Federal Court  Cour fédérale

Date: 20190613

Docket: IMM-3242-18

Citation: 2019 FC 808

BETWEEN:

RAJESVARAN SUBRAMANIAM

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

HENEGHAN J.

[1] Mr. Rajesvaran Subramaniam (the "Applicant") seeks judicial review of the decision made by the Backlog Reduction Office Manager (the "Manager"), refusing to process his application for permanent residence on Humanitarian and Compassionate ("H&C") grounds, pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant arrived in Canada on or about August 13, 2010, on board the MV “Sun Sea”. He was employed on that vessel in the engine room monitoring and maintaining equipment.

[3] In August 2011, the Applicant was found inadmissible to Canada pursuant to paragraph 37(1)(b).

[4] In 2015, the Supreme Court of Canada delivered its decision in *B010 v. Canada (Citizenship and Immigration)*, [2015] 3 S.C.R. 704, whereby it decided that a “profit motive” is required for a person to be found inadmissible pursuant to paragraph 37(1)(b) of the Act.

[5] The Manager returned the Applicant’s H&C application and said that he could not process that application since the inadmissibility finding precluded the availability of relief pursuant to subsection 25(1) of the Act.

[6] The Applicant argues that the Manager erred in law by refusing to exercise his discretion pursuant to subsection 25(1) of the Act.

[7] Alternatively, the Applicant submits that the Manager unreasonably interpreted subsection 25(1) of the Act.

[8] The Minister of Citizenship and Immigration (the "Respondent") argues that there is no question of jurisdiction arising here, that the Manager reasonably interpreted subsection 25(1) and that there is no basis for judicial intervention.

[9] By Direction issued on May 16, 2019, the parties were provided the opportunity to make further submissions relative to the decision in *Apotex Inc. v. Schering Corporation,* 2018 ONCA 890, leave to appeal to SCC refused, 38471 (16 May 2019), concerning the pleading of a subsequent change in the law after a prior decision.

[10] The parties accepted the opportunity to make further submissions.

[11] The Applicant argues that the Manager was required to consider the impact of the decision in *B010, supra*, since the prior finding of inadmissibility was based upon reasoning that was later rejected by the Supreme Court of Canada.

[12] The Respondent submits that the "change in the law" is addressed in *Apotex Inc., supra* as an exception to the principle of issue estoppel. He argues that issue estoppel was not raised in the present proceeding and does not apply in the context of H&C applications.

[13] The first matter for consideration is the applicable standard of review. I agree with the Respondent that the within application for judicial review does not raise an issue of "true jurisdiction" that could be reviewed on the standard of correctness.

[14] I agree with the submissions of the Respondent that the applicable standard of review in this case is reasonableness, since the decision-maker was interpreting his home statute, that is the Act. I refer to the decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers'* Association, [2011] 3 S.C.R. 654 at paragraph 30.

[15] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of reasonableness requires that a decision be transparent, justifiable and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[16] In *Oladele v. Canada (Citizenship and Immigration)*, 53 Imm. L. R. (4th) 242, Justice Manson considered the effect of a change in the interpretation of inadmissibility provisions of the Act, pursuant to the decision in *Ezokola v Canada (Citizenship and Immigration)*, [2013] 2 S.C.R. 678. He said the following at paragraph 77:

> Moreover, it is clear that decision-makers on H&C applications have discretion to consider the impact of *Ezokola* on previous findings of inadmissibility. Officers making these decisions must be satisfied that applicants meet the requirements of the *IRPA* and should consider the relevance of an intervening SCC decision (*NK v Canada (Citizenship and Immigration)*, 2015 FC 1040 at paras 19-21). A H&C decision will be unreasonable if it is impossible to ascertain from the decision-maker's reasons whether the applicant's inadmissibility may or may not have been assessed upon the refined test set out in *Ezokola* (*Aazamyar v Canada (Citizenship and Immigration)*, 2015 FC 99 at paras 39-41).

[17] I note that in the case of *Oladele, supra*, an H&C application was submitted prior to the enactment of the amendments to section 25 of the Act pursuant to the *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16.

[18] In the present case, the Applicant submitted his H&C application on March 15, 2017.

[19] Subsection 25(1) of the Act currently reads as follows:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché

[20] The language of subsection 25(1) of the Act is clear. It provides that a "foreign national who is inadmissible under section 34, 35 or 37" cannot benefit from the exercise of the discretion otherwise conferred upon the Minister pursuant to section 25(1).

[21] The Manager said the following in the decision:

> […] Subsection 25(1) bars an applicant inadmissible under s. 37 from H&C consideration. Consequently, as the Immigration Division determined Mr. Subramaniam to be inadmissible under para. 37(1)(b) and issued a removal order on these grounds, his application for permanent residence based on H&C considerations cannot be processed. […]

[22] In my opinion, the Manager's interpretation of subsection 25(1) is reasonable.

[23] The Legislative Summary of Bill C-43, submitted by the Respondent, provides background that the amendments to subsection 25(1) were intended to exclude a foreign national who is inadmissible under sections 34, 35 or 37, from eligibility for the exercise of H&C discretion.

[24] The Legislative Summary also says that section 42.1 was created to provide relief for foreign nationals who are now excluded from consideration pursuant to subsection 25(1). This information speaks to Parliament's intention and about the purpose of subsection 25(1). In my opinion, the interpretation proposed by the Applicant is inconsistent with this intention.

[25] I accept the Respondent's argument that the Applicant's proposed interpretation is inconsistent with the principle of interpretation that the Court should avoid interpretations which render parts of a provision meaningless.

[26] In my opinion, the interpretation of subsection 25(1) in a manner that allows an H&C officer to use discretion, where an applicant has been found inadmissible, renders the bar against inadmissible persons in section 25(1) meaningless.

[27] In light of the language of subsection 25(1), the Manager's decision meets the standard of reasonableness as set out in *Dunsmuir*, *supra*.

[28] While the decision may be unsatisfactory to the Applicant, it is reasonable, in law. There is no basis for judicial intervention.

[29] In the present case, the Applicant may apply to the Immigration Division for a re-opening of the inadmissibility decision. He may also seek relief pursuant to subsection 42.1(1) of the Act, which provides as follows:

Exception — application to Minister	**Exception — demande au ministre**
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.	42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

[30] It is up to Parliament, and not the Court, to address a need for amendments that will accommodate changes in the law as a result of decisions made by the Supreme Court of Canada in interpreting the Act. It is reasonable to expect that federal statutes will reflect rulings made by the highest Court in the land.

[31] In the result, this application for judicial review is dismissed. The parties may submit a question for certification within fourteen days and Judgment will issue then.

"E. Heneghan"

Judge

Toronto, Ontario
June 13, 2019

FEDERAL COURT

SOLICITORS OF RECORD

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