Federal Court of Appeal | Cour d'appel fédérale

Date: 20170210

Docket: A-153-16

Citation: 2017 FCA 29

CORAM: **PELLETIER J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

MASARU GENNAI

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on January 19, 2017.

Judgment delivered at Ottawa, Ontario, on February 10, 2017.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: PELLETIER J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] Masaru Gennai, the appellant, appeals from the April 29, 2016 judgment of the Federal Court (2016 FC 481) in which Justice Heneghan dismissed his application for judicial review. The appellant sought judicial review of the decision of a delegate of the Minister of Citizenship and Immigration, the respondent, refusing to consider his application for permanent residence.

[2] By way of background, the appellant first submitted an application for permanent residence under the Canadian Experience Class (CEC) category in October 2014. The appellant provided credit card information to pay the applicable fee. In early January 2015, the respondent made multiple attempts to charge the appellant's credit card and was ultimately unsuccessful. On January 8, 2015, pursuant to section 12 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations), the respondent returned the appellant's application because it did not meet the requirements of section 10 of the Regulations, one of which is providing proof of payment of the applicable fee.

[3] In February 2015, the appellant again submitted a CEC application, but included the applicable fee with a money order. On February 20, 2015, the respondent refused to consider and returned the appellant's application because the appellant had failed to comply with a Ministerial Instruction that had been issued on December 1, 2014. The Ministerial Instruction indicated that, as of January 1, 2015, all CEC applicants must apply for permanent residence through the Express Entry scheme.

[4] On judicial review of the respondent's February 20, 2015 decision, the appellant argued that, once he provided the applicable fee, his application for permanent residence should have been processed in accordance with the scheme that was in place when he first applied in October 2014, prior to the issuance of the Ministerial Instruction. The Judge determined that the application submitted in October 2014 was incomplete and, therefore, not an application within the meaning of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and the Regulations (reasons at para. 14). Further, the Judge found that the respondent made no

reviewable error in refusing to consider the application submitted in February 2015 as the appellant "had no vested right and no legitimate expectation" that the scheme for processing CEC applications would not change (reasons at para. 16).

[5] The Judge certified the following question, which has been slightly amended, as indicated, on appeal:

> If an application for permanent residence is incomplete as it fails to meet the requirements prescribed by s 10 of the Immigration and Refugee Protection Regulations ("IRPA Regulations") and the application and all supporting documents are returned to the applicant pursuant to s 12 of the IRPA Regulations, does the application still "exist" such that it preserves or "locks in" the applicant's position in time so that a subsequently submitted complete application must be assessed according to the ~~regulatory~~ scheme that was in effect when the first, incomplete application was submitted?

[6] I agree with the Judge that an incomplete application is not an application within the meaning of IRPA and the Regulations. In my view, an incomplete application can no longer exist because the text of section 12 provides that the entirety of an application that has failed to meet the requirements under section 10 is returned to the applicant. When the appellant submitted his CEC application in February 2015, the respondent assessed the appellant's application in light of the scheme in place at that time and not in reference to his previous incomplete and returned application. There was no authority to do otherwise. Therefore, as the appellant did not comply with the requirements of the Express Entry scheme, the respondent reasonably refused to consider his application.

[7] Indeed, the appellant conceded at the outset of the hearing before this Court that the certified question should be answered in the negative and that the Regulations did not allow for, in counsel's words, a "placeholder function" for incomplete applications.

[8] The appellant went on to ask this Court to consider the doctrine of reasonable expectations and referred to the respondent's OP1 manual which provides that a permanent resident applicant should receive an initial response on the status of their application within a four-week period. The appellant submitted that compliance with the OP1 manual's timeline would serve to put an applicant on notice that there may be a problem with their application and allow an applicant to resolve the problem in a timely fashion. It may be that, in a different case with different facts, an undue delay in responding to a permanent residence application in the manner contemplated in the OP1 manual may give rise to a procedural fairness issue. However, in the present matter, respondent's counsel objected to the appellant's oral submissions on the OP1 manual because procedural fairness arguments were not raised in the notice of appeal or the appellant's memorandum of fact and law. As anything said on procedural fairness would be *obiter dicta* at this time, any further comment on this issue is unnecessary.

[9] I would dismiss the appeal and answer the certified question in the negative.

"David G. Near"
J.A.

"I agree.
J.D. Denis Pelletier"

"I agree.
Donald J. Rennie"

APPENDIX

Immigration and Refugee Protection Regulations, S.O.R./2002-227	*Règlement sur l'immigration et la protection des réfugiés*, D.O.R.S./2002-227
PART 2	PARTIE 2
General Requirements	Règles d'application générale
…	[…]
DIVISION 2	SECTION 2
Applications	Demandes
Form and content of application	Forme et contenu de la demande
10 (1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall	10 (1) Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement :
(a) be made in writing using the form provided by the Department, if any;	a) est faite par écrit sur le formulaire fourni par le ministère, le cas échéant;
(b) be signed by the applicant;	b) est signée par le demandeur;
(c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;	c) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;
(d) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and	d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;
(e) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	e) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.
…	[…]
Return of application	Renvoi de la demande

12 Subject to section 140.4, if the requirements of sections 10 and 11 are not met, the application and all documents submitted in support of it shall be returned to the applicant.

12 Sous réserve de l’article 140.4, si les exigences prévues aux articles 10 et 11 ne sont pas remplies, la demande et tous les documents fournis à l’appui de celle-ci sont retournés au demandeur.

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE HENEGHAN OF THE FEDERAL COURT DATED MAY 2, 2016, IN DOCKET NUMBER IMM-1104-15

DOCKET:	A-153-16
STYLE OF CAUSE:	MASARU GENNAI v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 19, 2017
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	PELLETIER J.A. RENNIE J.A.
DATED:	FEBRUARY 10, 2017

APPEARANCES:

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