**Date: 20081202**

**Docket: IMM-1476-08**

**Citation: 2008 FC 1315**

**Toronto, Ontario, December 2, 2008**

**PRESENT: The Honourable Maurice E. Lagacé**

**BETWEEN:**

**MANUEL ANTONIO ASUAJE ARANGUREN**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), whereby the applicant is seeking a judicial review of a decision of the Immigration Appeal Division (IAD) dated February 5, 2008, which had the effect of refusing him the right to sponsor a son, Manuel Erick Asuaje Lopez, pursuant to paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), because he had not declared him when he applied for a Canadian permanent resident visa.

II. The facts

[2] On August 13, 1993, before he left his country, Venezuela, the applicant received a permanent resident visa to come to Canada.

[3] In his application for permanent residence he stated that he had as dependants a wife and a young daughter, a Canadian citizen born on February 3, 1991.

[4] The applicant arrived in Montréal on August 22, 1995, and was granted landing. On arrival, he answered in the affirmative to question 13 of his record of landing, asking him whether he had other dependants apart from his wife, but he did not state any other information.

[5] In his application for permanent residence in Canada dated August 1993, the applicant failed to mention, however, that he was the father of a son named Manuel Erick Asuaje Lopez, born on August 21, 1989; the only dependants that he specifically declared and of whom the Canadian authorities were aware were his wife, Luz Marina Sarabia-Buestas, and his daughter, Bernette Manuellys Asuaje Sarabia.

[6] On September 26, 2007, an officer refused the application for a permanent resident visa filed by the applicant as a sponsor for his son, on the grounds that the son could not be considered as a member of the family class within the meaning of paragraph 117(9)(*d*) of the Regulations. The officer determined as such after considering that when the applicant applied for a permanent resident visa, he had not stated that his family included a son and that when he entered Canada as a

permanent resident, the son did not accompany the applicant and was therefore not examined as required by the Regulations.

[7] The applicant appealed this decision of the visa officer to the IAD, and on February 12, 2008, the IAD dismissed his appeal on the grounds that his son was excluded under paragraph 117(9)(*d*) of the Regulations.

III. Issue

[8] Is the decision of the IAD tainted by an error of fact or law justifying the intervention of the Court?

IV. Statutory framework

[9] The Regulations provide as follows:

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| **Applications** | **Demandes** |
| **10.** (1) Subject to paragraphs 28(*b*) to (*d*), an application under these Regulations shall . . . | **10.** (1) Sous réserve des alinéas 28*b*) à *d*), toute demande au titre du présent règlement: [ . . . ] |
| **Required information** | **Renseignements à fournir** |
| (2) The application shall, unless otherwise provided by these Regulations, | (2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants: |
| (*a*) contain the name, birth date, address, nationality and immigration status of the | *a*) les nom, date de naissance, adresse, |

applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

. . .

nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

[ . . . ]

**Excluded relationships**

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

. . .

(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[Emphasis added.]

**Restrictions**

**117.** (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes:

[ . . . ]

*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[Je souligne.]

[10] The term “family member” referred to in these paragraphs is defined in the Regulations as follows**:**

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|---|---|
| **1.** (1) The definitions in this subsection apply in the Act and in these Regulations. | **1.** (1) Les définitions qui suivent s’appliquent à la Loi et au présent règlement. |
| . . . | [ . . . ] |
| Definition of “family member” | Définition de ”membre de la famille” |
| (3) For the purposes of the Act, other than section 12 and paragraph 38(2)(*d*), and for the purposes of these Regulations, other than sections 159.1 and 159.5, “family member” in respect of a person means | (3) Pour l’application de la Loi — exception faite de l’article 12 et de l’alinéa 38(2)*d*) — et du présent règlement — exception faite des articles 159.1 et 159.5 —, “membre de la famille”, à l’égard d’une personne, s’entend de: |
| (*a*) the spouse or common-law partner of the person; | *a*) son époux ou conjoint de fait; |
| (*b*) a dependent child of the person or of the person’s spouse or common-law partner; and | *b*) tout enfant qui est à sa charge ou à la charge de son époux ou conjoint de fait; |
| (*c*) a dependent child of a dependent child referred to in paragraph (*b*). [Emphasis added.] | *c*) l’enfant à charge d’un enfant à charge visé à l’alinéa *b*). [Je souligne.] |

V. Analysis

(i) *Standard of review*

[11] The issue now involves the interpretation of paragraph 117(9)(*d*) of the Regulations and its application to the facts. This is therefore a mixed question of fact and law subject to the "unreasonableness" standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

(ii) *The IAD decision is reasonable*

[12] The applicant alleges that when he applied for a visa he did not have legal custody of his son. Such that, in his opinion, he satisfied the requirements of the Regulations by the mere fact that he gave an affirmative answer to question 13 on his record of landing. Bear in mind that question 13 asked him if he had any dependants other than those accompanying him and other than those whose names he had provided.

[13] Should we rely on the documents filed, and specifically the decision of the Judicial Power of the Republic of Bolivia of Venezuela, dated June 2, 2006, it indeed appears that it was only on that date, therefore after the visa application, that the Court of the Judicial Circuit of the Protection of Children and Adolescents of the judicial district of metropolitan Caracas, in Venezuela, formally transferred to the applicant the custody of his son. In this decision, the Court authorized the child to live in Montréal with his father so that the father [TRANSLATION] "is able to fully exercise the custody of his son ERICK MANUEL, supervise him and offer him the material assistance, the moral and educational guidance that the son will require (while) the mother will retain parental authority as well as the right to visits."

[14] It is perhaps worthy of note that this decision was the result of an agreement between the applicant and the child's mother, and that the Court referred in its decision to the following passage: [TRANSLATION] " . . . the father MANUEL ASUAJE established his residence in the city of Montréal, Québec, Canada, for work-related reasons and to improve the quality of life, the health and the safety of our minor child, we have made a joint decision to have this child travel to that city to establish his residence at his father's home and to pursue his studies . . . ." This in short is why the mother agreed to transfer the custody of the child to the father, the applicant in this case.

[15] It may be accurate that before this date the applicant did not have the legal custody of his son. But whether or not he had custody of his son does not in any way change the biological tie connecting the applicant with his son and the related obligations and responsibilities. A father does not cease to be a father because he does not have physical custody of his son. Why in his application for permanent residence in Canada did he forget to state that he had a son?

[16] It is clear from paragraph 117(9)(*d*) of the Regulations that this son must be considered under the Act as a "foreign national" member of the sponsor's family and that when the applicant applied for permanent residence, his son, "the foreign national" within the meaning of the Act, was a non-accompanying family member and was not examined at the point of entry. Accordingly, this son is excluded from the family class in accordance with the terms of paragraph 117(9)(*d*) of the Regulations.

[17] The definition of the term “family member” is not any more helpful to the applicant since this term includes “a dependent child of the person or of the person’s spouse or common-law partner.” The fact that the applicant’s ex-wife had custody of his son has no effect on the applicant’s obligation to state on his application for a permanent resident visa the names, date of birth, nationality and immigration status of each “family member” within the meaning of the Regulations, regardless of whether the family member accompanied him when he entered Canada as a permanent resident. He could not merely forget that he was the biological father of the son that he is now seeking to sponsor.

[18] The Regulations are clear but unfortunately the applicant disregarded them and his excuse does not hold water, given the facts and requirements of the Regulations. Accordingly, the Court determines that the decision contemplated by this proceeding is justified in fact and in law, in short it is a reasonable decision that does not justify an intervention to set it aside.

## VI. Question for certification

[19] The applicant proposes the following question for certification:

> Does paragraph 117(9)(*d*) of the Regulations apply to the applicant when the child was not a dependent at the time of the permanent resident visa application but when the child was at the time of the subsequent sponsorship application?

[20] The judgment on an application for judicial review cannot be appealed to the Federal Court of Appeal unless the judge certifies that a serious question of general importance is involved and states the question (paragraph 74(*d*) of the Act).

[21] However, for the Court to agree to certify a question, it is not enough to submit that the question has never been decided; the proposed question must also be "determinative of the appeal . . . [the requested certification must not be used] as a tool to obtain from the Court of Appeal declaratory judgments on . . . questions which need not be decided in order to dispose of a particular case." [Emphasis added.] (*Liyanagamage v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1637 (F.C.A.)(QL), at paragraph 4). In this matter we need not certify the proposed question since it was already decided by the Federal Court of Appeal in *Fuente*, even if the facts differ (see *Minister of Citizenship and Immigration v. Cleotilde dela Fuente*, 2006 FCA 186 (*Fuente*)). In that matter, Ms. dela Fuente and her mother had requested and been given a permanent resident visa in the family class. Ms. dela Fuente had been given the visa because she was an unmarried member of her mother's family and accompanied her mother. When she arrived in Canada in October 1992, she stated on her landing form that she was single and had no dependents, although she had been married two weeks before she entered Canada. A child was born in Canada as a result of this marriage and Ms. dela Fuente filed a sponsorship application for her husband. Initially received and approved, this application was later refused by an immigration officer (officer) on the grounds that Ms. dela Fuente had not declared her spouse when she was admitted to Canada; the spouse was therefore excluded under paragraph 117(9)(*d*) of the Regulations.

[22] A judge of this Court allowed an application for judicial review of that decision by the officer, finding that the words “at the time of that application” of paragraph 117(9)(*d*) of the Regulations meant the date on which Ms. dela Fuente had filed her visa application, or at the very latest the date that she received her visa. According to this judge, since on that date Ms. dela Fuente was not married and her future husband was not a family member, paragraph 117(9)(*d*) did not apply. In his decision, the judge certified two questions, including one which reads as follows:

> Does the phrase “at the time of that application” in paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, contemplate the time at which the application for permanent residence was made?

[23] With the question before it, the Court of Appeal answered as follows:

> The phrase “at the time of that application” in paragraph 117(9)(*d*) of the Regulations contemplates the life of the application from the time when it is initiated by the filing of the authorized form to the time when permanent resident status is granted at a port of entry.

[24] Since at the time of his permanent residence application this applicant was the biological father of the child that he seeks to sponsor after he entered Canada, and since he did not previously indicate it, unfortunately for him his son Erick Manuel is now excluded from the family class under paragraph 117(9)(*d*) and from the definition of the term “family member” in the Regulations.

[25] Given the Court of Appeal's response in *Fuente* to the above-mentioned question, it is not necessary to certify the question proposed by the applicant even if his application involves his son rather than a spouse, as was the case in *Fuente*. These facts are no more advantageous for the applicant than those considered by the Federal Court of Appeal in *Fuente*, rather quite the contrary.

## VII. Conclusion

[26] Accordingly, the application will be dismissed and no question will be certified.

**JUDGMENT**

**FOR THESE REASONS, THE COURT :**

**DISMISSES** the application for judicial review.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation

Kelley A. Harvey, BA, BCL, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-1476-08 |
| **STYLE OF CAUSE:** | MANUEL ANTONIO ASUAJE ARANGUREN<br>v. MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | November 5, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | LAGACÉ D.J. |
| **DATE OF REASONS:** | December 2, 2008 |

**APPEARANCES:**

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| Steve Bell | FOR THE RESPONDENT |

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