the member) on April 18, 2007 for the Immigration and Refugee Board, Immigration Appeal Division, dismissing the appeal from the visa officer's decision on May 26, 2003 which held that the sponsored person did not belong to the family class.

FACTS

[2] The appellant Franc Castor Linares was born in the Dominican Republic on January 13, 1965.

[3] He made an application for permanent residence in 1993 and became a father on June 12, 1994.

[4] He arrived in Canada on December 12, 1995 and tried to declare the existence of his son Emmanuel to the immigration officer at the point of entry. However, as the officer did not speak Spanish he was unable to understand what the applicant was trying to tell him and granted him landing after trying in vain to obtain the assistance of an interpreter. The applicant's son never underwent examination.

[5] Several years later, the applicant made an application to sponsor his son.

[6] On April 4, 2000 the applicant was the subject of an investigation in which the adjudicator Michel Beauchamp decided that he had made reasonable efforts to disclose the fact that he had a son, whom he was being charged with failing to declare.

APPLICABLE LEGISLATIVE PROVISION

[7] The following passages from the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) are relevant in determining whether the applicant belongs to the family class:

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

ISSUES

(1) Did the member make an error by not applying subsection 117(10) of the Regulations?

(2) Did the member make an error by not taking into account the respondent's public policy, which clarifies the otherwise restrictive application of paragraph 117(9)(*d*) of the Regulations?

(3) Did the member make an error by not considering the Regulatory Impact Analysis Statement (RIAS) and proposed amendments regarding the Regulations?

(4) Did the member make an error reviewable on judicial review by disregarding irrelevant points in his assessment of the applicant's credibility?

APPLICABLE STANDARD OF REVIEW

[8] It has already been held that the standard of review applicable to a mixed question of law and fact in the application and interpretation of paragraph 117(9)(*d*) of the Regulations is reasonableness *simpliciter* (*Akhter v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 481, at paragraph 20).

ANALYSIS

(1) Did member make error by not applying subsection 117(10) of Regulations?

[9] The judgment cited by the applicant deals with a situation similar to the one at bar and is of no assistance in his case. In *Dumornay v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 541, at paragraphs 9, 10 and 11, Yvon Pinard J. said the following:

> 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.
>
> 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).
>
> 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] F.C.J. No. 1073, 2005 FC 854, in which 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 . . .

[10] In the case at bar we should not lose sight of the fact that although it was found by the Immigration and Refugee Board's Adjudication Division that the applicant had made no misrepresentation regarding the fact that he had no child – because in the adjudicator's opinion the applicant had made a sufficient attempt to inform the visa officer – he was still unable to disclose the existence of his son to the immigration officer.

[11] The foregoing passages accordingly apply to the case at bar and the applicant thus cannot argue that the officer found that the child did not have to be the subject of an examination within the meaning of section 117(10) of the Regulations since he never understood that the applicant had a child.

[12] It should be recalled that when the applicant made his permanent residence application he did not yet have a child. However, when he arrived in Canada his child was 18 months old.

[13] The applicant mentioned in his testimony to the adjudicator that his brother, who lives in Montréal, had told him he should declare his child. He was therefore not unaware that he had to declare it, and it is not unreasonable to believe that he tried in vain to explain to the officer that he had a child at the time of entry.

[14] At the same time, it was not until several years later that the applicant took steps to bring his son here. This is when the authorities realized that he had not declared it and not only did the sponsorship application for his son have to be looked at, but his own application for permanent residence also had to be reviewed. The adjudicator's investigation dealt with the applicant himself, as to whether he had made misrepresentations at the time he entered the country, and did not concern his son.

[15] It should also be noted that at the time of entering Canada the applicant was a dependant of his mother, who obtained permanent residence at the same time as himself. It is quite clear that if the authorities had been aware of the fact that he was a dependant of his mother at the time of entry and he himself had a child as a dependant, it would have been necessary to re-analyse his case and he could never have obtained permanent residence at the time he appeared at the airport in December 1995.

[16] As the applicant received the document certifying his permanent residence at the time of his arrival – and although he could not read it at that time – it would have been easy in the next few days for him to have the content of the document checked by someone in Montréal and to see at once that his son had not been mentioned in the document. Not only is there a legal principle that everyone is deemed to know the law, but in this case the applicant was told by his brother that he had to declare his son. He could at any time in the 18 months between summer 1994, when his son was born, and his arrival in Montréal, have contacted Canadian authorities in Port-au-Prince or in Canada to have his situation corrected. He could not be unaware that when he made his permanent residence application he had not mentioned the existence of his child. It does not seem reasonable to

the Court to believe that he could have come to the airport and believed that adding his son to his file at this time would allow him to obtain permanent residence on the same day without the latter being the subject of an examination within the meaning of subsection 117(10) of the Regulations.

[17] The board member accordingly did not make any error in his interpretation of paragraph 117(9)(*d*) of the Regulations. He also did not make any error by not applying subsection 117(10) of the Regulations to the case at bar.

(2) Did member make error by not taking into account respondent's public policy, which clarifies otherwise restrictive application of paragraph 117(9)(d) of Regulations?

[18] The next decision, cited by the applicant under this heading, does not in any way assist his position since Judith A. Snider J. decided the above question as follows in *Collier v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1209, at paragraphs 21 to 23:

> Ms. Collier submits that, in its interpretation of the scope and application of subsection 117(9)(*d*), the IAD had an obligation at law to consider the OP Manual. This submission, even if accepted, does not advance Ms. Collier's case. Upon carefully reading the OP Manual to which Ms. Collier directs this Court's attention, I believe that it offers guidance to Canadian immigration officials on how to advise those who disclose the existence of their non-accompanying dependents at the time they apply for permanent residence in Canada and who elect not to have the child examined. For further clarity, the final paragraph cited above states explicitly that section 117(9)(*d*) is intended to exclude family members who were consciously excluded from an applicant's application. That covers the case of Ms. Collier who, in 1985, consciously chose not to disclose the existence of her children. She cannot now rely on the OP Manual to assist her.
>
> In 1991, Ms. Collier successfully sponsored three of her children to come to Canada, at which time she disclosed to immigration officials the existence of her other two children, including John born in 1985.

> Ms. Collier submits that, owing to her disclosure in 1991 when she sponsored three of her children, the OP Manual obliged Canadian immigration officials to advise her of the consequences of not having her non-accompanying dependent children examined. On my reading of the OP Manual, the obligation of Canadian immigration officials, if it exists, only arises when disclosure of non-accompanying dependents is made in the sponsor's own application for permanent residence in Canada. For Ms. Collier, that was in 1985 and not when she sponsored her other three children in 1991.
>
> In any event, a policy of the Respondent cannot be in conflict with the words of a statutory provision. Thus, even if the policy read as proposed by Ms. Collier, it would likely be *ultra vires* and of no force.

[19] Although on arrival in Canada the applicant tried to declare to the immigration officer that he had a child, I note here that the child was born on June 12, 1994 and that it was not until December 12, 1995 that for the first time he tried to inform the authorities of the birth.

[20] In *Akhter v. Canada (Minister of Citizenship and Immigration), supra*, at paragraph 23, it states:

> The family reunification objective is to promote that family members [be] considered within the family class designation. To be considered members of the family class, therefore, it was Mr. Akhter's obligation to ensure that his family members were disclosed for the necessary procedures within that designation to be envisaged. (*Collier v. Canada (Minister of Citizenship and Immigration)* (2004), 260 F.T.R. 266, 2004 FC 1209, [2004] F.C.J. No. 1445 (QL), at paragraph 33; *Azizi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 354, [2005] F.C.J. No. 436, at paragraphs 36-37; *Canada (Minister of Citizenship and Immigration) v. De Guzman*, 2005 FC 1255, [2005] F.C.J. No. 1520, at paragraph 25.) As stated by Mr. Justice Michael Kelen in *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 F.C.R. 162, [2004] F.C.J. No. 1557 (QL), at paragraph 38:

> The objective of family reunification does not override, outweigh, supercede or trump the basic requirement that the immigration law must be respected, and administered in an orderly and fair manner. An applicant cannot be allowed to misrepresent her family members and marital status to circumvent the immigration law, and then challenge the validity of the family class law as *ultra vires* because it impedes the reunification of her family. Such a result would be contrary to the proper, fair and orderly administration of the immigration law.

[21] In my opinion, the member did not have to take the public policy into account in the case at bar since, in accordance with the above-cited judgments, if the officer has a duty to explain the importance of examining the child, it clearly could not arise before the existence of a child has been disclosed. Contrary to what the applicant maintained, there was no waiver by the officer of the need to subject the child to examination since the officer did not know there was a child.

[22] Although the public policy in question states that the provision should be amended so that [TRANSLATION] "only persons whom the claimant has decided knowingly to exclude" should be considered excluded from the family class, the fact remains that the legislation applies and has not been changed.

(3) Did member make an error by not considering the Regulatory Impact Analysis Statement (RIAS) and proposed amendments regarding Regulations?

[23] The applicant alleged that his son was not examined for administrative reasons within the meaning of the RIAS.

[24] The respondent submitted that the applicant's son was not examined because the applicant was unable to declare the existence of his child to the immigration officer. In his submission, not being able to disclose the existence of his son because the applicant spoke Spanish was not an administrative reason. The respondent further noted that the applicant had an opportunity to declare the existence of his son to Canadian authorities before his arrival in Canada by contacting the embassy to tell them of his birth.

[25] The following passage of the RIAS should be noted:

> The amendments to section 117 of the Regulations ensure that certain family members who were not examined as part of a sponsor's application for immigration to Canada are no longer excluded from the family class and could be sponsored. These family members were originally not examined because they were not required to be examined for administrative or policy reasons. This change affects family members of refugees, persons who submitted humanitarian and compassionate applications in Canada and persons who applied prior to the coming into force of IRPA.

[26] In my opinion, the case at bar is not covered by this passage, in which it can be seen that such persons were not initially the subject of examination because they were not subject to such a duty on administrative or policy grounds. The child was subject to the duty of being declared and it is the fact he was not effectively declared which led to his exclusion, without the immigration officer being able to comment on the need for examination if there was a child.

[27] I take the liberty of again citing a passage from *Collier* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, at paragraph 26:

> Similar to my comments about the OP Manual, when the relevant portions of the RIAS are read carefully, it appears that the proposed amendments apply to cases where a family member is not examined as part of his or her sponsor's application for immigration to Canada because of administrative or policy reasons. In this case, John was not examined as part of Ms. Collier's application for immigration to Canada because of her failure to disclose his existence to the immigration officials who processed her application for landing. The failure to examine John at the time that Ms. Collier came to Canada in 1986 cannot be attributed to administrative or policy reasons. Consequently, even if the RIAS ought to have been considered by the IAD, which is neither admitted nor denied, it, like the OP manual, is not relevant to the case at bar. Neither of these documents assists Ms. Collier.

[28] Although an appeal to the Immigration Appeal Division involves a hearing *de novo*, it was not shown in the case at bar that the summary was before the member.

[29] Moreover, I do not see how being unable to speak one of the two official languages and being unable to inform the authorities of the existence of a son at the point of entry constitutes an administrative error on the basis of which it is possible to avoid the application of paragraph 117(9)(*d*) of the Regulations. An application for an exemption on humanitarian and compassionate grounds would be a more appropriate remedy in the case at bar.

(4) Did member make error reviewable on judicial review by disregarding irrelevant points the adjudicator's decision?

[30] The applicant alleged it was clearly shown to the adjudicator that he had declared the existence of his son to the immigration officer and that the latter had granted him permanent residence status.

[31] The respondent submitted that the applicant had not established that the adjudicator's decision had been drawn to the member's attention.

[32] It is important here to note that the adjudicator had to determine whether the applicant had made a misrepresentation within the meaning of section 40 of the Act, not whether the applicant had declared his son.

[33] The member did not have to rely on the adjudicator's decision in determining whether the applicant's son had in fact been declared and exempted from examination by the officer. That decision did not constitute evidence of a finding by the officer that the applicant's child did not have to be examined. At most, it was evidence of a finding by the adjudicator that the applicant had made sufficient effort not to be charged with making a misrepresentation resulting in inadmissibility within the meaning of the Act.

[34] For these reasons, the application for judicial review at bar is dismissed.

[35] The parties suggested no question for certification.

JUDGMENT

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"Pierre Blais"

Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1896-07

STYLE OF CAUSE:

FRANC CASTOR LINARES

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING: Montréal, Quebec

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REASONS FOR JUDGMENT AND JUDGMENT BY: The Honourable Mr. Justice Blais

DATED: November 26, 2007

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