Federal Court  Cour fédérale

Date: 20101004

Docket: IMM-6213-09

Citation: 2010 FC 973

[UNREVISED CERTIFIED TRANSLATION]

Ottawa, Ontario, October 4, 2010

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

Sotheary HUOT

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the Act) for judicial review of a decision by a visa officer at the High Commission of Canada to Singapore, rejecting the application by the applicant's son for permanent residence in the family class. In addition, the officer did not find any humanitarian or compassionate considerations that would justify granting an exemption.

[2] The applicant is a Cambodian citizen. She came to Canada in 2004 and claimed refugee status. Her claim was accepted, and she became a permanent resident on November 30, 2006. She sponsored the two children of her Cambodian marriage, born in 1998 and 2000.

[3] Viasna Chan is the applicant's son, born out of wedlock in 1991. He lived with his grandmother from the age of three months to 2006, when she came to Canada, sponsored by the applicant's sister (a fact that the applicant was unaware of at the time). Viasna Chan has been living with his uncle since 2006.

[4] When the applicant came to Canada, she declared her two children as dependants, but she never mentioned Viasna Chan. The grandmother tried to sponsor Viasna Chan in 2007, but the application was denied.

[5] According to the applicant, she happened to meet the grandmother in Montréal in 2007, and as a result of that meeting, she began speaking with Viasna Chan by telephone. She wanted to have him come to Canada to live with her. She filed an application to sponsor and undertaking under the family class towards the end of 2007. At the same time, Viasna Chan submitted an application for permanent residence to the High Commissioner to Singapore based on humanitarian and compassionate considerations.

[6] The visa officer in Singapore considered the two applications together. He rejected both of them on August 18, 2009. A letter was sent to the applicant telling her that she had the right to appeal the decision refusing the application for permanent residence to the Immigration Appeal

Division (IAD). The letter stated that, if the IAD determined that Viasna Chan could not immigrate under the family class heading, it could not consider humanitarian and compassionate grounds, and the appeal would be dismissed.

[7] The applicant filed a notice of appeal but withdrew it on December 7, 2009. She filed the application for judicial review on December 8 together with a application for an extension of time on the ground that she pursued the appeal to the IAD as a result of bad advice from her counsel at the time.

[8] The immigration officer found that Viasna Chan was not a member of the family class and that there were no humanitarian and compassionate considerations that would justify granting him permanent residence.

[9] The officer rejected the sponsorship application because, under 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, a person cannot be a member of the family class if he or she was not mentioned in the foreign national's application for residence.

[10] With respect to humanitarian and compassionate considerations, the officer found that the circumstances did not warrant an exemption. The officer determined that the mother probably abandoned Viasna Chan when he was a baby because he was illegitimate and because he was disabled in that he could only see with one eye. He found that the applicant knowingly omitted to mention Viasna Chan when she came to Canada, that Viasna Chan was leading a normal life in Cambodia and that he had friends and a good school. He concluded that there had been no

communication between Viasna Chan and the applicant since she left Cambodia in 2004. He stated that he had considered the best interests of the child but found no undeserved hardship for Viasna Chan.

* * * * * * * *

[11] The record shows that the "Application for Leave and Judicial Review" included an application for an extension of time under paragraph 72(2)(*c*) of the Act. The order granting leave to submit the application for judicial review in this case is completely silent on this preliminary application for an extension of time. At the hearing before me, in the circumstances, I invited counsel for the parties to make oral representations strictly on the preliminary issue of the application for an extension of time because if the extension was going to be refused, this would necessarily result in the dismissal of the application for judicial review itself. Moreover, I stated that if an extension of time was going to be granted, another date would be set for the hearing of the application for judicial review.

[12] I agree with counsel for the respondent that the fact that leave was granted to file the application for judicial review, in this case, is not determinative of the extension of time issue because the order for leave is silent on this point. It is sufficient to refer to the relatively recent decision of the Federal Court of Appeal in *Deng Estate v. Canada (Public Safety and Emergency Preparedness*), 2009 FCA 59. In that case, the Federal Court of Appeal stated the following:

> [12] Counsel for the appellant relies upon the decision of this Court in *Subhaschandran v. Canada*, [2005] 3 F.C.R. 255 where Sexton J.A. found that the adjournment of a stay motion to a time when the stay matter would be moot amounted to a constructive

refusal to exercise jurisdiction which called for a remedy in the nature of mandamus. He submits that Pinard J., in the present instance, refused to exercise his jurisdiction..

[13] I disagree with this submission. Pinard J. did exercise a jurisdiction when he dealt with the motion for an extension of time and denied it. He also exercised his jurisdiction when he dismissed the application for judicial review.

[14] In the alternative, counsel for the appellant contended that Pinard J. had no jurisdiction to review the decision of the motions judge and deny the leave application that the motions judge had granted. According to counsel, Pinard J. had no power to review the merits of the decision rendered by another judge of coordinate jurisdiction. Counsel refers us to the decision of our Court in *Bubla v. Solicitor General*, [1995] 2 F.C. 680, at page 692.

[15] With respect, I do not think that this is what Pinard J. did in the present instance. The order of the motions judge was silent on the issue of the extension of time. The order contained no conclusion either granting or denying an extension. Pinard J. made a finding of fact that the matter had been overlooked by the motions judge. That finding is not unreasonable in the circumstances. The memorandum of fact and law of the appellant and that of the respondent, while dealing in their arguments with the extension of time, contained in the part relating to the Order sought no demand regarding an extension of time. That may explain the oversight: for another example of an omission to consider the request for an extension of time, see *Nayyar v. Canada (Minister of Citizenship and Immigration)* (2007), 62 Imm. L.R. (3d) 78.

[16] The appellant submits that it should be inferred from the granting of the leave, by the motions judge, to commence the application for judicial review that the motions judge also granted an extension of time. A similar situation occurred in *Canada (Minister of Human Resources Development) v. Eason* (2005), 286 F.T.R. 14 (F.C.) where Tremblay-Lamer J. refused to draw that kind of inference. I agree with the following assertion that she makes at paragraph 20 of her reasons for judgment:

> [20] However, as stated above, the member was silent on the issue of extension of time. The respondent suggests that as leave to appeal cannot be granted unless an extension of time is also granted, it can be inferred from the member's decision to grant leave that she also granted an extension of time. I disagree. While

> Mr. Eason did apply for the extension of time and for leave, it cannot automatically be inferred that the member turned her mind to the issue of extension of time simply because she granted leave. The granting of an extension of time must be explicitly considered by the decision maker.
>
> [17] Since the motion for an extension of time had not been dealt with by the motions judge, Pinard J. had jurisdiction to decide the issue.
>
> [18] In dismissing the motion for an extension of time, Pinard J. disposed, by the same occasion, of the application for judicial review because that application had no valid legal existence unless duly authorized by a judge to be commenced after the expiry of the limitation period. To put it differently, the dismissal of the application for judicial review was a necessary corollary and consequence of the refusal to extend the time limit.

[13] Thus, considering the applicant's application for an extension of time, I am satisfied, after hearing counsel for the parties and reviewing the evidence in the record, that the criteria required to obtain a similar extension have been properly met.

[14] The applicant must satisfy the Court (a) that she had a continuing intention to pursue her application for judicial review; (b) that the application for judicial review deserves consideration; (c) that there is a reasonable explanation for the delay; and (d) that an extension of time will not prejudice the respondent.

[15] The explanations provided by the applicant in paragraphs 33 to 40 of her affidavit dated December 8, 2009, leave no doubt as to her intention to pursue her application for judicial review and, in my view, constitute a reasonable explanation for the delay:

a. I received a negative decision with regards to my sponsorship in August 2009;

b. I went to seek advice from my legal counsel who told me that the only recourse I had was to file an appeal to the IRB, joined hereto as Exhibit 'B' of my affidavit;

c. The Immigration Appeal Board sent me a letter, dated November 16th 2009, joined hereto as Exhibit 'C' of my affidavit;

d. In this letter, it is written that my appeal will be denied if my son is not considered a member of the family class;

e. I decided to seek another legal opinion and that is how I met Me Annick Legault who saw me in her office on 2nd December 2009;

f. I was told that I should present a federal court application but that the delay to instigate this relief was passed;

g. Nevertheless, I chose to go forward and present my file before the Federal Court;

[16] As to whether the application for judicial review deserves consideration, the applicant's primary argument that the decision-maker based his decision on conjectures rather than on the facts put in evidence does not appear to me to be frivolous or clearly bound to fail. In addition, on this point, consideration must be given to the fact that the application for leave to submit the application for judicial review was granted in this case.

[17] Last, I do not see how an extension of time could prejudice the respondent, who, moreover, has not complained of any prejudice.

[18] In the specific circumstances of this case, I am therefore of the view that the interests of justice will be better served if an extension of time is granted.

[19] Accordingly, the application for an extension of time is granted, and the application for judicial review will be heard on a date to be determined by the Judicial Administrator of this Court.

[20] The parties have indicated that there is no question to be certified in this case.

ORDER

The application for an extension of time is granted. The application for judicial review of the decision rendered on August 18, 2009, by a visa officer at the High Commissioner of Canada to Singapore will be heard at a date to be determined by the Judicial Administrator of this Court.

"Yvon Pinard"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6213-09
STYLE OF CAUSE:	Sotheary HUOT v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 16, 2010
REASONS FOR ORDER AND ORDER:	Pinard J.
DATED:	October 4, 2010

APPEARANCES:

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