

Date: 20080306

Docket: A-186-07

Citation: 2008 FCA 87

**CORAM: NADON J.A.
SEXTON J.A.
RYER J.A.**

BETWEEN:

MOMIN RAHIM

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on February 14, 2008.

Judgment delivered at Ottawa, Ontario, on March 6, 2008.

REASONS FOR JUDGMENT BY:

RYER J.A.

CONCURRED IN BY:

**NADON J.A.
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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal from a decision of Mactavish J. (2007 FC 310) in which she dismissed an application for judicial review of a decision of a visa officer denying the application of Mr. Momin Rahim for a permanent resident visa, as an entrepreneur, pursuant to subsection 11(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”) and in accordance with subsection 10(1) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the “Regulations”).

[2] The issue in this appeal relates to the appropriate test to be applied with respect to the determination of whether Mr. Rahim had control of certain shares of a corporation, a condition of the definition of business experience that Mr. Rahim is obliged to meet to succeed in his application for a permanent resident visa as a member of the entrepreneur class.

BACKGROUND

[3] Mr. Rahim is a Pakistani citizen who moved from Pakistan to Texas in 1994. While in Texas, he was involved in the operation of a number of small businesses. One of those businesses is Quality Enterprises Inc. (the “corporation”), a corporation which owned and operated a gas station and convenience store. The incorporation date of the corporation is November 14, 2000.

[4] At the time of the organization of the corporation on November 20, 2000, Mr. Rahim was not a lawful resident of the United States. For that reason, Mr. Rahim stated that he did not want to have any of the issued shares registered in his name. Accordingly, 40% of the shares of the corporation were registered in his spouse’s name and the remaining 60% were registered in the name of Mr. Rahim’s friend, Mr. Abdul Noormohd Ali. The share certificates in respect of these issued shares are dated November 20, 2000.

[5] In 2003, a trust document was executed by Mr. Rahim, as trustor, and Mr. Ali, as trustee. In that document, Mr. Ali declared that all of Mr. Rahim’s right, title and interest in and to 60% of the shares of the corporation had previously been transferred by Mr. Rahim to him. The trust document indicates that the transfer of the shares by Mr. Rahim occurred on November 14, 2000, the date

upon which the corporation was incorporated. However, the shares were not issued until November 20, 2000, the date upon which the corporation was organized. Under the terms of the trust document, the trust is revocable at any time by Mr. Rahim, in which event all of the trust property will be transferred by Mr. Ali to Mr. Rahim.

[6] Mr. Rahim applied for a permanent resident visa on the basis that he is an entrepreneur, within the meaning of subsection 88(1) of the Regulations.

[7] Pursuant to subsection 97(1) of the Regulations, the entrepreneur class is prescribed as a class of persons, for the purposes of subsection 12(2) of the Act, who may become permanent residents on the basis of their ability to become economically established in Canada. To qualify for a permanent resident visa as an entrepreneur, the applicant must meet a number of conditions, one of which is that the applicant must have business experience, as defined in subsection 88(1) of the Regulations. The essential elements of that definition are that the applicant must have two years of experience in the management of a qualifying business and must have control of a percentage of equity, as defined in subsection 88(1) of the Regulations, of the qualifying business. Where the qualifying business is undertaken by a corporation, the percentage of equity means the percentage of the issued and outstanding voting shares of the corporation controlled by the applicant or the spouse or common-law partner of the applicant. The issue in this appeal relates to the requirement of control of a percentage of equity of a corporation.

[8] The visa officer stated that the documentary evidence showed that Mr. Rahim set up a trust whereby he had turned over his rights, titles and 60% interest in the issued shares of the corporation to Mr. Ali and accordingly, the visa officer considered that Mr. Rahim had relinquished his equity in the corporation. The visa officer concluded that Mr. Rahim did not meet the business experience requirement of the definition of entrepreneur in subsection 88(1) of the Regulations and, therefore, rejected Mr. Rahim's application.

APPLICABLE PROVISIONS OF THE REGULATIONS

[9] The relevant provisions of the Regulations are as follows:

<p>"business experience" , in respect of</p> <p style="text-align: center;">...</p> <p>(b) an entrepreneur, other than an entrepreneur selected by a province, means a minimum of two years of experience consisting of two one-year periods of experience in the management of a qualifying business <u>and the control of a percentage of equity of the qualifying business</u> during the period beginning five years before the date of application for a permanent resident visa and ending on the day a determination is made in respect of the application;</p>	<p>«expérience dans l'exploitation d'une entreprise» :</p> <p style="text-align: center;">[...]</p> <p>b) s'agissant d'un entrepreneur, autre qu'un entrepreneur sélectionné par une province, s'entend de l'expérience d'une durée d'au moins deux ans composée de deux périodes d'un an d'expérience dans la gestion d'une entreprise admissible <u>et le contrôle d'un pourcentage des capitaux propres de celle-ci</u> au cours de la période commençant cinq ans avant la date où la demande de visa de résident permanent est faite et prenant fin à la date où il est statué sur celle-ci;</p>
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<u>"entrepreneur" means a foreign national who</u>	<u>entrepreneur» Étranger qui, à la fois :</u>
(a) <u>has business experience;</u>	a) <u>a de l'expérience dans l'exploitation d'une entreprise;</u>
<u>"percentage of equity" means</u>	<u>pourcentage des capitaux propres»</u>
...	[...]
(b) <u>in respect of a corporation, the percentage of the issued and outstanding voting shares of the capital stock of the corporation controlled by a foreign national or their spouse or common-law partner;</u>	b) <u>dans le cas d'une société par actions, la part des actions du capital social avec droit de vote émises et en circulation que contrôle l'étranger ou son époux ou conjoint de fait;</u>

The Decision of the Federal Court

[10] Mr. Rahim applied to the Federal Court for judicial review of the decision of the visa officer rejecting his application. Mactavish J., of the Federal Court, found that Mr. Rahim owned 60% of the shares of the corporation and that he transferred those shares to Mr. Ali, as trustee, pursuant to the trust document. The Federal Court also found that the trust can be revoked at any time by Mr. Rahim.

[11] In upholding the decision of the visa officer, the Federal Court held that the test to be applied in the determination of whether an applicant controlled a percentage of equity of a qualifying business, as required by the definition of business experience in subsection 88(1) of the Regulations, had been established in *Huang v. Canada (Minister of Citizenship and Immigration)*,

2006 FC 507. According to the Federal Court, that test is whether the applicant had legal or *de jure* control over the shares in question. The Federal Court concluded that Mr. Rahim did not have legal control over the shares of the corporation because that control had been transferred to Mr. Ali, even though Mr. Rahim could have regained that control at any time by revoking the trust.

[12] The Federal Court held that the trust document did not impose any limitation on the capacity of the trustee to vote the shares of the corporation and that the voting rights attached to those shares would have to be considered in the *de jure* control analysis, citing *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795.

[13] The Federal Court went on to question whether the *de jure* control test that was developed in an income tax context is appropriate in an immigration context. In particular, in the context of subsection 88(1) of the Regulations, the purpose of which is to identify potential new immigrants who have demonstrated entrepreneurial skills that would be transportable to Canada, the Federal Court indicated that a *de facto* control test would seemingly be more appropriate.

[14] Nonetheless, the Federal Court held that Mr. Rahim had not shown that the test in *Huang* was manifestly wrong and in the interests of judicial comity, the Federal Court decided to follow *Huang* and upheld the decision of the visa officer.

[15] The Federal Court held that the interpretation of the phrase “the control of a percentage of equity of the qualifying business” in subsection 88(1) of the Regulations is an important legal question and certified the following question:

Does the phrase “the control of a percentage of equity of the qualifying business”, as it appears in subsection 88(1) of the *Immigration and Refugee Protection Regulations*, refer only to the legal or *de jure* control of the shares in issue, or does it include cases where an applicant may have *de facto* control over the shares in question, notwithstanding the fact that legal control over the shares may temporarily rest in another person?

ANALYSIS

Huang

[16] The basis of the decision of the Federal Court with respect to the test for control of shares of a corporation for the purposes of the definition of business experience in subsection 88(1) of the Regulations lies in the decision in *Huang*.

[17] In *Huang*, the shares of the corporation in question were held in trust for the applicant, Ms. Huang, by her father. The visa officer held that the applicant’s father had “all authority” over the shares in question in his capacity as trustee and, therefore, Ms. Huang did not control those shares. Lemieux J. found that in reaching this decision, the visa officer adopted a *de jure* control test. Lemieux J. stated that the *de jure* test is the proper test to determine control of a corporation for income tax purposes, citing the income tax cases of *Buckerfield’s Limited v. Canada (Minister of National Revenue)*, [1965] 1 Ex. C.R. 299 and *Duha Printers*, seemingly as implicit authority for the proposition that the same test should be applied with respect to the matter of control of shares for the purposes of the definition of business experience in subsection 88(1) of the Regulations.

Lemieux J. went on to find that the visa officer was justified, based on the evidence before him, in concluding that Ms. Huang did not control the shares in question and that any ambiguity in the trust documentation counted against her, since she had the burden of satisfying the visa officer that she met the requirements of the Act and the Regulations.

[18] In my view, the cases cited by Lemieux J. as authority for the *de jure* control test with respect to the determination of who, if anyone, controls a corporation for income tax purposes do not provide authority for the proposition that a *de jure* control test is applicable with respect to the determination of whether a person controls shares for the purposes of the definition of business experience in subsection 88(1) of the Regulations. With respect, income tax legislation and immigration legislation are based upon significantly different considerations. Moreover, the tests in *Buckerfield's* and *Duha Printers* deal with control of a corporation, whereas the test to be applied under the applicable provisions of the Regulations deals with control of shares of a corporation.

Effective Control

[19] The Court referred the parties to the decision of this Court in *Cloutier v. Canada (Minister of National Revenue)*, [1987] 2 F.C. 222; 1986 F.C.J. No. 778, a decision that interpreted the concept of control of shares in the context of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48 and the *Unemployment Insurance Regulations*, C.R.C., c. 1576. In that case, the issue was whether Mr. Cloutier retained control over certain shares that he had deposited in trust to provide security for a loan that he had received. Marceau J.A. held, at paragraph 5, that in the context of the

particular provision of that legislation, control could be interpreted as effective control, which he described as follows:

... effective control, which means control that can be freely exercised and is not impeded by circumstances independent of the person having control.

Applying this test, Marceau J.A. found that while the shares were the subject of the trust arrangement, Mr. Cloutier was not free to deal with them and accordingly, he did not have effective control of them.

[20] In my view, the effective control test in *Cloutier* is consistent with the language of the definitions of business experience and percentage of equity that are found in subsection 88(1) of the Regulations, as well as the purpose of the provisions of the Regulations which deal with immigration by entrepreneurs. Accordingly, I adopt this definition. I would also add that both counsel at the hearing agreed that this definition was appropriate.

Application - Huang

[21] While the decision in *Huang* is not under review, I would observe that the application of the effective control test to the facts in that case would likely have produced the same result. In that case, the evidence established that Ms. Huang was unable to deal with the shares that were held in trust for her and as a result, I do not believe that she would have met the effective control test.

Application in the Present Circumstances

[22] The Crown expressed some concern as to whether the documentation in the record adequately supported the factual findings of the visa officer and the Federal Court. The Crown correctly pointed out that on November 14, 2000, no shares of the corporation had been issued, such issuance having occurred six days later. This discrepancy was not the subject of comment by either the visa officer or the Federal Court and nothing in the record expressly explains it. However, it appears to be a simple mistake in that the date of incorporation of the corporation was included in the trust document rather than the date upon which the shares of the corporation were issued.

[23] Having correctly pointed out this discrepancy to the Court, the Crown did not contend that this or any other documentary discrepancy should be considered to be a basis upon which any of the factual findings of the visa officer and the Federal Court, including the finding that Mr. Rahim owned 60% of the shares of the corporation and transferred those shares to Mr. Ali as his trustee, should be set aside. Instead, the Crown's argument was focused on the legal test for control of the shares of the corporation and, as noted above, the Crown agreed that the effective control test referred to above was the appropriate one.

[24] In the present circumstances, Mr. Rahim has always been in a position to have the shares of the corporation transferred to him by revoking the trust. His power to do so is unfettered and can be freely exercised. While he caused those shares to be held in trust for a reason, at any time he wishes to do so, he can cause those shares to be transferred to himself and registered in his name. Mr. Rahim's circumstances are, in this important respect, fundamentally different from the

circumstances of Mr. Cloutier, who could not deal with his shares without first repaying the loan in respect of which those shares stood as security, and Ms. Huang, who had no apparent ability at all to gain control of the shares that were held in trust for her. Accordingly, I am of the view that Mr. Rahim has, and has always had, effective control over the shares of the corporation that are held in trust for him by Mr. Ali and has, therefore, demonstrated that he meets the requirement of control of a percentage of equity of the qualifying business in subsection 88(1) of the Regulations.

DISPOSITION

[25] I would answer the first part of the certified question in the negative and the second part by reference to paragraphs 19 and 20 of these reasons.

[26] For the foregoing reasons, I would allow the appeal, with costs, and set aside the decision of the Federal Court. I would allow the application for judicial review, with costs, set aside the decision of the visa officer denying Mr. Rahim's application for a permanent resident visa and refer the matter back to the Minister for reconsideration in accordance with these reasons.

“C. Michael Ryer”

J.A.

“I agree.
M. Nadon J.A.”

“I agree.
J. Edgar Sexton J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-186-07

**(APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE
MACTAVISH OF THE FEDERAL COURT, DATED MARCH 22, 2007, IN COURT FILE
NO. IMM-1835-06).**

STYLE OF CAUSE: MOMIN RAHIM v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: NADON J.A.
SEXTON J.A.

DATED: MARCH 6, 2008

APPEARANCES:

Cecil L. Rotenberg, Q.C. FOR THE APPELLANT

Ian Hicks FOR THE RESPONDENT

SOLICITORS OF RECORD:

CECIL L. ROTENBERG, Q.C.
Barrister & Solicitor
Toronto, Ontario FOR THE APPELLANT

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario FOR THE RESPONDENT