Date: 20051205

Docket: A-151-05

Citation: 2005 FCA 406

CORAM: LINDENJ.A.

ROTHSTEIN J.A.

PELLETIER J.A.

BETWEEN:

AHMED SALEM AZIZI

Appellant

(Applicant)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

(Respondent)

Heard at Winnipeg, Manitoba, on October 20, 2005.

Judgment delivered at Ottawa, Ontario, on December 5, 2005.

REASONS FOR JUDGMENT BY:
ROTHSTEIN J.A.

CONCURRED IN BY:
LINDEN J.A.

PELLETIER J.A.

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REASONS FOR JUDGMENT

ROTHSTEIN J.A.

[1] This is an immigration appeal pursuant to a question of law certified by Mosley J.

Does paragraph 117(9)(*d*) of the IRP Regulations apply to exclude Convention refugees abroad, or Convention refugees seeking resettlement, as members of the family class by virtue of their relationship to a sponsor who previously became a permanent resident and at that time failed to declare them as non-accompanying family members?

[2] The appellant Ahmed Salem Azizi is a citizen of Afghanistan. He is married with two daughters; in 2001 he and his family were living in a refugee camp in Pakistan; he entered Canada from Pakistan alone as a Convention refugee seeking resettlement on August 21, 2001. He was sponsored by the World University Service Canada ("WUSC") for study at a Canadian post-secondary institution. On his application for permanent residence submitted on February 9, 2001, he represented

that he was never married and marked "n/a" next to questions relating to the date and place of marriage and personal details of dependants. His record of landing, which he certified as true and correct, makes no mention of his having a wife and daughters.

[3] On June 28, 2002, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and the *Immigration Refugee Protection Regulations*, SOR/2002-227 (IRP Regulations) came into force. Paragraph 117(9)(*d*) of the IRP Regulations provides that a person will not be considered to be a member of the family class if that person was not examined at the time of the sponsor's application for permanent residence.

[4] Mr. Azizi applied to sponsor his wife and daughters in April 2003. A visa officer determined that Mr. Azizi's wife was not eligible for sponsorship because she was not a member of the family class because at the time Mr. Azizi applied for permanent residence she was a non-accompanying family member and was not examined. That decision applied to Mr. Azizi's two daughters as well.

[5] Mr. Azizi appealed to the Immigration Appeal Division (IAD) under subsection 63(1) of the IRP Regulations. He told the IAD that before coming to Canada he lived in a refugee camp in Pakistan, having fled the Taliban regime in Afghanistan. He had no way to leave Pakistan other than through the WUSC sponsorship and scholarship program, which required him to be single, so he did not disclose his wife and children.

[6] The IAD found that the visa officer was correct to decide that Mr. Azizi's wife and children were not members of the family class because of the operation of paragraph 117(9)(*d*) of the IRP Regulations. Mosley J. upheld the decision of the IAD.

STANDARD OF REVIEW

[7] The issue here involves the interpretation of paragraph 117(9)(*d*) of the IRP Regulations and related provisions of the IRPA including constitutional questions. The standard of review is correctness and Mosley J. was correct in reviewing the IAD's decision on that standard.

ANALYSIS

[8] Mr. Azizi's arguments in this Court are essentially a restatement of his arguments before Mosley J. and I am in substantial agreement with his reasons. However, in view of the certification of the question of law, I will briefly deal with Mr. Azizi's numerous arguments in this Court.

[9] The difficulty with Mr. Azizi's case is that it arises out of his own misrepresentations. In order to minimize or eliminate the consequences of his misrepresentations he seeks to:

a) Interpret paragraph 117(9)(*d*) in a manner that renders it inapplicable to non-accompanying family members of a Convention refugee applicant;

b) argue that his misrepresentations were not material;

c) draw a distinction between misrepresentations that go to inadmissibility, which he says is not applicable here, and misrepresentations that go to a failure to meet the requirements of the Act, which he says is;

d) argue that paragraph 117(9)(*d*) is *ultra vires* because it is inconsistent with the purpose of the authorizing legislation, namely the IRPA;

e) argue that the Act defines family class as including a spouse and children and that the Regulations cannot exclude them from the family class as defined;

f) argue that his section 7 Charter right to security of the person is violated if the interpretation of paragraph 117(9)(*d*) excludes his wife and daughters from the family class because family unification is denied and the best interest of the children are ignored;

g) argue that paragraph 117(9)(*d*) is being applied retroactively; and

h) argue that paragraph 117(9)(*d*) violates section 15 of the Charter.

Interpreting paragraph 117(9)(*d*) in a manner that renders it inapplicable to non-accompanying family members of a Convention refugee applicant

[10] Mr. Azizi argues that paragraph 117(9)(*d*) should not apply to non-accompanying family members of Convention refugee applicants. Paragraph 117(9)(*d*) states:

A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
...	...
(*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.	(*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.

[11] Mr. Azizi says that non-accompanying family members are not seeking admission to Canada and there is no purpose for paragraph 117(9)(*d*) applying to

them. In making this argument, Mr. Azizi refers to a Directive issued by the Minister which acknowledged that paragraph 117(9)(*d*) unintentionally excluded certain groups from the family class and that exclusion was an oversight. Relying on this admission by the Minister, Mr. Azizi says that paragraph 117(9)(*d*) should only apply when non-accompanying family members are required by law to be examined and were not. Since at the time of Mr. Azizi's application for permanent residence in Canada as a resettled refugee there was no requirement to examine non-accompanying family members, such an interpretation would render paragraph 117(9)(*d*) not applicable to Mr. Azizi's wife and daughters and they would be eligible to be members of the family class.

[12] As a result of the admitted oversight, the IRP Regulations were amended with the addition of subsections 117(10) and (11). In essence, subsection 117(10) provides that non-accompanying family members are not excluded from the family class if a visa officer determines that they are not required by law to be examined. Subsection 117(11) is an exception to 117(10).

[13] Subsections 117(10) and (11) provide:

117(10) Subject to subsection (11), paragraph (9)(*d*) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.	117(10) Sous réserve du paragraphe (11), l'alinéa (9)*d*) ne s'applique pas à l'étranger qui y est visé et qui n'a pas fait l'objet d'un contrôle parce qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas.
117(11) Paragraph (9)(*d*) applies in respect of a foreign national referred to in subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,	117(11)L'alinéa (9)*d*) s'applique à l'étranger visé au paragraphe (10) si un agent arrive à la conclusion que, à l'époque où la demande visée à cet alinéa a été faite :
(*a*) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination; or	(*a*) ou bien le répondant a été informé que l'étranger pouvait faire l'objet d'un contrôle et il pouvait faire en sorte que ce dernier soit disponible, mais il ne l'a pas fait, ou l'étranger ne s'est pas présenté au contrôle;
(*b*) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.	(*b*) ou bien l'étranger était l'époux du répondant, vivait séparément de lui et n'a pas fait l'objet d'un contrôle.

[14] Mr. Azizi says that subsection 117(10) does not go far enough because it interposes a discretion in the visa officer to determine whether a foreign national need be examined as a matter of law when there is never, at law, a need to examine a non-accompanying family member in the case of a Convention refugee applicant. His solution is to interpret paragraph 117(9)(*d*) as applying only when a non-accompanying family member is required to be examined. Since they are not required to be examined in his case, he says that paragraph 117(9)(*d*) does not apply to him.

[15] It is trite law that the Court may not change the words of a statute or regulation, which is what Mr. Azizi's argument implicitly requests. The Governor in Council has addressed the "overbreadth" oversight of paragraph 117(9)(*d*) in the manner considered appropriate by it in subsections 117(10) and (11).

[16] If Mr. Azizi is correct that there is no legal requirement for non-accompanying family members to be examined at the time of a Convention refugee application for permanent residence in Canada, that circumstance is accommodated by subsection 117(10). The officer will make that determination and paragraph 117(9)(*d*) will not apply. What is significant however is that subsection 117(10) requires that the officer make that decision. That implies that there must be disclosure of the non-accompanying family members at the time of the Convention refugee application.

[17] Although the argument was somewhat difficult to follow, Mr. Azizi seems to be saying that paragraph 117(11)(*a*) supports his argument. However, paragraph 117(11)(*a*), like subsection 117(10), contemplates that there has been disclosure of non-accompanying family members. There would be no reason for the visa officer to inform the sponsor that family members could be examined unless there was such disclosure. The scheme of the IRP Regulations is that non-accompanying family members who might later be sponsored for entry to Canada must be disclosed at the time of the application for permanent residence of the sponsor.

[18] Mr. Azizi argues that paragraph 117(9)(d) must be read in the context of other regulations. He submits that subsection 141(1), which deals explicitly with disclosure and refugees, implies that paragraph 117(9)(*d*) does not apply to refugees. The subsection reads:

141. (1) A permanent resident visa shall be issued to a family member who does not accompany the [Convention refugee] applicant if, following an examination, it is established that	141. (1) Un visa de résident permanent est délivré à tout membre de la famille du demandeur [Réfugiés au sens de la convention] qui ne l'accompagne pas si, à l'issue d'un contrôle, les éléments suivants sont établis :
(*a*) the family member was included in the applicant's permanent resident visa application at the time that application was made, or was added to that application before the applicant's departure for	*a*) le membre de la famille était visé par la demande de visa de résident permanent du demandeur au moment où celle-ci a été faite ou son nom y a été ajouté avant le départ du

Canada;	demandeur pour le Canada;
(*b*) the family member submits their application to an officer outside Canada within one year from the day on which refugee protection is conferred on the applicant;	*b*) il présente sa demande à un agent qui se trouve hors du Canada dans un délai d'un an suivant le jour où le demandeur se voit conférer l'asile;
(*c*) the family member is not inadmissible;	*c*) il n'est pas interdit de territoire;
(*d*) the applicant's sponsor under subparagraph 139(1)(*f*)(i) has been notified of the family member's application and an officer is satisfied that there are adequate financial arrangements for resettlement; and	*d*) le répondant visé au sous-alinéa 139(1)*f*)(i) qui parraine le demandeur a été avisé de la demande du membre de la famille et l'agent est convaincu que des arrangements financiers adéquats ont été pris en vue de sa réinstallation;
(*e*) in the case of a family member who intends to reside in the Province of Quebec, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province.	*e*) dans le cas où le membre de la famille cherche à s'établir au Québec, les autorités compétentes de cette province sont d'avis qu'il répond aux critères de sélection de celle-ci.
[Emphasis added.]	[Je souligne.]

[19] The basis of Mr. Azizi's argument is that paragraph 141(1)(*a*) deals expressly with the situation of refugees who fail to disclose family members before arrival and therefore paragraph 117(9)(d), which does not deal expressly with refugees, does not apply to them.

[20] Subsection 117(9) applies to "foreign nationals." Subsection 2(1) of the IRPA defines "foreign national" as "a person who is not a Canadian citizen or a permanent resident, and includes a stateless person." By its plain meaning, this includes refugees.

[21] Disclosure is implicitly required under paragraph 117(9)(*d*) because it deals with the examination of family members by immigration officials. Obviously, family members cannot be examined where there is no disclosure. The explicit reference to disclosure in subsection 141(1) does not detract from the implied disclosure obligation in paragraph 117(9)(*d*). On the contrary, the explicit reference to disclosure in subsection 141(1)(*a*) underscores the importance of disclosure in the Canadian immigration procedures.

[22] Mr. Azizi's argument tries to construe the Regulations in a manner that excuses nondisclosure by the Convention refugee appellant. That may suit his particular circumstances but it is not in accord with the scheme of the Regulations.

Were The Misrepresentations Material?

[23] There was argument about whether subsections 9(3) and 12(4) of the *Immigration Act*, R.S.C. 1985, c. I-2, or subsection 16(1) of the IRPA dealing with the requirement for truthful disclosure are applicable to this case. Mr. Azizi says subsection 16(1) of the IRPA applies; the Minister says that subsections 9(3) and 12(4) of the *Immigration Act* apply. Mr. Azizi relies on subsection 16(1) because he says that it only requires that relevant evidence be disclosed while subsections 9(3) and 12(4) of the *Immigration Act* are not expressly restricted to relevant evidence. Mr. Azizi says that the questions of whether he had a wife and children were not relevant to his permanent residence application as a refugee.

[24] It is not necessary to determine which Act applies to the facts of this case because I am of the view that information about non-accompanying dependents is relevant under the IRPA irrespective of whether the Refugee application was made under the *Immigration Act* or the IRPA. As Mosley J. pointed out at paragraph 23 of his reasons, a durable solution outside Canada might be indicated by the nationality or status of dependents. Paragraph 139(1)(*d*) of the Regulations provides:

139(1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that:	139(1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :
...	...
(*d)* the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely:	(*d*) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :
(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or	(i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,
(ii) resettlement or an offer of resettlement in another country;	(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;

The visa officer must be able to assess the potential of a durable solution outside Canada when assessing a refugee applicant's claim for permanent residence in Canada. That is the case whether or not the Convention refugee's dependants are accompanying him and is one reason why information about dependants is relevant.

[25] Mr. Azizi says that a durable solution outside Canadais not possible in this case. That may be so. But it is not the prerogative of the Convention refugee to make that decision. Information about dependants asked for on the permanent residence application form must be complete and accurate in order that the visa officer may make that determination. It is Canada that makes that decision not the Convention refugee.

Is There a Distinction Between Misrepresentations That Go To Inadmissibility as Opposed to Failure To Meet The Requirements Of The Act?

[26] Mr. Azizi cites no authority for the proposition that misrepresentation is only relevant to admissibility but not to compliance with the Act or the Regulations. While I doubt the distinction being argued for by Mr. Azizi, I need not decide that issue here. Information about dependants might affect the admissibility of a refugee applicant if a durable solution is possible elsewhere.

Is Paragraph 117(9)(*d*) *Ultra Vires*?

[27] Mr. Azizi says paragraph 117(9)(d) is *ultra vires* because it is inconsistent with the purpose of the IRPA. I agree that a purpose of the IRPA is family reunification and that the best interests of children are to be considered when relevant. But the legislation has other purposes as well. Another purpose is the maintenance of the integrity of the Canadian refugee protection system. The integrity of that system is undermined by a complacent approach to misrepresentations made by applicants for admission to Canada.

[28] Paragraph 117(9)(*d*) does not bar family reunification. It simply provides that non-accompanying family members who have not been examined for a reason other than a decision by a visa officer will not be admitted as members of the family class. A humanitarian and compassionate application under section 25 of the IRPA may be made for Mr. Azizi's dependants or they may apply to be admitted under another category in the IRPA.

[29] Mr. Azizi says these are undesirable alternatives. It is true that they are less desirable from his point of view than had his dependants been considered to be members of the family class. But it was Mr. Azizi's misrepresentation that has caused the problem. He is the author of this misfortune. He cannot claim that paragraph 117(9)(*d*) is *ultra vires* simply because he has run afoul of it.

[30] Another *ultra vires* argument made by Mr. Azizi is that subsection 12(1) of the IRPA defines the family class and that the Regulations cannot alter that definition. Subsection 12(1) lists who may be eligible to be members of the family class.

(1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family	(1) La sélection des étrangers de la catégorie regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de

member of a Canadian citizen or permanent resident.	conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement

.

[31] As I read subsection 12(1), it does not define the family class. It only enumerates who, by reason of their relationship to a Canadian citizen or permanent resident, may be selected to be a member of the family class. In other words, it does not provide that spouses or children are automatically members of the family class.

[32] Subsection 14(1) provides in part as follows:

(1) The regulations may provide for any matter relating to the application of this Division ...	(1) Les règlements régissent l'application de la présente section et définissent, ...

Whether a person may be a member of the family class and be sponsored as such are matters to which the Division applies. Subsection 14(1) is broad enough to authorize the Governor in Council to provide, by regulation, who may not be considered a member of the family class for purposes of sponsorship.

Section 7 of The Charter

[33] Mr. Azizi invokes section 7 of the Charter. He submits that by preventing him from reuniting with his family, the state has caused him to have a high level of psychological stress, which adversely affects his security of the person. He says his section 7 right is engaged because paragraph 117(9)(*d*) is being applied retroactively, which he says is contrary to the principles of fundamental justice.

[34] I accept that being separated from his wife and children has caused Mr. Azizi psychological stress. However, he chose to leave his wife and daughters in Pakistan in 2001, and he chose to make a misrepresentation to immigration authorities. Some of his psychological stress may have resulted from the state's refusal to allow Mr. Azizi to sponsor his family as permanent residents but in large part it arose from his own actions. The government is only accountable for deprivation that results from state action (see *Blencoe v. British Columbia(Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraph 59). Much of Mr. Azizi's psychological stress is as a result of his own decisions. On the facts here, there is not a sufficient causal connection between state action and Mr. Azizi's psychological stress that would justify a finding of deprivation of security of the person by the state. As the right to security of the person is not engaged, it is unnecessary to deal with Mr. Azizi's submissions regarding the principles of fundamental justice.

Section 15

[35] Mr. Azizi's section 15 arguments do not address the factors required for a valid claim of discrimination. It is not at all clear which group he seeks to be compared with or what enumerated or analogous ground of discrimination he seeks to

rely on. Any differential treatment of Mr. Azizi is as a consequence of his misrepresentation, not as a consequence of a government action.

CONCLUSION

[36] The appeal should be dismissed and the certified question answered in the affirmative.

"Marshall Rothstein"

J.A.

"I agree

A.M. Linden J.A."

"I agree

J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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