Federal Court Cour fédérale

Date: 20130104

Docket: IMM-456-12

Citation: 2013 FC 8

Ottawa, Ontario, January 4, 2013

PRESENT: THE CHIEF JUSTICE

BETWEEN:

VALERIAN LUKAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Valerian Lukaj, brought this application for judicial review of a refusal of an unidentified person at the Case Processing Centre [CPC] of Citizenship and Immigration Canada [CIC] to process his parental sponsorship application. Mr. Lukaj claims that:

(a) CIC erred by concluding that his sponsorship application, which he sent by registered mail on November 4, 2011, was received after that date, and therefore

beyond the deadline set forth in Ministerial Instructions issued earlier that day; and

(b) The Minister of Citizenship and Immigration acted beyond, or abused, his authority in issuing those Ministerial Instructions, and refused to act in accordance with sections 12 and 13 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and *Immigration And Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[2] I disagree. For the reasons that follow, this application is dismissed.

I. Background and Decision under Review

[3] On November 4, 2011, CIC issued Operational Bulletin 350, entitled *Fourth Set of Ministerial Instructions: Temporary Pause on Family Class Sponsorship Applications for Parents and Grandparents* [Ministerial Instructions], announcing that CIC would be instituting a "temporary pause of up to 24 months on the acceptance of new sponsorship applications for parents and grandparents." The Ministerial Instructions also announced that this pause would be coming into effect the following day, November 5, 2011.

[4] After learning of this announcement, Mr. Lukaj met with his counsel that afternoon to finalize and submit his sponsorship application to CIC by registered mail, in accordance with a Document Checklist previously issued by CIC.

[5] On December 20, 2011, the sponsorship application package was returned to the office of Mr. Lukaj's counsel with an unsigned and undated form letter stating that the date stamp on the application showed that it was received at the CPC's processing center on or after November 5, 2011. The letter proceeded to explain that CIC had temporarily stopped accepting new applications for the sponsorship of parents and grandparents, effective November 5, 2011. It explained that only applications received before that date would be processed by the CPC. It added that this temporary pause in accepting new applications would continue until further notice, and that as a result of that pause, his application and supporting documentation were being returned to him, together with any fees that he may have paid. The letter ended by stating that effective December 1, 2011, a Parent and Grandparent Super Visa would be available to those who qualify. Mr. Lukaj was directed to CIC's website for additional information.

II. Standard of Review

[6] The issue of when Mr. Lukaj's application was "received" by the CPC concerns CIC's interpretation of the Ministerial Instructions, which were issued pursuant to section 87.3(3) of the IRPA.

[7] In *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 54, [2008] 1 SCR 190 [*Dunsmuir*], a majority of the Supreme Court stated: "Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (emphasis added). In subsequently discussing, at paragraph 55, the standard applicable to questions of law in general, it couched the test in terms of whether the

question "is of 'central importance to the legal system … and outside the … specialized area of expertise' of the administrative decision maker" (emphasis added). It added that the review of questions of law not meeting this test might be compatible with a reasonableness standard, where certain other factors so indicated. It also identified three particular types of questions of law that will generally be subject to review on a standard of correctness. None of those particular types of question are at issue in this proceeding.

[8] Later in the majority decision, it was observed that the first step in the process of judicial review involves ascertaining "whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (*Dunsmuir*, above, at para 62).

[9] Prior to *Dunsmuir*, it appears that the jurisprudence may have determined that a visa officer's interpretation of the IRPA and the Regulations was reviewable on a correctness standard of review (*Hilewitz v Canada (Minister of Citizenship and Immigration)*; *De Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, at para 71, [2005] 2 SCR 706; *dela Fuente v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 186, at paras 39-51, [2007] 1 FCR 387 [*dela Fuente*]).

[10] However, since *Dunsmuir*, the Supreme Court has repeated on numerous occasions that "deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, at para 30, [2011] 3

SCR 654 [*Alberta Teachers*]; *Celgene Corporation v Attorney General of Canada*, 2011 SCC 1, at para 34; *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7, at paras 26-28); *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals and Attorney General of British Columbia*, 2011 SCC 59, at para 36; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, at para 16, [2011] 3 SCR 471). It has also recently stated:

> This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, …'[q]uestions regarding jurisdictional lines between two or more competing tribunals' [and] true questions of jurisdiction or *vires*" (*Alberta Teachers*, above, at para 30).

[11] Indeed, the Court has now gone so far as to say that "unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of its 'own statute or statutes closely connected to its function, which with it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review" (*Alberta Teachers*, above, at para 34).

[12] Given the foregoing, I am of the view that the pre-*Dunsmuir* jurisprudence cannot be said to have already determined "in a satisfactory manner," as contemplated by *Dunsmuir*, above, at para 62, the degree of deference to be accorded to an administrative tribunal's interpretation of the IRPA, the Regulations, or, by extension, ministerial guidelines issued pursuant to those legislative enactments.

[13] The situation is less clear with respect to other types of administrative decision-makers, particularly ministerial delegates, such as visa officers. In *Toussaint v Canada (Attorney General)*, 2011 FCA 213, at para 19, the Federal Court of Appeal observed that it was uncertain whether the reasonableness or correctness standard of review applied to the interpretation and application of an administrative policy issued under an Order in Council by a ministerial delegate employed at CIC. Given that nothing turned on whether the standard of review was reasonableness or correctness, the Court determined that it did not need to make a determination on this issue.

[14] I will adopt a similar approach in this case, as the conclusion that I have reached below would be the same, regardless of whether the CIC's interpretation of the Ministerial Guidelines is reviewed on a standard of reasonableness or correctness.

[15] The issue of whether the Minister acted beyond, or abused, his authority in issuing the Ministerial Instructions is reviewable on a correctness standard (*Dunsmuir*, above, at paras 59-60; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 42, [2009] 1 SCR 339 [*Khosa*]).

IV. Analysis

A. *Did CIC err in concluding that it had "received" Mr. Lukaj's application on or after November 5, 2011?*

[16] Mr. Lukaj submits that the scheme established under the IRPA and the Regulations for the sponsorship of specified individuals, including parents of permanent residents and citizens,

constitutes a contractual offer to potential sponsors which furthers the objective of family reunification. He asserts that, by filing an application, which includes a sponsorship undertaking, an applicant effectively accepts the offered terms and communicates that he or she is willing to enter into a binding agreement with CIC to undertake corresponding obligations to enable the sponsored person(s) to be accepted for permanent residence in Canada. He initially added that, having offered the contractual terms set forth in the above-mentioned statutory scheme, the Minister was bound by the "postal acceptance rule" to accept his application on the day it was mailed. However, during the hearing of this application, his counsel acknowledged that the postal acceptance rule does not apply in the context of a sponsorship application. He therefore grounded Mr. Lukaj's position regarding the contractual nature of his application in his view that he had a legitimate expectation that his application would be processed once he sent it by registered mail on November 4, 2011.

[17] I do not accept Mr. Lukaj's submissions on this point.

[18] The sponsorship scheme established by the IRPA and the Regulations is statutory, rather than contractual, in nature (*Canada (Attorney General) v Mavi*, 2011 SCC 30, at paras 47-50, [2011] 2 SCR 504).

[19] Eligibility to be sponsored as a member of the family class is established by subsection 12(1) of the IRPA, which states:

Selection of Permanent Residents	***Sélection des résidents permanents***
Family reunification	**Regroupement familial**
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

[20] The corresponding eligibility of permanent residents and Canadian Citizens to sponsor a family member is established by subsection 13(1) of the IRPA, which states:

Sponsorship of Foreign Nationals	***Régime de parrainage***
Right to sponsor family member	**Droit au parrainage : individus**
13. (1) A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.	**13.** (1) Tout citoyen canadien et tout résident permanent peuvent, sous réserve des règlements, parrainer l'étranger de la catégorie « regroupement familial ».

[21] The regulatory framework applicable to sponsorship applications is set forth in Division 3 of the Regulations, specifically, sections 130 – 137.

[22] In this statutory scheme, the right to sponsor a family member does not vest, accrue or begin to accrue until an affirmative decision is made in respect of the application (*Kaur Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522, at para 40. Until that time, an applicant simply has a hope that his or her application will be accepted.

[23] Indeed, until that time, an applicant may not even have a right to have his or her application processed (*Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758, at paras 5 – 11 and 43). This is clearly contemplated by the plain language in subsection 87.3(4), which applies to applications and requests made on or after February 27, 2008 *(Budget Implementation Act, 2008*, SC 2008, s. 120).

[24] Mr. Lukaj submits that he had a legitimate expectation that the Minister would accept his sponsorship application based on its contractual nature and the fact that the CIC's Document Checklist indicates that mail is the preferred mode of communication.

[25] I disagree. In the same breath, Mr. Lukaj acknowledges that he "knew when we sent the application on November 4, 2011 that it would not physically arrive at the Case Processing Centre." In fact, the uncontested evidence is that his application was physically received by the CPC on November 9, 2011. He was also clearly informed by the Ministerial Instructions that his application would not be accepted for processing if it did not receive before November 5, 2011. Specifically, under the heading "Processing Instructions," he was informed that: "[e]ffective November 5, 2011, no new family class sponsorship applications for a sponsor's parents

(R117(1)(c)) or grandparents (R117(1)(d)) will be accepted for processing." In addition, under the heading "Applications Received on or after November 5, 2011," it was stated:

> New FC4 Sponsorship Applications for parents or grandparents received by [the CPC] on or after November 5, 2011, will be returned to the sponsor with a letter … advising them of the temporary pause. Applications which are postmarked before November 5, 2011, but are received at [the CPC] on or after November 5, 2011 will also be returned to the sponsor. In both cases, processing fees shall be returned. (Emphasis added)

[26] Given the foregoing, I disagree with Mr. Lukaj's assertions that the scheme established by the IRPA and the Regulations constitute an "offer" which he accepted, and that he had a legitimate expectation that his application would be processed even though he knew it would not physically arrive until after November 5, 2011. I note that Justice Zinn dealt with a similar situation recently and concluded, as I have concluded, that "the applicant's sponsorship application was required to have been mailed and received by CIC before November 5, 2011" (*Vahit Esensoy v Canada (Minister of Citizenship and Immigration)* 2012 FC 1343, at para 8 [*Esensoy*]).

[27] I would simply add that it is settled law that sponsorship applications under the family class are considered to be "received" only when they are physically received, not when they are mailed (*Hamid v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 217, at paras 45-47; *Salhova v Canada (Minister of Citizenship and Immigration)*, 2010 FC 352, at paras 15-10; *Lim v Canada (Minister of Citizenship and Immigration)*, 2005 FC, at para 28; *Castro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 659, at para 10). I note that the affidavit of Glen Bornais, Senior Analyst at CIC, dated July 1, 2012 [Bornais Affidavit], states, at paragraph 27, that this is also the CIC's standard approach. This further undermines

Mr. Lukaj's position regarding his legitimate expectations (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 26 [*Baker*]). This evidence was not contradicted by Mr. Lukaj.

B. *Are the Ministerial Instructions ultra vires or do they constitute an abuse of the Minister's authority?*

[28] Mr. Lukaj submits that the Minister acted beyond his authority in issuing the Ministerial Instructions, because those instructions contravene the legislative scheme established in sections 12 and 13 of the IRPA and in Part 7, Division 3 of the Regulations (ss. 130 – 137), including the sponsorship rights created therein.

[29] I disagree. This argument was recently addressed and rejected by Justice Zinn in *Esensoy*, above, at paras 8 – 21. I concur with the reasons given by Justice Zinn and see no need to repeat them here.

[30] Further, and in the alternative, Mr. Lukaj submits that the issuance of the Ministerial Instructions was arbitrary, unfair, done in bad faith and therefore constituted an abuse of the Minister's authority.

[31] I disagree. In *Esensoy*, above, at para 18, Justice Zinn found that the Minister appears to have had a legitimate and *bona fide* rational for issuing the Ministerial Instructions:

> The record shows that there was a 165,000 application backlog when the Ministerial Instructions were announced. As of January 2012, the anticipated processing time for applications for permanent residence arising out of Turkey could take up to 81

> months. This was arguably an issue that required administrative intervention and the Minister's actions appear to have been bona fide and directed to that backlog issue.

[32] The evidence adduced in the present proceeding confirms that there was a backlog of approximately 165,000 applications at the time the Ministerial Instructions were issued. According to the Bornais Affidavit, at paragraph 10, this backlog stood at 103,000 at the beginning of 2008. Among other things, paragraph 10 of that affidavit provided the following additional helpful information:

> Growing backlogs compromise Canada's ability to deliver the most efficient immigration system possible. There are mounting costs associated with maintaining the backlogs. Rather than *processing* applications resources are spent *managing* applications and responding to complaints and requests for information. A corollary of backlogs is lengthening wait times, since as backlogs grow clients must wait longer and longer for their applications to be processed. Not only do wait times represent poor client service and force applicants to put life decisions on hold, but they also reduce public confidence in the immigration system. Finally, lengthening wait times expose the government to the risk of legal challenge (i.e., mandamus litigation).

[33] The Bornais Affidavit further noted that the temporary pause was part of a broad Action Plan for Faster Family Reunification. Among other things, Phase I of that plan includes three other principal components. The first of those components committed the federal government to increasing the number of sponsored parents and grandparents that it will admit from nearly 15,500 in 2010 to 25,000 in 2012 – an increase of approximately 60%. The second of those components was the establishment of a Parent and Grandparent Super Visa, which can be valid for up to 10 years and allow multiple entries for up to 24 months at a time without the renewal of status. This came into effect on December 1, 2011. The third component was a commitment to

consult with Canadians regarding the redesign of the parents and grandparents sponsorship program to ensure that it is sustainable into the future. Paragraph 22 of the Bornais Affidavit states that this consultation was launched on March 23, 2012.

[34] These features of the Minister's action plan were all explained in the press release issued by CIC on November 4, 2011. That press release also explained that Phase II of the action plan would be initiated "in about two years, following our consultations." At that time, the plan contemplates that the temporary pause will be lifted, future applications will be processed quickly, and that the program for sponsoring parents and grandparents will operate on a more efficient and sustainable basis than in the past.

[35] In the meantime, according to the Bornais Affidavit, at paragraph 22, CIC is continuing "to process, on a priority basis, all sponsorship applications for spouses, partners and dependent children, regardless of levels plan targets."

[36] The rationale for implementing the Ministerial Instructions on very short notice is briefly explained in the *Speaking notes for The Honourable Jason Kenney, PC, MP Minister of Citizenship, Immigration and Multiculturalism,* which were released at the news conference held on November 4, 2011, to announce the temporary pause and the other prong's of the Minister's action plan.

> … [A]s we redesign the program to make it sustainable, here's the challenge we have: if we leave the program open for applications during that period of consultation and redesign, we know what will happen - we will get absolutely flooded with a huge increase in applications. Because people will say "if the criteria might change, we need to get our application in right away." And we're very

> concerned about this possibility. This has happened before. Immigration consultants and lawyers will go to their clients and say "we're going to send your application in right now." And then we'll go from 40,000 applications to 50 or 60 or 70,000, and we'll never be able to deal with the backlog.

[37] According to an affidavit sworn by Sharon Ferreira, who is an Operations Coordinator at the CPC, on July 10, 2012, the processing time for parents and grandparents sponsorship applications was approximately 31 to 55 months at that time. At the visa office in Rome, Italy, where Mr. Lukaj's application likely would have been sent for processing, the processing time was approximately 40 months. Had Mr. Lukaj submitted his application prior to November 5, 2011, that processing time likely would not have begun until "after 2013."

[38] Considering all of the foregoing, I agree with Justice Zinn's finding in *Esensoy*, above, at para 18, that issuance of the Ministerial Instructions appears to have been part of a *bona fide* course of action designed to address the above-described backlog. I am satisfied that the Minister's actions in this regard were not arbitrary or taken in bad faith.

[39] Mr. Lukaj also submitted that the principles of procedural fairness required that he be given some notice of the change in the Minister's policy, given that the Ministerial Instruction affected his substantive right to sponsor his parents.

[40] I disagree.

[41] It is well established that the content of the duty of fairness owed to visa applicants is at the low end of the spectrum (*Petrosyn v Canada (Minister of Citizenship and Immigration)*, 2012

FC 1319, at para 19; *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297, at para 41 (CA); *Kahn v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, at paras 30-32, [2002] 2 FC 413; *Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55, at para 10, 23 Imm LR (3d) 161).

[42] As discussed above, Mr. Lukaj had no vested, accrued or accruing right to sponsor his parents. Nor did he have a right to have his application processed. In addition, he did not have a legitimate expectation that his application, which he knew would not be received by CIC until after the deadline established in the Ministerial Instruction, would be processed.

[43] Pursuant to subsection 87.3(2) of the IRPA, the Minister has, and had under the version of the IRPA that was in force at the time of the decision in 2011 that is the subject of this proceeding, broad statutory authority regarding the processing of sponsorship applications, including those referred to in subsection 13(1) (*Esensoy*, above, at paras 10-12).

[44] As explained above, the Minister appears to have had legitimate and *bona fide* reasons for issuing the Ministerial Instructions and for doing so on very short notice.

[45] Considering all of the foregoing, the duty of fairness owed to Mr. Lukaj did not include a right to more advance notice of the "temporary pause" in the processing of applications that was brought about by the issuance of the Ministerial Instructions (*dela Fuente*, above, at para 20l; *Salahova*, 2010 FC 352, at para 21; *Baker*, above, at paras 26-27).

V. Conclusion

[46] For the reasons set forth above, the CIC did not err in concluding that it had "received" Mr. Lukaj's application on or after November 5, 2011. Moreover, the Minister did not act beyond his authority, in bad faith or in an arbitrary manner in issuing the Ministerial Instructions. In addition, the issuance of the Ministerial Instructions on very short notice did not breach any duty of fairness owed to Mr. Lukaj.

[47] Accordingly, this application is dismissed.

[48] At the end of the hearing of this application, the Respondent proposed the following question for certification:

> Given the Minister's responsibility to administer the *Immigration and Refugee Protection Act* [IRPA] in a manner that achieves the various objectives set out at subsection 3(1), and to manage these objectives within the Government's annual plan for total admissions, does section 13 of the IRPA preclude the Minister from implementing Instructions under section 87.3 of the IRPA that temporarily pause the acceptance of sponsorship applications to reduce the application backlog and associated wait times for sponsored parents and grandparents?

[49] In the alternative, in the event that the Court preferred a more open question, the respondent proposed the following question for certification:

> In issuing and enforcing a temporary pause on the receipt of new sponsorship applications for parents and grandparents as set out in the Ministerial Instructions of November 5, 2011, did the Minister exceed his discretionary authority and were his actions *ultra vires* the IRPA?

[50] In my view, neither of these proposed questions raises "a serious question of general importance," as contemplated by paragraph 74(d) of the IRPA. For the reasons explained by Justice Zinn in *Esensoy*, above, it is clear that it was within the Minister's statutory authority to issue the Ministerial Instructions, including the aspect of those instructions which effected a temporary pause in the acceptance of applications to sponsor a parent or a grandparent.

[51] I would simply add that neither of the proposed questions set forth above would be dispositive of this application, if answered in the negative (*Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, at para 28).

[52] In my view, no other serious question of general importance arises from this application.

[53] Accordingly, there is no issue for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed.

2. There is no question for certification.

"Paul S. Crampton"
Chief Justice

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-456-12
STYLE OF CAUSE:	VALERIAN LUKAJ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 29, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton C.J.
DATED:	January 4, 2013

APPEARANCES:

Craig Costantino	FOR THE APPLICANT
Caroline Christiaens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon & Assoc. Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT