Date: 20091007

Docket: A-616-08

Citation: 2009 FCA 288

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

ZSOLT SOMODI

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on September 17, 2009.

Judgment delivered at Ottawa, Ontario, on October 7, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: SEXTON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Mootness of the appeal

[1] The appellant sought in the Federal Court judicial review of a decision of a visa officer which refused his spousal sponsorship application for permanent residence status as a member of a family class.

[2] At the same time as the appellant made his judicial review application, his sponsor appealed the decision of the visa officer.

[3] The appellant's application was dismissed by a judge of the Federal Court on the ground that paragraph 72(2)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) required the appellant's sponsor to exhaust her right of appeal to the Immigration Appeal Division (IAD) before an application for judicial review could be made.

[4] The appellant appealed the Federal Court's decision. While his appeal before us was pending, the IAD granted his sponsor's appeal and set aside the decision of the visa officer.

[5] The IAD found that there were "sufficient humanitarian and compassionate considerations to warrant special relief in light of all of the circumstances of this case". Consequently, the appellant would not be required to attend an immigration interview in Romania.

[6] Having set aside the decision of the visa officer, the IAD ordered that the officer "continue to process the application in accordance with the reasons" that it gave in support of its decision.

[7] In effect, the IAD, by setting aside the visa officer's decision, rendered the appellant's appeal moot since the decision which is the subject of the application for judicial review no longer exists. That is sufficient to dispose of it.

[8] However, the Federal Court judge certified a question on an issue which has not been considered by our Court. He was also of the view that the Immigration scheme would benefit from some clarity. The certified question relates to the legal effect of paragraph 72(2)(*a*) of the IRPA. It reads:

> Does section 72 of the IRPA bar an application for judicial review by the Applicant of a spousal application, while the sponsor exercises a right of appeal pursuant to section 63 of the IRPA?

[9] Both parties at the hearing submitted that it would be in the interest of justice that we answer the certified question. We invited them to address the issue raised by the certified question. I have come to the conclusion that the benefit of clarifying the law on this issue is not confined to the particular facts of this case and that judicial economy could result from a ruling of this Court on the legal effect of paragraph 72(2)(*a*) of the IRPA.

The decision of the Federal Court

[10] Paragraph 72(2)(*a*) of the IRPA reads:

> **72.** (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.
>
> (2) The following provisions govern an application under subsection (1):
>
> (*a*) the application may not be made until

> **72.** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
>
> (2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
>
> *a*) elle ne peut être présentée tant que les

any right of appeal that may be provided by this Act is exhausted;

voies d'appel ne sont pas épuisées;

[Emphasis added]

[11] Relying on the decisions of the Federal Court in *Sidhu v. Canada (M.C.I.)*, 2002 FCT 260; *Li v. Canada (M.C.I.)*, 2006 FC 1109; and *Ramautar v. Canada (M.C.I.)*, 2007 FC 1003, the judge concluded at paragraph 30 of his reasons for judgment that the "IRPA and the Regulations provide a process for reuniting family members where one is a Canadian citizen or permanent resident and the other is a foreign national".

[12] Under this process, the Canadian citizen or permanent resident is the Canadian family sponsor (family sponsor). The family sponsor becomes the person in charge of the family class immigration applications. Section 63 of the IRPA confers upon the family sponsor the right to appeal to the IAD against a decision not to issue the foreign national a permanent resident visa.

[13] The judge also ruled that the appeal to the IAD is an adequate alternate remedy in the form of an appeal *de novo*, readily available to the family sponsor and, therefore, convenient to deal with all the issues raised as a result of the visa officer's decision.

[14] Finally, interpreting paragraph 72(2)(*a*) of the IRPA, the judge concluded that the appellant could not make an application for judicial review. Any challenge to the immigration officer's decision had to proceed by an appeal by the sponsor. In his view, the words "any appeal" in the provision encompassed the right of appeal conferred to the family sponsor by section 63.

<u>Analysis of the decision</u>

[15] I am in substantial agreement with the decision of the Federal Court.

[16] The judge properly distinguished the earlier decision of the Federal Court in *Grewal v. Canada (M.E.I.)*, [1993] F.C.J. No. 363, rendered under the former *Immigration Act*, R.S.C. 1985, c. I-2 (Act). The former Act did not contain a statutory provision equivalent to paragraph 72(2)(*a*) of the IRPA.

[17] Nor is the case of *Khakoo v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1533 of any assistance to the appellant because of paragraph 72(2)(*a*) of the IRPA and because the scheme under the former Act was different from the existing one.

[18] The cases of *Telecommunications Workers Union v. Canada (Canadian Radio-Television and Telecommunications Commission – CRTC)*, [1993] 1 F.C. 231 (F.C.A.); *Arthur v. Canada (Attorney General)*, [1999] A.C.F. No. 1917; and *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.*, [1999] A.C.F. No. 242, relied upon by the appellant, are also distinguishable. They involved an interpretation of section 18.5 of the *Federal Courts Act* whose content is different from the content of paragraph 72(2)(*a*) of the IRPA. These cases refer to factual and legal situations not comparable to the ones in issue in the present proceedings. The statutory bar

in the IRPA is much broader than the bar in section 18.5 which prohibits a recourse to judicial review only to the extent that the decision may be appealed.

[19] Moreover, the right of appeal under the IRPA is much broader than the appeals contemplated in the three cases. In all three cases, an appeal required leave whereas in this case the appeal is of right. Furthermore, the appeal is also broader in scope. It is not limited as in the three cases to a question of law or a question of jurisdiction. Here, the appeal is *de novo* and, as the Federal Court judge pointed out citing Justice Dawson in the *Sidhu* case, the appeal remedy is far superior to that of judicial review. In my view, were section 18.5 of the *Federal Courts Act* to apply in this situation, the extent of the right of appeal under the IRPA is so broad that it precludes judicial review entirely.

[20] Finally, there is another reason to distinguish these three cases. In all of them, the parties seeking judicial review had no means of redress but for judicial review. They were denied leave to appeal because they were not a party to the proceedings. There was no guarantee that those who would be given leave to appeal would raise the applicants' positions as they were not necessarily sharing the same interests. This is not the case in this matter as the family sponsor and the foreign national pursue the same goal, i.e. the admission into Canada of the foreign national and a reunification of the family.

[21] In the IRPA, Parliament has established a comprehensive, self-contained process with specific rules to deal with the admission of foreign nationals as members of the family class. The

right of appeal given to the sponsor to challenge the visa officer's decision on his or her behalf to the benefit of the foreign national, as well as the statute bar against judicial review until any right of appeal has been exhausted, are distinguishing features of this new process. They make the earlier jurisprudence relied upon by the appellant obsolete.

[22] Parliament has prescribed a route through which the family sponsorship applications must be processed, culminating, after an appeal, with a possibility for the sponsor to seek relief in the Federal Court. Parliament's intent to enact a comprehensive set of rules in the IRPA governing family class sponsorship applications is evidenced both by paragraph 72(2)(*a*) and subsection 75(2).

[23] The broad prohibition in paragraph 72(2)(*a*) to resort to judicial review until "any" right of appeal has been exhausted is now provided for in the enabling statute as opposed to the more limited statutory bar provided by section 18.5 of the *Federal Courts Act*.

[24] Moreover, subsection 75(2) of the IRPA clearly states that in the event of an inconsistency between Division 8 – Judicial Review of the IRPA and <u>any</u> provision of the *Federal Courts Act*, Division 8 prevails to the extent of the inconsistency [emphasis added]. In other words, the statutory bar in paragraph 72(2)(*a*) prevails over section 18.1 of the *Federal Courts Act* granting the right to apply for judicial review.

<u>Whether the Federal Court judge should have stayed the appellant's application for judicial review instead of dismissing it</u>

[25] Counsel for the appellant submitted that the proper course of action for the Federal Court judge should have been to stay his judicial review proceedings while the spousal sponsor's appeal would be heard.

[26] The answer to this submission lies in the very nature of the family class sponsorship program, in the prohibition contained in paragraph 72(2)(*a*) and in subsection 75(2) of the IRPA which makes 72(2)(*a*) of the IRPA prevail over the right to judicial review conferred by section 18.1 of the *Federal Courts Act*.

[27] As the Federal Court judge found, under the family class sponsorship program, the family sponsor is the person vested with the rights and responsibilities created by the program, including the right to initiate and conduct the legal proceedings needed to assert his or her rights, also including the appeal proceedings before the IAD and, if necessary and authorized, judicial review in the Federal Court.

[28] At first blush, the family sponsorship scheme and the route chosen by Parliament to challenge an adverse decision may appear harsh to the appellant. However, it is the process that he and his spouse elected to choose to secure his entry into Canada.

[29] It should be remembered that, on a family sponsorship application, the interests of the parties are congruent. Both the sponsor and the foreign national seek a reunification of the family. It would be illogical and detrimental to the objectives of the scheme to allow a multiplicity of proceedings on the same issue, in different forums, to parties pursuing the same interests. It would also be detrimental to the administration of justice as it would open the door to conflicting decisions and fuel more litigation. This is precisely what Parliament intended to avoid.

[30] In addition, the appellant is not deprived of all remedies. He has other avenues such as an application to the Minister based on humanitarian and compassionate considerations pursuant to section 25 of the IRPA. We were told that such an application is pending. He has also unsuccessfully prevailed himself of the right to apply for refugee status as well as the right to apply for a pre-removal risk assessment.

[31] In my respectful view, the Federal Court judge had no other option under the present regime than to dismiss the appellant's application for judicial review.

[32] I would add the following. This case eloquently illustrates that an early application for judicial review may be unnecessary and an unwarranted waste of time, money and scarce judicial resources. The sponsor's appeal was successful and the impugned decision set aside. Staying the application for judicial review would not have revived an application that had become without object. As previously stated, it was a clear intention of Parliament to avoid a multiplicity of proceedings in respect of an immigration officer's decision regarding the sponsorship of a foreign

national as a family class member. To keep the application alive by staying it would also contravene Parliament's intent.

Whether costs ought to be awarded

[33] The appellant sought solicitor-client costs. There are, in my view, no exceptional circumstances within the meaning of section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 as amended by SOR/2002-232 which would justify an award of costs in this case, let alone solicitor-client costs. Therefore, I would issue no order as to costs.

Conclusion

[34] I would dismiss the appeal for mootness and would answer the certified question in the affirmative.

"Gilles Létourneau"

J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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