Date: 20080909

Docket: IMM-3197-08

Citation: 2008 FC 1007

Ottawa, Ontario, September 9, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ALAN HINTON AND
IRINA HINTON

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is round three in the efforts of Baz Singh Momi, Alan and Irina Hinton and others to have a class action certified: an action which would seek recovery of a portion of fees charged for more than 40 types of immigration visas prescribed in regulations under the *Immigration and Refugee Protection Act* (IRPA) and its predecessor, the *Immigration Act*. The legal basis is section 19(2) of the *Financial Administration Act* which provides that a profit cannot be made on a user fee. The factual basis is the suspicion derived from the annual reports filed by Citizenship and

Immigration Canada with Parliament, and other documents obtained through Access to Information, that a profit was in fact made visa by visa, year after year.

[2] It began as IMM-1669-05, *Momi v. Canada (Minister of Citizenship and Immigration)*. This was, and is, an action which seeks recovery in excess of $700 million with respect to the issuance of some 10 million visas to a class which probably exceeds two million in number.

[3] As reported in *Momi*, 2006 FC 738, [2007] 2 F.C.R. 291, I was satisfied that all the criteria of a class action had been met. Nevertheless, I would not issue a certification order in light of the decision of the Federal Court of Appeal in *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287. I was of the view that, since they were launching an attack against regulations, the plaintiffs had to first proceed in this court by way of judicial review. I stayed that action and it remains stayed to this day.

[4] The plaintiffs followed my dictates and, in 2006 under docket number IMM-5015-06, they instituted judicial review proceedings pursuant to IRPA. The applicants were Alan and Irina Hinton. They sought review of a decision rendered in May 2003 wherein the Minister charged, and Mr. Hinton paid, $75 for the determination of an application for sponsorship of his wife. Section 304 of the *Immigration and Refugee Protection Regulations* requires a sponsor to pay this service fee. Under IRPA, an applicant for judicial review must first obtain leave and the application is to be filed within 15 or 60 days, depending where the applicant resides. Although the application was out of time, I extended the delays and granted leave.

[5] The next step was the conversion of the application for judicial review into an action and to certify it as a class action. I so ordered. I identified the class as all those who had paid service fees under more than 40 regulations issued pursuant to IRPA or its predecessor, the *Immigration Act* (*Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 7, 67 Imm. L.R. (3d) 61).

[6] The Minister took the matter to appeal. By judgment issued this June in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2008] F.C.J. No. 1004 (QL), the Court of Appeal allowed "…the appeal in part to the extent that the class as presently certified must be modified so as to be confined to the individuals covered by the leave application."

[7] This was one of three points raised by the Minister in the appeal. The other two, which were not successful, were that a damages claim could not be commenced prior to the final disposition of the judicial review and that a class action was not the preferable procedure.

[8] Having cut down the class, Mr. Justice Sexton suggested a method to reinstall the other fee regulations. He said:

> [58] In the present case, without dictating to the Motions Judge (as Case Management Judge), or the respondents, how to rectify the situation, in my view it would suffice for the respondents to simultaneously apply for leave pursuant to section 72 of *IRPA* with respect to the remaining class members and move that those remaining members be allowed to join the class as modified by these reasons.
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> […]
>
> [63] For the reasons above, I would allow the appeal in part to the extent that the class as presently certified must be modified so as to

> be confined to the individuals covered by the leave application. However, this holding is without prejudice to the right of Mr. Hinton or another person to apply for leave, pursuant to section 72 of *IRPA*, on behalf of persons affected by the other impugned regulations and to be added into this class already certified.

This is exactly what the Hintons and others have done.

[9] In this particular application, the Hintons seek judicial review of the Minister's decision in May 2003 to collect the entire fee with respect to permanent residence (regulation 295(1) (*a*)(i)) and an application for sponsorship (regulation 304(1)). However, unlike their first application for judicial review, they also make the application on behalf of persons affected by all the impugned regulations with the declared goal, if leave is granted, to move to have the judicial review converted into an action, to have that action certified and then joined to the class action currently in place.

[10] The Minister opposes the application for leave on the grounds that: a) an extension of time to commence the judicial review should not be granted; b) the Hintons do not have standing to challenge any of regulations under which they did not personally pay a fee; c) only one decision or order should be challenged in one application for leave; and d) on this record it is plain and obvious that Her Majesty did not make a profit.

THE LEAVE PROCESS UNDER IRPA

[11] Applications for judicial review in immigration matters are not only governed by section 18 and following of the *Federal Courts Act*, but also, and more particularly, by section 72 and following of IRPA.

[12] Leave must first be obtained and the application for leave is to be filed within 15 or 60 days, depending on whether the matter arose within or outside Canada. The delays in the cases before me had long expired but section 72(2)(*c*) provides:

(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
[…]	[…]
(*c*) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;	*c*) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

[13] Subsections (*d*) and (*e*) go on to say:

[…]	[…]
(*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and	*d*) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;
(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.	*e*) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

[14] Almost invariably, applications for leave are decided without oral argument and reasons are not given. However, given the complex nature of this entire matter, I directed otherwise and also informed the parties I would issue reasons.

THE APPLICABLE STANDARD

[15] Section 72(1) of IRPA simply provides that a judicial review "…under this Act is commenced by making an application for leave to the Court." The parameters which should influence a judge's discretion are not set out. There is very little guiding jurisprudence, which is not surprising given that reasons are usually not provided and that the decision cannot be appealed.

[16] However, fortunately, in a case which challenged the constitutionality of the same leave process under the former *Immigration Act*, the Federal Court of Appeal held that the applicable standard is whether a "fairly arguable case" is disclosed (*Bains v. Minister of Employment and Immigration)* (1990), 109 N.R. 239, [1990] F.C.J. No. 457 (QL)). The Court of Appeal has not revisited this issue save that, in *Krishnapillai v. Canada*, 2001 FCA 378, [2002] 3 F.C. 74, Mr. Justice Décary favourably cited *Bains.*

[17] What, then, is a "fairly arguable case"? In *Bains*, Mr. Justice Mahoney said:

> Bearing in mind that the only consideration is whether a fairly arguable case has been disposed, the requirement for leave is in reality the other side of the coin of the traditional jurisdiction to summarily terminate proceedings that dispose no reasonably arguable case.

[18] Superior courts have the inherent power to control their own process and to dismiss out of hand litigation they consider frivolous or vexatious or which discloses no reasonable cause of action. At the time *Bains* was decided, this traditional inherent power was codified in rule 419 which is now rule 221 of the *Federal Courts Rules*. The leading case was *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 (QL), although the Supreme Court expanded

thereon a few months after *Bains* in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (QL). Both cases, drawing on a long line of English and Canadian jurisprudence, stand for the proposition that a pleading should not be struck unless it is “plain and obvious” that, the facts assumed to be true, the legal propositions set out therein are doomed to failure.

[19] In *Operation Dismantle*, Mr. Justice Dickson said at pages 449 - 450:

> The most recent and authoritative statement of the principle applicable to determine when a statement of claim may be struck out is that of Estey J. in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 740:
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> > As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (App. Div.)
>
> Madame Justice Wilson in her reasons in the present case [at p. 486] summarized the relevant principles as follows:
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> > The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed".

[20] There is an important difference, however, between a motion to strike a pleading for disclosing no reasonable cause of action and an application for judicial review of a decision under

IRPA. In the application for leave, the facts are in issue. Most applications are by those who did not persuade the Immigration and Refugee Board that they should be granted refugee status, or that their subsequent pre-removal risk assessments should have been positive (IRPA, ss. 96, 97 and 113). The basis of the application for leave is that the findings of fact by the decision maker were unreasonable.

[21] This application is peculiar in that the decision maker, be it the Governor in Council who enacted the regulations or the individual charged with the responsibility of collecting the fees, had no record to speak of; simply the Act and the Regulations. However, the parties have strayed from the proposition that the record on an application for leave should be limited to the record before the decision maker. They have attached to their affidavits annual reports filed with Parliament and a great deal of information obtained by Access to Information. I consider it appropriate they do so as I have already held in *Momi* that the facts, if taken as true, disclose a fairly arguable case.

[22] To put the "plain and obvious" test in perspective, it is worthy of note that in *Bains*, above, the Federal Court of Appeal did not refer to the one Federal Court rule which dealt with leave applications. Under then rule 307, leave from the Court was required to serve a notice of a statement of claim outside the jurisdiction. Among other things, the rule specifically required that the applicant show a "good arguable case". In *American Cyanamid Co. et al. v. Ethicon Inc. et al.*, 22 C.P.R. (2d) 75, [1975] F.C.J. No. 1123 (QL), Mr. Justice Addy equated a "good arguable case" with a *prima facie* case. That case was cited with approval by the Court of Appeal in *Price & Pierce International Inc. v. Finland Steamship Co. Ltd.* (1982), 46 N.R. 372, [1982] F.C.J. No. 1013 (QL).

A *prima facie* case is one which, if not rebutted, gives rise to the remedy sought, keeping in mind that in an interlocutory application affidavits may be based on information and belief. A fairly arguable case is therefore far less than a good arguable one.

[23] Turning now to this particular application, the Hintons' material comprises the record produced in their first case. For her part, The Minister filed the affidavits of Marlene Patrick, Director of Cost Management in the Finance Branch of the Department of Citizenship and Immigration, and of Mark Giralt, Foreign Service Officer, currently acting as Senior Analyst with the Department of Citizenship and Immigration. For a number of years he served as a visa officer in various Canadian embassies, high commissions and consulates. The "magic bullet" is a chart prepared by Ms. Patrick which, presumably drawing on the same material relied upon by the Hintons, sets out the revenue from service fees against costs incurred, not only by Citizenship and Immigration, but by a few other departments, especially the Department of Foreign Affairs and International Trade Canada (DFAIT). According to the chart, under the overall program known as *Maximizing Benefits of International Migration*, the costs exceeded revenue each and every year, one year by only about $15 million and in another by in excess of $200 million. There is no breakdown for each of the 43 visas at issue. In itself, this raises a serious issue. The approach taken by the Hintons, which I think is the correct one, is that one must determine all the expenses attributable to the entire program and then break them down visa by visa, just as the Minister has done with respect to revenue.

[24] The focus during argument was on the Minister's contention that there is proof positive that Her Majesty rendered all the services in question at a loss. I agree that if that is so leave should not be granted. A secondary argument derived from *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, [1999] S.C.J. No. 38 (QL), *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131 and *Canadian Association of Broadcasters v. Canada*, 2008 FCA 157, 292 D.L.R. (4th) 246, is that even if it could be shown that Her Majesty occasionally and accidentally made a profit on one or more of the visas, such profit would not violate the *Financial Administration Act*. I also agree with that proposition. One cannot be one hundred percent accurate in forecasting income. An unexpected glut in applications for one type of visa in a given year could result in a short-term profit.

[25] Concern was raised during argument that Ms. Patrick's affidavit simply focused on potentially better aspects of the Minister's defence. For instance, no mention was made of the proposition urged in the first Hinton application, IMM-5015-06, that more than half the salaries of the judges of the Federal Court and the Federal Court of Appeal should be charged as expenses against the fees generated by the regulations in issue; a proposition which, I noted, simply begs for discovery of documents and an examination on discovery.

[26] Since leave had already been given in the first Hinton application on much the same record, it could be argued that it is an abuse of process for the Minister to now bring forth what she considers better evidence on an interlocutory matter (*Sanofi-Aventis Canada Inc. v. Novopharm*

Ltd., 2007 FCA 163, [2008] 1 F.C.R. 174). However, in the light of my decision, it is not necessary to plumb that proposition further.

[27] Mindful of Mr. Justice Létourneau's admonishment in *Remo Imports Ltd. v. Jaguar Cars Ltd. et al*., 2007 FCA 258, 367 N.R. 177, that a judge should not be called upon to ferret out the salient facts from a record (of more than 1,500 pages of facts and figures), I am satisfied that, on the facts, the Hintons have a fairly arguable case and the Minister has a fairly arguable defence. Both sides are somewhat selective in the material they emphasize.

[28] It is not as if the annual reports filed by Citizenship and Immigration with Parliament made no mention of expenses incurred by other government departments which were attributable to the visa program. Overhead costs apparently include DFAIT indirect costs, Citizenship and Immigration corporate overhead, services or accommodations provided by Public Works, legal services by the Department of Justice, CSIS security checks and, of course, Federal Court judges' salaries. The *Guide to the Costing of Outputs in the Government of Canada*, issued by the Office of the Comptroller General in February 1989, which the applicants alleged was not followed, points out at page 10: "In most cost accounting situations, overheads are a highly complex issue… What one organization refers to as an overhead, another considers a direct cost. …" Litigators know this well. It usually ends up as a battle between accountants.

[29] To put the evidence of Ms. Patrick and the earlier evidence of Ms. O'Connor on behalf of the Minister in perspective, the draft costing studies over a number of years show great variation.

For instance, the September 2001 study seems to suggest that the unit cost on a multiple entry visitor visa was $50, while the fee charged was $150. The same report suggests that a single entry visitor visa unit cost $20, against a fee charge of $75. The cost recovery, with respect to these visas, was part of the *Maximizing Benefits of International Migration* program. Apart from the visa fees, there are right-of-landing fees. These are not service fees, are not subject to the restrictions of the *Financial Administration Act* and are not part of this case. Nevertheless, while expenses are set up against the visas, none whatsoever are set up against the landing fees. Should they have been proportioned?

[30] It boils down to this: I am being asked to summarily refuse to grant leave on the grounds that it is plain and obvious that Her Majesty did not make a profit on the visa program. I am called upon to make this decision without benefit of evidence from accountants or other experts who could assist the Court. Furthermore, my decision would be final, as there is no right of appeal.

[31] This brings me to the decision of the English Court of Appeal in *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094, cited in both *Operation Dismantle* and *Hunt v. Carey*, above. It was a motion to strike a statement of claim which alleged defamation. As Lord Pearson said at page 1101: "No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success…" He continued at page 1102:

> …the plaintiff should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not

> appropriate for other than plain and obvious cases. In *Dyson v. A-G* [[1911] 1 KB 410 at 419], Fletcher Moulton LJ said:
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> 'Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court.'

[32] The basis of the suit was an article published in the British Medical Journal. Sir Gordon Willmer, in concurring reasons, added at page 1106: "The article is of a highly technical nature, barely intelligible to the ordinary layman without a good deal of explanation and interpretation." It would both be perverse and capricious for me to drive the applicants from their judgment seat and to hold that it is plain and obvious there is only one reasonably possible outcome. The applicants have some chance of success. The record, as it stands, does not allow me to differentiate between profit and loss on the different types of visas in issue.

[33] As to the other grounds raised by the Minister, given that three judges of the Federal Court of Appeal suggested the procedure the Hintons are following, how can it be possibly held that they do not have a "fairly arguable case"?

[34] As stated by the Supreme Court in *Bisallion v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, the class action has a social dimension. Its purpose is to facilitate access to justice for those who share common problems. The defect in the first Hinton application, which is now cured, is that their application for leave only referred to one regulation. The Court of Appeal formed the

view that it would be *ultra petita* to then expand the class to those affected by other regulations, albeit under the same Act.

[35] The fact that the Hintons were not personally affected by all of the more than 40 regulations in issue is not, apparently, a bar. Indeed, the Minister concedes that counsel for the Hintons would probably have no difficulty in coming forth with a sufficient number of individuals to cover each and every challenged regulation. In fact, in IMM-3195-08, the Hintons have filed an application for leave with respect to another regulation under which they paid a fee, and in *Potapova v. Canada (Minister of Citizenship and Immigration)*, IMM-3196-08, another visa was challenged. What would be the point of having more than 40 applications which would then be joined?

[36] As to the normal rule that only one decision be the subject of a judicial review, a class action or, what is now permitted, a class judicial review, is an exception. Furthermore, rule 302 of the *Federal Courts Rules*, which limits an application to a single order, applies "unless the court orders otherwise."

[37] I find that there are "special reasons" to extend time for filing both under section 72(2)(*c*) of IRPA and under section 18.1(2) of the *Federal Courts Act*. Before the decision of the Federal Court of Appeal in *Grenier*, above, it had widely been thought that an action in damages with respect to a decision of a federal board or tribunal did not have to be preceded by an application for judicial review. The limitation period under section 39(2) of the *Federal Courts Act* is six years. I invoked that very provision to restrict the class in the first Hinton case.

[38] The only difference between this application and the first Hinton application, in which I extended time, is that this application makes reference to all the regulations in issue, not simply the one which proscribed the fee the Hintons paid. As stated by Chief Justice Thurlow in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, [1985] F.C.J. No. 144, at page 272: "The underlying consideration, however, which, as it seems to me, must be borne in mind in dealing with any application of this kind, is whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension." Justice calls. Time is extended.

[39] For all these reasons, the application for leave shall be granted. There shall be no order as to costs.

ORDER

THIS COURT ORDERS that:

1. The delays to serve and file an application for leave and for judicial review are extended.

2. The application for leave is granted.

3. Proceedings are stayed so that a case management conference may be held to work out a timetable on the applicants' declared intention to move that the judicial review be treated as an action, that it be certified as a class action, and that it be joined with Hinton, IMM-5015-06.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3197-08
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