Federal Court  Cour fédérale

Date: 20090731

Docket: IMM-666-08

Citation: 2009 FC 753

OTTAWA, Ontario, July 31, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

SANDRA MARIA DE SOUSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] On October 20, 2008, the undersigned rendered the following order in the present matter:

> "THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted and the decision of the immigration officer dated January 23, 2008 is annulled and set aside for all legal purposes. The matter is referred back to the respondent so that the application for permanent residence be processed from within Canada, taking into consideration the conclusion of the undersigned respecting the best interests of the child Amy."

[2] The respondent now seeks by way of a motion in virtue of section 397(1) and (2) of the *Federal Courts Rules*, the following order:

> "37. The Respondent also requests that the Reasons for Order and Order be reconsidered in accordance with the submissions made herein. In the alternative, the Respondent requests to be given an opportunity to make submissions on a certified question so that the matter may be considered by the Federal Court of Appeal."

[3] The submissions referred to are the following:

> "34. The Respondent submits that this Honourable Court overlooked the fact that it does not have the jurisdiction to make a positive decision on an H & C application where the evidence is not so conclusive as to allow for only one conclusion, and that its Order is inconsistent with both the jurisprudence on the applicability of directed verdicts in cases of Ministerial discretion, and the jurisprudence on how it is the Minister alone who is authorized to weigh the different factors before determining whether the requirement to hold a permanent residence visa can be waived.
>
> 35. For all the above reasons, the Respondent respectfully submits that the Reasons for Order and Order should be reconsidered."

[4] It is further submitted by the Respondent that in the event that the motion for reconsideration is denied, the Court should certify the following question, namely:

> "Does the Federal Court have jurisdiction under s. 18.1(3)(b) of the *Federal Courts Act* to approve an H&C application made under s. 25(1) of *IRPA*, or to direct the Minister to exercise his discretion favourably and approve an H&C application made under s. 25(1) of *IRPA*?

> On a motion for reconsideration under Rule 397 of the *Federal Courts Rules*, can a Judge of the Federal Court certify a question of general importance pursuant to s. 74(d) of *IRPA* when the proposed question relates to an issue that was invisible to the parties prior to the issuance of the Reasons for Judgment and Judgment?"

[5] The applicant's position is that the Federal Court, in virtue of s. 18.1(3) of the *Federal Courts Act*, has the jurisdiction to issue a directed verdict if the circumstances warrant it. The applicant made the following submissions, *inter alia*:

> "The Respondent does not dispute that a Federal Court judge normally has the authority under s. 18.1(3) to issue a directed verdict. A judge's order can contain directions that are "so specific that they will compel the federal board, tribunal or commission to reach a specific conclusion," and can, in fact, simply direct the decision maker to grant an application, "in effect, substituting its decision" for that of the first-instance decision maker. While the Court itself cannot directly give effect to these instructions, since it must always return the matter to the decision maker for a *pro forma* reconsideration, it can by issuing a directed verdict "accomplish indirectly what it is not authorized to do directly."

[6] The undersigned decided to issue a directed verdict since, according to uncontradicted evidence, a young child would have been devastated by either being separated from her mother or by having to move to Brazil.

[7] Having reconsidered all of the submissions, I have concluded that I went too far by ordering the respondent to process the application for permanent residence from within Canada.

[8] The jurisdiction of this Court in virtue of subsection 18.1(3) of the *Federal Courts Act* does not permit “orders” to the Minister in matters of ministerial discretion, but only appropriate directions.

[9] I have accordingly decided to reconsider my order of October 20, 2008 in accordance with the order contained in the present judgment.

[10] There is no reason for certification of the question as requested in the motion.

[11] For the above reasons the motion for reconsideration is granted without costs, in accordance with the following order.

ORDER

IT IS ORDERED THAT this application for judicial review is allowed and the decision of the Immigration Officer dated January 23, 2008, that is under review, is set aside. The applicant's application for landing from within Canada on humanitarian and compassionate grounds is referred back to the Respondent for reconsideration by a different Officer. On that reconsideration, the Officer is directed to give special consideration to the best interests of the applicant's child and to be guided by the evidence referred to in paragraphs 22, 23 and 25 of my reasons herein dated October 20, 2008.

"Louis S. Tannenbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-666-08
STYLE OF CAUSE:	Sandra Maria De Sousa v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 25, 2009
REASONS FOR JUDGMENT:	TANNENBAUM D.J.
DATED:	July 31, 2009

APPEARANCES:

Ms. Hilary Evans Cameron	FOR THE APPLICANT
Mr. Gregory George Ms. Ada Mok	FOR THE RESPONDENT

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