Federal Court  Cour fédérale

Date: 20140404

Docket: IMM-5758-13

Citation: 2014 FC 335

Vancouver, British Columbia, April 4, 2014

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MUKHTIAR SINGH PUNIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] When Mr. Punian, his wife and children immigrated to Canada from India, one daughter stayed behind. She was married at the time and had a child of her own. Thereafter, her marriage ended and she wanted to join her parents and siblings.

[2] Her father applied to sponsor her and her daughter.

[3] The visa officer held that she could not be sponsored because she was not a member of the family class within the meaning of the *Immigration and Refugee Protection Act* [IRPA] and *Regulations* thereunder.

[4] He then went on to consider whether there were sufficient humanitarian and compassionate considerations which would nevertheless allow him to issue permanent resident visas. He decided there were not.

[5] The sponsor, Mr. Punian, appealed to the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada. The panel upheld the visa officer's decision that his daughter and granddaughter did not fall within the definition of the family class. Having so found, the panel held it had no jurisdiction in law to take into account humanitarian and compassionate considerations. This is the judicial review of the IAD's decision, not the decision of the visa officer. It is most important to keep that distinction in mind.

[6] The decision that Mr. Punian's daughter, Kuljeet Kaur Punian, is not a member of the family class simply cannot be challenged in the light of section 117 of the *Regulations*. A foreign national is not a member of the family class if the sponsor has a spouse or a child who is a Canadian citizen or permanent resident. That is exactly the situation here.

[7] Counsel submitted that in instances where a visa officer deals both with whether the applicant falls within the definition of the family class, and humanitarian and compassionate considerations, it is open to the IAD to take into account such considerations, notwithstanding

the language of IRPA itself. Section 63 of IRPA gave Mr. Punian, as a sponsor, the right to appeal the visa refusal. However, section 65 goes on to provide that the IAD may not consider humanitarian and compassionate factors unless it is decided that the foreign national is a member of the family class, and that the sponsor is a sponsor within the meaning of the *Regulations*.

[8] Having upheld the visa officer's decision that Ms. Punian was not a member of the family class, the IAD declined to consider humanitarian and compassionate considerations.

[9] While it was correct for counsel for the applicant to point out that nevertheless the IAD has, in such circumstances, considered humanitarian and compassionate factors, that issue was recently put to rest by Mr. Justice Phelan in *Canada (Citizenship and Immigration) v Chen*, 2014 FC 262, [2014] FCJ No 268 (QL). In paragraph 14 of his reasons, he pointed out that in circumstances such as these, the IAD simply does not have jurisdiction.

[10] That is not to say that no recourse was available to challenge that part of the visa officer's decision in which he held that there were insufficient humanitarian and compassionate considerations. As Mr. Justice Phelan pointed out at paragraph 21 of his reasons, the recourse was by way of application for leave and judicial review to this Court. A case directly on point is the decision of Madam Justice Kane in *Kobita v Canada (Citizenship and Immigration)*, 2012 FC 1479, [2012] FCJ No 1580 (QL). There is a difference of opinion within the Court as to the timing of an application for judicial review of a visa officer's refusal to grant relief on humanitarian and compassionate considerations. In *Seshaw v Canada (Citizenship and Immigration)*, 2013 FC 396 and in *Habtenkiel v Canada (Citizenship and Immigration)*, 2013 FC

397, Madam Justice Heneghan, basing herself on the decision of the Federal Court of Appeal in *Somodi v Canada (Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 FCR 26, held that the legislative scheme enacted by Parliament requires that the sponsor appeal of the negative decision of the IAD be determined before someone like Ms. Punian may seek leave and judicial review. It is not necessary for me to comment as in this case Ms. Punian has not yet challenged the visa officer's H&C decision.

[11] Mr. Punian also invokes a lack of procedural fairness because the IAD did not grant him an oral hearing. Even if there were procedural unfairness, it is impossible for the conclusion of the IAD to be any different (*Mobil Oil Canada Ltd v Canada Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, [1994] SCJ No 14 (QL)).

[12] Counsel complains that this bifurcation of remedies is an affront to access to justice. If a statute is open to be interpreted in different ways, it should be interpreted to ease access to justice and to minimize unnecessary costs and complexity (*Canada (Attorney General) v TeleZone Inc*, [2010] 3 SCR 585, [2010] SCJ No 62 (QL)). However, there is no ambiguity. This is not the only statute in which Parliament, in its wisdom, has bifurcated remedies.

[13] Under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, a challenge to a finding that an individual has violated the Act is by way of trial, while the penalty or sentencing is by way of judicial review. In other words, one must file for a judicial review of a penalty long before the Court determines whether or not the Act had actually been violated!

(*Tourki v Canada (Public Safety and Emergency Preparedness)*, 2007 FCA 186, [2007] FCJ No 685 (QL)).

[14] The visa officer's decision was rendered 31 August 2012. The reasonableness thereof with respect to humanitarian and compassionate grounds is not before me. Although Ms. Punian is beyond the delays to seek leave and judicial review, section 72(2) of IRPA allows a judge, for special reasons, to allow an extension of time, which is consistent with section 18.1(2) of the *Federal Courts Act*.

[15] There is no serious question of general importance to certify.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5758-13
STYLE OF CAUSE:	MUKHTIAR SINGH PUNIAN v MCI
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 2, 2014
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	APRIL 4, 2014

APPEARANCES:

Gerald G. Goldstein	FOR THE APPLICANT
R. Keith Reimer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barbeau, Evans & Goldstein Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT