Federal Court  Cour fédérale

Date: 20130418

Docket: IMM-4225-12

Citation: 2013 FC 397

Ottawa, Ontario, April 18, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

RAHEAL HABTENKIEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] Ms. Raheal Habtenkiel (the "Applicant") seeks judicial review of the decision of a Visa Officer (the "Officer"). In that decision, dated March 7, 2012, the Officer denied the Applicant's application for permanent residence as a member of the family class, as defined in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

[2] The Applicant is a citizen of Eritrea. She is the daughter of Issak Gerensea Habtenkiel who was landed in Canada as a permanent resident on January 28, 2009. When applying for permanent residence, her father did not declare the Applicant as an unaccompanying family member.

[3] By application received on or about January 18, 2011, the Applicant's father applied to sponsor the Applicant's application for permanent residence. By letter dated January 26, 2011, the Applicant's father was informed that he did not meet the requirements for sponsorship because the Applicant did not appear to be a member of the family class by virtue of paragraph 117(9)(d) of the Regulations.

[4] The Applicant's application for permanent residence was forwarded to the visa post for consideration, and was received on February 25, 2011. On the application form, the Applicant indicated that she was applying under the "other" category, in which she wrote "humanitarian". The humanitarian and compassionate grounds were set out in a narrative provided by her father.

[5] The father had not included the Applicant in his application for permanent residence because she had been born out of wedlock and the father's current wife was unhappy about acknowledging the Applicant. As well, the Applicant had grown up with little contact with her father. The Applicant's application for permanent residence, on humanitarian and compassionate grounds, was supported by her father's wife who expressed regret for her earlier opposition to including the Applicant in the family's permanent residence application.

[6] In addition to the letters from her father and his wife the Applicant submitted a letter from her father's brother, a letter from the spiritual leader of the church her father attends in Winnipeg, copies of emails with her half-siblings, a letter from her school in Khartoum, and a document from her mother purporting to give guardianship to her father. The Applicant was interviewed in Khartoum by a visa officer. The officer's interview notes are dated February 22, 2012.

[7] By a letter dated March 7, 2012, the Officer determined that the Applicant was not a member of the family class because she had not been declared by her father as his daughter and she was not examined when his application for permanent residence was examined. The Officer then considered the Applicant's request to have her application approved on humanitarian and compassionate grounds. The Officer determined that there were no "extenuating circumstances" relating to the sponsor's failure to declare the relationship with the Applicant when the sponsor, that is her father, obtained permanent residence in Canada.

[8] The Officer noted that the Applicant was nearly 17 years old and had never lived with her father. The Officer noted the lack of evidence that the father had "ever" shown "serious interest" in the Applicant, and the absence of evidence from the Applicant of emotional ties with her father.

[9] The Applicant argues that the Officer committed a reviewable error by failing to consider the evidence submitted and by failing, specifically, to deal with her best interests as a child. Although the Act does not define "child", the Applicant pleads that since she was less than 17 years of age, she was not an adult and her interests should be considered as those of a child where best

interests will be served by reunification with her family, in line with the stated objectives of the Act set out in paragraph 3(1)(d).

[10] The Minister of Citizenship and Immigration (the "Respondent") for his part, argues that the Officer's decision meets the applicable standard of review, that is, reasonableness, and that there is no basis for finding that the Officer ignored or misunderstood the evidence submitted by the Applicant.

[11] The first matter to be addressed is this Court's jurisdiction to entertain this application for judicial review.

[12] The Respondent objected to jurisdiction in his initial memorandum of argument, pointing out that the Applicant had failed to exhaust her right of appeal to the Immigration Appeal Division ("IAD") pursuant to section 63 of the Act. The Respondent withdrew this objection in the face of reply submissions from the Applicant, arguing that since she was not a member of the family class, the IAD had no jurisdiction to hear a challenge to the Officer's negative decision. Relying on the recent decisions in *Phung et al. v. Canada (Minister of Citizenship and Immigration)* (2012), 408 F.T.R. 311 and *Huot c. Canada (Ministre de la Citoyenneté & de l'Immigration)* (2011), 97 Imm. L.R. (3d) 36 (F.C.), the Applicant submitted that her only recourse for relief, relative to the Officer's decision, is by way of an application for judicial review to this Court. The Respondent accepted these arguments.

[13] The decisions in *Phung*, *supra*, and *Huot*, *supra*, appear to contradict the decision of the Federal Court of Appeal in *Somodi v. Canada (Minister of Citizenship and Immigration)*, [2010] 4 F.C.R. 26 (F.C.A.) where that Court said the following at paragraphs 21 to 24:

> 21 In the IRPA, Parliament has established a comprehensive, self-contained process with specific rules to deal with the admission of foreign nationals as members of the family class. The right of appeal given to the sponsor to challenge the visa officer's decision on his or her behalf to the benefit of the foreign national, as well as the statute bar against judicial review until any right of appeal has been exhausted, are distinguishing features of this new process. They make the earlier jurisprudence relied upon by the appellant obsolete.
>
> 22 Parliament has prescribed a route through which the family sponsorship applications must be processed, culminating, after an appeal, with a possibility for the sponsor to seek relief in the Federal Court. Parliament's intent to enact a comprehensive set of rules in the IRPA governing family class sponsorship applications is [page33] evidenced both by paragraph 72(2)(a) and subsection 75(2) [as am. by S.C. 2002, c. 8, s. 194].
>
> 23 The broad prohibition in paragraph 72(2)(a) to resort to judicial review until "any" right of appeal has been exhausted is now provided for in the enabling statute as opposed to the more limited statutory bar provided by section 18.5 of the *Federal Courts Act*.
>
> 24 Moreover, subsection 75(2) of the IRPA clearly states that in the event of an inconsistency between Division 8-Judicial Review of the IRPA and any provision of the *Federal Courts Act*, Division 8 prevails to the extent of the inconsistency. In other words, the statutory bar in paragraph 72(2)(a) prevails over section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act* granting the right to apply for judicial review [emphasis in original].

[14] The "family class" is described in subsection 12(1) of the Act as follows:

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	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

family member of a Canadian citizen or permanent resident.	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.

[15] Division 1 of Part 7 of the Regulations is specifically focused on the family class, consisting of sections 116 to 122 of the Regulations inclusively. Section 116 and paragraph 117(1)(b) of the Regulations are relevant and provide as follows:

116. For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	116. Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants:
[…]	[…]
(b) a dependent child of the sponsor;	b) ses enfants à charge;

[16] "Dependent child" is defined in section 2 of the Regulations as follows :

2. The definitions in this section apply in these Regulations.	2. Les définitions qui suivent s'appliquent au présent règlement.
"dependent child", in respect of a parent, means a child who	« enfant à charge » L'enfant qui:
(a) has one of the following relationships with the parent,	a) d'une part, par rapport à l'un ou l'autre de ses parents:

namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,

(ii) is the adopted child of the parent; and

(ii) soit en est l'enfant adoptif;

(b) is in one of the following situations of dependency, namely,

b) d'autre part, remplit l'une des conditions suivantes:

(i) is less than 22 years of age and not a spouse or common-law partner,

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(ii) il est un étudiant âgé qui n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois:

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(A) n'a pas cessé d'être inscrit à un établissement d'enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) is 22 years of age or older and has depended substantially

(iii) il est âgé de vingt-deux ans ou plus, n'a pas cessé de

on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.	dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents à compter du moment où il a atteint l'âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental.

[17] The Applicant is under the age of 22 and is the biological child of the sponsor, her father Issak Gerensea Habtenkiel. There was evidence before the Officer that she received financial support from her father.

[18] The Applicant, however, is excluded as a member of the family class because she was a non-accompanying family member and was not examined when her sponsor became a permanent resident. This result flows from paragraph 117(9)(d) of the Regulations which provides as follows:

117(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	117(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
[…]	[…]
(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[19] The Applicant submits that because she is not a member of the family class, the IAD cannot exercise its humanitarian and compassionate jurisdiction in disposing of any appeal since that jurisdiction is excluded by the operation of section 65 of the Act which provides as follows:

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

[20] The unavailability of access to the humanitarian and compassionate jurisdiction of the IAD is not *per se* a reason for an affected person to side-step the IAD. According to section 62, the IAD is the authorized authority to hear appeals "under this Division". Section 62 is found in Division 7 of Part 1 of the Act. Part 1, consisting of 10 Divisions, is entitled "Immigration to Canada". Division 7 is entitled "Right of Appeal" and consists of sections 62 to 71, inclusively.

[21] Section 63 sets out the types of decisions for which a right of appeal is available. Subsection 63(1) is relevant to this application and provides as follows:

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[22] In the trial decision in *Somodi, supra,* the trial judge reviewed the sections of the Act. He noted that the right of appeal, in the case of a sponsorship, lay with the sponsor and not with the individual whose application for permanent residence was denied. He concluded that "any challenge to an immigration officer's decision must proceed by an appeal by the sponsor who is the Canadian citizen or permanent resident"; see the decision in *Somodi v. Canada (Minister of Citizenship and Immigration)*, [2009] 4 F.C.R. 91 (F.C.) at para. 34. The decision of the trial judge was affirmed on appeal.

[23] I acknowledge the decisions of my colleagues in *Huot*, *supra*, and *Phung*, *supra*, and most recently in *Kobita v. Canada (Minister of Citizenship and Immigration*), 2012 FC 1479. These decisions held that an applicant who is unable to raise humanitarian and compassionate considerations before the IAD because she is not a member of the family class can pursue those humanitarian and compassionate submissions in an application for judicial review that is brought pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[24] I decline to follow this approach. As noted above, the Federal Court of Appeal in *Somodi*, *supra*, affirmed that Parliament has prescribed the route through which family sponsorship applications must be processed. The legislative scheme enacted by Parliament requires that the Applicant's sponsor appeal the negative decision to the IAD before the Applicant can seek judicial review. This procedure is dictated by the legislation, which only allows the IAD to consider humanitarian and compassionate factors pursuant to section 65 of the Act when a person is a member of the family class.

[25] For greater clarity, a person who is excluded from the family class pursuant to subsection 117(9) of the Regulations cannot get the benefit of the IAD's discretion to grant relief on the basis of humanitarian and compassionate grounds. There is no issue here that the Applicant is excluded from membership in the family class pursuant to paragraph 117(9)(d) of the Regulations. I acknowledge that this procedural outcome may not be efficient; however, it is for Parliament, and not for this Court, to remedy this situation.

[26] In the event that I am wrong and this Court has jurisdiction to hear the application for judicial review, I will consider the application on its merits. The jurisprudence is settled that the standard of review for a humanitarian and compassionate decision is reasonableness (*Kisana v. Canada (Minister of Citizenship and Immigration)* (2009), 392 N.R. 163 (F.C.A.) at para. 18).

[27] In my view, the Officer's decision to refuse the Applicant's permanent residence application on humanitarian and compassionate grounds was reasonable. The Officer considered the Applicant's personal circumstances, including the lack of contact and emotional ties between her and her father. I am satisfied that the failure to use the words "best interests of the child" does not mean that those interests were ignored. The Officer reasonably assessed the evidence that was presented.

[28] In the result, the application for judicial review is dismissed.

[29] Counsel for the Applicant proposed a question for certification, that is, the question proposed by Counsel in *Phung, supra*.

[30] In my view, this question meets the standard for certification, that is, a serious question of general importance which would be dispositive of an appeal; see the decision in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.) at para 11. I have re-stated the question in terms of that proposed but not certified in *Phung, supra*. Accordingly, the following question will be certified:

> In light of sections 72(2)(a), 63(1) and 65 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and the case of *Somodi v. Canada (Minister of Citizenship and Immigration)*, [2010] 4 F.C.R. 26 (F.C.A.), where the applicant has made a family class sponsorship application and requested humanitarian and compassionate considerations within the application, is the applicant precluded from seeking judicial review by the Federal Court before exhausting their right of appeal to the Immigration Appeal Division where the right of appeal is limited pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. The following question is certified:

> In light of sections 72(2)(a), 63(1) and 65 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and the case of *Somodi v. Canada (Minister of Citizenship and Immigration)*, [2010] 4 F.C.R. 26 (F.C.A.), where the applicant has made a family class sponsorship application and requested humanitarian and compassionate considerations within the application, is the applicant precluded from seeking judicial review by the Federal Court before exhausting their right of appeal to the Immigration Appeal Division where the right of appeal is limited pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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