Federal Court  Cour fédérale

Date: 20090602

Docket: IMM-5383-08

Citation: 2009 FC 566

Ottawa, Ontario, June 2, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

HUONG THU HA
VI HAO LAM

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This judicial review arises from the attempts, unsuccessful so far, by Huong Thu Ha to sponsor her husband, Vi Hao Lam, for a permanent resident visa as a member of the family class. While in Canada, Mr. Lam was convicted of an indictable offence, an opinion was issued against

him that he was a danger to the public, and he was eventually deported. However, he was later granted a pardon.

[2] Thereafter, in March 2006, a Visa Officer determined he was inadmissible because he had been deported and under s. 52 of the *Immigration and Refugee Protection Act* was not entitled to return "…unless authorized by an officer or in other prescribed circumstances." In his notes, the Officer referred to the pardon but indicated he was not prepared to grant authorization because Mr. Lam had not applied for it and because he was not satisfied that he was no longer a danger to the public.

[3] An appeal was launched to the Immigration Appeal Division of the Immigration and Refugee Board. By decision rendered in September 2008 the appeal was dismissed for lack of jurisdiction. The Panel agreed with the Minister that, pursuant to s. 64(1) of IRPA and s. 326(2) of the *Immigration and Refugee Protection Regulations*, it had no jurisdiction. Section 64(1) of IRPA provides that no appeal may be made to the Immigration Appeal Division "…if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality." Mr. Lam was captured by the transitional provisions from the former *Immigration Act* to IRPA and, for the purposes of this case, was, when deported, a person inadmissible on the grounds of serious criminality.

[4] This is a judicial review of the decision of the Immigration Appeal Division refusing to hear the appeal on the grounds of lack of jurisdiction.

[5] The thrust of the applicants' argument is that the IAD had jurisdiction. It erred in law by not concluding that the effect of the pardon was to render the danger opinion nugatory.

[6] However, once the IAD turned down their appeal they obtained an extension of time and leave to have the Visa Officer's decision judicially reviewed directly by this Court. In docket IMM-2696-08 Mr. Justice Barnes granted the application this February, as follows:

> I am satisfied that there was a breach of fairness by the decision-maker in this case which requires this matter to be redetermined by a different decision-maker. The problem is that the Applicant requested an Authorization to Return to Canada (ARC) and acknowledged that an administrative fee was payable. This request for an ARC was then refused on the basis that the administrative requirements for the application were deficient. No notification of those outstanding administrative requirements was given to the Applicant as required by the Respondent's Operational Manual (O.P. 1). For this reason the decision was reached unfairly and must be set aside.

[7] That is not all. In June 2008, counsel applied to the Minister for a reconsideration of the Danger Opinion, in the light of subsequent events. No decision has yet been rendered on that request.

[8] I can appreciate that the applicants are uncertain as to which remedy is open to them and I do not consider this application vexatious since the Minister only raised the IAD's lack of jurisdiction at the last moment. That said, and even taking into account that one of the purposes of the Act is to reunite families, in the circumstances this application for judicial review is nonetheless to be dismissed on the grounds of mootness. Although there is still a live controversy between the

parties, I shall not exercise my discretion to nevertheless hear this application which, undoubtedly, raises important issues with respect to the effect of a pardon after a deportation order has been executed.

[9] The decision which was appealed to the IAD was quashed by Mr. Justice Barnes. He dealt with the required authorization to return and it would be inappropriate to speculate as to what the new Visa Officer's decision might be. Furthermore, the Minister may or may not quash the Danger Opinion. That is not before me.

[10] In the circumstances, I should not opine on the jurisdiction of the IAD. I could not direct it to hear the appeal, as the decision under appeal to it has been set aside.

ORDER

THIS COURT ORDERS that:

1. This 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-5383-08
STYLE OF CAUSE:	Huong Thu Ha et al v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 27, 2009
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	June 2, 2009

APPEARANCES:

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