

Federal Court



Cour fédérale

Date: 20100121

Docket: IMM-3333-09

Citation: 2010 FC 64

Toronto, Ontario, January 21, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MAHMOUD PEIROVDINNABI

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns whether the Respondent made a misrepresentation in the course of obtaining his landed immigrant status in 2002. This question was brought to the Immigration Appeal Division (IAD) on a *de novo* appeal from the decision of a member of the Immigration and Refugee Board. In the decision presently under review, the IAD found that the Respondent did not make a misrepresentation.

[2] The issue is whether, in 2002, the Respondent made a misrepresentation by giving the answer “yes” to the question “are you living with your spouse” posed in a form entitled “Supplementary Information Spouse in Canada (Respondent’s Record, Tab 21). This issue arose in the course of the Respondent’s sponsorship of his second wife to Canada in 2005. In the course of that application he was questioned about his living circumstances with his first wife 3 years before and he answered that he thought that the question posed at that time required an answer as to whether he and his first wife were living “together”. To this question the Respondent said that, while they were living together, he and his first wife maintained separate residences and lived in them both after their marriage. The problem which arose is that the Applicant interprets the question answered by the Respondent to mean “are you living together with your wife in the same residence”. This conflict in interpretation set a course of decision-making in motion which has resulted in the present Application.

[3] The first level decision on the question was that of an immigration officer pursuant to s. 44 of the *IRPA* who found the Applicant to be inadmissible pursuant to s.40(1)(a) of the *IRPA* as follows:

On a balance of probabilities there are grounds to believe [the Applicant] is a permanent resident or a foreign national who is inadmissible for misrepresentation 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.

(Applicant’s Book of Authorities, p. 103)

[4] The second level decision was that of a Refugee Board member who made the following determination:

[14] The panel finds that Mr. Peirovdinnabi directly misrepresented his living arrangements with his spouse to Immigration officials. In his *Supplementary Information Spouse in Canada* form signed on January 16, 2002, he indicated he was living with his spouse. In signing the form, he declared that the information given in the application was truthful and correct. Mr. Peirovdinnabi testified at the hearing that he never lived with his wife after their wedding. An applicant who indicates on the form that they are not living with their spouse is required to provide an explanation for their living arrangements. As Mr. Peirovdinnabi completed the form indicating he was living with his spouse, and that an explanation was “NOT APPLICABLE”. As such, the information provided by Mr. Peirovdinnabi in his *Supplementary Information Spouse in Canada* was neither true nor correct and the panel finds the Mr. Peirovdinnabi misrepresented his true living arrangements.

[...]

[18] The Minister introduced evidence which raised serious questions with respect to Mr. Peirovdinnabi’s true intentions in marrying Ms. Shahi. In particular it was established that the timing of the marriage ceremony was motivated by Mr. Peirovdinnabi’s immigration circumstances. Mr. Peirovdinnabi testified that a wedding date was set quickly following his release from detention as Ms. Shahi was fearful that he would be removed from Canada. In addition, Mr. Peirovdinnabi’s Affidavit in support of his petition for Divorce indicates the couple separated on January 15, 2002, prior to his filling of the *Supplementary Information Spouse in Canada* form. However, the panel finds it is not necessary to consider his intentions as the Minister has already met the burden of establishing Mr. Peirovdinnabi’s misrepresentation.

[Emphasis added]

(Applicant’s Book of Authorities, pp. 17 – 19)

[5] The third level decision is the one presently under review. In the present decision the IAD determined that the only question that was required to be answered is the one addressed in the first and second level decisions: did the Respondent make a misrepresentation? To aid in making the determination that the Respondent did not make a misrepresentation, the IAD approached the

subject from the perspective of whether the Respondent and his wife were living separate and apart as that concept is understood in divorce law. I find that that this perspective on the question was appropriate because the position taken throughout by the Applicant is that the Respondent and his first wife were living separate and apart. The IAD did not make a determination with respect to whether the Respondent's first marriage was genuine because no determination was made on this issue in the second level decision which brought the appeal to the IAD.

[6] The central argument advanced by the Applicant in the present review of the IAD decision is that, as a matter of law, the IAD was required to determine the genuineness of the Respondent's first marriage. The position that the Applicant takes is that since the hearing before the IAD was *de novo*, all issues with respect to the Respondent's first marriage were required to be determined. I reject this argument. I find that the IAD took the appeal as it came: there was only one question to be addressed and that was whether the Respondent made a misrepresentation. The question of whether the marriage was genuine was not determined in the first and second level decisions, and I find that it was not in play in the IAD decision.

[7] As a result, I find no reviewable error in the IAD's decision.

ORDER

As I find no reviewable error in the decision under review, the present Application is dismissed.

Counsel for the Applicant proposes the following question for certification:

Does the IAD have an obligation in law to determine the genuineness of a marriage on a *de novo* appeal brought with respect to an issue of misrepresentation when the issue of the genuineness of the marriage concerned was not specifically raised for determination in the appeal?

I agree that this question is determinative of the present Application and is a question of general importance and, accordingly, I certify the question for determination by the Federal Court of Appeal.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3333-09

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND IMMIGRATION
v. MAHMOUD PEIROVDINNABI

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 19, 2010

**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: JANUARY 21, 2010

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