Date: 20051003

Docket: IMM-2019-05

Citation: 2005 FC 1350

Ottawa, Ontario, October 3, 2005

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

PATRICIA RAYMOND

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] "On the basis of the information provided, the person who was sponsored by the appellant is not a member of the family class. Therefore, under s. 65 of the *Immigration and Refugee Protection Act*, the IAD has no discretionary jurisdiction to consider humanitarian and compassionate considerations".[1]

[1] *Collier v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1445 (QL). In such a case, according to the *Immigration and Refugee Protection Act*, only subsection 25(1), because of the capacity conferred, could be applicable, depending on the circumstances and context described.

NATURE OF JUDICIAL PROCEEDING

[2] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*[2] (Act), of the decision by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board which, on March 2, 2005, dismissed the applicant's appeal from the rejection of her sponsorship application for her daughter.

FACTS

[3] On December 4, 2000, Citizenship and Immigration Canada received from the applicant, Patricia Raymond, a sponsorship application for a member of the family class, her minor daughter, Naïka Tessier. This young girl is a Haitian citizen. On May 21, 2004, a visa officer rejected the sponsorship application on the ground that Naïka was not a member of the family class within the meaning of paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*[3] (Regulations). In her application for permanent residence dated November 20, 1995, Ms. Raymond did not declare her daughter born on November 16, 1995. Ms. Raymond obtained permanent residence in 1997 and did not declare her daughter when she entered Canada that same year. Thus, Ms. Raymond's failure to declare her daughter and have her examined by Immigration in 1995 resulted in her daughter's exclusion from the family class. Ms. Raymond appealed to the IAD from the visa officer's decision. The notes from an interview conducted by an Immigration officer on May 24, 2002 indicate that Ms. Raymond did not declare her daughter in her application for

[2] S.C. 2001, c. 27.
[3] SOR/2002-227.

permanent residence in 1995 because [TRANSLATION] "I believed that if I told Immigration (the embassy) that I had a child, it would cause me trouble".

IMPUGNED DECISION

[4] On May 2, 2005, the IAD handed down the following decision:

> [TRANSLATION]
> The appeal is dismissed because the appellant did not prove that the visa officer's rejection of the application was unfounded in law. According to the information provided, the person sponsored by the appellant is not a member of the family class. Thus, according to section 65 of the *Immigration and Refugee Protection Act*, the IAD does not have the necessary discretion to consider humanitarian and compassionate grounds.

ISSUES

[5] 1. Did the IAD violate a principle of procedural fairness by failing to hold an oral hearing before handing down its decision?

2. Did the IAD fail to exercise its jurisdiction by neglecting to rule on the question of the allegedly unreasonable delay between the submission of the sponsorship application and the decision by the visa officer?

ANALYSIS

[6] The Court would like to make a preliminary observation. Under subsection 63(1) of the Act, "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" (emphasis added). Therefore, the IAD had

jurisdiction to hear the appeal and, in fact, never asserted the contrary. In its brief decision, the IAD correctly indicated that it could not consider humanitarian and compassionate grounds in the case of Ms. Raymond's application, because section 65 of the Act states that those grounds may only be considered where it has been decided that the foreign national is, in fact, a member of the family class. Since Ms. Raymond had neglected to declare her daughter in her application for permanent residence in 1995, her daughter was excluded from the family class pursuant to paragraph 117(9)(*d*) of the Regulations, which stipulate the following:

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 regoupement 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.

1. Did the IAD violate a principle of procedural fairness by failing to hold an oral hearing before handing down its decision?

[7] Ms. Raymond asserts that, before rejecting her application, the IAD had an obligation to grant her an audience, with witnesses.

[8] The Court cannot subscribe to that argument. Paragraph 175(1)(*a*) of the Act deals with the only case in which the IAD must hold a hearing, that is, where the issue is the residency obligation from the standpoint of subsection 63(4) of the Act. That is not the issue in the present case. Subsection 175(1) provides as follows:

175. (1) The Immigration Appeal Division, in any proceeding before it,	**175**. (1) Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration :
(a) must, in the case of an appeal under subsection 63(4), hold a hearing;	*a*) dispose de l'appel formé au titre du paragraphe 63(4) par la tenue d'une audience;
(b) is not bound by any legal or technical rules of evidence; and	*b*) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(c) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	*c*) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

[9] Furthermore, the Court is satisfied that Ms. Raymond had an opportunity to be heard and to make her arguments. In a letter dated December 22, 2004, the IAD informed Ms. Raymond that she would have to provide proof in writing that her daughter was a member of the family class; otherwise, the appeal would be dismissed on the basis of section 65 of the Act. Ms. Raymond delivered her written arguments to the IAD on January 18, 2005. Thus, the IAD made its decision with the benefit of Ms. Raymond's arguments.

2. Did the IAD fail to exercise its jurisdiction by neglecting to rule on the question of the allegedly unreasonable delay between the submission of the sponsorship application and the decision by the visa officer?

[10] Ms. Raymond argues that the IAD failed to exercise its jurisdiction by neglecting to rule on the question of the delay in processing the file, a question that was included in Ms. Raymond's submissions in writing to the IAD. Ms. Raymond asserts that the decision-maker did not analyse whether the lengthy delay between the submission of the sponsorship application and the decision by the visa officer meant that "a principle of natural justice has not been observed" within the meaning of paragraph 67(1)(*b*) of the Act.

[11] On the basis of paragraph 67(1)(*b*) of the Act, Ms. Raymond alleges that the IAD had jurisdiction in the present case. The paragraph in question refers to a situation where a "principle of natural justice has not been observed".

[12] With respect, section 67 defines the situations in which the IAD may allow an appeal where it has jurisdiction to hear it. Obviously, the section does not give the IAD jurisdiction where a person is not a member of a family class:

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67**. 1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	*a*) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	*b*) il y a eu manquement à un principe de justice naturelle;

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer th matter to the appropriate decision-maker for reconsiderat.	(2 La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

[13] The respondent therefore takes the position that paragraph 67(1)(*b*) of the Act does not raise a serious question in this case.

[14] Finally, Ms. Raymond alleges that the visa officer took too long to deal with the sponsorship application and should have taken steps to hand down a decision much more quickly.

[15] The respondent reiterates that the IAD lacked jurisdiction to allow the appeal on this ground because of the reasons cited and that, all things considered, it is inappropriate to debate the question in the context of the application for leave and for judicial review before this Court in this manner. This argument could only be considered separately in another context. Otherwise, it would make it possible for the applicant to assert indirectly that which could not be considered directly.

[16] The issue of the visa officer's alleged unreasonable delay in responding to the over-four-year-old sponsorship application is a subsidiary issue related to the fact that the tribunal lacked jurisdiction on the primary issue. Accordingly, the subsidiary issue of the delay remains unanswered because of the manner in which it was raised.

CONCLUSION

[17] In view of these answers to the issues in dispute, the decision of the IAD is upheld, and the application for leave is dismissed.

ORDER

THE COURT ORDERS that

1. The application for judicial review be dismissed.

2. No question be certified.

"Michel M.J. Shore"
JUDGE

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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