Date: 20030319

Docket: IMM-1937-02

Neutral citation: 2003 FCT 325

BETWEEN:

VAN LAP NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.:

INTRODUCTION

[1] These reasons arise out of an application for judicial review of a decision of the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board wherein the IAD rejected an appeal by the Applicant from a decision of a visa officer rejecting the Applicant's brother's application for permanent residence in Canada. The Applicant had sponsored his brother's application for permanent residence, as a member of the family class. The decision under review is dated the 16th of April, 2002 and was based upon a determination by the IAD that it lacked jurisdiction to hear the Applicant's appeal.

[2] The IAD wrote in its reasons:

> The issue of whether or not an applicant [for permanent residence in Canada] is a member of the family class is a jurisdictional issue, that is, for the Immigration Appeal Division to assume jurisdiction, the applicant must be found to be a member of the family class.[1]

Later in its reasons, the IAD wrote:

> For the reasons stated above I am satisfied that while the appellant's [here the Applicant's] mother is alive, the appellant's brother does not fit within section 2(1)(h) of the Regulations [a portion of the definition "member of the family class"].
>
> As the applicant [here the Applicant's brother] therefore is not a "member of the family class" as defined by the Regulations, the respondent's [the Minister of Citizenship and Immigration's] motion to dismiss this appeal for lack of jurisdiction is granted. ...[2]

THE LEGISLATIVE SCHEME

[3] "Member of the family class" is defined in subsection 2(1) of the *Immigration Regulations, 1978*[3] (the "*Regulations*") in the following terms:

"member of the family class", with respect to any sponsor, means	«parent» À l'égard d'un répondant, l'une des personnes suivantes :
(a) the sponsor's spouse,	a) son conjoint;
(b) the sponsor's dependent son or dependent daughter,	b) un fils à sa charge ou une fille à sa charge;
(c) the sponsor's father or mother,	c) son père ou sa mère;
(d) the sponsor's grandfather or grandmother,	d) son grand-père ou sa grand-mère;
(e) the sponsor's brother, sister, nephew, niece, grandson or granddaughter, who is an orphan and is under 19 years of age and unmarried,	e) son frère, sa soeur, son neveu, sa nièce, son petit-fils ou sa petite-fille, orphelins âgés de moins de 19 ans et non mariés;
(f) the sponsor's fiancée,	f) sa fiancée;
(g) any child under 19 years of age whom the sponsor intends to adopt and who is	g) un enfant de moins de 19 ans qu'il a l'intention d'adopter et qui est, selon le cas :

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[1] Tribunal Record, page 3.

[2] Tribunal Record, page 7.

[3] SOR/78 - 172.

(i) an orphan,
(ii) an abandoned child whose parents cannot be identified,
(iii) a child born outside of marriage who has been placed with a child welfare authority for adoption,
(iv) a child whose parents are separated and who has been placed with a child welfare authority for adoption, or
(v) a child one of whose parents is deceased and who has been placed with a child welfare authority for adoption, or
(h) one relative regardless of the age or relationship of the relative to the sponsor, where the sponsor does not have a spouse, son, daughter, father, mother, grandfather, grandmother, brother, sister, uncle, aunt, nephew or niece
(i) who is a Canadian citizen,
(ii) who is a permanent resident, or
(iii) whose application for landing the sponsor may otherwise sponsor;

(i) un orphelin,
(ii) un enfant abandonné dont les parents sont inconnus,
(iii) un enfant né hors mariage qui a été confié à un bureau de protection de l'enfance aux fins d'adoption,
(iv) un enfant dont les parents sont séparés et qui a été confié à un bureau de protection de l'enfance aux fins d'adoption,
(v) un enfant dont l'un des parents est décédé et qui a été confié à un bureau de protection de l'enfance aux fins d'adoption;
h) une personne apparentée, indépendamment de son âge ou de son lien de parenté avec le répondant, dans le cas où le répondant n'a pas de conjoint, de fils, de fille, de père, de mère, de grand-père, de grand-mère, de frère, de soeur, d'oncle, de tante, de neveu ou de nièce :
(i) soit qui est citoyen canadien,
(ii) soit qui est résident permanent,
(iii) soit dont il peut par ailleurs parrainer la demande d'établissement.

[4] “Sponsor” is defined in the same subsection of the *Regulations* in the following terms:

"sponsor" means a person who
(a) is a Canadian citizen or permanent resident who is at least 19 years of age, sponsors an application for landing of a member of the family class and satisfies an immigration officer that the person will reside in Canada exclusively and without interruption beginning on the date of giving an undertaking in respect of the application for landing until the member is granted landing in Canada, and that the person will reside in Canada after that time, or
(b) is a Canadian citizen who is at least 19 years of age, sponsors an application for landing of a member of the family class referred to in subsection 6(3) and satisfies a visa officer that, at the time of giving an undertaking in respect of the application for landing, the person resided exclusively outside Canada and that the person will reside in Canada when the member is granted landing in Canada;

« répondant »
a) Citoyen canadien ou résident permanent âgés d'au moins 19 ans qui parrainent la demande d'établissement d'un parent et qui démontrent à l'agent d'immigration qu'ils résideront exclusivement au Canada, sans interruption, à partir de la date de leur engagement à l'égard de la demande jusqu'au moment où le parent se verra accorder le droit d'établissement au Canada et qu'ils résideront au Canada après ce moment;
b) citoyen canadien âgé d'au moins 19 ans qui parraine la demande d'établissement d'un parent visé au paragraphe 6(3) et qui démontre à l'agent des visas qu'il résidait exclusivement à l'étranger à la date de son engagement à l'égard de cette demande et qu'il résidera au Canada lorsque le parent se verra accorder le droit d'établissement au Canada.

[5] The opening words of subsection 5(2) of the *Regulations*, with cross-references that are irrelevant for the purposes of this matter deleted, and paragraph (a) of that subsection read as follows:

5.(2) . . . a person who is a Canadian citizen or permanent resident and who meets the following requirements is authorized to sponsor the application for landing of any member of the family class: (a) the person is a sponsor within the meaning of paragraph (a) or (b) of the definition "sponsor" in subsection 2(1); ...	5.(2) . . . est autorisé à parrainer la demande d'établissement d'un parent tout citoyen canadien ou résident permanent qui satisfait aux exigences suivantes : a) il est un répondant au sens des alinéas a) ou b) de la définition de « répondant » au paragraphe 2(1); ...

[6] Finally, the opening words of subsection 6(1) of the *Regulations*, once again with cross-references not relevant for the purposes of this matter deleted, and paragraph (b) of that subsection read as follows:

6. (1) . . . where a member of the family class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member and the member's accompanying dependants if ... (b) the sponsor and, if the sponsor's spouse has co-signed the undertaking referred to in paragraph 5(2)(b), the sponsor's spouse meet the applicable requirements set out in section 5, subject to section 5.1 in the case of an undertaking in respect of a member of the family class who intends to reside in the Province of Quebec; ...	6. (1) . . . lorsqu'une personne appartenant à la catégorie de la famille présente une demande de visa d'immigrant, l'agent des visas peut lui en délivrer un ainsi qu'à toute personne à charge qui l'accompagne: ... b) si le répondant et son conjoint, dans le cas où ce dernier a cosigné l'engagement visé à l'alinéa 5(2)b), satisfont aux exigences applicables énoncées à l'article 5, sous réserve de l'article 5.1 dans le cas d'un engagement donné à l'égard d'un parent qui entend résider au Québec; ...

[7] The visa officer whose decision was before the IAD is quoted by the IAD as having advised the Applicant's brother in part as follows:

> We have been advised by Citizenship and Immigration Canada's Case Processing Centre in Mississauga, Ontario that the sponsorship application submitted by [the Applicant herein] in Canada has not been approved, as he is ineligible under section 5(2)(a) of Canada's Immigration Regulations to sponsor your application as a member of the family class of immigration [sic]. As a result, I am unable under section 6(1)(b) of the Regulations to issue visas to you as a member of this class.[4]

THE ISSUES

[8] The only issues identified on this application were first, the appropriate standard of review, and second, against the appropriate standard of review, whether the IAD erred in its interpretation of paragraph (h) of the definition "member of the family class" when it concluded that so long as the Applicant's mother is alive, the Applicant's brother is not sponsorable by the Applicant as a "member of the family class".

ANALYSIS

[9] Interpretation of the definition "member of the family class" in subsection 2(1) of the *Regulations* is, I am satisfied, a pure question of law. That being said, the application of the particular facts of this matter to an appropriate interpretation of that definition is a mixed

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[4] Tribunal Record, page 2.

question of fact and law. In the circumstances, I am satisfied that the appropriate standard of review of the decision here under review is reasonableness *simpliciter*.

[10] In *ExpressVu Inc. v. NII Norsat International Inc.*[5], at paragraph [35] of my reasons, I adopted the following paragraphs, together with others, and modified as noted in what follows, of the reasons from the Honourable Judge LeGrandeur in *R. v. Knibb*[6]:

> The modern purposive approach to statutory interpretation seeks to determine the purpose and object of the legislation and to give it such interpretation as best shares [ensures] the attainment of such object and purpose. ...
>
> This is the approach that is to be applied in all cases regardless of whether the section or sections in the statute under consideration are ambiguous or not.
>
> The purpose or object of the legislation is to be gleaned from the whole. The construction of a section of a statute must be considered in the context of the whole statute. It can't be looked at in isolation, but must be considered in the context of the whole statute and its determined object and purpose. *Driedger on the Construction of Statutes,* 3rd edition at p. 44 describes the process thus:
>
> > "In purposive analysis every factor [feature] of legislation from the overall conception to small [and] linguistic detail is presumed to be there for a reason. It is presumed to address a concern, anticipate a difficulty or in some way promote the legislature's goals."
>
> At page 34 [35] of Driedger, supra, it is stated:
>
> > "Under a purposive approach, the definitive legislative task is not creation of a text, but the adoption of appropriate policies and goals and a plan for implementation. On this approach the text is thought of as a map or blueprint and the primary focus and interpretation is not so much the meaning of the text as the reasons for enacting it and the directions in which it points. Under a purposive approach, the Court defers to the legislature not by decoding its language, but by insuring that its plans are carried out."
>
> Legislative purpose may be established by reliance on a description of purpose emanating from authorized sources including statements made by the legislature itself and also descriptions of purpose appearing in the extra-legislative sources like commission reports, Hansard, academic texts and the like. Legislative purpose may also be established by the courts construing a plausible account of purpose out of the words of the legislation read in context. (See Driedger, Construction of Statute page 50 through 51).

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5 [1998] 1 F.C. 245 (F.C.T.D.); affirmed on appeal (1997), 81 C.P.R. (3d) 345.

6 [1997] A.J. No. 513 (Prov. Ct.)(Q.L.), reported at [1997] 8 W.W.R. 115, affirmed on appeal [1998] A.J. No. 628.

> More often than not, establishing the legislative purpose or object of a statute or legislative scheme is attained by application of both the aforementioned approaches.
>
> ... [some citations omitted]

[11] The *Immigration Act* itself contains a statement of Canadian immigration policy. Under the headings "Canadian Immigration Policy" and "Objectives", the opening words of section 3 and paragraph (c) of that section read as follows:

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need ...	3. La politique canadienne d'immigration ainsi que les règles et règlements pris en vertu de la présente loi visent, dans leur conception et leur mise en oeuvre, à promouvoir les intérêts du pays sur les plans intérieur et international et reconnaissent la nécessité : ...
(c) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad; ...	c) de faciliter la réunion au Canada des citoyens canadiens et résidents permanents avec leurs proches parents de l'étranger; ...

I am satisfied that the definition "member of the family class" in subsection 2(1) of the *Regulations* is directed to recognition of the foregoing objective.

[12] In *Mahmood v. Canada (Minister of Citizenship and Immigration)*[7], Justice Evans, then of the Federal Court of Appeal, but writing as a judge of the Trial Division, wrote at paragraph [16]:

> In contrast, the policy underlying paragraph 2(1)(*h*) [of the *Regulations*] would seem to be geared principally to ameliorating the position of a person with no relatives in Canada.

That is the position of the Applicant herein.

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[7] [2001] 1 F.C. 563 (T.D.).

[13] Counsel for the Applicant cited two (2) decisions of the IAD which support the position adopted by the Court of Appeal of *Mahmood*. In *Mlinarich v. Canada (Minister of Citizenship and Immigration)*[8], Appeal Division Member Buchanan wrote at paragraph 20 of his reasons:

> It seems to me that section 2(1)(h) of the Regulations presents a clear legislative intent to depart from the strictly defined family group and for good reason. To relieve the isolation of a Canadian citizen or permanent resident who finds themselves [sic] not only alone in Canada, but without any family members who by legislative definition they may otherwise sponsor. In my view, this provision is intended to relieve the harshness of that situation, and to restrict it in the manner proposed by the Minister's counsel would undermine the provision.
>
> [emphasis added]

[14] In *Sarmiento v. Canada (Minister of Citizenship and Immigration)*[9], Appeal Division Member Whist wrote at paragraph 15:

> ...The panel agrees with Member Buchanan [in Mlinarich] that the parliamentary intent of 2(1)(h) is to assist persons isolated in Canada without family. This is similar to Justice Evans assessment of the purpose of 2(1)(h) when he states in Mahmood that 2(1)(h) "would seem to be geared principally to ameliorating the position of a person in Canada with no relatives". ... So, in a scenario in which an appellant ceased to have a relative in Canada who was originally sponsored under 2(1)(h), for example, because of death, in the panel's opinion [the appellant] should have the opportunity to sponsor a further one relative. [citation omitted]

[15] Counsel for the Respondent directed my intention to a number of reported decisions, the most relevant of which I regard as *Rafizade v. Canada (Minister of Citizenship and Immigration)*[10] where Justice Cullen sounded the following cautionary note at paragraph [13]:

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[8] [2002] I.A.D.D. No. 1887 (QL).

[9] [2002] I.A.D.D. No. 911 (QL).

[10] (1995), 30 Imm. L.R. (2d) 261 (F.C.T.D.).

> It is not the role of the Court to expand the scope of the family for immigration purposes beyond that which Parliament has determined to be appropriate.

[16] I regard the paragraph quoted from *Mlinarich, supra*, particularly the portion of that paragraph that I have emphasized, and Justice Cullen's cautionary note from *Rafizade* as constituting the most helpful commentary on the definition "member of the family class", and particularly paragraph (*h*) of that definition, read in the light of the overriding principle of family unification.

[17] The definition "member of the family class" sets out in paragraphs (*a*) to (*g*), relatives of a potential sponsor and the fiancée of a potential sponsor whom the potential sponsor is entitled by subsection 5(2) of the *Regulations* to sponsor. Paragraph (*h*) is, I conclude, a "mechanism of last resort" to ensure that a potential sponsor who has any relative, regardless of age or relationship, will not be without an opportunity to sponsor a relative in circumstances where there is no one described in paragraphs (*a*) to (*g*) of the definition that he or she "...may otherwise sponsor". Such an interpretation is consistent with the principle of family unification without providing a potential sponsor with an option in favour of a relative outside the classes described in paragraphs (*a*) to (*g*). Where a sponsor has resort to paragraphs (*a*) to (*g*), I am satisfied that the option of last resort is not exercisable simply because all of the persons described in paragraphs (*a*) to (*g*) prefer not to join the potential sponsor in Canada.

[18] My preferred interpretation is, I am satisfied, consistent with a purposive interpretation of the legislative scheme as a whole, with the rationale enunciated by Justice Evans in *Mahmood*, with the cautionary note sounded by Justice Cullen in *Rafizade*, and with the reference by Appeal Division Member Buchanan in *Mlinarich* to a potential sponsor who is without family members who by legislative definition he or she might otherwise sponsor.

[19] Counsel for the Applicant urged that the interpretation that I favour leaves the words "whose application for landing the sponsor may otherwise sponsor", those words constituting subparagraph (iii) of paragraph (*h)* of the definition "member of the family class", without meaning and that Parliament must be interpreted as having intended that those words have meaning. I reject this argument. I am satisfied that the words to which counsel directs me are entirely consistent with the interpretation that I have given to the definition "member of the family class" read as a constituent element of the legislative scheme as a whole, as it should be.

[20] On the facts of this matter, the Applicant was, at the time the decision under review was delivered, not without resort to a "member of the family class" described in paragraphs (*a*) to (*g*) of that definition. His mother was alive. Evidence that the Applicant put before the Court, which did not include any evidence emanating directly from his mother, indicated that his mother did not wish to come to Canada and that she had had medical difficulties. The IAD found these impediments to the Applicant successfully sponsoring his mother not to be determinative. It further found the evidence regarding the impediments to be less than fully

persuasive, albeit that, even if it had been fully persuasive, it would not have affected the outcome.

[21] I find the conclusion arrived at by the IAD to be not only reasonably open to it but to indeed be correct.

CONCLUSION

[22] Based on the foregoing analysis, this application for judicial review will be dismissed.

CERTIFICATION OF A QUESTION

[23] Counsel for the Applicant recommended certification of the following question:

> "In order to invoke the right of a sponsor to rely on section 2(1)(h)(iii) of the Immigration Regulations to sponsor one relative must other potential applicants take a positive step in submitting an application for permanent residence to Canada before she is excluded from the list of eligible relatives for sponsor or is mere refusal to submit an application for permanent residence sufficient, or can the visa officer assess the probability of whether or not the optional applicant could succeed as a matter of probability and not possibility?"

[24] Counsel for the Applicant urges that the foregoing question is a serious question of general importance that would be determinative on an appeal of my decision herein. By contrast, counsel for the Respondent urges that it is not a serious question of general importance.

[25] I adopt the position of counsel for the Respondent. I conclude that the question proposed is not a serious question of general importance that would be determinative. My analysis places no importance whatsoever on the fact that the Applicant's mother was not sponsored and did not submit an application for landing in Canada on the basis of a sponsorship. Rather, the essence of my analysis is that where a sponsor has a relative living abroad who is within the classes of persons described in paragraphs (a) to (g) of the definition "member of the family class" in the *Regulations*, there exists no authority for the sponsor to choose to sponsor a person falling within paragraph (h) of that definition. Such were the facts before me.

[26] At hearing, counsel for the Applicant urged that regard should be had to the legislative scheme under the *Immigration and Refugee Protection Act*[11] and related Regulations. That scheme, of course, was not before the IAD when the decision under review was made. Further, that scheme did not amount to a mere amendment of the legislative scheme that was before the IAD, but rather amounted to a complete repeal and replacement of that scheme. In the circumstances, and I recorded this conclusion at the hearing, I am satisfied that it would be quite inappropriate to have regard to the new legislative and regulatory scheme in arriving at my decision.

[27] Further, in light of the arrival of a complete new legislative and regulatory scheme on the scene since the time the decision under review was made, I conclude that my decision herein can

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[11] S.C. 2001, c. 27.

hardly be regarded as one that is of “general importance”. Rather, it may well be the last decision on facts such as those before me, under a legislative and regulatory scheme that is no longer in force.

[28] In the circumstances, I decline to certify the question proposed on behalf of the Applicant, or any other question.

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J. F.C.C.

Ottawa, Ontario
March 19, 2003

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED: MARCH 19, 2003

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