Date: 20071214

Docket: IMM-1151-07

Citation: 2007 FC 1325

Vancouver, British Columbia, December 14, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JOSE NOLI LACARTA DELOS SANTOS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Jose Noli Lacarta Delos Santos from a decision of the Immigration Appeal Division of the Immigration and Refugee Board (Appeal Board) rendered at Vancouver, British Columbia, on February 22, 2007. In that decision, Mr. Delos Santos' appeal from a removal order was dismissed on the basis that he had misrepresented his marital status to gain entry into Canada as a permanent resident. The Appeal Board also concluded that he had failed to demonstrate that he was entitled to humanitarian and compassionate relief under the authority conferred by s. 67(1)(*c*) of the *Immigration and Refugee Protection Act* (Act).

I. Background

[2] Mr. Delos Santos was admitted to Canada as a permanent resident on May 13, 1994. He came here with his parents and one sister under the sponsorship of a Canadian sister. At that time, the *Immigration Act, 1976,* S.C. 1976-77, c. 52, permitted unmarried sons and daughters of any age to immigrate as dependents of sponsored parents.

[3] When Mr. Delos Santos and the others initiated their application to emigrate to Canada, Mr. Delos Santos was unmarried and qualified under the sponsorship rules. However, on March 24, 1992, Mr. Delos Santos was married in the Philippines and on November 18, 1992, his wife gave birth to their first daughter. Notwithstanding these events, Mr. Delos Santos did not advise Canadian immigration officials of the change in his marital status and his application went forward as though he remained an unmarried dependent of his parents. There is no dispute that had Mr. Delos Santos' true status been declared, he would not have been admitted to Canada as a permanent resident.

[4] When Mr. Delos Santos came to Canada in 1994, his wife and child remained behind in the Philippines. Upon arrival in Vancouver, Mr. Delos Santos attended a port of entry interview. The official record of that attendance indicated that he was unmarried. On July 4, 1994, Mr. Delos Santos' second daughter was born in the Philippines.

[5] It was not until Mr. Delos Santos applied to sponsor his wife and children to come to Canada in August 2004 that his true marital status came to the attention of Canadian immigration

authorities. That information was disclosed by Mr. Delos Santos in his sponsorship application in which he stated that he was married on March 24, 1992. In that application the existence of both of Mr. Delos Santos' children and their dates of birth were also declared. As a result of that disclosure the Department made further enquiries and the Minister referred the matter for an admissibility hearing under s. 44(2) of the *Immigration and Refugee Act*, R.S. 2001, c. 27 (Act).

[6] On February 27, 2006, after a hearing on the merits, the Immigration Division of the Immigration and Refugee Board (Board) found that Mr. Delos Santos had failed to fulfill the positive legal duty of candour which required him to disclose his changed marital status. The Board also took the information on the face of the port of entry declaration at face value and seems to have concluded that Mr. Delos Santos misstated his marital status at that point. In the result, the Board issued a removal order. Mr. Delos Santos then initiated an appeal to the Immigration Appeal Division under s. 63 of the Act and it is from that decision of February 22, 2007, that this application for judicial review arises.

II. The Appeal Board Decision

[7] The Appeal Board was required by s. 67 of the Act to review the Board's decision for error and to take into account any humanitarian and compassionate considerations which could justify the granting of special relief. The Appeal Board dealt with Mr. Delos Santos' appeal *de novo* and it heard evidence from him and from several other witnesses.

[8] The Appeal Board first considered the validity of the removal order and upheld it for the following reasons:

> [16] The appellant confirmed that he signed the Record of Landing without understanding its content. I am satisfied that the appellant chose to do nothing throughout his entire processing of immigration visa especially after his status changed within the Philippines. The excuse of lack of an Ilongo interpreter does not apply. I find not credible his arguments that if he had an access to the interpreter in Ilongo he would have reported his marital status and dependent to the Canadian immigration authorities. I find that the Canadian immigration authorities were not apprised of the appellant's marriage and a birth of his daughter. Based on the information provided by the appellant with respect to his single status they continued to process his application at the port of entry.
>
> [17] Based on the evidence before me I agree with the I.D. Member's decision that the allegation against the appellant of being a person described in paragraph 40(1)(a) of the *Act* who is inadmissible 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*. I find the Exclusion Order is valid in law.

[9] The Appeal Board went on to consider the evidence bearing on its humanitarian and compassionate discretion. It correctly noted the requirement to consider the so-called Ribic factors as affirmed in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, 1 S.C.R. 84, including the following:

(a) the seriousness of the circumstances which led to the issuance of the removal order;

(b) the likelihood of repeat behaviour;

(c) the length of time and the degree of establishment that the appellant has achieved in Canada;

(d) the extent of available family and community support for the appellant; and

(e) the degree of hardship caused to the appellant and his family from his removal from Canada.

[10] The Appeal Board found that Mr. Delos Santos and his family supporters lack credibility with respect to their evidence dealing with the disclosure of his marital status. It specifically rejected the evidence of Mr. Delos Santos' sponsoring sister that she was unaware, before his arrival, that he was married and had fathered a daughter. The Appeal Board also found that the family decided to withhold that information from immigration authorities with the knowledge that Mr. Delos Santos would otherwise be inadmissible. This finding of a deliberate misrepresentation was described by the Appeal Board as a serious negative factor in the exercise of its humanitarian and compassionate authority. The Appeal Board also rejected Mr. Delos Santos' explanation for participating in a second marriage ceremony in 1996 and found that conduct to be part of a deception to hide the earlier misrepresentation. These negative factors were further aggravated by Mr. Delos Santos' efforts to minimize the gravity of his actions and the extent of his involvement.

[11] On the positive side of the ledger, the Appeal Board noted Mr. Delos Santos' continuous Canadian employment, his financial support to his family, and his frequent visits to the Philippines to see his family. It also noted the positive testimonials given by friends and other supporters which established that Mr. Delos Santos was a hardworking and law abiding individual with close family ties.

[12] The Appeal Board also considered the hardship that Mr. Delos Santos had experienced in the Philippines while living with a physical deformity in "dire conditions of poverty". It referred to

letters from his children which disclosed mistreatment by others related to Mr. Delos Santos' disability; albeit that the Appeal Board gave that evidence less weight because of the family's self-interest in promoting his claim. The Appeal Board explicitly recognized the significance of Mr. Delos Santos' disability in the following way:

> The appellant's personal appearance may cause him some hardship if he returns to the Philippines, but despite his health condition and his short stature he was employed prior to his immigration to Canada and he married and fathered two children.

[13] In weighing the evidence of Mr. Delos Santos' establishment in Canada, the Appeal Board observed that his success was based on a material misrepresentation which allowed him to wrongfully obtain permanent resident status. It went on to note that the skills obtained by Mr. Delos Santos in Canada would be advantageous in the Philippines. The interests of Mr. Delos Santos' children were found to be best served by a family reunification in the Philippines notwithstanding a possible reduction in their living standards. The Appeal Board's humanitarian and compassionate conclusion was stated as follows:

> [32] The Immigration Appeal Division has to perform a delicate balancing act. I have considered the objectives of the *Act* and positive and negative factors in this appeal. I note that if the marital status of the appellant was correctly disclosed at the time of the application or the time of a landing, he could not have been sponsored by his sister. The appellant was able to come to Canada and prosper by virtue of his misrepresentation, yet at the same time he asks the IAD to exercise its discretionary jurisdiction in his favour, while he continued to deny that he mislead Canadian immigration authority and was untruthful to the Panel.
>
> [33] In weighing the evidence in this case I am guided by *Chirwa*, in looking to humanitarian and compassionate considerations, which warrant relief in any given case "…taken as those facts, established

> by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another…"
>
> [34] I conclude the appellant has not met the onus on him of demonstrating that, taking into account the best interests of a child or children directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of this case.
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> [footnotes omitted]

III. Analysis

[14] All of the issues raised on this appeal are evidence-based and, therefore, attract the highest level of judicial deference. I accept Ms. Aharon's argument that it is not the role of the Court to reweigh the evidence or to substitute its own views for those of the Appeal Board, absent a perverse or capricious analytical error. It is not enough that the Court might have come to a different conclusion on the same evidence. To overturn the Appeal Board decision I must be satisfied that it contains patently unreasonable errors of fact: see *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 2 SCC 40, 2 S.C.R. 100 at para. 38.

[15] I was invited by Mr. Goldstein to view the decision cumulatively and to subject it to a "smell test". However, notwithstanding Mr. Goldstein's capable submissions, I am not satisfied that the Appeal Board decision contains a reviewable error.

[16] It was urged on behalf of Mr. Delos Santos that the Appeal Board misunderstood the extent of his disability and considerable reliance was placed on an obvious mistake in one passage of the decision. That passage stated:

> There is no medical evidence in the Record from Dr. D.J. Ferrier M.D. that the appellant is suffering from 'Gibbus deformity' consistent with previous spinal tuberculosis. No other abnormality is demonstrated'. I had an opportunity to observe the appellant and while he appeared to have a deformity, there was not a noticeable 'hunchback'.

[17] It is clear to me that the Appeal Board's insertion of the word "no" in the first sentence above was a typographical error because much of the remaining text is a direct quote from the subject medical report. Furthermore, the Appeal Board obviously recognized the existence of Mr. Delos Santos' disability and the limitations it imposed. In the result, this mistake by the Appeal Board is not one of substance and carries no legal significance.

[18] In further support of the argument that Mr. Delos Santos' medical condition was underestimated by the Appeal Board, he submitted an affidavit to the Court which included a new medical report and photographs depicting the curvature of his spine. This evidence is inadmissible because it was readily available to Mr. Delos Santos and could have been put into evidence during the hearing before the Appeal Board: see *Moktari v. Canada (Minister of Citizenship and Immigration)* (2001), 200 F.T.R. 25, 12 Imm.L.R. (3d) 268 at para. 34. It is not enough for counsel to assert that he did not anticipate that this could be an issue of controversy. It is up to a claimant to make his case and the decision-maker cannot be faulted for making findings that are reasonable on the evidence presented. In any event, this new evidence is insufficient to undermine the Appeal Board's medical findings. The degree of curvature in Mr. Delos Santos' spine is largely in the eye of the beholder. The Appeal Board understood the nature of the disability and the extent of the

functional limitations it created, and a disagreement over how that condition should be described is not material to the outcome.

[19] It was also argued that the Appeal Board erred by not taking sufficient account of the positive evidence adduced in support of Mr. Delos Santos' claim to humanitarian and compassionate relief. Reference was made to the Appeal Board's supposed failure to fully consider the testimonial evidence and, in particular, the letters from his children and from Reverend Poirier.

[20] It is trite law that the Appeal Board is not required to recite every piece of evidence put before it. The decision here identified all of the testimonial evidence tendered on behalf of Mr. Delos Santos and appropriate findings were drawn from that material. All of the significant points made by Reverend Poirier were addressed in the Appeal Board's decision and I am not satisfied that anything material was overlooked. It was also open to the Appeal Board to discount the letters submitted by Mr. Delos Santos' children. Although the sentiments and experiences expressed in those letters were undoubtedly heartfelt, the Appeal Board's detection of an unnatural tone to that correspondence was not unreasonable. The content of the letter written by 12-year-old Nolinie does leave an impression that it was written under the direction of someone familiar with the factual issues relevant to Mr. Delos Santos' appeal.

[21] The further argument that the Appeal Board overlooked or misconstrued evidence bearing on the interests of the children also lacks merit. The fact that Mr. Delos Santos' youngest child was not excluded when the family sponsorship application was rejected is not a material fact that the

Appeal Board was obliged to consider. The Appeal Board correctly observed that the only place where this family could be lawfully reunited was the Philippines. It was not unreasonable, therefore, to conclude that the interests of these children would be best served by having their father returned to the Philippines. It was also not unreasonable for the Appeal Board to find that the interests of Mr. Delos Santos' immediate family took precedence over those of his Canadian siblings.

[22] I also do not accept that the Appeal Board failed to consider issues of foreign hardship. The decision contains a number of references to the hardship Mr. Delos Santos had experienced in the Philippines and to the problems he would likely encounter upon a return there. The Appeal Board's observation that Mr. Delos Santos would be returning with a good English language capacity and other skills, all of which would mitigate the earlier hardships he had encountered, cannot be described as unreasonable.

[23] While I acknowledge that the Appeal Board's finding with respect to Mr. Delos Santos' motives for participating in a second marriage ceremony is thinly supported by the evidence, I am unable to conclude that it was a capricious inference or was based on conjecture. Mr. Delos Santos' explanation for this event was unconvincing. Given the temporal relationship of this event to the remaining immigration history and considering the Appeal Board's other credibility concerns, it was open to find that this, too, was a deception.

[24] I am satisfied that the Appeal Board appropriately weighed the evidence before it and carried out a proper balancing of the humanitarian and compassionate considerations. It was not

fixated on the issue of misconduct but weighed that factor against the other evidence. The decision also demonstrates a correct appreciation of the burden of proof.

[25] The issues raised here are not matters which invoke the Court's judicial review authority and, consequently, this application is dismissed.

[26] Mr. Goldstein proposed the following question for certification:

> Does the issue of potential foreign hardship to the Applicant, pursuant to section 63(2) of the *Immigration and Refugee Protection Act* ("IRPA") incorporate the best interests of the child, pursuant to *Baker v. Canada*, [1999] 2. S.C.R. 817?

[27] The Respondent objects to this question on the basis that the issue is clearly determined by s. 67(1) of the Act. I agree. I would add that the proposed question does not arise from these reasons.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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