Date: 20091105

Docket: IMM-5146-08

Citation: 2009 FC 1133

Ottawa, Ontario, November 5, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

AHMET EKICI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to Section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (the Board), dated October 31, 2008, wherein the applicant's appeal of the Removal Order against him was dismissed. These are my reasons for determining that the application must be dismissed.

Background

[2] Ahmet Ekici, the applicant, is a 26 year old permanent resident of Canada who is originally from Turkey. He was landed in Canada on August 10, 2000.

[3] The applicant was sponsored in 1999, as the dependent son of his father, Ibrahim Ekici, along with his mother, brother and sister. The applicant was 16 years old at the time.

[4] Prior to his application for permanent residence, the applicant had married his wife, Mirac Eren Ibrahim, in a religious ceremony in Turkey which took place in 1998. A civil marriage and the birth of Eren Ekici (son of the applicant) were not registered with the Turkish authorities until January 8, 2002.

[5] The applicant and his wife were not formally married under Turkish law at the time the Permanent Residence Visa was issued to the applicant nor when he was landed in Canada on August 10, 2000. It was concluded by the IAD, in an other matter regarding the applicant's sponsorship, that the applicant was not required to disclose the existence of a common-law spouse.

[6] It was also concluded by the IAD, in the matter of the applicant's sponsorship, that the applicant did not disclose the existence of his dependant son. As such, the applicant's dependant son was found not to be a member of the Family Class pursuant to the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (IRPR) and the appeal regarding the applicant's dependant son was dismissed accordingly.

Decision Under Review

[7] The IAD decision under review is the "Removal Order" of October 31, 2008, issued by Member Erwin Nest.

[8] In the IAD decision under review, Member Nest heard an appeal by the applicant, pursuant to subsection 63(3) of IRPA against an Exclusion Order issued against him on September 26, 2007 by a Member of the Immigration Division (the "ID") who determined that the applicant is a person described in paragraph 40(1)(a) of IRPA (a permanent resident inadmissible for misrepresentation).

[9] The ID Member concluded that the applicant, who was sponsored to Canada as a dependent child of his mother, did not disclose the existence of his spouse and dependent son to immigration officials at the time the sponsorship application was made, at the time the visa was issued, and at the port of entry on August 10, 2000. The applicant was determined to be inadmissible for misrepresentation as he had closed off a valid avenue of investigation by the immigration authorities.

[10] The applicant requested that the IAD exercise its discretionary jurisdiction based on paragraphs 67(1)(c) and section 68 of IRPA and allow his appeal by taking into account the best interests of his child directly affected by the decision. He cited humanitarian and compassionate considerations as warranting special relief in light of all the circumstances.

IAD's Analysis

[11] After a consideration of the testimony adduced at the *de novo* hearing, the contents of the Record, the applicant's disclosure and the written submissions from the applicant's counsel and the Minister's counsel, the appeal was dismissed.

[12] The Member was not satisfied with the applicant's explanations regarding his part in misleading immigration officials. The Member found the applicant's evidence not credible that his father, who came to Canada in 1986 and successfully filed a refugee claim resulting in being granted permanent resident status in 1995, was unfamiliar with the Canadian immigration system and was unaware that his son would be disqualified as a dependent if the information about his marriage was disclosed.

[13] Based on the preponderance of the evidence in this case and on the balance of probabilities, the Member found that the applicant was aware of his father's plan of sponsoring him for the purpose of bringing the applicant and his wife and dependant child to Canada. He found that the applicant went to Turkey in 2002, after achieving full employment in Canada, to register his marriage and the birth of his child to carry out his original plan of sponsoring his family after he had a degree of establishment in Canada.

[14] The applicant's misrepresentation was determined to be serious, causing an immigration official to grant him a permanent resident visa that would not have been issued by the official had he been aware of the dependent son.

[15] The Member found not credible the applicant's explanations for not disclosing the information about his wife and dependent child before filing the sponsorship application in Canada in 2004, despite ample opportunities to do so. The applicant's lack of credibility in claiming his understanding of the seriousness of the breach was considered to be a further negative factor weighing against the applicant.

[16] Based on the evidence, since the applicant's immigration to Canada in 2000, it was found that family-reunification in Canada was not a priority for the applicant. It was also considered that both of the applicant's children were born and raised in Turkey under their mother's care who receives financial support from the applicant, that she understands the arrangement of the visits by her husband in Turkey and accepts voluntarily that the couple would be living apart from shortly after their marriage.

[17] The Member concluded that the applicant had 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 warranted special relief in light of all the circumstances of this case.

[18] The IAD determined that the seriousness of the applicant's actions, the non-disclosure of his dependent son, which was aimed at inducing an error in the administration of IRPA, outweighed the important objective of family reunification.

Issues

[19] The sole issue is whether the IAD made a reviewable error on any of the statutory grounds listed in subsection 18.1(4) of the *Federal Courts Act*.

Analysis

[20] Findings of credibility are "quintessentially findings of fact": see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, [2003] S.C.J. No. 18 at para. 38. Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, it has been held that a Board's decision concerning questions of fact and credibility are reviewable upon the standard of reasonableness: *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427, [2008] F.C.J. No. 515.

[21] An expert panel charged by Parliament with determining the exact questions of this case, the IAD has the delegated power to conclude that the applicant's explanations for not disclosing the information about his dependant son were not credible.

[22] The IAD's credibility analysis is central to its role as a trier of fact. As such, these findings are to be given significant deference by the reviewing Court. The Board's credibility findings should stand unless its reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, supra, at para. 47.

[23] In this case, this Court will accord substantial deference to the IAD's credibility finding in the "Removal Order" since the Member had the advantage of seeing and hearing the witnesses testify at a *de novo* oral hearing: *Fletcher v. Manitoba Public Insurance Co*., [1990] 3 S.C.R. 191, [1990] S.C.J. No. 121; *Brar v. Canada (Minister of Employment and Immigration)* (F.C.A.), (1986), A-987-84, [1986] F.C.J. No. 346.

[24] In considering humanitarian and compassionate considerations to grant relief, it was within the range of possible and acceptable outcomes for the Member to conclude that the seriousness of the applicant's actions, the non-disclosure of his dependent son, which aimed at inducing an error in the administration of IRPA, outweighed the important objective of family reunification: *Dunsmuir*, supra at paras. 47-49; *Khosa*, supra, at para. 59.

[25] Eren Ekici, born on October 10, 1999, was a dependent son of a dependent son according to the definitions contained in section 2 of the former *Immigration Regulations*, 1978, SOR/78-316. The applicant's son should have been disclosed as a dependent. The failure to disclose the applicant's son was an "indirect" misrepresentation caught by both paragraph 27(1)(e) of the former

Immigration Act, R.S.C. 1985, c.I-2 and paragraph 40(1)(a) of the IRPA: *Wang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, [2005] F.C.J. No. 1309, at para. 56.

[26] I agree with the respondent that the Member did not err in finding that the indirect misrepresentation caused the applicant to be issued a permanent resident visa in error, contrary to the immigration laws then in effect.

[27] Acknowledging that it is in the best interests of any children to be cared for by both of their parents, based on the facts of this case, it was reasonable for the Member to find that it was in the best interests of the applicant's two children for the family to be re-united in Turkey.

[28] I agree with the respondent that the applicant's arguments regarding errors in the assessment of the gravity of the misrepresentation and in the assessment of the applicant's credibility are invitations to this Court to re-weigh the evidence that was before the IAD. It is not open to this Court to substitute its own view of a preferable outcome: *Khosa*, supra, at para. 59.

[29] Taken as a whole, the IAD's "Removal Order" falls within the range of acceptable, possible outcomes that are defensible on the law and the facts. The "Removal Order" is not unreasonable and should not be disturbed upon review: *Dunsmuir*, supra, at paras. 47 & 53; *Federal Courts Act*, subsection 18.1(4).

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. There are no questions to certify.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5146-08
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