Federal Court  Cour fédérale

Date: 20170206

Docket: IMM-5015-06

Citation: 2017 FC 140

Ottawa, Ontario, February 6, 2017

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ALAN HINTON, IRINA HINTON

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

REASONS FOR ORDER

[1] Alan and Irina Hinton currently represent a class of plaintiffs, perhaps as many as three million, who applied for and paid for any one of more than forty visas from 1 April 1994 to 31 March 2004, and who were informed of the decision with respect thereto after 12 September 2000. They assert they were overcharged and seek a refund on the basis that the *Financial Administration Act* does not allow Her Majesty to make a profit on a service.

[2] In this motion, the Hintons ask that the timeframe with respect to one of the visas, the multiple-entry temporary resident visa (MTRV) be extended from 31 March 2004 to 31 March 2015. They seek discovery of further documents in that connection. They also seek further data runs pursuant to the Order of the Court dated 28 November 2011. However, by agreement, that portion of the motion has been left in abeyance.

[3] I am granting the motion as filed, except as otherwise stated herein. I will reduce the timeframe to 31 March 2007 and establish a sub-class being those who applied for an MTRV. I will also order the production of further documents, but limited to that timeframe.

History of the Proceedings

[4] This matter began in March 2005. Baz Momi and others filed a proposed class action with respect to the alleged overcharging for visa applications. The Crown moved to have the action struck on the basis that it did not disclose a viable cause of action. I granted the motion in part on the grounds that it was plain and obvious that no claim lay in negligence. However, I held that otherwise it was not plain and obvious that the plaintiffs would not succeed. (*Momi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1484, 283 FTR 143).

[5] It is important to keep in mind that that decision did not hold that there was no merit to the Crown's position, merely that it was not plain and obvious that the action would be dismissed. It will be up to the trial judge to decide whether the Crown's principal defences are valid(see *Toney v Canada (Royal Canadian Mounted Police)*, 2013 FCA 217, [2015] 1 FCR 184). These defences are that the visa program was actually provided at a loss; that the

regulations were validly enacted pursuant to the *Immigration and Refugee Protection Act*, and the former *Immigration Act*; and that the regulations are not constrained by the *Financial Administration Act*. Finally, and in any event, if a profit was improperly made, the plaintiffs have no recourse.

[6] The next step was to certify the *Momi* action as a class action. I held that I would, although on a narrower basis than proposed, were it not for the decision of the Federal Court of Appeal in *Grenier v Canada*, 2005 FCA 348, [2006] 2 FCR 287. That case held that a party who sought damages against the Crown arising from a decision of a federal board, agency, or tribunal had to first proceed by way of judicial review, notwithstanding that an award of damages is not a judicial review remedy. Five years later, the Supreme Court held that *Grenier* was wrongly decided in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585, *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64, [2010] 3 SCR 639 and *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 SCR 657.

[7] The plaintiffs responded to my *Momi* decision by filing this application for judicial review under Docket IMM-5015-06. This time, the Hintons were the proposed class representatives. The judicial review presented its challenges. As a general rule, applications for judicial review must be made within 30 days, although the Court may extend that time (*Federal Courts Act*, s 18.1). In the immigration context, s 72 of the *Immigration and Refugee Protection Act* gives different time delays: fifteen days if the matter arose in Canada, or otherwise sixty

days. Again, the Court may extend time. However, it is a condition precedent to the review that the applicant first obtain leave from the Court.

[8] By Order dated 24 April 2007, I granted leave. I then converted the application for judicial review into an action, and certified it as a class action (*Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FC 7, [2008] 4 FCR 391). I also certified various questions. The Crown took the matter to appeal. Other than for a slight modification, which was later rectified, my decision was upheld (*The Minister of Citizenship and Immigration v Hinton*, 2008 FCA 215, [2009] 1 FCR 476).

[9] While the appeal was pending, the Hintons moved to extend the timeframe of the class action from 31 March 2004 to 31 March 2007. By Order dated 4 April 2008, I held:

> CONSIDERING the record, the written and oral representations on behalf of the applicants, and the oral representations on behalf of the respondent;
>
> CONSIDERING the Order dated 4 January 2008 is under appeal under Court Docket No. A-11-08, which appeal is scheduled to be heard in Toronto on 26 May 2008;
>
> THIS COURT ORDERS that the motion be adjourned *sine die*.

That motion is still pending and is the reason I have extended the timeframe with respect to MTRVs to 31 March 2007.

[10] Other applications for judicial review, with a view to conversion to a class action, were filed and, in December 2008, were consolidated with this action, *Alan Hinton and Irina Hinton v MCI*, IMM-3195-08, *Svetlana Potapova and Nikolay Potapov v MCI*, IMM-3196-08, and *Alan*

Hinton and Irina Hinton v MCI, IMM-3197-08. However, these three proceedings relate to visa applications made prior to 31 March 2004, and so do not advance the cause.

[11] The other development, which I consider very significant, is that an action, not an application for judicial review, was filed, in October 2015, in *Nguyen v The Queen*, Docket No. T-1778-15. This is a proposed class action in favour of all those who applied for an MTRV from 21 October 2009 to 31 March 2015. Although I was appointed case manager, together with Prothonotary Lafrenière, by consent, this matter has been left in abeyance. In the light of these reasons, *Hinton*'s counsel, who are also counsel for *Nguyen*, may well reconsider.

Analysis

[12] Although the plaintiffs have not given up with respect to the other visas, they are now focussing on MTRVs. The fee levied was $150. The cost of processing may have been $106, which leaves a profit of $44 for each of several million applications. I say "may" because the Crown has blended four visitor visas together, the multiple-entry, the single-entry, extensions thereto, and restorations thereof. By weighing the number of visas by volume, it is suggested that the average cost was $105, which means that all four visas were dealt with at a loss of $1.00. It will be up to the trial judge to determine whether blending is appropriate, but the plaintiffs are certainly entitled to get a breakdown if such is attainable.

[13] The Crown opposes this motion on the basis of time-bar. The underlying fact giving rise to this litigation is that various Ministers of Citizenship and Immigration claimed a profit in their annual reports to Parliament. I deliberately restricted the class to those who were informed of the

decisions on their visa within six years of the institution of the proceedings. I had in mind that proceedings must be taken against the Crown within six years in virtue of s 32 of the *Crown Liability and Proceedings Act*, as well as the six-year limitation with respect to a cause of action not arising within a single province in s 39 of the *Federal Courts Act*. Although *Hinton* was instituted in 2006, I refused to certify a class extending beyond 31 March 2004 because Parliamentary Reports were not then available for the fiscal years commencing 1 April 2004.

[14] This is not to say that claims made on decisions made more than six years before the institution of the action were time-barred. Time only begins to run when a party could reasonably have discovered that it had a cause of action. However, discoverability might vary from one individual to the next which would have, in my opinion, unnecessarily have complicated the proceedings.

[15] The reason I am extending the MTRV class to 31 March 2007 is that, when the original motion was filed in 2008, applications from 1 April 2004 to 31 March 2007 could not have been subject to the six-year time-bar.

[16] The Crown takes issue with this point and submits that time is only tolled when the class is certified. This is incorrect in law. Time was protected for the Hintons when they filed proceedings proposing a class. That filing also benefits those who have been held to fall within the class. However, those who were excluded by my Order were not protected. Time continued to run against them during the certification process, unlike in some jurisdictions such as Ontario and British Columbia.

[17] The Crown's reliance on the decision of Madam Justice MacTavish in *Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, [2006] 4 FCR 341 is misplaced. It is true that one cannot resurrect a time-barred claim by including it in a class proceeding. However, Madam Justice MacTavish had not certified the class and had not extended time, unlike in this case in which I both extended time and certified the class as permitted under both the *Federal Courts Act* and the *Immigration and Refugee Protection Act*.

[18] The Crown also submitted that an amendment should not be permitted, if its effect would be to bring in new plaintiffs and new causes of action based on visas issued in different years. There is no merit to this submission because the action as presently constituted already covers ten years. Obviously, there are different plaintiffs. That is the whole point of a class action, i.e. common questions of law or fact.

[19] There is ample evidence in the Court record to establish that the extended class has the same cause of action as the class which ended 31 March 2004. Indeed, it may also be true up to 31 March 2015. However, I must be consistent with my original rationale.

[20] Counsel for the Hintons anticipated this scenario and pointed out that *Federal Courts Rule* 201 appears to provide for an amendment to introduce a new cause of action as long as it arises out of substantially the same facts as those already pleaded (*Scottish & York Insurance Co v Canada*, (2000) 180 FTR 115, [2000] FCJ No 6). They also referred to my decision in *Mohawks of Kanesatake v Canada*, 2012 FC 282 in which I referred to *Federal Courts Rule* 3 which provides that the Rules be interpreted so as to secure the just, most expeditious, and least

expensive determination of any proceeding on its merits. I had also referred to what Mr. Justice Pigeon had said in *Hamel v Brunelle*, [1977] 1 SCR 147 at p 156 ". . . que la procédure reste la servante de la justice et n'en devienne jamais la maîtresse" / "that procedure be the servant of justice not its mistress".

[21] They submit that the resurrection of the *Nguyen* case will simply create a procedural morass and ultimately the end result will be the same.

[22] However, I am not prepared to permit an amendment which would extend the class indefinitely.

[23] Should Nguyen be reactivated and certified, there would still be a time gap between 23 July 2008 and 20 October 2009. Counsel submits that there is no time gap as no one could possibly have discovered the blending issue before the examination for discovery which took place in 2010. That may, or may not, be so, but would have to be argued in Nguyen, not in this case. The annual reports to Parliament would obviously be relevant.

Production of Documents

[24] The Hintons sought further documents "including, without limitation". They have now reduced their request to the twelve enumerated sets of documents. I am prepared to grant the Order with respect to the first ten, but limited to the timeframe from 1 April 1994 to 31 March 2007.

[25] I am not prepared, in this action, to grant the eleventh request which is for documents relating to the fee for MTRVs being reduced to $100 in February 2014.

[26] Nor am I prepared to grant the twelfth request which is for the production of unredacted documents in accordance with the Order of Prothonotary Lafrenière on 28 November 2011. As there is a dispute as to the scope of that Order, it would be better to direct the motion to him.

[27] The Crown submits it would be too onerous to review extensive records. However, I am guided by the decision of the Ontario Court of Appeal in *Cassano v Toronto-Dominion Bank*, 2007 ONCA 781, [2007] OJ No 4406 which dealt with a certified class action involving foreign currency transactions conducted with Visa credit cards issued by the bank. The bank had estimated that it would take fifteen hundred people about one year to identify and record the foreign exchange transactions in issue and at a cost of $48,000,500. However, as Chief Justice Winkler stated:

> 49 The economic argument advanced by TD ignores the fact that the damages calculation would only be necessary if TD is found to have breached the contract with its cardholders. Therefore, the essence of TD's argument is that the recovery phase of the litigation, subsequent to a finding of liability, will cause it to incur significant expense. It would hardly be sound policy to permit a defendant to retain a gain made from a breach of contract because the defendant estimates its costs of calculating the amount of the gain to be substantial. A principal purpose of the CPA is to facilitate recovery by plaintiffs in circumstances where otherwise meritorious claims are not economically viable to pursue. To give any effect to the economic argument advanced by TD here would be to pervert the policy underpinning the statute.

[28] Although the plaintiffs, in written motion, requested that the documents be produced "forthwith" they have resiled from that position. The documents should be provided within a reasonable period of time. I do not have sufficient information at this time to provide a deadline.

[29] The Crown submits that the Hintons would not be appropriate representatives for the MTRV sub-class as they did not apply for such a visa. I am entitled to amend an Order certifying a class proceeding (Rule 334.19) and to establish a sub-class which could be separately represented (Rule 334.17(2)). As the interests of the MTRV sub-class may well differ, I accept plaintiffs' suggestion that Svetlana Papatova, who applied for and paid for an MTRV, be appointed as the representative of the sub-class.

[30] The Crown does not oppose the motion that Richard Kurland be added as class counsel for the MTRV sub-class. Mr. Kurland had, earlier, provided an affidavit, but it was really only a vehicle by which certain government documents were entered into the court record.

[31] The Hintons also propose that the action with respect to the other visas be, in effect, stayed. I am not prepared to do so for two reasons. The first is that, as Mr. Justice Sexton pointed out in the *Hinton* appeal, a decision should first be rendered on the Crown's defences (other than that the service was provided at a loss) and the second is that bifurcation issues should be dealt with at a Trial Management Conference with the trial judge.

[32] In accordance with Rule 394, I call upon counsel for the moving party to prepare for endorsement a draft order, hopefully approved as to form and content by the Crown.

[33] There has been some liberty with respect to the style of cause both in this Court and in the Court of Appeal. The proper name of the defendant is Her Majesty the Queen in Right of Canada, not the Minister of Citizenship and Immigration.

[34] Copy of these reasons shall be placed in Docket IMM-5015-06 together with IMM-3196-08, IMM-3197-08 and IMM-3195-08.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5015-06, IMM-3196-08, IMM-3197-08 AND IMM-3195-08
STYLE OF CAUSE:	ALAN HINTON, IRINA HINTON v HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
PLACE OF HEARING:	TORONTO, ONTARIO
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