Federal Court  Cour fédérale

Date: 20100121

Docket: IMM-2622-09

Citation: 2010 FC 70

Toronto, Ontario, January 21, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

EL TAYEB OMER DAFAALA MOHAMED

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application addresses an issue of law with respect to the application of s.117(9)(d) of the *Immigration and Refugee Protection Regulations* S.O.R./2002-227.

[2] Concisely stated, the facts are as follows. In 2004 the Respondent landed in Canada. After this date his wife submitted an application for a permanent resident visa as a member of the family class, and in the application included, as dependants, their two minor children. In 2008 a visa officer

considered the application and denied the Respondent's wife on a finding that she was not a member of the family class on the basis of the application of s.117(9)(d). The reason for the denial was that the Respondent and his wife were married approximately three months after the Respondent was issued his immigration visa and he did not declare the marriage at the time he landed in Canada in 2004. The Respondent appealed the denial to the Immigration and Appeal Division (IAD) which rendered the decision presently under review.

[3] Before the IAD, the Respondent applied to withdraw the appeal, but only with respect to his wife in an attempt to keep the appeal alive with respect to his children. The IAD concurred with this request, and as a result made the following findings:

> […], while there is no refusal of the minor applicants in the [visa officer's] refusal letter, these applications were not processed due to the inadmissibility of their mother, the principal applicant, which in turn made them inadmissible per section 122 of the *Regulations*. Accordingly, there was a constructive refusal of the minor applicants who themselves are members of the appellant's family class. Due to the withdrawal of the principal applicant, the paragraph 117(9)(d) refusal is no longer in play and section 122 no longer applies to the minor applicants. Accordingly, the appeal should be allowed with respect to the minor applicants. The result is that they can continue with their applications. They will, of course, still have to meet all the normal requirements as to their eligibility and admissibility and provide to the visa post all necessary documents requested by the visa post to process their applications.
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> (IAD Decision, p. 3)

The effect of these findings is that, regardless of the spousal application being withdrawn of which the children as dependents were an integral part, the IAD took jurisdiction to grant independent relief to the children when there was no independent decision made by the visa officer with respect to them. In my opinion, the IAD had no jurisdiction to make the findings quoted because there was

no decision with respect to the children from which an appeal could be taken. As a result, I find the decision under review is made in reviewable error of law.

ORDER

Accordingly, I set aside the decision under review.

I find that the following certified question for consideration by the Federal Court of Appeal is of general importance and dispositive of the present Application:

> In the case of a spousal sponsorship of a spouse with two dependant children, does the IAD have jurisdiction to grant relief with respect to the dependant children when the appeal before the IAD with respect to the spouse is withdrawn?

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2622-09
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. EL TAYEB OMER DAFAALA MOHAMED
PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	JANUARY 21, 2010

APPEARANCES:

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