Federal Court  Cour fédérale

Date: 20160223

Docket: IMM-3635-15

Citation: 2016 FC 238

Toronto, Ontario, February 23, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

KUGENTHIRAN MARIMUTHU

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The history leading to the decision under review is well described in the Immigration Appeal Division's (IAD) decision of July 2, 2015 presently under review (Decision):

> Kugenthiran Marimuthu (the appellant) appeals the refusal of the sponsored application for permanent residence filed on behalf his spouse (the applicant).
>
> The appellant and applicant married on 25 January 2006, less than a month prior to the appellant's landing in Canada as a permanent resident, on 13 February 2006. The appellant failed to disclose the

> existence of his spouse in the course of his immigration process or upon landing at the Canadian port of entry on 13 February 2006.
>
> The appellant applied to sponsor the applicant and this application in 2007 was refused on 19 June 2008. A visa officer found that the applicant was excluded from membership in the family class pursuant to section of the Immigration and *Refugee Protection Regulations* (*Regulations*). The appellant appealed the decision of the visa officer and the appeal was dismissed by the Immigration Appeal Division (IAD) on 27 February 2009 on the basis that the applicant had not been examined at the time of the appellant's immigration or landing in Canada and was therefore described in section 117(9)(d) of the Regulations.
>
> The appellant filed a second application to sponsor the applicants on 9 December 2013. This application was refused [by a visa officer] on 2 October 2014, also based on the finding that the applicants were described in section by section 117(9)(d) of the *Regulations*. <u>That refusal is the subject of this appeal.</u>
>
> (Decision, paras. 1 to 4) [Emphasis added]

[2] The issue placed before the IAD on the appeal, which was conducted on written submissions without oral argument, is accurately described in paragraph 5 of the Decision:

> The IAD requested submissions with respect to the applicant's membership in the Family Class given the application of section 117(9)(d) of the Regulations. The appellant filed submissions that do not contest the applicant's exclusion from the Family Class pursuant to section 117(9)(d) of the *Regulations*, <u>but arguing that the visa officer failed to consider the humanitarian and compassionate grounds of the case and the Temporary Resident Permit application filed on behalf of the applicant and dependants</u>.
>
> [Emphasis added]

[3] Thus, the argument advanced by Counsel for the Applicant was with respect to the issue of the visa officer's error. However, the Decision rendered did not address this issue, instead it

addressed the completely different and un-advanced issue as to whether humanitarian and compassionate relief could be granted by the IAD on the circumstances of the present case.

[4] I find that, because the Decision was rendered on the basis of a fundamental mistake as to the issue to be determined, the corrective measure required is to set aside the decision as a failed determination and to order that a proper determination be conducted.

[5] In the course of closing oral argument in the hearing of the present Applicant an exchange took place between Counsel as to whether the IAD has jurisdiction to address the visa officer's decision-making. Although this issue was not a feature of the present review, it is outstanding, and as a result it is incorporated into the Judgement on the present Application for the IAD's consideration.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the issue of the visa officer's error advanced by Counsel for Applicant in the present Application is referred to a different IAD member for determination on the following directions:

1. The IAD member must decide whether the IAD has jurisdiction to make a determination with respect to the visa officer's decision-making; and
2. If jurisdiction is found to exist, to make a determination on the issue of the visa officer's error advanced by Counsel for the Applicant; and
3. If error is found, to refer the matter to a visa officer at the Canadian Embassy in Sri Lanka for reconsideration; and
4. In fairness to the Applicant, I further direct that each stage of the determination as described be conducted on an expedited basis.

There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3635-15
STYLE OF CAUSE:	KUGENTHIRAN MARIMUTHU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 18, 2016
JUDGMENT AND REASONS:	CAMBPELL J.
DATED:	FEBRUARY 23, 2016

APPEARANCES:

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