Federal Court  Cour fédérale

Date: 20130418

Docket: IMM-3803-12

Citation: 2013 FC 396

Ottawa, Ontario, April 18, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ANDENET GETACHEW SESHAW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] Mr. Andenet Getachew Seshaw (the "Applicant") seeks judicial review of a decision of an Immigration Officer (the "Officer"), dated February 14, 2012. In that decision, the Officer refused the Applicant's application for permanent residence as a member of the family class on the grounds that he was excluded pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") and that there were insufficient humanitarian and compassionate considerations to justify waiving non-compliance with the Regulations.

[2] The Applicant is a citizen of Ethiopia. While living in Sudan as a refugee he met Ms. Zafu Woldegebri Gebru in 2007, and they began co-habiting in March 2010.

[3] Years before meeting the Applicant, Ms. Gebru, together with her father, had applied to immigrate to Canada. The Applicant's father died in 2007. Ms. Gebru was called to an interview with a visa officer in January 2010. The Computer Assisted Immigration Processing ("CAIPS") notes from her interview show that the visa officer inquired about her marital status, but no conclusive answers are recorded. Three months later Ms. Gebru found out that she would be able to come to Canada. She married the Applicant on October 5, 2010, and travelled to Canada on October 13, 2010, obtaining status as a permanent resident upon her arrival.

[4] By way of an application dated March 2011, the Applicant applied for permanent residence, under the sponsorship of Ms. Gebru. On the application form, under the question "category under which you are applying", the box "family class" was checked off, and "spouse H&C" was written in the space reserved for "other" categories. By letter dated February 14, 2012, the Officer refused the application on the grounds that the Applicant did not meet the requirements for immigration to Canada.

[5] The Officer wrote that although the Applicant married his sponsor on February 22, 2010, and although the sponsor had obtained permanent residence in June 2010, the sponsor did not declare the Applicant as a family member either at the Canadian Embassy in Cairo or upon her arrival at the port of entry in Canada. The Officer also found that Ms. Gebru did not meet the

requirements of a sponsor in accordance with subsection 133(1) of the Regulations because she was in default of an immigration loan.

[6] The Officer further stated in notes dated February 14, 2012, that Ms. Gebru, the sponsor, had requested humanitarian and compassionate consideration relative to the Applicant's application for permanent residence. The Officer noted Ms. Gebru's narrative and the evidence of her establishment in Canada and relationship with her husband. The Officer also noted Ms. Gebru's claim that she notified both the visa office and Citizenship and Immigration Canada in Winnipeg of her marriage, and acknowledged her explanation that due to her limited education and experience she did not understand the refugee and sponsorship system.

[7] The Officer further noted Ms. Gebru's account of her difficulties in Sudan and the support her husband gave her, but stated that the onus was on the Applicant and his sponsor to inform themselves of the requirement that a sponsor declare all dependents. The Officer concluded that having considered humanitarian and compassionate considerations, the Officer was not satisfied that there were grounds to overcome the exclusion of the Applicant pursuant to paragraph 117(9)(d) of the Regulations.

[8] The Applicant argues that the Officer erred in finding that Ms. Gebru was in default of an immigration loan, and that the Officer's decision on the basis of humanitarian and compassionate considerations was unreasonable.

[9] The Minister of Citizenship and Immigration (the "Respondent") argues that the immigration loan issue is immaterial because the approval of Ms. Gebru as a sponsor is not at issue, and in any event, the Officer's conclusion was appropriate. The Respondent also submits that the Officer's conclusion with respect to humanitarian and compassionate considerations was reasonable.

[10] This case raises a question of jurisdiction insofar as the basis of the Applicant's claim is his exclusion from the family class, pursuant to paragraph 117(9)(d) of the Regulations, because he was neither declared nor produced for examination, as a member of the family class, when his sponsor, his wife, entered Canada.

[11] In his initial memorandum of argument, the Respondent raised the question of this Court's jurisdiction to adjudicate this application for judicial review.

[12] The Respondent objected to jurisdiction, pointing out that the Applicant had failed to exhaust his right of appeal to the Immigration Appeal Division ("IAD") pursuant to section 63 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The Respondent withdrew this objection in the face of reply submissions from the Applicant, arguing that since he was not a member of the family class, the IAD had no jurisdiction to hear a challenge to the Officer's negative decision.

[13] 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 his 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.

[14] 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*.
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> 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 <u>any</u> 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].

[15] 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 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.

[16] Division 1 of Part 7 of the Regulations is specifically focused on the family class, consisting of sections 116 to 137 of the Regulations inclusively. Section 116 and paragraph 117(1)(a) 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:
[…]	[…]
(a) the sponsor's spouse, common-law partner or conjugal partner;	a) son époux, conjoint de fait ou partenaire conjugal;

[17] It is not disputed that the Applicant is Ms. Gebru's husband.

[18] The Applicant, however, is excluded as a member of the family class because he was a non-accompanying family member and was not examined when his 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 he 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	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

the family class and that their sponsor is a sponsor within the meaning of the regulations.	le répondant a bien la qualité réglementaire.

[20] The Applicant's submission, accepted by the Respondent, is that this Court has jurisdiction.

[21] In my view, there are two problems with the parties' approach to the question of jurisdiction.

[22] First, the Applicant argued before this Court that the Officer erred in finding that Ms. Gebru was ineligible as a sponsor because she was in default of an immigration loan. In light of the scheme of the Act and the Regulations, an application for judicial review to this Court on this basis is unavailable. Section 63 of the Act provides that:

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.

[23] In my view, the issue of Ms. Gebru's apparent default on her immigration loan must be dealt with by the IAD before an application for judicial review before this Court can be commenced.

[24] Second, in my opinion, this Court also lacks jurisdiction to consider the application for judicial review based on the Officer's assessment of humanitarian and compassionate considerations. The unavailability of access to the humanitarian and compassionate jurisdiction of

the IAD, as set out in section 65 of the Act, is not *per se* a reason for an affected person to side-step the IAD.

[25] According to section 62 of the Act, 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 ten Divisions, is entitled "Immigration to Canada". Division 7 is entitled "Right of Appeal" and consists of sections 62 to 71, inclusively. Section 63, noted above, sets out the types of decisions for which a right of appeal is available.

[26] 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.

[27] 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.

[28] 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.

[29] 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.

[30] In the event that I am wrong and this Court has jurisdiction to hear the application for judicial review with respect to the Officer's decision on humanitarian and compassionate considerations, 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).

[31] In my opinion, the Officer's decision was reasonable. The Officer considered the Applicant's personal circumstances, including evidence of his sponsor's establishment in Canada and their relationship, as well as her explanation for why the Applicant was not disclosed in her application for permanent residence. The Officer's conclusion that these considerations were insufficient to overcome the Applicant's exclusion under paragraph 117(9)(d) of the Regulations was reasonable. The Officer's errors in the refusal letter regarding the dates of the marriage and when Ms. Gebru gained permanent resident status are not determinative.

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

[33] Counsel shall have ten (10) days to propose a question for certification. A final judgment will then be issued.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Bashir A. Khan	FOR THE APPLICANT
Alexander Menticoglou	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bashir A. Khan Barrister and Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT