

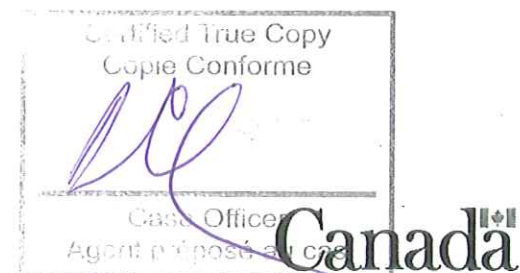


IAD File No. / N° de dossier de la SAI: TB6-10437  
Client ID No. / N° ID client: 5928-7493

## Reasons and Decision – Motifs et décision

### REMOVAL ORDER

|                              |  |   |
|------------------------------|--|---|
| Appellant(s)                 | ILDA DUKAJ   | Appelant(e)(s)                                    |
| and                          |  | et  |
| Respondent                   | The Minister of Public Safety and Emergency Preparedness<br>Le ministre de la Sécurité publique et de la Protection civile | Intimé(e)   |
| Date(s) of Hearing           | March 6, 2018  | Date(s) de l'audience                             |
| Place of Hearing             | Toronto, Ontario   | Lieu de l'audience                                |
| Date of Decision             | April 9, 2018  | Date de la décision                               |
| Panel                        | Lloyd Richards   | Tribunal  |
| Counsel for the Appellant(s) | Mary Keyork<br>Barrister and Solicitor   | Conseil(s) de l'appelant(e) /<br>des appelant(e)s |
| Designated Representative(s) | N/A  | Représentant(e)(s)<br>désigné(e)(s)               |
| Counsel for the Minister     | Adib Abbasi  | Conseil du ministre                               |



## REASONS FOR DECISION

### BACKGROUND

[1] The appellant, Ilda Dukaj, appeals a removal order made against her, dated June 30, 2016. She was ordered removed because an immigration officer made a report, dated May 2, 2014, under subsection 44(1) of the *Immigration and Refugee Protection Act* (the *Act*), determining that she had committed a misrepresentation pursuant to section 40(1)(a) of the *Act*. A member of the Immigration Division, at an admissibility hearing dated January 26, 2016 and May 31, 2016, confirmed the immigration officer's determination and issued an exclusion order against the appellant.<sup>1</sup>

[2] The appellant is an Albanian citizen and became a Canadian permanent resident on July 14, 2008. She was sponsored to Canada by her then spouse. She was found to be inadmissible because she failed to disclose that her marriage had broken down prior to her landing in Canada. Her failure to disclose the breakdown of her marriage induced an error in the administration of the *Act* as she was granted a Canadian permanent resident visa based on the spousal sponsorship.

[3] The appellant is not challenging the legal validity of the immigration officer's decision. Instead, she pleads humanitarian and compassionate (H&C) considerations for special relief under section 67(1)(c) of the *Act*.

### DECISION

[4] At the hearing the appellant admitted to the misrepresentation. After hearing the testimony of the appellant and her spouse, as well as her admission, and taking into consideration the exhibits and the submissions of both parties, I find that the decision of the immigration officer is legally valid. I also find that there are sufficient H&C grounds to justify granting relief.

[5] The appeal is allowed.

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<sup>1</sup> Exhibit R-1, p. 317.

## ISSUE AND LAW

### Humanitarian and Compassionate Grounds

[6] The issue in this appeal is whether there are sufficient H&C considerations to warrant special relief under section 67(1)(c) of the *Act* to allow the appeal, in light of all the circumstances of the case, including the best interests of any children directly affected by the decision. The *Ribic*<sup>2</sup> factors are frequently cited in appeals involving inadmissibility based on misrepresentation, to assess if there are sufficient H&C considerations to grant special relief. Although the *Ribic* factors are used for removal order appeals regarding criminality they can be modified as follows to apply to the assessment of circumstances for special relief in a removal order regarding misrepresentation.<sup>3</sup> These factors are: the seriousness of the misrepresentation; the remorsefulness of the appellant; the length of time the appellant has spent in Canada; family ties in Canada; community support; and hardship and dislocation to the appellant and family members. These factors are not exhaustive, and their applicability and the weight assigned to the factors may vary according to the circumstances.

[7] I will outline what I consider to be the relevant factors below.

#### The seriousness of the misrepresentation

[8] The misrepresentation the appellant committed is serious, and is, therefore, a negative factor in her appeal. Subsection 40(1) of the *IRPA* is to be interpreted broadly so as to deter misrepresentation and maintain the integrity of the immigration system.

[9] The appellant's immigration story is a convoluted one. She was sponsored to Canada by her former spouse, Mr. Arian Karaj. He is also an Albanian citizen. The appellant alleges that she had an argument with her spouse while waiting in Albania during the processing of the sponsorship application. He was in Canada and they did not speak for a month. During this period she went to Montenegro with her mother and met Mr. Elidion Sadikat, who was a family friend. She was sexually intimate with Mr. Sadikat and she became pregnant. At the time the

<sup>2</sup> *Ribic, Marida v. M.E.I.* (I.A.B. 84-9623), D. Davey Benedetti, Petryshyn, August 20, 1985.

<sup>3</sup> *Wang v. Canada (M.C.I.)* 2005 CarswellNat 2150 (F.C.) [F.C., IMM-5815-04], O'Keefe, August 3, 2005.

appellant arrived in Canada she was approximately six months pregnant. She met with Mr. Sadikat on, or shortly, after arrival in Canada and has lived with him in a common-law relationship since. They have four children together.

[10] Mr. Sadikat's circumstances are what brought the appellant's misrepresentation to light. He is also an Albanian citizen and was found to be a Convention refugee in Canada in 2002, but was not granted residence because of a criminal conviction. He was ordered deported on June 10, 2008. He appealed his deportation order and the appellant testified on his behalf at his appeal in December 2009. The appellant made statements about her arrival in Canada which triggered an investigation into her sponsorship.

[11] The Minister questioned the appellant about the misrepresentation. The story surrounding her immigration remains hazy, at best. She stated that she attempted to contact her spouse, both prior to and after arriving in Canada, and was unsuccessful. She maintained that she told a kind stranger on her flight to Canada that she was unable to contact her spouse. The kind stranger paid for a hotel for her. She remained there for three days and, during this time, her family gave her Mr. Sadikat's telephone number and he picked her up.

[12] At the Immigration Division hearing the Member, in his decision, speculated that the appellant and her present spouse knew each other prior to his leaving Albania for Canada. Because he could not sponsor her she entered into a marriage of convenience in order to immigrate and she and her family had always intended for her to be with her present spouse.

[13] Whether the speculation in which the Immigration Division Member engaged is true or not, the fact remains that the misrepresentation in this case is intentional and severe. The appellant, her spouse and others engaged in a scheme to dupe the immigration system. Misrepresentation such as the appellant has committed affects the immigration system as a whole. Those who have legitimate applications and are not engaging in fraud often suffer undue scrutiny because of those who abuse the system.

The remorsefulness of the appellant

[14] The appellant expressed remorse for her misrepresentation. She stated that she misrepresented when she was young and that she felt ashamed and that her actions were not good for her or her children. At the hearing, she did however, continue to obfuscate and not clearly address her actions.

[15] This, as well, is a negative factor in her appeal.

The length of time the appellant has spent in Canada

[16] The appellant is now 30 years old. She has been in Canada since 2008, when she was 21 years old. She has spent most of her adult life here, but has only been here for nine years.

[17] The appellant has taken English classes and has been taking daycare education classes since November 2017. She and her spouse own their own home, which they purchased in 2009. They also formerly owned a business, which they sold in 2017. Since then her spouse has established his own company in the construction industry.

[18] The appellant and her spouse send \$300 to \$400 per month to their family in Albania.

[19] The Minister's counsel requested that I find that the appellant has no establishment in Canada because her misrepresentation occurred from the time she entered the country. While the misrepresentation is serious, and I acknowledge the case law that states that an appellant should not be rewarded for her time under illegal circumstances,<sup>4</sup> I find that it does not completely negate her establishment. She has worked to establish herself in Canada. She spends the bulk of her time taking care of her children and worked in the family's business until 2017. She has learned to speak English and is in school.

[20] However, I have reduced the positive credit for the establishment that she has achieved to reflect the fact the establishment is as a result of her misrepresentation that enabled her to obtain her permanent resident status. In *Fouda*,<sup>5</sup> the Court stated, "Whether the impact of the fraud is to

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<sup>4</sup> *Canada v. Liu*, 2016 FC 460.

<sup>5</sup> *Fouda v. Canada*, 2017 FC 1176 at para 54.

reduce the establishment to zero or to something more is a question for the discretion of the decision-maker based on the particular facts of the matter before them.”

[21] Although the appellant has not been in Canada for a long time, that fact is countered by her working to establish herself here. Therefore, the length of time she has been in Canada and her establishment during that period is a moderate positive factor in her appeal.

#### Family ties in Canada

[22] The appellant has four children, all born in Canada. They are nine and eight years old and four-year-old twins. The appellant's spouse is also in Canada and is a protected person. He is in the process of applying to become a permanent resident. She has no other family here.

[23] The appellant's mother and stepfather are in Albania, as are her grandparents, who raised her. She has a 25-year-old sister who lives with her mother.

[24] The appellant testified that she does not enjoy a very close relationship with her mother and sister. She is much closer to her grandparents. She is very close to her spouse and children. She, her spouse and children spend most of their time together and engage in family activities as much as they can. She testified that her children only have her and her spouse. She grew up without parents and would not want to do the same to her children.

[25] I find that the appellant's family ties are a positive factor in her appeal. She is close to her grandparents in Albania, but her closest family ties are to her spouse and children in Canada.

#### Hardship and dislocation to the appellant and family members

[26] If the appellant were removed from Canada to Albania, her spouse would not accompany her as he fled from that country to Canada to seek political asylum. He has not been back to Albania since leaving there. The appellant testified that, if removed, she would take her children with her and that it would be difficult to live with four children without her spouse's support. However, the appellant's family and her spouse's family live in the same building in Albania and would be able to provide some support to the appellant.

[27] She has no property there and has never worked as an adult there.

[28] Hardship to the appellant is a moderate positive factor as she has support both in Albania and Canada. Although, if she were removed to Albania, she would not be able to see her spouse as he has stated that he cannot return there.

#### Community support

[29] The appellant provided a number of reference letters from members of the community supporting her appeal. The letters were from neighbours and former employees. Although the appellant has not had involvement with volunteer organizations, it is clear from the letters that her family is integrated into the community. The letters from former customers and employees of her business also attest to the support the appellant enjoys here.

#### Best interests of a child

[30] The strongest ground for H&C relief in the appellant's case is the best interests of her children. They were all born and raised in Canada and are established here. They attend school, have a network of friends and are well cared for by their parents. The appellant's children would have some family support if the appellant took them with her to Albania. Critically however, if the appellant were removed from Canada to Albania, her spouse would not be able to return with her.

[31] She could choose to leave the children in Canada with her spouse, but she has been with them their entire lives. They are emotionally and otherwise dependent on her as she is very involved in their lives. The negative emotional impact on the children would be extensive if separated from their mother. The children's father is actively involved in their lives. However, he relies on the appellant as she is primarily a stay-at-home parent while he works outside of the home.

[32] Removing the appellant from Canada would mean breaking up the family unit. Accordingly, it is in the children's best interests to permit the appellant to remain in Canada. This is a strong positive factor supporting the exercise of special relief.

[33] The Minister did not articulate a position about the best interests of the children, but did suggest that once the appellant's spouse acquires permanent resident status he can sponsor the appellant back to Canada. Waiting for the appellant's spouse to acquire status to sponsor her back to Canada would be speculative at this point and could take some time. Separating the family while waiting for the sponsorship would be punitive to the children and not in their best interests.

#### **CONCLUSION**

[34] The seriousness of the appellant's misrepresentation must be weighed against the H&C considerations in this case. The misrepresentation is serious, and while the appellant expressed remorse, she did continue to obfuscate. These are negative factors.

[35] Her length of time in Canada and her establishment are moderate positive factors. Hardship if she were to be removed is also a moderate positive factor.

[36] In her favour are her family ties in Canada and the community support she enjoys here.

[37] Critically however, removing the appellant from Canada would mean breaking up the appellant's family as her spouse could not return with her to Albania. As such, it is in the children's best interests to permit the appellant to remain in Canada. This is a strong positive factor.

[38] For the foregoing reasons I conclude, that sufficient H&C considerations exist to permit the appellant to remain in Canada as a permanent resident. Accordingly, the appeal is allowed.



## NOTICE OF DECISION

The appeal is allowed. The removal order is set aside. The Immigration Appeal Division finds that the appellant has not lost her permanent resident status.

\_\_\_\_\_  
Lloyd Richards

**Lloyd Richards**

\_\_\_\_\_  
April 9, 2018

**Date**

Judicial Review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.