

BETWEEN:

JASVIR SAJJAN,

Applicant

- and -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND
THE ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR ORDER

GIBSON J.:

By Originating Notice of Motion filed the 8th day of July, 1996, the Applicant seeks judicial review, pursuant to section 18.1 of the *Federal Court Act*¹ and section 82.1 of the *Immigration Act*,² of a decision of the Immigration Appeal Division (the "Panel") of the Immigration and Refugee Board (the "Board"), that the Applicant's adopted son is not a member of the family class and that therefore the Panel was without jurisdiction to hear an appeal, pursuant to subsection 77(3) of the *Immigration Act*, of a decision of a visa officer under subsection 77(1) of that Act.

¹ R.S.C. 1985, c. F-7 (as amended)

² R.S.C. 1985 c. I-2 (as amended)

Counsel for the Applicant takes the position that the application for judicial review falls within the ambit of subsection 82.1(2) of the *Immigration Act* rather than subsection 82.1(1). Those subsections read as follows:

82.1(1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court - Trial Division.

(2) Subsection (1) does not apply with respect to a decision of a visa officer on an application under section 9, 10, or 77 or to any other matter arising thereunder with respect to an application to a visa officer.

If counsel for the Applicant is correct in his position, then this application for judicial review can proceed without leave, that is to say, as of right.

On the face of the Originating Notice of Motion, the following paragraph appears:

The Applicant requests the Appeal Division of the Immigration and Refugee Board, ... to send a certified copy of the following material that is in its possession to the Applicant and to the Registry [of the Court].

i) Complete transcript of the hearing of the appeal on February 22, 1996... alongwith [sic] the Exhibits and documents on file.

[the address of the Panel and the Panel's file number have been omitted from the foregoing quotation].

Whether or not leave is required in respect of this application for judicial review, the procedure on the application is governed by the *Federal Court Immigration Rules, 1993*.³ Section 3 of those Rules reads as follows:

3.(1) These Rules apply to applications and appeals which are commenced after the coming into force of sections 73, 114, 115, 116, 117 and 118 of *An Act to amend the Immigration Act and other Acts in consequence thereof*, chapter 49 of the Statutes of Canada, 1992.

(2) Part V.I of the *Federal Court Rules* and Rule 18 of these Rules apply to applications for judicial review of a decision of a visa officer.

Subsection 3 (1) clearly applies to this application for judicial review. The exception provided in subsection 3(2) extends only to applications for judicial review of decisions of visa officers and that is clearly not the case here. Paragraph 15(1)(b) of the Rules provides that an order granting an application for leave shall specify the time limit within which the tribunal (here the Panel) is to send copies of its record as required by section 17 of the Rules. Subsection 15(2) requires the Registry of this Court to send to the Board a copy of an order granting leave "forthwith after it has made", thus ensuring that the Panel has notice of its obligation to send copies of its record. Section 17 of the Rules imposes an obligation on the Board or Panel, upon receipt of an order under section 15, to prepare a record including "...a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application," and imposes a further obligation on the

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Board or Panel to send certified copies of that record to the parties to the appeal and to the Registry of this Court.

Counsel for the Applicant takes the position that a complete transcript of the hearing before the Panel is essential to allow him to complete his application record. The Board has refused to provide the requested material on the basis of its position that leave of this Court is required to commence this application for judicial review, that is to say that it falls within the ambit of subsection 82.1(1) rather than subsection 82.(1)(2) of the *Immigration Act*, and that, since the *Federal Court Immigration Rules* apply, leave of this Court is a condition precedent to any obligation on the Board to provide the requested material.

The Applicant is now out of time to file his application record.

By reason of the Applicant's tardiness in filing his application record, on October 25, 1996, this Court issued an order requiring the Applicant to show cause why his application for judicial review should not be summarily dismissed. Counsel for the Applicant responded citing the failure of the Panel to provide the requested material and, by Notice of Motion, requesting an extension of time to file the Applicant's application record.

Counsel for the Respondent opposes the application for an extension of time on two bases: first, that the Board is correct in its position that leave is required to commence this application for judicial review and, leave not having been applied for or obtained, the Board is under no obligation to provide the requested material; and second, even if leave is not required, the Applicant has not fully justified his delay in filing an application record in that the Board has offered access to tapes of the Panel's hearing and both the Applicant and his counsel were present throughout the hearing and therefore do not require a transcript to complete the application record. On the basis of the same reasoning, counsel for the Respondent seeks an order striking the Applicant's Originating Notice of Motion under the authority of the Court's show cause order.

The Court is entitled to proceed on the basis of its show cause order without appearance of counsel. The Applicant's motion for an extension of time is brought pursuant to Rule 324 of the *Federal Court Rules* and therefore can also be disposed of without the appearance of counsel.

The first issue before the Court is whether or not the Applicant's application for judicial review is exempt from the requirement for leave established by subsection 82.1(1) of the *Immigration Act* by reason of the exception contained in subsection (2) of the same section. Subsection 82.1(2) is repeated here for convenience:

- (2) Subsection (1) does not apply with respect to a decision of a visa officer on an application under section 9, 10 or 77 or to any other matter arising thereunder with respect to an application to a visa officer.

The decision in respect of which judicial review is sought is certainly not "... a decision of a visa officer on an application under section 9, 10, or 77 [of the *Immigration Act*]...". Is it then "...any other matter arising thereunder with respect to an application to a visa officer?" I am satisfied that the words "arising thereunder" in subsection 82.1(2) refer to matters arising under section 9, 10 or 77 of the *Immigration Act*. Subsections 77(1) and (3) of the *Immigration Act* read as follows:

77. (1) Where a person has sponsored an application for landing made by a member of the family class, an immigration officer or visa officer, as the case may be, may refuse to approve the application on the grounds that
- (a) the person who sponsored the application does not meet the requirements of the regulations respecting persons who sponsor applications for landing or
 - (b) the member of the family class does not meet the requirements of this Act or the regulations;
- and the person who sponsored the application shall be informed of the reasons for the refusal.
- (3) Subject to subsections (3.01), (3.02) and (3.1), a Canadian citizen or permanent resident who has sponsored an application for landing that is refused pursuant to subsection (1) may appeal to the Appeal Division on either or both of the following grounds:
- (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
 - (b) on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

Subsections (3.01), (3.02) and (3.1) referred to in subsection 77(3) are not relevant for the purpose of the question that is now before the Court.

I am satisfied that the decision of the Panel with respect to which judicial review is sought is a decision or matter "...arising" under section 77 even though it was made under the authority of subsection 69.4(2) which vests the Panel with exclusive jurisdiction to determine questions of jurisdiction in respect of appeals made pursuant to section 77. I am also satisfied that the decision is "...with respect to an application to a visa officer." The appeal to the Panel arose out of a decision of a visa officer under subsection 77(1) made following an application to a visa officer. If subsection 82.1(2) were intended to apply only to decisions of visa officers on applications under section 77, then all of the words following "77" in that subsection, as they relate to that section, would be superfluous. I am not prepared to conclude that Parliament meant the closing words to be without meaning.

Although the terminology of subsection 82.1(2) is less than as clear as one would wish⁴, I am not satisfied that the closing words of that subsection can be interpreted in any other way but to include an application for judicial review such as that which is now before the Court. In the result, I conclude that leave of a judge of this Court to commence the application for judicial review is not required.

The second question that arises is whether or not the Board is, on the facts of this matter, under an obligation by virtue of section 17 of the *Federal Court Immigration Rules* to prepare a record, including a transcript of the oral hearing before the panel, and to provide a copy of that record to the Applicant. The obligation under section 17 of the Rules arises "Upon receipt of an order under Rule 15...". An order under section 15 of the Rules is an order granting an application for leave. On the facts before me, no application for leave has been made to the Court and, as indicated in these reasons, I conclude that no such application was required. In the absence of such an application and an order granting leave, no obligation is placed on the Board by section 17 of the Rules. In the result, on the circumstances of this application, the Board is correct in concluding that it has no obligation in law to provide to the Applicant a record of the proceedings before the Panel, with or without a transcript of those proceedings.

I recognize that my foregoing conclusions result in an anomalous situation under which neither an applicant or this Court has a right to require of the Board a record of its proceedings to facilitate certain applications for judicial review. It is for others to determine whether, in such circumstances, an amendment to the *Immigration Act* or the *Federal Court Immigration Rules* is required.

There remains the question of whether the Applicant, in his application for an extension of time to file his application record has fully accounted for the delay to this point in time. There is no doubt that the Applicant could have proceeded more expeditiously in preparation of his application record, even in the absence of the material that he requested from the Board. However, given the fact that the denial of access to material in the possession of the Board undoubtedly resulted in some prejudice to the Applicant and the fact that that denial was based on an interpretation of provisions of law that are not entirely clear on the facts of this matter, I am not prepared to deny the Applicant a reasonable extension of time to file his Applicant's application record.

In the result, the Court will not at this time proceed further under its Show Cause Order and an extension of time to file the Applicant's application record will be granted.

⁴ SOR/93-22

“Frederick E. Gibson”

Judge

Ottawa, Ontario
January 24, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: IMM-2292-96

STYLE OF CAUSE JASVIR SAJJAN c. LE MINISTRE DE LA CITOYENNETÉ ET DE
L'IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE GIBSON

DATED: January 24, 1997

APPEARANCES:

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FOR THE APPLICANT

Mr. John Loncar

FOR THE RESPONDENT

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