

Federal Court



Cour fédérale

Date: 20151211

**Dockets: IMM-2838-15
IMM-2840-15**

Citation: 2015 FC 1380

Ottawa, Ontario, December 11, 2015

PRESENT: The Honourable Mr. Justice Harrington

Docket: IMM-2838-15

BETWEEN:

JOSEPHINE STANABADY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION AND
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

Docket: IMM-2840-15

AND BETWEEN:

GEORGES MARIE STANABADY

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION AND**

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

JUDGMENTS AND REASONS

[1] Mr. and Mrs. Stanabady's status in Canada turns on the meaning of "application" as used in section 183 of the *Immigration and Refugee Protection Regulations*.

[2] The Stanabadys, who are French nationals, were here in Canada on temporary resident permits. An exclusion order was issued against them on the grounds that they had remained in Canada after their permits had expired. The Stanabadys' position is that the exclusion order is invalid because they had applied for an extension of their permits before they had expired, so that they maintained Canadian status under the Regulations until their applications were refused on the merits.

I. The Facts

[3] The Stanabadys were issued temporary resident permits to allow them to be with their son while he was studying here. At last word, he still is.

[4] Their temporary resident permits expired 15 July 2014. Under s 29 of the *Immigration and Refugee Protection Act* and s 183(1) of the Regulations, they were obliged to leave Canada by then. They did not. However, s 183(5) of the Regulations goes on to provide that if a temporary resident has applied for an extension before the expiry date, the period is extended

until the date the application is refused, or if the application is allowed until the end of the new authorized period.

[5] On 16 June 2014, the Stanabadys applied for an extension of time.

[6] Their application forms and the documents they provided were returned to them because they had failed to make sufficient payment (the fee had been increased) and to provide necessary photos in passport form for them, and for each member of their family. Citizenship and Immigration Canada's covering letter concluded that their request could not be dealt with unless they returned copy of the letter, together with a new complete application in proper form accompanied by the correct fee and recent photographs in passport form. It should be noted that by the time this letter was sent to the Stanabadys, their temporary resident permits had already expired.

[7] On 25 August 2014, the Stanabadys purported to comply. However, their application forms were again sent back with the same form covering letter which pointed out that certain information and photographs were still missing.

[8] On 21 April 2015, they, again, resubmitted everything and have as yet to receive a reply.

[9] On 4 July 2015, the Minister's delegate signed an exclusion order pursuant to s 44(2) of the *Immigration and Refugee Protection Act* on the grounds that they had violated s 29(2) of the Act by failing to leave Canada at the expiry of their temporary resident permits.

II. Issue

[10] Does the submission of an incomplete application form, in which an extension of a temporary resident permit is sought, extend the period authorized to stay in Canada until the application is granted or refused on the merits?

III. Decision

[11] In my opinion, the decision of the Minister's Delegate to issue the Stanabadys an exclusion order was both reasonable and correct. An application within the meaning of s 183 of the Regulations must be such that the decision maker is able to grant the extension, or to reject it, on the merits. The applications for extensions could not be granted if for no other reason than that the forms were incomplete.

IV. Analysis

[12] Section 183 of the Regulations must be read together with sections 10 and 12 of the Regulations, all of which are appended hereto. Section 10(1) provides that applications must, among other things, be made in writing using the prescribed form, be signed, include all required information and documents and be accompanied by evidence of payment of the applicable fee. S 12 goes on to provide that if the requirements of s 10 (and 11) are not met, the application and all documents submitted are returned to the applicant. This is exactly what happened, albeit after the permits had expired.

[13] I do not consider that the fact that Citizenship and Immigration Canada sent the Stanabadys a form letter, after their temporary resident permits had expired, which letter stated that if they wished to reapply they had to send back a copy of that letter together with an application form complete in all respects locked in their status until a negative decision was made on the merits.

[14] There are two decisions of this Court which bear on the issue. Unfortunately, they came to different conclusions. In *Campana Campana v Canada (Citizenship and Immigration)*, 2014 FC 49, 446 FTR 84, Mr. Justice Roy was of the view that an incomplete application was still an application. In *Ma v Canada (Citizenship and Immigration)*, 2015 FC 159, Mr. Justice Rennie, without referring to the decision of Mr. Justice Roy, concluded that an incomplete application was not an application at all. Knowing Mr. Justice Rennie, I can only assume that he was not made aware of Mr. Justice Roy's decision.

[15] As a general principle, comity suggests that although we are not bound by decisions of our Court, usually we should follow them for the sake of uniformity (*Police Authority for Huddersfield v Watson*, [1947] 1 KB 842 at 847; *Alfred v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1134, a decision of Madam Justice Dawson, as she then was; and my own decision in *Dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2005 FC 992). Comity is quite distinct from *stare decisis* which requires us to follow the decisions of the Supreme Court of Canada and the Federal Court of Appeal on points of law.

[16] In the circumstances, I shall carry out my own independent analysis, before commenting further on *Campana Campana* and *Ma*.

[17] Counsel for the Ministers has referred to the Regulatory Impact Analysis Statement accompanying the Regulations. It states that incomplete applications will be returned, including applications which do not meet the requirements of section 10 of the Regulations. The Statement adds nothing to the Regulations themselves.

[18] The Ministers also refer the department's policy procedures and guidance with respect to "Temporary resident; implied status (extending a stay)". The policy draws a distinction between extension requests which are "refused" and those which are "rejected" as being incomplete. If the extension is refused, the client is considered in status until the day that decision is rendered. If the extension is rejected as being incomplete, the applicant is considered in status until the original temporary resident permit expires.

[19] Policies are useful, but they must be in accordance with the Regulations, which in turn must be in accordance with the law. I see nothing in this distinction between "refusals" and "rejections" which is of assistance in this case.

[20] The simple fact of the matter is that the officer could not have made a positive decision on the application form submitted before the Stanabadys' temporary resident permits expired because the applications were incomplete. Therefore, they were required to depart Canada under s 183(1) of the Regulations and s 29 of the Act.

[21] The Stanabadys had not left within time, and so the exclusion orders were valid. They have since voluntarily returned to France. Nevertheless, these applications for judicial review are not moot because, as matters presently stand, they cannot return to Canada without ministerial approval.

V. *Campana Campana v Canada (Citizenship and Immigration)*, 2014 FC 49

[22] This was a sponsorship case. The applicants' argument, which was successful, was that they made their application before the Regulations were amended and that the fact that some information was missing and the complete fees had not been paid did not disqualify them. However, as in this case, the original application was returned with the proviso that in order to process the application, a complete application would have to be resubmitted.

[23] At paragraph 12, Mr. Justice Roy was of the view that as a matter of law s 10 of the Regulations was not robust enough to declare that an incomplete application does not exist.

VI. *Ma v Canada (Citizenship and Immigration)*, 2015 FC 159

[24] Ma was an overseas application for permanent residence in the family class.

[25] Mr. Justice Rennie stated at paragraph 13 and 15 of his decision:

[13] An application under *IRPA* must be a complete application. The receipt of an application which is missing key components is not an application within the meaning of *IRPA* and the Regulations. This interpretation ensures that officers spend their time reviewing completed files, allowing for a more effective use of resources. Importantly, applicants are not preserving their place or priority in a queue based on the filing of partial applications, to

the determinant of those applicants who file later, but file complete files.

[15] Section 10 of the *Regulations* sets out the minimum requirements for applications. Specifically, subsection 10(1)(c) states that an application under the *Regulations* shall “include all information and documents required by these *Regulations*, as well as any other evidence required by the Act.” As the applicant’s inland application that was initially submitted on November 1, 2013, was incomplete, his application was therefore not locked-in until December 31, 2013, when all of the necessary information pursuant to subsection 10(1)(c) was received.

[26] My own analysis is closer to that of Mr. Justice Rennie’s rather than that of Mr. Justice Roy. Mr. Justice Roy did not specifically deal with s 12 of the *Regulations* which requires that the application form be returned. The fact of the matter is that it was impossible to render a decision extending the temporary resident permits before they expired. Had the applications been complete in everyway, the officer may or may not have granted the extension after the permits expired, as permitted under s 183(5) of the *Regulations*. As it is, s 183(5) never came into play.

VII. Certified Question

[27] Even before the hearing of this judicial review, the Ministers submitted the following serious question of general importance for certification:

When a temporary resident has applied for an extension of the period authorized for his or her stay, but the Application is returned to the Applicant, due to the incompleteness, in accordance with section 12 of the *Immigration and Refugee Protection Regulations*, does the Applicant benefit from implied status until he or she actually submits a complete Application and that Application is either refused or allowed?

[Grammatically adjusted question]

[28] I was assured that this was not to be taken as an invitation to rule against the Ministers. In light of the conflicting jurisprudence in this Court, they consider it important to benefit from a decision of the Federal Court of Appeal.

[29] Counsel for the Stanabadys agrees that the question put forward by the Ministers is a serious question of general importance. However, it must be a question capable of supporting an appeal under s 74(d) of IRPA (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89). As they have returned to France, they may not be willing to finance an appeal.

[30] The Court of Appeal has held that s 74(d) carries out a gatekeeper function (*Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 FCR 129). The application judge should answer the question. The answer, in my opinion, as analysed above, is “no”.

[31] However, I agree it is a serious question of general importance that, in light of the conflicting jurisprudence of this Court, should be answered by the Federal Court of Appeal. I consider the situation identical to that in *Canada (Minister of Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186. There was conflicting jurisprudence in the Federal Court as to the meaning of “the time of that application” within s 117(9)(d) of the Regulations. At paragraph 39, Mr. Justice Marc Noël, as he then was, recognized that the phrase could be read in two different ways, but only one would be correct.

[32] Although I am of the view that an incomplete application form is not an “application” within the meaning of s 183(5) of the Regulations, Mr. Justice Roy makes a strong case that s 10

of the Regulations is not robust enough to equate an incomplete application with no application at all. Consequently, I shall certify the question.

JUDGMENTS

FOR REASONS GIVEN;

THIS COURT'S JUDGMENTS are that:

1. The applications for judicial review under dockets IMM-2838-15 and IMM-2840-15 are dismissed.

2. The following serious question of general importance is certified in each case:

When a temporary resident has applied for an extension of the period authorized for his or her stay, but the Application is returned to the Applicant, due to the incompleteness, in accordance with section 12 of the Immigration and Refugee Protection Regulations, does the Applicant benefit from implied status until he or she actually submits a complete Application and that Application is either refused or allowed?

“Sean Harrington”

Judge

APPENDIX

**IMMIGRATION AND REFUGEE
PROTECTION REGULATIONS
(SOR/2002-227)**

**RÈGLEMENT SUR L'IMMIGRATION
ET LA PROTECTION DES RÉFUGIÉS
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SECTION 10

ARTICLE 10

10. (1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall

10. (1) Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement :

(a) be made in writing using the form provided by the Department, if any;

a) est faite par écrit sur le formulaire fourni par le ministère, le cas échéant;

(b) be signed by the applicant;

b) est signée par le demandeur;

(c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;

c) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;

(d) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and

d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;

(e) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.

e) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.

(2) The application shall, unless otherwise provided by these Regulations,

(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :

(a) contain the name, birth date, address, nationality and immigration status of the

a) les nom, date de naissance, adresse, nationalité et statut d'immigration du

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applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

(b) indicate whether they are applying for a visa, permit or authorization;

(c) indicate the class prescribed by these Regulations for which the application is made;

(c.1) if the applicant is represented in connection with the application, include the name, postal address and telephone number, and fax number and electronic mail address, if any, of any person or entity — or a person acting on its behalf — representing the applicant;

(c.2) if the applicant is represented, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the name of the body of which the person is a member and their membership identification number;

(c.3) if the applicant has been advised, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the information referred to in paragraphs (c.1) and (c.2) with respect to that person;

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demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi que la mention du fait que le demandeur ou l'un ou l'autre des membres de sa famille est l'époux, le conjoint de fait ou le partenaire conjugal d'une autre personne;

b) la mention du visa, du permis ou de l'autorisation que sollicite le demandeur;

c) la mention de la catégorie réglementaire au titre de laquelle la demande est faite;

c.1) si le demandeur est représenté relativement à la demande, le nom, l'adresse postale, le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique de toute personne ou entité — ou de toute personne agissant en son nom — qui le représente;

c.2) si le demandeur est représenté, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, le nom de l'organisme dont elle est membre et le numéro de membre de celle-ci;

c.3) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une personne visée à l'un des alinéas 91(2)a) à c) de la Loi, les renseignements prévus aux alinéas c.1) et c.2) à l'égard de cette personne;

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(c.4) if the applicant has been advised, for consideration in connection with the application, by an entity — or a person acting on its behalf — referred to in subsection 91(4) of the Act, include the information referred to in paragraph (c.1) with respect to that entity or person; and

c.4) si le demandeur a été conseillé, moyennant rétribution, relativement à la demande par une entité visée au paragraphe 91(4) de la Loi — ou une personne agissant en son nom —, les renseignements prévus à l'alinéa c.1) à l'égard de cette entité ou personne.

(d) include a declaration that the information provided is complete and accurate.

d) une déclaration attestant que les renseignements fournis sont exacts et complets.

(3) The application is considered to be an application made for the principal applicant and their accompanying family members.

(3) La demande vaut pour le demandeur principal et les membres de sa famille qui l'accompagnent.

(4) An application made by a foreign national as a member of the family class must be preceded or accompanied by a sponsorship application referred to in paragraph 130(1)(c).

(4) La demande faite par l'étranger au titre de la catégorie du regroupement familial doit être précédée ou accompagnée de la demande de parrainage visée à l'alinéa 130(1)c).

(5) No sponsorship application may be filed by a sponsor in respect of a person if the sponsor has filed another sponsorship application in respect of that same person and a final decision has not been made in respect of that other application.

(5) Le répondant qui a déposé une demande de parrainage à l'égard d'une personne ne peut déposer de nouvelle demande concernant celle-ci tant qu'il n'a pas été statué en dernier ressort sur la demande initiale.

(6) A sponsorship application that is not made in accordance with subsection (1) is considered not to be an application filed in the prescribed manner for the purposes of subsection 63(1) of the Act.

(6) Pour l'application du paragraphe 63(1) de la Loi, la demande de parrainage qui n'est pas faite en conformité avec le paragraphe (1) est réputée non déposée.

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SECTION 12

12. Subject to section 140.4, if the requirements of sections 10 and 11 are not met, the application and all documents submitted in support of it shall be returned to the applicant.

ARTICLE 12

12. Sous réserve de l'article 140.4, si les exigences prévues aux articles 10 et 11 ne sont pas remplies, la demande et tous les documents fournis à l'appui de celle-ci sont retournés au demandeur.

SECTION 183

183. (1) Subject to section 185, the following conditions are imposed on all temporary residents:

(a) to leave Canada by the end of the period authorized for their stay;

(b) to not work, unless authorized by this Part or Part 11;

(b.1) if authorized to work by this Part or Part 11, to not enter into an employment agreement, or extend the term of an employment agreement, with an employer who, on a regular basis, offers striptease, erotic dance, escort services or erotic massages;

(b.2) if authorized to work by this Part or Part 11, to not enter into an employment agreement, or extend the term of an employment agreement, with an employer whose name appears on the list referred to in subsection 209.91(3) if a period of two years has not elapsed since the day on which the

ARTICLE 183

183. (1) Sous réserve de l'article 185, les conditions ci-après sont imposées à tout résident temporaire :

a) il doit quitter le Canada à la fin de la période de séjour autorisée;

b) il ne doit pas travailler, sauf en conformité avec la présente partie ou la partie 11;

b.1) même s'il peut travailler en conformité avec la présente partie ou la partie 11, il ne peut conclure de contrat d'emploi — ni prolonger la durée d'un tel contrat — avec un employeur qui offre, sur une base régulière, des activités de danse nue ou érotique, des services d'escorte ou des massages érotiques;

b.2) même s'il peut travailler en conformité avec la présente partie ou la partie 11, il ne peut conclure de contrat d'emploi — ni prolonger la durée d'un tel contrat — avec un employeur dont le nom figure sur la liste visée au paragraphe 209.91(3), s'il ne s'est pas écoulé une période de deux ans depuis la

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determination referred to in subsection 203(5) or 209.91(1) or (2) was made; and

(c) to not study, unless authorized by the Act, this Part or Part 12.

(2) Subject to subsections (3) to (5), the period authorized for the stay of a temporary resident is six months or any other period that is fixed by an officer on the basis of

(a) the temporary resident's means of support in Canada;

(b) the period for which the temporary resident applies to stay; and

(c) the expiry of the temporary resident's passport or other travel document

(3) The period authorized for the stay of a temporary resident begins on

(a) if they are authorized to enter and remain in Canada on a temporary basis, the day on which they first enter Canada after they are so authorized;

(a.1) if they have become a temporary resident in accordance with subsection 46(1.1) of the Act, the day on which their application to renounce their permanent resident status is approved; and

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date à laquelle la conclusion visée aux paragraphes 203(5) ou 209.91(1) ou (2) a été formulée;

c) il ne doit pas étudier sans y être autorisé par la Loi, la présente partie ou la partie 12.

(2) Sous réserve des paragraphes (3) à (5), la période de séjour autorisée du résident temporaire est de six mois ou de toute autre durée que l'agent fixe en se fondant sur les critères suivants :

a) les moyens de subsistance du résident temporaire au Canada;

b) la période de séjour que l'étranger demande;

c) la durée de validité de son passeport ou autre titre de voyage.

(3) La période de séjour du résident temporaire commence

a) dans le cas de celui qui est autorisé à entrer et à séjourner à titre temporaire, à la date à laquelle il entre au Canada pour la première fois par suite de cette autorisation;

a.1) dans le cas de celui qui est devenu résident temporaire conformément au paragraphe 46(1.1) de la Loi, à la date d'acceptation de sa demande de renonciation au statut de résident permanent;

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(b) in any other case, the day on which they enter Canada.

b) dans tout autre cas, à la date à laquelle il entre au Canada.

(4) The period authorized for a temporary resident's stay ends on the earliest of

(4) La période de séjour autorisée du résident temporaire prend fin au premier en date des événements suivants :

(a) the day on which the temporary resident leaves Canada without obtaining prior authorization to re-enter Canada;

a) le résident temporaire quitte le Canada sans avoir obtenu au préalable l'autorisation d'y rentrer;

(b) the day on which their permit becomes invalid, in the case of a temporary resident who has been issued either a work permit or a study permit;

b) dans le cas du titulaire d'un permis de travail ou d'études, son permis cesse d'être valide;

(b.1) the day on which the second of their permits becomes invalid, in the case of a temporary resident who has been issued a work permit and a study permit;

b.1) dans le cas du titulaire à la fois d'un permis de travail et d'un permis d'études, celui ayant la date d'expiration la plus tardive cesse d'être valide.

(c) the day on which any temporary resident permit issued to the temporary resident is no longer valid under section 63; or

c) dans le cas du titulaire d'un permis de séjour temporaire, son permis cesse d'être valide aux termes de l'article 63;

(d) the day on which the period authorized under subsection (2) ends, if paragraphs (a) to (c) do not apply.

d) dans tout autre cas, la période de séjour autorisée aux termes du paragraphe (2) prend fin.

(5) Subject to subsection (5.1), if a temporary resident has applied for an extension of the period authorized for their stay and a decision is not made on the application by the end of the period authorized for their stay, the period is

(5) Sous réserve du paragraphe (5.1), si le résident temporaire demande la prolongation de sa période de séjour et qu'il n'est pas statué sur la demande avant l'expiration de la période, celle-ci est prolongée :

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extended until

(a) the day on which a decision is made, if the application is refused; or

a) jusqu'au moment de la décision, dans le cas où il est décidé de ne pas la prolonger;

(b) the end of the new period authorized for their stay, if the application is allowed.

b) jusqu'à l'expiration de la période de prolongation accordée.

(5.1) Subsection (5) does not apply in respect of a foreign national who is the subject of a declaration made under subsection 22.1(1) of the Act.

(5.1) Le paragraphe (5) ne s'applique pas à l'égard d'un étranger qui fait l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.

(6) If the period authorized for the stay of a temporary resident is extended by operation of paragraph (5)(a) or extended under paragraph (5)(b), the temporary resident retains their status, subject to any other conditions imposed, during the extended period.

(6) Si la période de séjour est prolongée par l'effet de l'alinéa (5)a) ou par application de l'alinéa (5)b), le résident temporaire conserve son statut, sous réserve des autres conditions qui lui sont imposées, pendant toute la prolongation.

FEDERAL COURT
SOLICITORS OF RECORD

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