Date: 20081202

Citation: 2008 FC 1343

Dockets: IMM-5015-06
IMM-3195-08
IMM-3197-08

BETWEEN:

ALAN HINTON
IRINA HINTON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-3196-08

AND BETWEEN:

SVETLANA POTAPOVA AND NIKOLAY POTAPOV

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] This is the latest effort by Alan and Irina Hinton, Baz Singh Momi and others to get a class action underway for the recovery of an alleged profit of some $700 million on the issuance of visas, or equivalents, pursuant to 43 regulations under the *Immigration and Refugee Protection Act* (IRPA), or its predecessor. As matters currently stand, a class action has been certified in IMM-5015-06; but, as a result of a decision of the Federal Court of Appeal, the members of the class were restricted to those who paid fees under one regulation. The applicants ask that the class be expanded to include all those who paid under any of the 43 regulations.

[2] The legal basis is that while the *Financial Administration Act* authorizes the Government to charge for services on a user-pay basis, it may not make a profit.

A BRIEF HISTORY

[3] The history of this affair is reported at great length in *Momi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1484; *Momi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 738, [2007] 2 F.C.R. 291; *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 7 (Hinton no. 1); the decision of the Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Hinton*, 2008 FCA 215 (Hinton no. 2) and in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1007 (Hinton no. 3).

[4] It began with a proposed class action in *Momi*. I stayed that action on the grounds that, since the plaintiffs were attacking a decision of a federal board or tribunal, their initial foray into this

Court had to be by way of judicial review, rather than by action. Furthermore, since this was an immigration matter, they first had to apply for leave as required by section 72 of IRPA.

[5] This is exactly what the applicants did in Hinton no. 1. In their application for leave and for judicial review, they cited the one regulation under which they had paid a fee, always with the intention of obtaining leave and then moving that the application for judicial review be converted into a class action covering all 43 visas. Leave was granted, the application for judicial review was converted into a class action, and the class was certified as all those who had paid under any of the 43 visas for the years in question.

[6] The Minister took that decision to appeal.

[7] In Hinton no. 2, the Court of Appeal cut back the class as the application for judicial review had been initially limited to just one of the 43 regulations. The Court modified the class "…so as to be confined to the individuals covered by the leave application"…, i.e. one regulation. However, it suggested a method by which the entire class originally certified could be reconstituted. Mr. Justice Sexton stated at paragraph 58:

> In the present case, without dictating to the Motions Judge (as Case Management Judge), or the respondents, how to rectify the situation, in my view it would suffice for the respondents to simultaneously apply for leave pursuant to section 72 of *IRPA* with respect to the remaining class members and move that those remaining members be allowed to join the class as modified by these reasons.

[8] The Hintons and Mrs. Hinton's parents, the Potapovas, took this advice to heart. However, they took a two-step approach. In IMM-3195-08, IMM-3196-08 and IMM-3197-08, they applied

for leave and for judicial review citing not only regulations under which they had paid fees, but all 43 regulations in issue. In Hinton no. 3, I granted leave. Section 72 of IRPA provides that the application for leave is to be disposed of in a summary way and, unless otherwise directed, without personal appearance. Given the complexity of this matter, I heard oral argument and, in granting leave, issued reasons.

[9] Now, to use the words of the Court of Appeal, they ask that "…those remaining members be allowed to join the class as modified by these reasons." They ask that I reinstate the class I originally certified.

THE MINISTER'S OPPOSITION

[10] Following the decision of the Federal Court of Appeal in Hinton no. 2, the Minister no longer disputes the holding that a class action in Hinton is the preferred procedure. He is prepared to concede that there is some evidentiary basis that the class be expanded to cover a few of the 42 other types of visas, but only with respect to certain specified years. He submits that the motion is premature in that he wishes to exercise his right to cross-examine one Richard Kurland on various affidavits. He hopes to establish by this cross-examination that, save as aforesaid, the motions "…seeking joinder and expansion of the currently defined class in Hinton are without adequate evidentiary support."

[11] The affidavits of Mr. Kurland, on which more shall be said, were not filed in support of these motions. Indeed, the motions are not accompanied by any affidavit, and need not be, as Rule 363 of the *Federal Courts Rules* only requires a party to set out in an affidavit facts to be relied

upon that do not appear in the Court record. The applicants are relying on the record as it was when I granted leave to commence judicial review as required by section 72 of IRPA (Hinton no. 3).

[12] I find that the Minister has no right to cross-examine Mr. Kurland on these motions. It is not necessary to rule on the Hintons' contention that the Minister had waived such right of cross-examination as he may have had or that his position constitutes an abuse of process. I do agree, however, that in essence the Minister is asking that I reconsider my decision in Hinton no. 3. If I am entitled to so do, which I rather doubt, I refuse.

AFFIDAVITS OF RICHARD KURLAND

[13] Mr. Kurland is a solicitor who practices immigration law in Vancouver. Although not counsel of record, he appears to be an instructing solicitor. He has filed a number of affidavits throughout all these proceedings by which various documents, such as annual reports by Citizenship and Immigration to Parliament, were introduced into the Court record, as well as other government documents he obtained through Access to Information. He was cross-examined in *Momi*, but not in Hinton no. 1. His affidavits cover the same matters, but vary in that the financial years at issue in *Momi* and in *Hinton* are not quite the same.

[14] He executed an affidavit in support of the applications for leave and judicial review in IMM-3195-08, IMM-3196-08 and IMM-3197-08. He simply confirmed and reiterated what he had said earlier. The record in Hinton no. 1, including his earlier affidavits and the exhibits appended thereto was reproduced and formed part of the record upon which I granted leave. It is worth noting that under section 12 of the *Federal Courts Immigration and Refugee Protection Rules*, "unless a judge

for special reasons so orders, no cross-examination of a deponent of an affidavit filed in connection with an application is permitted before leave to commence an application for judicial review is granted." The Minister did not seek leave to cross-examine Mr. Kurland before leave was granted.

[15] If these matters were to continue as applications for judicial review, which they are not, the Minister would have the absolute right to cross-examine Mr. Kurland. However, one of the great advantages of an action, as I stated both in *Momi* and in Hinton no. 1, is that evidence is not adduced by affidavits and cross-examinations thereon, but rather by a full production of documents, an examination for discovery and *viva voce* evidence at trial.

[16] The goal of the proposed cross-examination by the Minister is to obtain an admission from Mr. Kurland that there is nothing in the record which provides an evidentiary basis that the Government made any profit with respect to most of the visas, most of the time, and therefore those who paid for such visas should be excluded from the class. He relies upon *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, *Hoffman v. Monsanto Canada Inc.*, 2003 SKQB 174, 44 C.P.C. (5th) 290, *MacKinnon v. National Money Mart Co. et al*, 2004 BCSC 1533 and *Hickey-Button v. Loyalist College of Applied Arts & Technology*, (2006), 267 D.L.R. (4^{th}) 601, 31 C.P.C. (6^{th}) 390, for the proposition that there must be an evidentiary basis for constituting one particular class, rather than another.

[17] I disagree. There are two answers. The first, and I say this with respect, is that I do not care what Mr. Kurland thinks. He is not an expert accountant. I formed the view in *Momi*, Hinton no. 1 and Hinton no. 3, based on my own review of what is essentially the same documentation that there

is a fairly arguable case, as well as a fairly arguable defence. I am not going to sift through the same 1,500 pages of material a fourth time. It is time to move on.

[18] The second answer is that the cases cited by the Minister do not stand for the proposition he advances. Evidence on a motion for certification deals with such matters as common issues, a representative plaintiff, and preferable procedure. All of this was dealt with in Hinton no. 1 and Hinton no. 2.

[19] Indeed, as stated by the Chief Justice at paragraph 25 of *Hollick*, above:

> […] In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. [My emphasis]

[20] Since Hinton no. 1, the *Federal Courts Rules* have been amended to allow a class judicial review. Prior thereto, an application for judicial review had to be first converted into an action. However new rule 334.16(1)(a), like its predecessor, simply provides that the pleadings disclose a reasonable cause of action. The difference in applications under section 72 of IRPA is that the originating document is the application for leave. It is in the context of a perfected application that there ought to be some evidentiary basis disclosing a reasonable cause of action.

[21] I subscribe to the view of Rothstein, J.A. (as he then was) in *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 308 at paragraph 20:

> I would observe that, in immigration matters, leave must be obtained before judicial review may proceed. Therefore, in immigration matters, when a judicial review application gives rise to conversion/ certification applications, the question of whether there is a

> reasonable cause of action has been determined and should not be an issue on the conversion/certification applications. In the case of non-immigration judicial reviews, the reasonableness of the cause of action will be argued by the parties. If it is demonstrated that there is no reasonable cause of action, the conversion/ certification application will be dismissed. The judicial review may proceed but the applicant will know that the prospects of success are dim.

[22] In essence, the Minister is indirectly asking that I vary my order in Hinton no.3. Lord Denning, in his *The Discipline of Law*, quoted Sir George Jessel as saying "I may be wrong and sometimes am, but I am never in doubt." I may be wrong, and sometimes am, and am often in doubt. I doubt it is plain and obvious that the entire proposed class does not have a fairly arguable case. I decided, rightly or wrongly, three times over in *Momi* and in Hinton nos. 1 and 3 that that low threshold had been met. By restricting the class, in effect I am being asked to drive most of the applicants from the judgment seat. As I said in Hinton no. 3, in so doing I would be acting both perversely and capriciously.

[23] An order shall issue reconstituting the original class.

"Sean Harrington"
Judge

Montréal, Quebec
December 2, 2008

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	IMM-5015-06, IMM-3195-08 AND IMM-3197-08
STYLE OF CAUSE:	ALAN HINTON AND IRINA HINTON v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-3196-08
STYLE OF CAUSE:	SVETLANA POTAPOVA AND NIKOLAY POTAPOV v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING TOOK PLACE BY VIDEOCONFERENCE BETWEEN TORONTO, ONTARIO AND OTTAWA, ONTARIO

DATE OF HEARING:	November 25, 2008
REASONS FOR ORDER BY:	HARRINGTON J.
DATED:	December 2, 2008

APPEARANCES:

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