Date: 20071228

Docket: IMM-2534-06

Citation: 2007 FC 1368

Ottawa, Ontario, December 28, 2007

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GLORIZA DELA REA MANALANG
SHEENA DELA REA MANALANG
RIZZA DELA REA MANALANG

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Gloriza Dela Rea Manalang (the "Principal Applicant") and her children Sheena Dela Rea Manalang and Rizza Dela Rea Manalang (the "minor Applicants")(collectively, the "Applicants") seek judicial review of a decision made on May 1, 2006 by the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board (the "Board"). In that decision, the IAD dismissed the appeals brought by the Principal Applicant and her children from the exclusion orders issued on June 24, 2004 by the Immigration Division (the "Immigration Division") of the

Board. The exclusion orders were made on the basis that the Applicants were inadmissible for misrepresentation, pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The appeals did not challenge the legal validity of the exclusion orders but were brought solely on humanitarian and compassionate grounds pursuant to subsection 63(3) of the Act.

[2] The decision was issued by the second IAD to hear the appeal. Following the first hearing before the IAD in April and May, 2005, but before a decision was rendered, the IAD on its own motion ordered a re-hearing because a designated representative had not been appointed for the two minor applicants, Sheena and Rizza. A new IAD Panel was convened and the appeal was re-heard on a *de novo* basis in December 2005. A representative was designated for the children for this second hearing. The decision of the second panel of the IAD is the subject of this application for judicial review.

I. Facts

[3] The Principal Applicant was born in 1971 in the Philippines. Between approximately 1988 and 1991, she lived with a Mr. Shigor Komeamu and gave birth to his child on January 23, 1991. The child was named Ayai Oshin Rea and the father died soon after the child's birth.

[4] On April 20, 1993, the Principal Applicant married Geronimo Saulog in the Philippines. They had a child together who was born on November 13, 1993, named Jeriza Dela Rea Saulog.

The relationship between the Principal Applicant Mr. Saulog ended within a year of the child's birth.

[5] On September 2, 2000, the Principal Applicant married Mr. Ricardo Manalang in the Philippines. Mr. Manalang sponsored the Principal Applicant to come to Canada as his spouse. The Principal Applicant applied for permanent residence for herself and her daughters by application signed June 13, 2001. In that application, she identified Ricardo Manalang as her spouse, listed her two children as Sheena and Rizza, and indicated that she had not been previously married. She also submitted false birth certificates for her children. These birth certificates were later found to be false. The false birth certificate for Oshin was under the name of Sheena, showing her date of birth as February 23, 1991, and that her father was Ricardo Manalang. The false birth certificate for Jeriza was under the name of Rizza, showing her date of birth as December 13, 1993, and that her father was Ricardo Manalang.

[6] The Principal Applicant and her two daughters were landed in Canada on July 11, 2002. In the record of landing for the Principal Applicant, Mr. Ricardo Manalang is identified as the spouse. In signing her application, the Principal Applicant stated that the contents were true and correct. The records of landing for the minor Applicants are based on the information previously provided in the false birth certificates.

[7] The Principal Applicant and Mr. Manalang divorced on November 30, 2003.

[8] The Applicants were reported as inadmissible on the grounds of misrepresentation on September 17, 2003. An inadmissibility hearing was heard on June 24, 2004, and the presiding member Mr. Paul Kyba ordered the Applicants excluded that same day. During the hearing, the Immigration Division member designated the Principal Applicant as the representative of the two children. The Applicants appealed the exclusion orders to the IAD. Evidence was heard on April 20 and May 4, 2005, before IAD member Kim Workum. The parties then filed written submissions. Upon the request of the Applicants, the same IAD Panel reconvened on August 22, 2005 to hear the evidence of a further witness.

[9] By letter dated September 30, 2005, the IAD advised the Applicants that no representative had been designated for the two minor Applicants. The letter said that, as a result, the appeals of the Applicants would be convened for a *de novo* hearing before another member. The text of the letter reads as follows:

> I have been directed to advise the parties as follows:
>
> During the continued management of this file, it was noted that a representative for the two minor appellants was not designated by the presiding member. As a result, the Division orders that the appeals of ***Gloriza MANALANG, Sheena dela Rea MANALANG, Rizza dela Rea MANALANG***, be convened by *de novo* hearing before another member. The scheduling unit will be in contact with you shortly in order to schedule the matter to be heard on a priority basis.

[10] The *de novo* hearing took place on December 19 and 20, 2005, before IAD member Kashi Mattu. Mr. David Matas was named the designated representative for the two minor Applicants and

appeared in that capacity at the proceedings in December 2005. The IAD dismissed the appeals in a decision dated May 1, 2006.

II. The Decision

[11] In its decision, the IAD first found the exclusion orders to be valid in law. It then addressed the basis for the positive exercise of discretion, on humanitarian and compassionate grounds, to allow the appeals. That discretion is granted in paragraph 67(1)(c) of the Act which provides as follows:

67(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of, … (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	67(1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé : … c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[12] The IAD then referred to the decision in *Ribic v. Canada (Minister of Employment and Immigration)* (August 20, 1985), Doc. I.A.B. 84-9623 (Can. Imm. & Ref. Bd.) (App.Div.) where a

number of factors were identified as being relevant to the exercise of discretion in the context of an appeal based on misrepresentation. The IAD listed the following factors:

> (1) the seriousness of the offence leading to the deportation order;
>
> (2) the possibility of rehabilitation;
>
> (3) the length of time spent in Canada and the degree to which the appellant is established here;
>
> (4) the family in Canada and the dislocation to the family that deportation would cause;
>
> (5) the support available to the appellant, not only within the family but also within the community;
>
> (6) the degree of hardship that would be caused to the appellant by his return to his country of nationality.

[13] The IAD reviewed the evidence that had been submitted and concluded that the misrepresentations were serious and “at the high end of the spectrum” in that regard. The Principal Applicant had deliberately misrepresented her marital status, and the names and birth dates of her daughters. The IAD found that the children were indirectly affected by the misrepresentation of the Principal Applicant since their entry into Canada was directly related to the statements and actions of their mother.

[14] The IAD determined that the Principal Applicant had not shown remorse. The gravity of the misrepresentation and lack of remorse were given significant negative weight by the IAD.

[15] On the positive side, the IAD took into account the efforts made by the Principal Applicant to improve her skills and to enhance her prospects of employability while in Canada. The IAD commented on the presence of family members in Canada and the evidence of active participation of the Applicants in community events.

[16] The IAD found that there was some degree of establishment in Canada which was a positive factor. However, it also found that family members in Canada would suffer only a limited effect from the removal of the Applicants from Canada. It found that expressions of community support, in favour of allowing the appeals, was compromised because that support was based upon incomplete information. The factor of community support received a negative assessment.

[17] The IAD assessed the evidence from the Principal Applicant and her elder daughter Sheena concerning their fears of returning to the Philippines. The IAD concluded that the Applicants would enjoy family support and access to mental health services, if required, in their country of citizenship.

[18] The IAD specifically addressed the purpose of family reunification that is set out in the Act, referring in particular to the relationship between the Principal Applicant and Mr. Deleon. While acknowledging the relationship, the IAD noted that it was not long-standing. Further, the IAD commented upon the continued existence of the Principal Applicant's first marriage in the Philippines and Mr. Deleon's current obligations to his children and employment in Canada.

[19] The IAD further observed that further evidence had been submitted after the conclusion of the hearing in December 2005. This further evidence consisted of a doctor's note indicating that the Principal Applicant was in the early stages of pregnancy. The IAD characterized the actions of the Principal Applicant, in being pregnant, as something that "was completely within the control" of the Principal Applicant, but in any event, there was credible evidence as to the availability of medical services in the Philippines.

[20] The IAD specifically referred to the best interests of the daughters of the Principal Applicant, referring to evidence as to their adaptation to life in Canada, success in school and participation in extra-curricular activities. It concluded that with the availability of family support, access to free education in the Philippines, and knowledge of the language, the minor Applicants would adapt quickly to life in the Philippines and accordingly, would not suffer undue hardship if required to leave Canada.

[21] The IAD dealt with an argument that had been made that the minor Applicants be allowed to remain in Canada without their mother until the Principal Applicant could return under the sponsorship of Mr. Deleon. The IAD stated that this option had been "specifically considered" but since the children have consistently remained in the care of the Principal Applicant, it was in their best interests to live with their mother in the same country.

[22] In conclusion, the IAD said that, having considered the totality of the evidence, the negative factors outweighed the positive ones and the evidence did not warrant the positive exercise of

discretion in favour of the Appellants. It added that the circumstances of the case did not warrant a stay and commented, again, on the gravity of the misrepresentations made by the Principal Applicant.

III. Submissions

A. *The Applicants' Submissions*

[23] The Applicants advanced several arguments. First, they argued that the IAD decision is invalid because it was made without jurisdiction. In this regard, they argue that the failure of the first IAD Panel to designate a representative for the minor applicants did not vitiate the proceedings before it. They say that the IAD was not authorized to convene a *de novo* hearing pursuant to section 174 of the Act which essentially establishes that the IAD has the equivalent powers, rights and privileges of a superior court of record.

[24] Relying on the decision in *Demirtas v. Canada (Minister of Employment and Immigration),* [1993] 1 F.C. 602 (F.C.A.), they submit that once a superior court of record has heard evidence it is seized of the case and no other judge may decide it. They submit that the first IAD Panel was seized of the appeal and consequently, the IAD had no statutory authority to reopen the appeal on its own motion.

[25] They argue that section 71 of the Act gives the IAD the authority to reopen an appeal in certain circumstances upon the application of a foreign national who has not left Canada. However,

they say that by granting the IAD such authority specifically upon receipt of an application, the statute implicitly denies the IAD authority to reopen the hearing in the absence of such an application.

[26] The Applicants further submit that the IAD lacks jurisdiction under common law to reopen the appeal hearing. They argue that at common law, a tribunal can only re-hear a matter if the former hearing was a nullity because of a breach of natural justice and rely on the decision in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 and *Kaur v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 209 (F.C.A.).

[27] The Applicants say that the failure to designate a representative may or may not breach natural justice depending on the facts of the case, relying on the decision in *Duale v. Canada (Minister of Citizenship and Immigration)*, 40 Imm. L.R. (3d) 165.

[28] The Applicants argue that the failure to designate a representative by the first IAD Panel did not breach natural justice and was a mere "technicality". They say that the Principal Applicant, although she was not formally designated as such, served as a representative acting in the best interests of the minor Applicants at the first hearing and that she met all the requirements under subsection 167(2) of the Act and Rule 19 of the *Immigration Appeal Division Rules*, SOR/202-230, as amended (the "Rules"). They also note that the mother was designated as the representative of the minor Applicants at the Immigration Division hearing and that nothing occurred at either hearing to put this designation into doubt, that the second IAD Panel proceeded as if it too had designated the

mother as a representative and that the mother assumed that her designation as a representative by the Immigration Division applied equally to the proceedings before the IAD.

[29] Second, in any event, the Applicants submit that the IAD Panel was obligated to make a determination on the facts of whether or not the failure by the first IAD Panel to designate a representative vitiated the proceedings that it presided over.

[30] Third and finally, the Applicants argue that the first IAD panel was obligated as a matter of procedural fairness to accept submissions from the parties before making a vitiation determination.

[31] The second main issue raised by the Applicants is that the various misrepresentations made by the Principal Applicant were immaterial, irrelevant, and did not and could not have induced an error in the administration of the Act.

[32] They say that the effect of the misrepresentations was to lead the Respondent to incorrectly believe that the Principal Applicant was married to Ricardo Manalang even though this marriage was invalid because she was already married to Geronimo Saulog.

[33] They submit that this effect was immaterial because Mr. Manalang, regardless of the validity of his marriage with the Principal Applicant, could sponsor her as a conjugal partner. In this regard, they rely on section 2 and paragraph 117(1)(a) of the *Immigration and Refugee Protection*

Regulations, SOR/2002-207 (the "IRP Regulations") and to the Citizenship and Immigration Canada's *Overseas Processing Manual* (the "Manual"), Chapter 2, section 5.36.

[34] The Applicants emphasize that the concept of conjugal partnership is new to the present Act, which they say applies to their situation because it was in force when they entered Canada, at the time of their admissibility hearing and at the time of their appeal. They refer to section 190 of the Act which provides as follows:

190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.	190. La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.

[35] They further argue that they accepted that they were inadmissible before both the Immigration Division and the IAD.

[36] As well, the Applicants argue that at the Immigration Division level, the Panel produced flawed legal reasoning. They submit that the Panel failed to observe that the new Act had come into

force between the time when the visa officer made his original decision and the time of the hearing over which it presided.

[37] They also submit that the Immigration Division failed to explain how the birth certificate misrepresentations could have possibly led to an error in the administration of the Act. They note that the minor Applicants were only 8 and 11 years old at the time their visas were issued, that consequently the only relevant requirements were medical, and that, upon examination, the minor Applicants met those requirements.

[38] The Applicants then raise an argument that the IAD improperly took judicial notice that the pregnancy of the Principal Applicant before the IAD re-hearing was an action that was "completely within her control".

[39] They submit that the IAD, as a court of record, is only authorized pursuant to section 174 and paragraph 175(1)(c) of the Act to take notice only of those facts which may be judicially noticed and otherwise must base its decisions upon the evidence adduced before it. They complain that the IAD exceeded its authority to take notice when it stated the following conclusion at page 7 of its reasons:

> … that she [Gloriza Manalang] allowed herself to become pregnant between the time of the original hearing and this hearing. This action was completely within the control of the appellant. Based on the evidence before me, I find it is more likely the appellant has made this choice in an effort to bolster the evidence for the appeal.

[40] The Applicants also submit that the IAD's remarks concerning the pregnancy of the Principal Applicant give rise to a reasonable apprehension of bias since the comments are sexist and irrelevant. In any event, the Applicants note that the Principal Applicant was pregnant at the time of the re-hearing in December 2005 but did not go for a pregnancy test until January, 2006. They argue that if she had truly become pregnant in order to bolster her case, she would not have waited so long after the re-hearing to confirm the pregnancy.

[41] Finally, the Applicants argue that the IAD did not properly consider the best interests of the minor Applicants and further, that it failed to take into account the views of those Applicants. The Applicants submit that these two oversights give rise to a breach of Canada's obligations pursuant to the *Convention on the Rights of the Child*, November 20, 1989, [1992] Can. T.S. No. 3, Art. 12 (the "Convention on the Rights of the Child").

[42] With respect to the first point, the Applicants submit that the IAD, in its reasons, concluded that the minor Applicants would not suffer undue hardship if returned to the Philippines. They submit that the conclusion that the best interests of the minor Applicants would be met by remaining in Canada is implicit in the reasons of the IAD. Specifically, they argue that the IAD's conclusion that the minors would not suffer "undue hardship" if removed implies that the minors would suffer some hardship. Since this recognition was only implicit, the Applicants submit that the IAD failed

in its obligation, pursuant to paragraph 67(1)(c) of the Act, to give reasons for why and how the best interests of the children are served by their removal from Canada, together with their mother.

[43] With respect to the second point, the Applicants submit that the IAD failed to comply with the obligation under Article 12 of the Convention that the views of children, in certain circumstances, be given "due weight". They suggest that the IAD is required to comply with this obligation by reason of paragraph 3(3)(f) of the Act and further to the decision of the Federal Court of Appeal in *De Guzman v. Canada (Minister of Citizenship and Immigration),* [2006] 3 F.C.R. 655, application for leave to appeal to Supreme Court of Canada dismissed 356 N.R. 399 (n).

B. *The Respondent's Submissions*

[44] The Respondent argues that the IAD decision to re-hear the appeal was sound in law. First, they said that section 71 of the Act does not apply in the present case, since that provision only applies where the reopening of an appeal is sought. In this case, such an application was not available since no conclusion has been reached by the first IAD Panel. Further, the Respondent suggests that all divisions of the Board are required to specifically designate representatives for minor applicants and in this regard, refers to the decisions in *Stumf v. Canada (Minister of Citizenship and Immigration)* (2002), 289 N.R. 165 (F.C.A.) and *Duale*. Finally, in response to the Applicants' argument that the first IAD was seized of the matter, the Respondent notes that the first

IAD had not made a decision and there are other circumstances where a matter is re-heard by a second panel where a first panel does not render a decision.

[45] The Respondent further argues that the Applicants did not object to the manner in which the IAD ordered the re-hearing of the appeal and consequently, they are precluded from objecting to that procedure. No objections were raised by the Applicants to this method of proceeding when the second IAD hearing convened and the point was not addressed in the extensive written arguments submitted by counsel for the Applicants after that hearing.

[46] The Respondent disagrees with the Applicants' arguments that the misrepresentations in question were irrelevant. They submit that the Principal Applicant's misrepresentation about her marriage was relevant because it relates to whether or not she met the definition of a family class member. They note that the misrepresentation related to the minor Applicants' birth father was relevant because it prevented the visa officer from determining issues such as whether the father objected to the departure of the children for Canada and whether there were any outstanding custody matters.

[47] As for the Principal Applicant's argument about the applicability of the conjugal partner provisions in the IRP Regulations, the Respondent argues that this is a wholly new issue which the Applicant failed to raise before the IAD. Accordingly, the issue cannot be raised in the present proceeding.

[48] Finally, with respect to the arguments as to the materiality of the misrepresentations, the Respondent submits that those misrepresentations are “demonstrably material”. Among other reasons, the Respondent argues that the marital status of the Principal Applicant was critically important to the grant of permanent residence by the Visa Officer in Manila.

[49] In response to the Applicants’ submissions as to the Board taking improper judicial notice of the Principal Applicant’s pregnancy, the Respondent concedes that the comments may be questionable but otherwise, he submits that the analysis and conclusions of the IAD were appropriate and grounded in the evidence submitted. The Respondent submits that the decision as a whole shows that the IAD considered both positive and negative factors and ultimately reached its decision on the basis that the positive factors did not outweigh the negative factors.

[50] The Respondent denies the Applicants’ claim that the IAD failed to take the best interests of the minor Applicants into account and argues that the decision clearly shows that those interests were considered. Further, the Respondent disagrees with the Applicants’ arguments concerning an obligation to consider the views of the children pursuant to the Convention. They say that paragraph 3(3)(f) of the Act does not require, in accordance with Article 12 of the Convention, that the IAD explicitly give due weight to the views of minor applicants. They rely on paragraphs 42 and 44 of the decision in *Charkaoui (Re)*, [2006] 3 F.C.R. 325, where this Court said that that Parliament’s intention in enacting paragraph 3(3)(f) was to provide a general guide to interpretation “that does

not operate to incorporate international law into domestic law". The Respondent also refers to the decision of the Federal Court of Appeal in *De Guzman*.

[51] The Respondent argues that subsection 67(1) requires the IAD to consider only "the best interests of a child directly affected by the decision" and notes that the minor Applicants were represented by legal counsel before the second IAD Panel. Accordingly, their views would have been expressed through counsel. In any event, the IAD sought the views of the minor Applicants during questioning of Sheena during the hearing.

C. *Further Submissions*

[52] Following the hearing of the application for judicial review counsel were provided with the opportunity to make further submissions as to the scope and relevance of section 71 of the Act to this proceeding, following the recent decision of the Federal Court of Appeal in *Nazifpour v. Canada (Minister of Citizenship and Immigration)* (2007), 360 N.R. 199 (F.C.A.), application for leave to appeal to Supreme Court of Canada dismissed [2007] S.C.C.A. No. 196, counsel for each party filed further submissions.

(1) Applicants' Submissions

[53] The Applicants submit that the decision of the Federal Court of Appeal in *Nazifpour* supports its earlier arguments that the IAD committed a reviewable error by acting on its own

motion to send the matter for hearing before a differently constituted tribunal after the first panel had heard the evidence but before it had rendered its decision.

[54] The Applicants argue that the Federal Court of Appeal has now determined that the IAD can reopen a case only if there has been a breach of natural justice. Accordingly, the Applicants maintain their position that the IAD had no authority to order a new hearing of their appeal, on its own motion.

[55] The Applicants further argue that the power to reopen an appeal, pursuant to section 71 of the Act, is not limited to those situations where a decision has been made, since the word “decision” does not appear in section 71. In any event, if an appeal can be reopened only if there has been a breach of natural justice, the Applicants point out that no such finding had been made in their case, relative to the non-appointment of a designated representative for the minor children.

[56] The Applicants argue that neither the Act, nor the Regulations nor the Rules authorizes a rehearing prior to the making of a decision upon the merits of an appeal. By ordering a rehearing, the Board here acted without jurisdiction.

[57] The Applicants contest the Respondent’s reliance upon Rule 57 as authorizing the actions of the Board. They say that the Respondent only referred to this Rule in its oral arguments and made no reference to it, or other legal authority, in the earlier written submissions.

[58] The Applicants submit that two conditions must exist before Rule 57 can apply. First, they say that Rule 57 is engaged only when there is no other provision in the Act, the Regulations or the Rules that addresses the matter, and second when the action taken by the Board is necessary to deal with the matter. They argue that in this case, neither condition is met.

[59] First, the decision in *Nazifpour* demonstrates that section 71 of the Act addresses the matter of a rehearing. Such a rehearing can take place only where there has been a breach of natural justice and there was no such finding here, before the rehearing was ordered.

[60] Alternatively, if section 71 applies only to reopening an appeal once a decision has been rendered, then the Applicants argue that Rule 57 must be read consistently with Parliament's objectives as set out in section 71, relative to rehearings. The Applicants note that section 71 requires a request for a rehearing by a foreign national who has not left Canada under a removal order. No such request was made here.

[61] With respect to the second condition, the Applicants argue that the action taken by the Board was not necessary and therefore, Rule 57 does not come into play. Relying on *Nazifpour*, the Applicants submit that the Board could have made its decision to rehear the appeal conditional upon a finding that a breach of natural justice had occurred, given the parties an opportunity to make representations regarding a rehearing prior to deciding how to proceed, designated a representative for the children and awaited an application from that representative for a rehearing. The Applicants

say that since the Board failed to take these steps, it is "impossible to say that what the Board did was necessary to deal with the matter before it."

(2) Respondent's Submissions

[62] The Respondent takes the position that section 71 and *Nazifpour* do not apply to the present case, on the basis that section 71 comes into play only where an applicant seeks to reopen a Board decision. In the present case, no decision had been made.

[63] Further, the Respondent argues that the Federal Court of Appeal in *Nazifpour* distinguishes between "reopening" and "rehearing", in paragraph 52 of the reasons, contrary to the submissions of the Applicants. In any event, they submit that *Nazifpour* supports his position "by analogy" since section 71 allows the reopening of a hearing in the case of a breach of procedural fairness and since a breach occurred here due to the Board's failure to appoint a designated representative.

[64] Finally, the Respondent submits that the Board acted within its authority and did not breach procedural fairness. They argue that the Board appropriately decided that the absence of a designated representative for the minor Applicants required a rehearing of the appeal. The Board was not required to wait for one of the parties to make an application requesting a rehearing since Rule 58(a) provides that the powers of the Immigration Appeal Division are such that it may act on initiative without application or request from any party.

[65] Alternatively, the Respondent submits that Rule 57 authorizes the Board to proceed as it did.

(3) Interlocutory Nature of Decision

[66] In the course of oral submissions, counsel for the Respondent raised the issue whether the decision of the IAD to rehear the appeal constitutes an interlocutory decision. Generally, such a decision is not subject to judicial review, as discussed by the Court in *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon*, [2006] 3 F.C.R. 493 (F.C.) at paras. 10-12

[67] The Respondent submits that the Applicants should have objected at the commencement of the second hearing to the decision of the Board to convene a new hearing. They argue that the failure of the Applicants to do so precludes them from raising their objections in this judicial review application. In this regard, the Respondent relies on the decision in *Yassine v. Canada* (1994), 172 N.R. 308 (F.C.A.).

[68] The Applicants argue, in response, that the Respondent has concluded that the Applicants should not have sought judicial review of an interlocutory decision of the Board. However, they submit that this case is distinguishable on its facts. In *Yassine*, the applicant had not requested the Board to reconvene for a hearing. The Federal Court of Appeal decided that even if a breach of natural justice has occurred, the breach was waived.

[69] The Applicants here argue that the previous hearing had ended and a new one had begun. Once the decision was made to conduct a new hearing, the former panel of the IAD was *functus* and no forum was available in which they could have objected to the new hearing. The Applicants further argue that the Respondent is combining two issues, that is whether a new hearing should have been ordered and the form that hearing should take.

IV. Analysis

A. *Issues*

[70] The present application for judicial review raises the following issues:

1. What is the appropriate standard of review?
2. Did the Board possess the authority to order a re-hearing of the case upon its own initiative?
3. Were the misrepresentations and undisclosed information material to a relevant matter, such that they could have induced an error in the administration of the Act?
4. Did the reasons of the IAD give rise to a reasonable apprehension of bias?
5. Did the IAD comply with Canada's obligations under the *Convention on the Rights of the Child*?

B. *Standard of Review*

[71] The starting point is to determine the applicable standard of review, based upon a pragmatic and functional analysis having regard to four factors: the presence or absence of a privative clause;

the expertise of the tribunal; the purpose of the legislation and of the particular provision in issue; and the nature of the question.

[72] The Act contains no privative clause and this tends in favour of deference. The IAD is a specialized tribunal, experienced in hearing appeals and this factor tends in favour of deference.

[73] The broad purpose of the Act is to regulate the entry of immigrants and persons in need of protection into Canada. The purpose of section 63 is to provide an avenue of appeal from a variety of negative decisions that may be made under the Act. Subsection 63(3) provides a permanent resident or a protected person the right to appeal to the IAD from a removal order. Paragraph 67(1)(c) authorizes the IAD to consider humanitarian and compassionate grounds, that is the exercise of discretion, in allowing an appeal. These two statutory provisions are remedial. The general purpose of the Act, together with the remedial purposes of subsection 63(3) and paragraph 67(1)(c), also favor deference.

[74] Finally, there is the nature of the question. This application raises several issues and the applicable standard of review will vary according to the nature of the issue.

[75] The Applicants challenge the jurisdiction of the IAD to convene a new hearing on its own motion, arising from the failure of the IAD to name a designated representative for the children of the Principal Applicant. The Applicants submit that this issue be reviewed on a standard of

correctness. The Respondent argues that this action was sound in law, implicitly treating the issue of jurisdiction as a question of law.

[76] Questions of law are reviewable on the standard of correctness and I conclude that the issue of the IAD's jurisdiction will be reviewed on that standard.

[77] The issue of the materiality of the misrepresentations, in my opinion, raises a question of mixed fact and law. Generally, a misrepresentation will have a factual foundation but the Act addresses the making of a material misrepresentation in paragraph 40(1)(a). I conclude that the nature of this question is one of mixed fact and law that is subject to review on the standard of reasonableness *simpliciter*.

[78] The issue with respect to the materiality of the misrepresentation, in my opinion, is factually intensive and would likely be subject to review on the standard of patent unreasonableness. The issue of the status of the Principal Applicant as a "conjugal partner", within the meaning of paragraph 117(1)(a) of the Regulations is a question of mixed fact and law and would attract review on the standard of reasonableness.

[79] The issue with respect to bias can be characterized as being an issue of procedural fairness and accordingly, the standard of correctness will apply.

[80] The alleged failure to apply the provisions of the Convention on the Rights of the Child raises a question that tends in favour of law more than fact and will be reviewed on the standard of correctness.

C. *Discussion*

[81] I will first address the Applicants' argument that the IAD acted without jurisdiction by convening a *de novo* hearing of the appeal on its own motion, after the evidence and arguments had been presented to the first IAD Panel. The Applicants rely heavily upon the characterization of the IAD as a "court of record" in section 174 of the Act which provides as follows:

174. (1) The Immigration Appeal Division is a court of record and shall have an official seal, which shall be judicially noticed. (2) The Immigration Appeal Division has all the powers, rights and privileges vested in a superior court of record with respect to any matter necessary for the exercise of its jurisdiction, including the swearing and examination of witnesses, the production and inspection of documents and the enforcement of its orders.	174. (1) La Section d'appel de l'immigration est une cour d'archives; elle a un sceau officiel dont l'authenticité est admise d'office. (2) La Section d'appel a les attributions d'une juridiction supérieure sur toute question relevant de sa compétence et notamment pour la comparution et l'interrogatoire des témoins, la prestation de serment, la production et l'examen des pièces, ainsi que l'exécution de ses décisions.

[82] The Applicants rely upon the words "court of record" to ague that this status necessarily means that a panel of the IAD who has heard an appeal is seized of the matter and the matter cannot

be adjudicated by another panel of the IAD. They say that the assignment of the matter to another panel of the IAD was made without statutory authority and that the decision of the second panel was made without jurisdiction.

[83] There is no quarrel with the language of the Act. Section 174 clearly describes the IAD as a "court of record". Traditionally, these words have been interpreted to mean a superior court that maintains a record of the proceedings before it, see *Re Winnipeg Charter*; *Re Community of the Sisters of the Holy Names of Jesus and Mary* [68 D.L.R.] 506 (Man. K.B. at p. 514). There is no doubt that the proceedings before both panels were recorded; the transcripts are included in the certified tribunal record.

[84] The IAD is a statutory tribunal, created by the Act. It is a separate division of the Board. Its powers are described in section 174. The difference between a court and an administrative tribunal was clearly explained by the Ontario Court of Appeal in *Re Ashby et al*, [1934] O.R. 421 at page 428 as follows:

> The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 106, 107 and 108:
>
> > A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law" means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence'

> (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.
>
> In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.
>
> Leeds (Corp.) v. Ryder, [1907] A.C. 420, at 423, 424, per Lord Loreburn, L.C.; Shell Co. of Australia v. Federal Commissioner of Taxation, [1931] A.C. 275, at 295; Boulter v. Kent JJ., [1897] A.C. 556, at 564.

[85] Neither section 174 nor any other provision of the Act provides that any particular Panel of the IAD that is constituted to hear an appeal is necessarily forever seized of that matter. The IAD is a statutory tribunal, not a superior court. Its description as a "court of record" does not change it into a superior court.

[86] According to section 62 of the Act, the sole function of the IAD is to deal with appeals under the Act. The word "appeal" is not defined in the Act. In *LeClair v. Manitoba (Director, Residential Care)*, 33 C.P.C. (4th) 1 at para. 28, the Manitoba Court of Appeal said that the meaning of "appeal" may vary according to the particular statutory scheme in which it is used as follows:

> … An "appeal" does not refer to a document or a moment in time. An appeal is a process, an event which may occur over a period of time, and may or may not include a final decision. …

[87] Subsection 161(1) of the Act authorizes the Board to make rules. Paragraph 161(1)(a) specifically authorizes the Board to make rules concerning its practice and procedure in each of its Divisions. The IAD is one such Division. Subsection 161(1) provides as follows:

161(1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting (a) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given; (b) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules; (c) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and (d) any other matter considered by the Chairperson to require rules.	161(1) Sous réserve de l'agrément du gouverneur en conseil et en consultation avec les vice-présidents et le directeur général de la Section de l'immigration, le président peut prendre des règles visant : a) les travaux, la procédure et la pratique des sections, et notamment les délais pour interjeter appel de leurs décisions, l'ordre de priorité pour l'étude des affaires et les préavis à donner, ainsi que les délais afférents; b) la conduite des personnes dans les affaires devant la Commission, ainsi que les conséquences et sanctions applicables aux manquements aux règles de conduite; c) la teneur, la forme, le délai de présentation et les modalités d'examen des renseignements à fournir dans le cadre d'une affaire dont la Commission est saisie; d) toute autre mesure nécessitant, selon lui, la prise de règles.

[88] Section 162 of the Act accords each Division sole and exclusive jurisdiction to determine all questions of law and fact that come before it. Section 162 provides as follows:

162(1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction. (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	162(1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie. (2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

[89] The Board made Rules respecting proceedings before the IAD. Rule 19 addresses the appointment of a designated representative. Rule 19 of the IAD (Immigration Appeal Division) Rules provides as follows:

19(1) If counsel for either party believes that the Division should designate a representative for the person who is the subject of the appeal because they are under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel	19(1) Si le conseil d'une partie croit que la Section devrait commettre un représentant à la personne en cause parce qu'elle est âgée de moins de dix-huit ans ou n'est pas en mesure de comprendre la nature de la procédure, il en avise sans délai la Section par écrit. S'il sait qu'il se trouve au Canada une personne ayant les qualités requises pour être représentant, il fournit les coordonnées de cette personne dans l'avis.

must provide the person's contact information in the notice. Requirements for being designated (2) To be designated as a representative, a person must (a) be 18 years of age or older; (b) understand the nature of the proceedings; (c) be willing and able to act in the best interests of the person to be represented; and (d) not have interests that conflict with those of the person to be represented.	Qualités requises du représentant (2) Pour être désignée comme représentant, la personne doit : a) être âgée de dix-huit ans ou plus; b) comprendre la nature de la procédure; c) être disposée et apte à agir dans l'intérêt de la personne en cause; d) ne pas avoir d'intérêts conflictuels par rapport à ceux de la personne en cause.

[90] This Rule mirrors subsection 167(2) of the Act which provides as follows:

167(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.	167(2) Est commis d’office un représentant à l’intéressé qui n’a pas dix-huit ans ou n’est pas, selon la section, en mesure de comprendre la nature de la procédure.

[91] The Rules do not detail the manner in which an appeal before the IAD will proceed. However, in light of the provisions of the Act which grant the IAD broad and full power to determine all question of law and fact and to deal with matters in an expeditious manner, I am of the view that it, the IAD undoubtedly has the authority to determine how it will proceed in a given case.

[92] Rules 57, 58 and 59 are relevant to this proceeding and provide as follows:

57. In the absence of a provision in these Rules dealing with a matter raised during an appeal, the Division may do whatever is necessary to deal with the matter.	57. Dans le cas où les présentes règles ne contiennent pas de dispositions permettant de régler une question qui survient dans le cadre d'un appel, la Section peut prendre toute mesure nécessaire pour régler la question.
58. The Division may (a) act on its own initiative, without a party having to make an application or request to the Division; (b) change a requirement of a rule; (c) excuse a person from a requirement of a rule; and (d) extend or shorten a time limit, before or after the time limit has passed.	58. La Section peut : a) agir de sa propre initiative sans qu'une partie n'ait à lui présenter une demande; b) modifier une exigence d'une règle; c) permettre à une partie de ne pas suivre une règle; d) proroger ou abréger un délai avant ou après son expiration.
59. Unless proceedings are declared invalid by the Division, a failure to follow any requirement of these Rules does not make the proceedings invalid.	59. Le non-respect d'une exigence des présentes règles ne rend pas l'affaire invalide, à moins que la Section ne la déclare invalide.

[93] The Applicants complain that the IAD acted without jurisdiction by convening a new hearing, on its own motion, once it discovered that a designated representative had not been named for the children at the hearing that took place in April-May 2005. They do not argue that the failure to name a designated representative gave rise to a breach of natural justice that might justify a re-opening of an appeal, pursuant to section 71 of the Act, as discussed by the Federal Court of Appeal in Nazifpour.

[94] Rather, the Applicants submit that the lack of appointment of a designated representative was a “technicality” which did not affect the jurisdiction of the first panel to make a decision, upon the evidence that was presented to it. They argue that the first panel was seized of the matter and that no other panel could dispose of their appeal.

[95] In light of the statutory scheme referred to above and the statutorily-authorized Rules of the IAD, I am satisfied that the IAD acted within its jurisdiction in convening a new hearing. The mandate of the IAD is to act in an informal and expeditious manner, according to subsection 162(2) of the Act. In light of the decision in *Duale*, it is clear that the absence of a designated representative for children or minors at law may give rise to a breach of natural justice and lead to a new hearing. The IAD pre-empted such an eventuality in this case by acting as it did.

[96] It is apparent from the transcript of the proceedings in December 2005 that the second panel did not refer to the evidence that was adduced before the fist panel. That evidence was referred to by the representative of the Respondent only when inconsistent evidence was presented at the second hearing. The second panel made its decision on the basis of the evidence that was presented to it.

[97] I am satisfied, having regard to the provisions of the Act authorizing the IAD to make rules concerning its practice and procedure and the passage of such rules by the Governor in Council that Parliament intended to extend a high degree of autonomy to the IAD over its practice and proceedings. The exercise of that authority in the present case does not give rise to a loss of jurisdiction. The fundamental requirement of a court of record that it maintain records of

proceedings before it has been met in this case; there is no doubt that the proceedings before both the first and second Panels of the IAD were transcribed and are available.

[98] I agree with the submissions of the Respondent that section 71 of the Act is not engaged in the present case. Section 71 provides as follows:

71.The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.	71.L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

Section 71, as found by the Federal Court of Appeal, applies in the case where an appeal before the IAD has been heard and adjudicated. Such an appeal can be reopened only in the particular circumstances identified in the Act, that is when a breach of natural justice has occurred.

[99] In the course of their written and oral submissions before this Court, the Applicants raised arguments as to the materiality of the misrepresentations. I agree wholly with the conclusions of the IAD and the arguments of the Respondent that the misrepresentations of the Principal Applicant with respect to her marital history and the birth dates and names of her daughter were demonstrably material. These were matters wholly within the knowledge of the Principal Applicant. There is no evidence that the misrepresentations were inadvertent or based upon a mistaken view as to their

importance. The evidence supports the IAD's finding that the misrepresentations were deliberate. There is no basis for interference with the findings of the IAD in that regard.

[100] As for the Applicants' arguments that the materiality of the misrepresentation is mitigated because the Principal Applicant could qualify as a "conjugal partner", within the meaning of paragraph 117(1)(a) of the Regulations, I accept the submissions of the Respondent that these arguments should not be entertained because they were not raised in the notice of application for judicial review and appear, for the first time, in the written memorandum filed before this Court. I refer to the decision in *Singh v. R.* (1996), 37 Imm. L.R. 140 where the Court declined to hear arguments with respect to an issue that was raised for the first time in an application for judicial review, when the opportunity existed to raise it before the Tribunal.

[101] The next matter to be addressed is the Applicant's submissions upon the alleged error by the IAD in purporting to take judicial notice of the Principal Applicant's pregnancy. In this regard, the Board made the following comments:

> … that she [Gloriza Manalang] allowed herself to become pregnant between the time of the original hearing and this hearing. This action was completely within the control of the appellant. Based on the evidence before me, I find it is more likely the appellant has made this choice in an effort to bolster the evidence for the appeal.

[102] The Respondent concedes that these remarks may be inappropriate, however, the question is whether they undermine the integrity of the decision as a whole. In my opinion, they do not.

[103] The test for a finding of a reasonable apprehension of bias is set out in the dissenting judgment in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394 as follows:

> As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…[t]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.

[104] As a matter of law, a person alleging the existence of a reasonable apprehension of bias must meet a high evidentiary threshold; see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at page 532; and *Weywaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 76. The person alleging such bias bears the burden of proof; see *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91 paragraph 13.

[105] In my opinion, the commentary of the IAD in the present case, concerning the pregnancy of the Principal Applicant, reveals doubt as to her motives but do not give rise to the level of partiality that would meet the test for bias, as described by the Supreme Court of Canada in *Mugesera* where the Court said the following at paragraph 13:

> … The duty of impartiality requires that judges approach all cases with an open mind (see para. 58). There is a presumption of impartiality. The burden of proof is on the party alleging a real or

> apprehended breach of the duty of impartiality, who must establish actual bias or a reasonable apprehension of bias. …

[106] In my view, the IAD fairly assessed the evidence before it relative to humanitarian and compassionate grounds. There was evidence that the Principal Applicant had become pregnant during the appeal proceedings before the IAD. The conclusion that this circumstance was a matter within her personal control is not patently unreasonable.

[107] The IAD was expressing an opinion but I am satisfied that its decision is solidly grounded in the evidence before it. Whether or not the Principal Applicant became pregnant in order to bolster her case was not the principal issue before the IAD and it is not the main issue before this Court.

[108] Finally, there remains the issue relative to the IAD's alleged failure to comply with Canada's obligations under the Convention on the Rights of the Child. As noted above, this argument involves a question of law and is subject to review on the standard of correctness.

[109] In *De Guzman*, the Federal Court of Appeal considered, once again, the relationship between the Convention and proceedings under the Act.

[110] The best interests of a child or children, in the context of the Act, are but one factor to be taken into consideration. They are not the predominant factor; see *Canadian Foundation for Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76. The Convention, as an instrument of international law, informs the application of the Act but it is not part of the statutory scheme

created by the Act; see *De Guzman* at para. 87.

[111] The Applicants argue that the IAD failed to provide the minor applicants with the opportunity to express their views about their best interests, in particular relative to their continued residence in Canada. I reject this argument. The minor applicants were represented by a designated representative and it was his role to ensure that their interests were fully and adequately disclosed to the panel. There was no indication in the transcript of the proceedings that the designated representative was barred from doing so. I see no merit in this argument.

[112] In any event, the decision of the IAD shows that the best interests of the minor Applicants were taken into account.

D. *Conclusion*

[113] In conclusion, the Applicants have failed to persuade me, on the basis of any of the arguments that were advanced, that the IAD committed a reviewable error in dismissing their appeal. There is no basis to interfere with the decision of the IAD and this application is dismissed.

[114] Counsel for the Applicants submitted the following questions for certification:

1. Does the failure of the Immigration Appeal Division of the Immigration and Refugee Board to designate a representative for child appellants during an appeal hearing give the Division the authority on its own initiative to order the convening of the appeal by

de novo hearing before another member without giving the parties an opportunity to make submissions?

2. Is a misrepresentation that a person is not married material to a spousal partnership where the spouse is, in any case, a conjugal partner?

3. Does the Immigration Appeal Division of the Immigration and Refugee Board err in law by failing to consider the views of a child in matters affecting the child in accordance with the age and maturity of the child as required by Article 12 of the Convention on the Rights of the Child?

[115] Counsel for the Respondent opposed certification of any question.

[116] The criterion for certifying a question is that an application raises a serious question of general importance that is dispositive of the appeal; see *Zazai v. Canada (Minister of Citizenship and Immigration)* 36 Imm. L.R. (3d) 169. I agree with the Respondent that the proposed certified questions in this case do not meet the standard for certification. In my opinion, the proposed certified questions relating to a spousal partnership involving a conjugal partner and the best interests of the child, pursuant to Article 12 of the Convention on the Rights of the Child do not meet this test.

[117] In the result, the application is dismissed and no question will be certified.

ORDER

The application for judicial review is dismissed and no question will be certified.

"E. Heneghan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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