Federal Court   Cour fédérale

Ottawa, Ontario, June 9, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

LINDA ESCANILLA FARENAS

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1]   This is an application for judicial review of a decision of Immigration Officer F. Watt-Galardo (the Officer) dated April 9, 2010, wherein the Applicant was denied permanent residence status in Canada under the live-in caregiver class. The Officer found that the Applicant had submitted insufficient evidence to show that she and her family members were not inadmissible pursuant to subsection 72(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*].

[2]   Based on the reasons that follow, this application is allowed.

I.   Background

     A.   *Factual Background*

[3]   The Applicant, Linda Escanilla Farenas, is a citizen of the Philippines. She came to Canada as a caregiver and applied for permanent residence from within Canada as a member of the Live-in Caregiver Class. She included both her husband and son on her application.

[4]   The Applicant received a fairness letter dated October 17, 2009 informing her that her application might have to be refused because the Officer believed that she might be inadmissible pursuant to paragraph 36(2)(c) of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [IRPA]. This section provides that a foreign national is inadmissible on the grounds of criminality if they have committed an act outside Canada that is an offence in the place where it was committed and that if committed in Canada, would constitute an indictable offence.

[5]   The visa office in Manila determined that the birth certificate the Applicant provided for her son contained fraudulent information. The visa office discovered that there was a registration of the child's birth in 1993 that listed a different father than the birth certificate submitted by the Applicant, which was issued in 2003. The Officer believed that this act constituted an offence in the Philippines that if committed in Canada would constitute an offence under paragraph 337(1)(b) of

the *Criminal Code of Canada*, RSC, 1985, c C-46, [the *Criminal Code*] -- causing false information to be inserted into a birth register. Furthermore, the Officer had information that the Applicant was still married to the father listed on the 1993 birth registration, Roger Buenaventura, when she married her current husband, Redante Garcia. This, in the Officer's opinion, constituted the crime of bigamy which is punishable in Canada pursuant to section 290 of the *Criminal Code*.

[6]   The Officer also opined that the Applicant might be inadmissible under paragraph 36(1)(c) of the IRPA for serious criminality. This was based on the finding that the Applicant provided false information to obtain a marriage license in the Philippines and also submitted the registration of her marriage to Redante Garcia to Citizenship and Immigration Canada (CIC) knowing it to have been falsely obtained and with the intent to mislead CIC officials. This would constitute the offence of perjury under section 131 of the *Criminal Code*. Moreover, she might also be inadmissible due to a material misrepresentation pursuant to paragraph 40(1)(a) of the IRPA.

[7]   The Applicant accepted the invitation to provide more information and responded by letter dated October 27, 2009. She explained that she was living in Saudi Arabia when she met another overseas Philippine worker, Roger Buenaventura. They had a relationship and she got pregnant. Since it would have been illegal for her to remain in Saudi Arabia while pregnant and unmarried, she returned to the Philippines and married Mr. Buenaventura on January 26, 1993. Shortly after the marriage, Mr. Buenaventura disappeared. The Applicant nonetheless gave her son his father's surname. She searched for Mr. Buenaventura but was never able to locate him. She claimed to have come to the realization that one Roger Buenaventura did not in fact exist, and whoever she married had given her a false name. In 1996 the Applicant met her current husband. The Applicant

claimed to have believed that her first marriage was invalid because Mr. Buenaventura had lied about his identity. She therefore married her current husband without taking any action to dissolve her first marriage. Mr. Garcia began to raise the Applicant's son as his own, and so they re-registered his birth, listing Mr. Garcia as the father. The Applicant indicated in the letter that she never had any intention of submitting fraudulent information.

[8]   The Applicant submitted a document to support her assertion that no person by the name of Roger Buenaventura, matching the criteria of the man she married, existed. The attached certificate from the National Statistics Office of the Philippines indicated that there was no record of the birth of a Roger R. Buenaventura born January 3, 1959 in Santiago City, Isabela. Curiously, the document also says that it was "Issued upon the request of Roger Buenaventura for Passport/Travel".

B.   *Impugned Decision*

[9]   The Officer refused the application by way of letter dated April 9, 2010. The Officer indicated that the Applicant had not presented sufficient evidence that she was able to comply with subsection 72(1) of the *Regulations*, requiring a foreign national to establish that they and their family members are not inadmissible. The letter indicated that the Applicant and her family members were required to leave Canada before the expiry date of her work permit.

[10]   The notes to file indicate that the Officer was not satisfied that the Applicant was unaware

that she was submitting false documentation:

> I have reviewed the submissions from the applicant in detail. While
> the applicant believes that her former spouse provided her with an
> identity which was not his own, this does not negate the fact that
> when she married her current spouse she was not legally free to do
> so. I also note that as she believed that she was the victim of fraud,
> she may have had recourse to seek to have the marriage found to be
> void prior to entering her marriage with her current spouse, however
> she did not take any action to have the marriage found void and
> insufficient evidence has been provided to demonstrate that she took
> any action prior to her marriage to her current spouse. I also note
> that when she and her current spouse applied for their marriage
> license she did not disclose the information regarding her previous
> marriage. I am not satisfied that the applicant did not know that she
> was providing false information when she applied for her marriage
> license.

[11]   The Officer had similar concerns regarding the filing of the late birth registration listing the

Applicant's current spouse as the child's father, remarking that:

> [the Applicant] was fully aware at the time of filing these
> applications that the information on the document was not accurate.
> While there is insufficient evidence to indicate this action was taken
> solely for immigration purposes, I note that she provided this
> inaccurate document to the visa office and did not disclose the
> accurate information. I am not satisfied that the applicant did not
> know that she was committing an illegal act or that she was
> misrepresenting herself to the Government of the Philippines and
> officials at the visa office in Manila.

[12]   The Officer also noted concerns regarding the document that purported to show that the

Applicant's first husband did not exist:

> […] the document clearly states that this document was issued at the
> request of Roger Buenaventura for the purpose of a passport or travel
> the attached receipt indicates that the document was requested and
> paid for by Roger Buenaventura. Based on the information before, I
> am not able to determine whether the applicant further

> misrepresented herself to the National Statistics Office to obtain this document or if the applicant has misrepresented herself further by attempting to conceal the existence of Roger Buenaventura. I further note that the document is indicating that there is no birth record matching the information provided and does not indicate that a person by the name of Roger Buenaventura does not exist.

[13]   Based on the evidence, the Officer was satisfied that the Applicant was inadmissible to Canada under paragraphs 36(1)(c), 36(2)(c), 40(1)(a) of the IRPA.

II.   Issues

[14]   This application raises the following issues:

(a)   Are the reasons adequate?

(b)   Did the Officer err in law with respect to his equivalency analysis?

(c)   Did the Officer err by failing to consider humanitarian and compassionate (H&C) considerations?

III.   Legislative Scheme

[15]   Paragraph 36(1)(c) of the IRPA provides that a permanent resident or foreign national is inadmissible on grounds of serious criminality for having committed an act outside Canada that is an offence in the place where it was committed and, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[16]   Similarly paragraph 36(2)(c) of the IRPA provides that a foreign national is inadmissible on grounds of criminality for having committed an act outside Canada that is an offence in the place where it was committed and, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

[17]   Paragraph 40(1)(a) of the IRPA provides that a permanent resident or foreign national is inadmissible on grounds of misrepresentation for having directly or indirectly misrepresented or withheld a material fact that induces or could induce an error in the administration of the IRPA.

[18]   The offence of causing false information to be inserted into a register of birth is found in paragraph 377(1)(b) of the *Criminal Code*:

Damaging documents	Documents endommagés
377. (1) Every one who unlawfully	377. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque illégalement, selon le cas :
(a) destroys, defaces or injures a register, or any part of a register, of births, baptisms, marriages, deaths or burials that is required or authorized by law to be kept in Canada, or a copy or any part of a copy of such a register that is required by law to be transmitted to a registrar or other officer,	a) détruit, maquille ou détériore un registre ou toute partie d'un registre de naissances, baptêmes, mariages, décès ou sépultures que la loi oblige ou autorise à tenir au Canada, ou une copie ou toute partie d'une copie de ce registre que la loi prescrit de transmettre à un registrateur ou autre fonctionnaire;
(b) inserts or causes to be inserted in a register or copy	b) insère ou fait insérer, dans un registre ou une

referred to in paragraph (a) an entry, that he knows is false, of any matter relating to a birth, baptism, marriage, death or burial, or erases any material part from that register or copy,

(c) destroys, damages or obliterates an election document or causes an election document to be destroyed, damaged or obliterated, or

[…]

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

copie que mentionne l'alinéa a), une inscription qu'il sait être fausse au sujet d'une naissance, d'un baptême, d'un mariage, d'un décès ou d'une sépulture, ou efface de ce registre ou de cette copie toute partie essentielle;

c) détruit, endommage ou oblitère, ou fait détruire, endommager ou oblitérer un document d'élection;

[…]

[19]   Section 290 of the *Criminal Code* makes it an offence to commit bigamy:

Bigamy

290. (1) Every one commits bigamy who

(a) in Canada,

(i) being married, goes through a form of marriage with another person,

(ii) knowing that another person is married, goes through a form of marriage with that person, or

(iii) on the same day or

Bigamie

290. (1) Commet la bigamie quiconque, selon le cas :

a) au Canada :

(i) étant marié, passe par une formalité de mariage avec une autre personne,

(ii) sachant qu'une autre personne est mariée, passe par une formalité de mariage avec cette personne,

(iii) le même jour ou

simultaneously, goes through a form of marriage with more than one person; or

(b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

Matters of defence

(2) No person commits bigamy by going through a form of marriage if

(a) that person in good faith and on reasonable grounds believes that his spouse is dead;

(b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years;

(c) that person has been divorced from the bond of the first marriage; or

(d) the former marriage has been declared void by a court of competent jurisdiction.

[…]

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simultanément, passe par une formalité de mariage avec plus d'une personne;

b) étant un citoyen canadien résidant au Canada, quitte ce pays avec l'intention d'accomplir une chose mentionnée à l'un des sous-alinéas a)(i) à (iii) et, selon cette intention, accomplit à l'étranger une chose mentionnée à l'un de ces sous-alinéas dans des circonstances y désignées.

Défense

(2) Nulle personne ne commet la bigamie en passant par une formalité de mariage :

a) si elle croit de bonne foi, et pour des motifs raisonnables, que son conjoint est décédé;

b) si le conjoint de cette personne a été continûment absent pendant les sept années qui ont précédé le jour où elle passe par la formalité de mariage, à moins qu'elle n'ait su que son conjoint était vivant à un moment quelconque de ces sept années;

c) si cette personne a été par divorce libérée des liens du premier mariage;

d) si le mariage antérieur a été déclaré nul par un tribunal compétent.

[…]

Punishment

291. (1) Every one who commits bigamy is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Peine

291. (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque commet la bigamie.

[20]   Section 131 of the *Criminal Code* makes it an offence to commit perjury:

Perjury

131. (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

[…]

Parjure

131. (1) Sous réserve du paragraphe (3), commet un parjure quiconque fait, avec l'intention de tromper, une fausse déclaration après avoir prêté serment ou fait une affirmation solennelle, dans un affidavit, une déclaration solennelle, un témoignage écrit ou verbal devant une personne autorisée par la loi à permettre que cette déclaration soit faite devant elle, en sachant que sa déclaration est fausse.

[…]

Punishment

132. Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Peine

132. Quiconque commet un parjure est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans.

IV. Standard of Review

[21]   I accept, as submitted by the parties, that the issues raised in this application are questions of

mixed fact and law which should be reviewed on a standard of reasonableness (*Amin v Canada*

(Minister of Citizenship and Immigration), 2008 FC 168, 322 FTR 293 at para 9; *Khosa v Canada*

(Minister of Citizenship and Immigration), [2007] FCJ No 139, 2007 FCA 24 at para 12).

V. Argument and Analysis

   A.   *Were the Reasons Sufficient to Support an Equivalency Finding?*

[22]   The Applicant argues that the Officer conducted an insufficient analysis to justify the

finding of equivalency, and so erred in concluding that the Applicant was inadmissible due to

serious criminality. The Applicant argues that she lacked the requisite *mens rea* to have committed

bigamy and perjury, and the Officer conducted no analysis at all regarding the offence of defacing a

birth registry. In either case, the Applicant takes the position that the reasons provided were not

sufficient to support the Officer's determination.

[23]   In his written submissions, the Respondent argued that it was reasonably open to the Officer

to find that the Applicant was inadmissible to Canada for having committed acts in the Philippines

that, if committed in Canada, would constitute the offences of bigamy and perjury. The Respondent

disputed the Applicant's position that the Applicant's conduct would not constitute crimes under

Canadian law because of a lack of intent. However, at the hearing, the Respondent basically

conceded that the reasons with respect to the equivalency analysis were not sufficient enough to reasonably support the equivalency finding. Nonetheless, the Respondent maintained that the Applicant misrepresented herself, and for this alone the Officer was justified in finding her inadmissible.

[24]   Despite the submission of the Respondent that, when stripped of any equivalency finding, a sufficient basis remains for the rejection of the Applicant's application, this matter must be sent back for redetermination. As the Applicant submits, in the absence of a conviction, the Officer must look at the facts and Filipino law to determine whether or not there are reasonable grounds to believe that the Applicant can be said to have committed the alleged crime in the Philippines, and then he must explain how that same act would constitute a crime in Canada. To be reasonable, it is incumbent on the Officer to provide a critical analysis (*Zeon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1338, 49 Imm LR (3d) 146 at para 8). In the present matter, I agree that there is no evidence to suggest that the Officer conducted an adequate, critical, equivalency analysis. Consequently, he failed to provide sufficient reasons to support his finding.

[25]   For instance, with respect to the finding of bigamy, the Applicant argues that she could not have committed bigamy because she learned that the purported person she had married did not exist prior to entering into her second marriage. Therefore, she believed that her first marriage was void. The Applicant argues that Canadian law, like Filipino law, requires one to have the intent to marry a person while already legally married to someone else in order to be convicted of bigamy. In Canada mistake of fact is a valid defence to bigamy (*R v Pappajohn*, [1980] 2 SCR 120).

[26]   In the recent case of *R v Kairouz*, 2010 QCCQ 2649, [2010] RJQ 1279 the Quebec

Provincial Court discussed the validity of the defence of mistake of fact at para 118. The accused in

that case attempted to use defence of fact as a defence to a charge of bigamy. The Court explained:

> [118]   […]
>
>> The defence of an error in fact originates in common law and applies via section 8(3) of the Criminal Code. That defence consists in demonstrating that, at the time of the offence, the accused <u>honestly and sincerely believed</u> that there was a situation of fact that, if it had existed, would have made the defendant's acts innocent. Let me repeat: criminal law does not seek to punish a person who is morally innocent...
>>
>> <u>The central issue in the defence of an error in fact is the accused's sincere and honest belief.</u> It is a matter of a <u>subjective test. What is important is that the accused believed, not what a reasonable person would have believed in the accused's place.</u> However, if the accused, <u>suspecting an established fact, does not seek to clarify the situation</u> and prefers to continue to believe the inaccuracy (wilful blindness), then his or her belief in the established fact cannot be considered sincere and honest.
>
> [Emphasis in original]

[27]   The Court emphasized that the assessment of the defence of mistake of fact is a very fact

specific finding based on the subjective sincere and honest belief of the individual. In the Officer's

reasons, there is no consideration of the Applicant's state of mind. The Officer treats the offence of

bigamy as though it were a strict-liability offence. However, both Canadian and Filipino law require

mens rea in order to convict an individual of bigamy. The Officer did not conduct a thorough

enough analysis to conclude whether or not the Applicant had the requisite *mens rea* to have

committed the offence of bigamy. Therefore the Officer's conclusion was not reasonable.

[28]   I am similarly unsatisfied with the remainder of the Officer's reasons. While the misrepresentations allegedly made by the Applicant regarding her first marriage and the father of her child are troubling and breach the duty of candour required by the IRPA, they are not sufficient in and of themselves to overcome the deficiencies found in the equivalency analysis and defeat this application for judicial review. I will allow this application and remit the matter to a different decision-maker.

B.   *Did the Officer Err in Failing to Consider H&C Factors?*

[29]   Although, I am allowing this application for judicial review, I would nonetheless like to comment on the second reviewable error raised by the Applicant. The Applicant submits that the Officer erred by failing to consider H&C grounds. Although the Applicant did not expressly seek H&C consideration, she submits that her letter dated October 27, 2009 was a plea for consideration on H&C grounds. The Applicant cites *Rogers v Canada (Minister of Citizenship and Immigration)*, 2009 FC 26, 339 FTR 191 for the proposition that the Officer was obliged to consider whether there were sufficient H&C grounds to warrant granting an exemption since the Applicant was unrepresented and made the equivalent of an H&C plea.

[30]   The Respondent contends that the letter was not a "plea" for H&C consideration and that an applicant bears the responsibility of providing all the information to demonstrate that his or her personal circumstances warrant exemption. The Respondent argues that while an Officer may put

forward a case for an exemption on H&C grounds of his own initiative, but it is not a reviewable

error for him not to do so.

[31]   I share the review of the Respondent. In *Rogers*, above, Justice Yves de Montigny wrote at

para 41:

> [41]   The respondent is no doubt correct in stating that no breach
> of procedural fairness is established on the mere basis that the
> immigration officer did not put the applicant's case forward for
> consideration for an exemption on his own initiative. Although the
> Bulletin contemplates situations in which an immigration officer may
> consider putting an applicant's case forward for an exemption in the
> absence of a request from an applicant, it cannot mandate an officer
> to do so.

[32]   Furthermore, *Rogers*, above, was decided in a specific factual context. The applicant in that

case filled out an application form that contained no information on making an H&C claim. Due to

a policy change, the application form and guide for H&C applicants now tells applicants that they

must clearly indicate that they wish to be considered for exemption to overcome an inadmissibility.

In fact, CIC's IP-5 Processing Manual for in-land H&C applications now states at section 5.12:

> However, if the client did not specifically request an exemption and
> the inadmissibility was discovered during the application process, the
> officer is not obliged to counsel the client and can refuse the
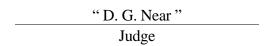> application.

[33]   I do not find that the Officer erred in not considering H&C factors.

VI.   Conclusion

[34]   No question was proposed for certification and none arises.

[35]   In consideration of the above conclusions, this application for judicial review is allowed.

<u>JUDGMENT</u>

THIS COURT'S JUDGMENT is that this application for judicial review is allowed.

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" D. G. Near "

Judge

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DOCKET: **IMM-2490-10**

STYLE OF CAUSE: **LINDA ESCANILLA FARENAS v. MCI**

PLACE OF HEARING: **TORONTO**

DATE OF HEARING: **FEBRUARY 2, 2011**

REASONS FOR JUDGMENT
AND JUDGMENT BY: **NEAR J.**

DATED: **JUNE 9, 2011**

APPEARANCES:

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