IMM-3164-96

B E T W E E N:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

- and -

JOSEPHINE SUBALA

Respondent

REASONS FOR ORDER

ROTHSTEIN, J.:

This is a judicial review of a decision of the Immigration Appeal Division dated August 28, 1996, which allowed an appeal from a decision of a visa officer refusing an application for landing based on family class. The respondent sponsored an application for landing made by a person who apparently is now her adopted son. However, it was agreed between the parties that when the application for landing was made in March, 1993, and indeed, when the visa officer's decision was made on or about January 12, 1995, the applicant for landing had not been adopted by the respondent in accordance with the laws of the Philippines. The evidence is that the decision of the Court in the Philippines which confirmed an adoption petition was not issued until January 31, 1995. Accordingly, when the application for landing was made, the applicant was not the adopted son of the respondent in accordance with the definition of "adopted" in subsection 2(1) of the *Immigration Regulations, 1978* and did not meet the definition

of "member of the family class" in subsection 2(1) of the *Regulations*. Subsection 77(1) of the *Immigration Act* provides:

> 77.(1) Where a person has sponsored an application for landing made by a member of the family class, an immigration officer or visa officer, as the case may be, may refuse to approve the application on the grounds that
>
> (a) the person who sponsored the application does not meet the requirements of the regulations respecting persons who sponsor applications for landing, or
>
> (b) the member of the family class does not meet the requirements of this Act or the regulations,
>
> and the person who sponsored the application shall be informed of the reasons for the refusal.

Subsection 77.(3) provides:

> (3) Subject to subsections (3.01), (3.02) and 3.1), a Canadian citizen or permanent resident who has sponsored an application for landing that is refused pursuant to subsection (1) may appeal to the Appeal Division on either or both of the following grounds:
>
> (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
>
> (b) on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

It is apparent that a condition precedent for the granting of landing was absent here and the visa officer was obliged, to refuse the application, which she did, as it was not made under subsection 77.(1), i.e. it was not made by a member of the family class. For the same reason the Immigration Appeal Division was obliged to have denied the appeal. In arriving at this conclusion I have had regard to the dicta of Strayer J. (as he then was) in *Sheriff v. Canada (Minister of Employment and Immigration)*, (1985) 31 Imm. L.R. (2d) 246 at 247:

> However the Appeal Division when considering an appeal under subsection 77 of the *Immigration Act* has the initial jurisdiction and obligation to determine whether the appeal comes within that section and thus within its authority to hear. To so decide it must determine certain jurisdictional facts. It must consider, in a case such as this, whether there is in fact a valid declaration by a parent within subparagraph 6(5)(a)(iii) of the *Immigration Regulations* which would exclude her son from the family class. This in our view can involve the board in the examination of the circumstances in which the declaration was signed, to determine its validity.

Because the applicant for landing was not a member of the family class the appeal did not come within section 77 of the *Immigration Act* and the Appeal Division did not have jurisdiction to consider it.

While the Minister must, of course, ensure that the *Immigration Act* and *Regulations* are correctly interpreted and followed, the result in this case is that the applicant for landing and the respondent must commence the immigration process again. The applicant for landing is now 15 years of age and *prima facie* would now qualify as a member of the family class. This is eminently a case in which once a new application for sponsored landing has been made, the Minister should ensure it is processed as expeditiously as possible.

I would observe that while respondent counsel submitted that the matter was now moot, I cannot say it is, as, even if the applicant for landing qualifies as a member of the family class, there are other immigration requirements e.g., medical admissibility, which must be considered. Nonetheless, as I have said, the new application once it is made should be dealt with as expeditiously as possible.

The judicial review is allowed and the decision of the Immigration Appeal Division is quashed.

"Marshall E. Rothstein"
Judge

Toronto, Ontario
July 22, 1997

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

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APPEARANCES:

Mr. Robin Sharma	For the Applicant
Mr. Joe Rivera	For the Respondent

SOLICITORS OF RECORD:

George Thomson Deputy Attorney General of Canada	For the Applicant
Joe Rivera Barrister and Solicitor 2 Sheppard Avenue East Suite 900 North York, Ontario M2N 5Y7	For the Respondent

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Between:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

- and -

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