Federal Court  Cour fédérale

Date: 20110216

Docket: IMM-6213-09

Citation: 2011 FC 180

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 16, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SOTHEARY HUOT

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is challenging the legality of the decision of a visa officer at the High Commission of Canada to Singapore (the officer), dated August 18, 2009, rejecting the application by the applicant's son, Viasna Chan (Viasna), for permanent residence as a member of the family class; at the same time, the officer found that there were no humanitarian or compassionate

considerations to justify granting an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), hence this application for judicial review.

[2] The applicant is Cambodian. She arrived in Canada in 2004 as a refugee and became a permanent resident in 2006. When she arrived in Canada, she declared two children as dependants and subsequently sponsored them. However, she did not mention her first child, Viasna. He was born out of wedlock on January 15, 1991. In the Cambodian culture, there was still significant shame associated with illegitimacy; the applicant had to leave Viasna with his maternal grandmother and severed all contact with her family. In fact, Viasna lived with his grandmother until 2006; at that point, she arrived in Canada, sponsored by the applicant's sister, without the applicant's knowledge. In turn, the grandmother attempted to sponsor Viasna in 2007, but the application for residence was rejected because she had not formally adopted Viasna. He has been living with his uncle in Cambodia since 2006.

[3] The applicant had no contact with Viasna prior to 2007. At that time, she happened to meet her mother on a Montréal street. As a result of that fortuitous meeting, she began speaking with her son by telephone. Viasna was still a minor. The applicant wanted to have him come to Canada: she made an application to sponsor and undertaking in the family class; simultaneously, Viasna completed an application for permanent residence based on humanitarian and compassionate considerations. That was in December 2007. On August 18, 2009, a little less than two years later, the officer communicated his refusal. The officer found, on the one hand, that because the applicant did not mention Viasna in her initial application when she arrived in Canada, Viasna was not a

member of the family class and, on the other hand, there were no humanitarian and compassionate grounds to grant an exemption or special treatment.

[4] That being said, on November 16, 2009, the applicant was advised by letter that she had the right to appeal to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. However, the official missive indicated at the same time that if the IAD determined that Viasna was not a member of the family class, it would no longer have jurisdiction and would not be able to consider humanitarian and compassionate grounds; the appeal would therefore be dismissed. In spite of everything, the applicant filed her appeal but withdrew it on December 7, 2009, on the advice of her new counsel. In doing so, the applicant filed this application for judicial review on December 8, 2009, but it was out of time. With her application for leave and judicial review, the applicant filed an application for an extension of time. In a detailed affidavit, the applicant explained that she filed her appeal to the IAD as a result of receiving bad advice from her counsel at the time. Even so, the applicant's new counsel candidly admitted today that her assistant also did not include Viasna's name as a co-applicant, which would have avoided the procedural confusion created by her office's error.

[5] In his memorandum filed on February 24, 2010, the respondent submits that there is no substantial ground on which this Court could intervene, while opposing the application for leave and an extension of time. In particular, the respondent argues that the applicant cannot rely on ignorance of the law to obtain an extension of time, that the right of appeal to the IAD has not been exhausted and that, although the officer's refusal to grant Viasna permanent residence under subsection 25(1) of the IRPA is subject to judicial review, that application can only be brought by Viasna himself. On

March 4, 2010, the applicant attempted to correct the situation and filed a written motion to the Court asking that Viasna's name be added in the style of cause as the co-applicant. However, on April 9, 2010, the Prothonotary of the Court before whom the motion to amend was brought decided on his own initiative to not consider it, but instead to adjourn it. According to the adjournment order, the motion to amend will become moot if the judge dealing with the application for leave and extension of time dismisses the latter at this stage.

[6] On June 21, 2010, a little less than three months later, leave to file the application for judicial review was granted by a judge of the Court. There was no specific finding in the order for leave regarding the application for an extension of time. Nothing special happened in the meantime, and it seemed that the motion to amend had even been forgotten. On September 16, 2010, the application for judicial review was heard by my colleague, Mr. Justice Yvon Pinard. However, before disposing of the matter on the merits, Justice Pinard raised the issue of the extension of time "because if the extension was going to be refused, this would necessarily result in the dismissal of the application for judicial review itself": *Huot v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 973 at paragraph 11 (*Huot*).

[7] On October 4, 2010, after hearing counsel, Justice Pinard found that the applicant had a continuing intention to pursue her application for judicial review, that the application for judicial review deserved consideration, that there was a reasonable explanation for the delay and that the extension of time would not prejudice the respondent (*Huot*, above, at paragraphs 13 to 19). In doing so, he granted the application for an extension of time and adjourned the hearing of the application for judicial review to a later date to be determined by the Judicial Administrator of the

Court. At the same time, in a separate order dated October 4, 2010, he dismissed the motion to amend because it was not supported by an affidavit of Viasna himself. On October 20, 2010, on the express direction of the Chief Justice of the Court, the hearing of this matter was set for December 1, 2010.

[8] Although the parties made submissions on the merits of the case, I must nonetheless examine another preliminary objection by the respondent that Justice Pinard did not formally deal with in his decision. The respondent repeats the argument that he raised in February 2010 in his memorandum opposing the application for leave, namely that the Court cannot examine the legality of the impugned decision on the merits: on the one hand, the applicant has not exhausted her right of appeal to the IAD (*Somodi v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 1356, affirmed by *Somodi v. Canada* (*Minister of Citizenship and Immigration*), 2009 FCA 288); on the other hand, only Viasna, who is now an adult, can make an application for judicial review to dispute the legality of the officer's refusal to grant the application for residence on humanitarian and compassionate considerations (*Kisana v. Canada* (*Minister of Citizenship and Immigration*), 2009 FCA 189).

[9] The respondent points out to the Court that, in a separate order also issued on October 4, 2010, Justice Pinard did not grant the motion to amend to add Viasna as a co-applicant. The Court should therefore summarily dismiss this application for judicial review without examining the merits of the arguments to set aside raised by the applicant in her memorandum because she is not "directly affected by the matter in respect of which relief is sought", as required by subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (*Carson v . Canada* (*Minister of Citizenship*

and Immigration), [1995] F.C.J. No. 656, (1995), 95 F.T.R. 137 (*Carson*); *Wu v. Canada* (*Minister of Citizenship and Immigration*), [2000] F.C.J. No. 302, 4 Imm. L.R. (3d) 145) (*Wu*). Of course, the applicant strenuously contests the respondent's submissions.

[10] In the interests of justice and of the parties, for the following reasons, this last preliminary objection by the respondent should be dismissed.

[11] Any analogy sought to be made here with subsection 18.1(1) of the *Federal Courts Act* regarding the concept of "interested party" in a review application must take into consideration the particularities of the scheme established in the IRPA. Unlike the *Federal Courts Act*, a party who wishes to dispute the legality of a decision must first be granted leave by a judge of the Court. This is not a mere formality.

[12] Moreover, the Federal Court already addressed the issue of the interpretation of subsection 18.1(1) of the *Federal Courts Act* after its reform in 1990:

> I think the wording in subsection 18.1(1) allows the Court discretion to grant standing when it is convinced that the particular circumstances of the case and the type of interest which the applicant holds justify status being granted. (This assumes there is a justiciable issue and no other effective and practical means of getting the issue before the courts.) In this case, the applicant has demonstrated such interest and the issue is clearly justiciable (*Friends of the Island Inc. v. Canada (Minister of Public Works*) (T.D.), [1993] 2 F.C. 229 at paragraph 80).
>
> (Emphasis added)

[13] The wording of subsection 18.1(1) of the *Federal Courts Act* is broad and leaves the door open to a wide variety of persons. The applicant's status as Viasna's mother/sponsor justifies

granting this status in this case. Also, taking into consideration the wording and the purpose of subsection 18.1(1) of the *Federal Courts Act*, it seems clear to me that the applicant falls into the category of "anyone directly affected by the matter in respect of which relief is sought", especially since the respondent took no steps to have the applicant's name struck in this proceeding, which is at a very advanced stage.

[14] Normally, when leave is granted, procedure must defer to the law. It is understandable that in cases where there is no jurisdiction or order extending the time to file an application for judicial review, these issues must be determined at the outset. However, the hearing before the judge on the application for review must not become an arena where a party can present yet again each and every possible preliminary motion and objection that has not previously been decided or heard.

[15] The Court must be able to control the proceedings that are before it so as to prevent abuse. In this regard, a party's lack of status should normally have been decided prior to the hearing on the merits by means of a motion to strike, if necessary. Although there was no judicial determination on the merits, the first judge authorized the application for judicial review and the second, who was to hear the case on the merits, granted the applicant leave to commence this proceeding out of time, i.e. almost 11 months after the application for leave and judicial review dated December 8, 2009, was filed with the Court.

[16] It must be noted that, procedurally and factually, we are faced today with a very unique, if not exceptional case that cannot serve in the future as a master key allowing a sponsor to circumvent the clear provisions of subsection 63(1) of the IRPA. The purpose of subsection 72(2)(*a*) of the

IRPA is to avoid multiple inconsistent proceedings. A party must not unduly appeal to the precious resources of the Court where another remedy is available and has not been exercised. On the other hand, the Court's rules of procedure must be interpreted so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. In this case, none of these goals were achieved.

[17] In this case, the applicant theoretically had the right to appeal to the IAD, but in practice it was a meaningless right insofar as she wanted the IAD to grant an exemption based on humanitarian and compassionate considerations under section 25 of the IRPA. The IAD did not have jurisdiction on this issue, and thus the applicant's appeal would have been dismissed since it is not disputed that Viasna cannot be sponsored in the family class (given that he was not declared).

[18] Subsection 72(2)(*a*) of the IRPA does not apply in this case. The applicant's argument before the Court today is not that Viasna is, in fact, a member of the family class. The applicant submits that the officer's decision, considered as a whole, was unreasonable; the officer arbitrarily disregarded the reasonable and compassionate grounds by basing his refusal on the fact that the applicant abandoned her son because he had a visual handicap and that he was raised by his grandmother since 1996.

[19] Counsel for the applicant submits that, through a combination of uncontrollable circumstances, this is a case where the applicant who is before the Court to obtain justice must be able to contest the legality of the impugned decision especially considering its practical effect on the applicant and her son Viasna, the only one who has not yet been admitted to Canada, the applicant's

two other children having already been sponsored. This is a case where the reunification of the family, Viasna's mother and his grandmother being in Canada, trumps the officer's unfounded personal criticism of the applicant in the impugned decision.

[20] In the exercise of its discretion to grant standing to a party, the Court must examine all the circumstances of the case. After considering counsel's representations, I do not believe that the statements made at another time in the *Carson* and *Wu* cases, above, under the former *Immigration Act* are binding on me and determinative, and, furthermore, the facts of this case are certainly quite different from those two cases.

[21] Therefore, having determined that the applicant properly brought the application for judicial review, we will now review the merits of the case. The applicant forcefully argues that the officer's findings were speculative and not supported by the evidence, even revealing his personal prejudices about the applicant's conduct. The applicant's primary argument appears valid to me, and moreover the respondent did not seriously dispute her submissions.

[22] The very reasons why the applicant abandoned her son and did not mention him when she arrived in Canada are contested. The applicant's explanations on this issue seem to have been quickly rejected by the officer in favour of a moralistic approach and an obtuse analysis of the personal situation of the applicant and Viasna in 1991 and today, a number of years later.

[23] The applicant freely admits that cultural shame forced her to leave Viasna with her mother and to sever all contact with her family. In the letter to Viasna, the officer wrote that "your mother

abandoned you in 1991 and left Cambodia in 2004 and made a conscious decision to leave you behind because you were born out of wedlock and also likely due to your visual disability; blind in one eye." However, there is no evidence to indicate that Viasna's disability was the basis for the abandonment, either in the applicant's affidavit or in the transcript of the interview with Viasna.

[24] Another example of the officer's speculative reasoning concerns the applicant's motivation for excluding Viasna from her application for permanent residence. The officer stated that "the motivation behind this misrepresentation was not a simple and innocent act of ignorance. Rather it was a result of a calculated move. *It was not possible for her not to know she had a child*" (Emphasis added). The applicant did not state that she did not know she had a third child but that cultural shame had forced her to abandon him and to sever all contact with her family, and that she thought it was impossible to have a future that included Viasna.

[25] The lack of an open mind and the fact that the officer seemed determined to not consider humanitarian and compassionate grounds appears to us even more evident when the officer found that there was no reliable evidence that the applicant was communicating with Viasna. To the contrary, the applicant and Viasna testified that they spoke regularly on the telephone, which was not contradicted or challenged. In addition, the officer's criticism of the applicant for not returning to Cambodia to see Viasna is completely illogical: the applicant fled Cambodia as a refugee and to avoid persecution in her country.

[26] Rejecting the respondent's arguments, the Court rules in favour of the applicant; the officer's accumulation of errors is determinative and taints the rest of his decision. The

jurisprudence is clear that a statement of facts followed by a finding that is not based on the facts but on conjecture is a ground for setting aside the decision. See *Espino v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1255 at paragraphs 9-11; *Payen v. Canada* (*Minister of Citizenship and Immigration*), 2007 FC 577 at paragraph 11; *Xiu Jie Zhang v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 533 at paragraph 3.

[27] Accordingly, the Court finds that the officer's decision is unreasonable, and on that basis the application for judicial review is allowed; it is not necessary to examine the applicant's other arguments.

[28] No question of general importance was raised in this proceeding, and none was raised by the parties before the Court.

JUDGMENT

THE COURT RULES that the application for judicial review is allowed, that the officer's decision dated August 18, 2009, is set aside and that the matter is remitted for reconsideration by another officer at the High Commission of Canada to Singapore. No question is certified by the Court.

"Luc Martineau"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Annick Legault	FOR THE APPLICANT
Sébastien Dasylva	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Boisclair & Legault Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT