Federal Court of Appeal | Cour d'appel fédérale

Date: 20200113

Docket: A-384-18

Citation: 2019 FCA 314

CORAM: **WEBB J.A.**
NEAR J.A.
LOCKE J.A.

BETWEEN:

THECLA SENDWA

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on November 13, 2019.

Amended Judgment delivered at Ottawa, Ontario, on January 13, 2020.

AMENDED REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: WEBB J.A.
LOCKE J.A.

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AMENDED REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] The appellant, Ms. Thecla Sendwa, appeals from a decision of the Federal Court, dated June 1, 2018, dismissing her application for judicial review of a decision of the Immigration Appeal Division (IAD) dated December 2, 2016, which had upheld an immigration officer's

decision refusing an application for permanent residence by the appellant's niece on the basis that she was not a member of the family class.

II. Background

[2] The appellant, a Canadian citizen, attempted to sponsor her niece, Naomi Karlo Sendwa, a national of Tanzania, for permanent residence under paragraph 117(1)(h) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-2007 (IRPR). In a decision rendered on June 18, 2014, an immigration officer at the High Commission of Canada in Nairobi refused the niece's application for permanent residence on the ground that the appellant had parents living in Tanzania whom she could "otherwise sponsor", and was therefore barred from sponsoring her niece as a member of the family class under paragraph 117(1)(h) IRPR.

[3] The appellant appealed to the Immigration Appeal Division (IAD) from the immigration officer's refusal. Before the IAD, the appellant argued that her father would be medically inadmissible and her mother would not be admissible as an accompanying dependent. On June 29, 2015, the IAD dismissed the appeal on the basis that the appellant's parents were alive and could therefore be sponsored, such that the appellant's niece could not be a member of the family class as a non-enumerated relative under paragraph 117(1)(h) of the IRPR. In so deciding, the IAD held that there was no requirement that the relatives enumerated in paragraph 117(1)(h) be actually admissible.

[4] The appellant sought judicial review of the June 29, 2015 IAD decision. In its decision on judicial review (*Sendwa 1*), the Federal Court found that the IAD's decision was unreasonable

because it had dismissed the appellant's appeal simply because her parents were alive, without considering whether the appellant was eligible or in a position to sponsor her parents. The Federal Court allowed the application for judicial review, set aside the IAD's decision, and ordered that the appeal be redetermined by a differently constituted panel.

III. Decision of the IAD on Redetermination

[5] In a decision issued on December 2, 2016, a new panel of the IAD found that the impugned decision of the immigration officer was valid in law and accordingly dismissed the appellant's appeal. Following the direction of the Federal Court on judicial review, the IAD focused its analysis on whether the appellant would be eligible or in a position to sponsor her parents. It held that because the appellant had declared in her submissions before the IAD that she had no intention of sponsoring her parents, it was not able to fully explore the issue of the appellant's ability to sponsor her parents.

[6] The IAD nevertheless considered the appellant's argument that, at the time she had sponsored her niece, she would not have met the higher financial requirements necessary to sponsor a parent under subparagraph 133(1)(j)(B) IRPR and could therefore not "otherwise sponsor" her parents within the meaning of paragraph 117(1)(h) IRPR. The IAD accepted that the appellant would likely have been financially ineligible to sponsor her parents the year that she applied to sponsor her niece. However, it rejected the appellant's argument that her own self-assessment that she did not meet the financial requirements to sponsor her existing enumerated relatives was sufficient to allow her to sponsor her niece as a non-enumerated member of the family class under paragraph 117(1)(h) IRPR.

[7] The IAD found that, in light of the right of appeal available to sponsors, it was not the legislative intent that an officer's determination of the sponsor's financial eligibility should be the determinative decision on the sponsor's ability, nor that an applicant's self-assessment should be determinative.

[8] The appellant sought judicial review of the IAD's redetermination decision.

IV. Decision of the Federal Court

[9] In a decision dated June 1, 2018, the Federal Court dismissed the appellant's application for judicial review. The Federal Court determined the standard of review on all issues other than the appellant's allegation of bias on the part of one of the IAD panel members to be reasonableness.

[10] With respect to the allegation of bias, the Federal Court held that the IAD panel had correctly found that the appellant had failed to present substantial evidence that the impugned panel member would not adjudicate her appeal impartially and independently.

[11] The Federal Court next considered the appellant's argument that the IAD had ignored the direction of the Federal Court in *Sendwa 1* by failing to assess the applicant's financial "eligibility" to sponsor her parents and speaking only of her "ability" to meet the financial requirements for sponsorship. The Federal Court concluded that nothing turned on the use of either word as neither is used in relation to sponsorship in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) or the IRPR. It held that the IAD had complied with the

reasoning in *Sendwa 1* in focusing its analysis, to the extent possible, on whether the appellant would be eligible or in a position to sponsor her parents.

[12] The Federal Court then considered the appellant's argument that the IAD's suggestion that an immigration officer's decision to refuse a family class application is not determinative runs contrary to the legislation. The appellant reasoned that, while the IRPA creates a right of appeal, it does not create an obligation to appeal. The Federal Court held that the IAD's interpretation was reasonable: even though an appeal is a discretionary right and not an obligation, an appeal was nonetheless a means by which the applicant might have overcome an officer's refusal and put herself in a position to sponsor her parents.

[13] Finally, the Federal Court considered the appellant's argument that section 117 of the IRPR, and specifically the phrase "may otherwise sponsor" in subparagraph 117(1)(h)(ii), has historically been misinterpreted to improperly create a hierarchy of relatives that a sponsor must exhaust before being permitted to sponsor a non-enumerated relative under paragraph 117(1)(h). The Federal Court rejected the appellant's interpretation and found that in the overall context of the legislation, a plain grammatical reading of section 117 in its entirety made clear that a non-enumerated relative can only be sponsored when there is no enumerated relative who may be sponsored. It found that the hierarchy to which the appellant objected was part and parcel of the legislation. It accordingly concluded that the IAD's interpretation and application of section 117(1) was reasonable.

[14] In a supplemental judgment and reasons issued on October 30, 2018, the Federal Court certified the following questions:

> i. In determining an application for permanent residence under section 117(1)(h) of the *Immigration and Refugee Protection Regulations* (IRPR) is consideration of the financial eligibility criteria in section 133(1)(j)(i)(B) of the IRPR required by subparagraph 117(1)(h) of the IRPR?
>
> ii. If so, does the existence of a right of appeal to the Immigration Appeal Division require a sponsor to appeal the denial of an application to sponsor such a relative because of the financial ineligibility of the sponsor in order to establish that there are no relatives whom the sponsor may otherwise sponsor?

V. Issues

[15] The issue before this Court is whether the IAD's interpretation of section 117, which was upheld by the Federal Court, was reasonable. This analysis will encompass the certified question of whether subparagraph 117(1)(h) IRPR requires consideration of the financial eligibility criteria set out in section 133(1)(j)(i)(B). In light of my answer to the first question, it is not necessary to answer the second question.

VI. Standard of Review

[16] On appeal from a judicial review decision of the Federal Court, this Court must determine whether the application judge identified the correct standard and applied it properly (*Agraira v. Canada* (*Public Safety and Emergency Preparedness*), 2013 SCC 36 at paras. 45-46).

VII. Analysis

[17] The Federal Court correctly determined that the standard of review on the issues other than bias was reasonableness, as the presumption of a reasonableness standard of review where an administrative tribunal is interpreting its home statute was not rebutted (see also *Bousaleh v. Canada (Citizenship and Immigration)*, 2018 FCA 143 at para. 40 [*Bousaleh*]).

[18] In my view, the Federal Court properly applied the standard of review to find that the IAD's decision on redetermination was reasonable. I am of the view that the IAD reasonably concluded that the decision of the immigration officer refusing the appellant's niece's application for permanent residence because the niece was not a member of the family class was valid in law.

[19] Until *Sendwa 1*, the case law had uniformly interpreted section 117(1)(h) as a provision of last resort that could only be relied upon where an applicant had no living enumerated relatives. In other words, the very fact that an enumerated relative was alive would preclude an applicant from sponsoring a non-enumerated relative under section 117(1)(h) (see e.g. *Nguyen v. Canada (Citizenship and Immigration)*, 2003 FCT 325; *Mahmood v. Canada (Minister of Citizenship and Immigration)*, 195 FTR 14; *Jordano v. Canada (Citizenship and Immigration)*, 2013 FC 1143; see also *Ende v. Canada (Citizenship and Immigration)*, 2017 CanLII 42825 (CA IRB)).

[20] This Court in *Bousaleh* conducted a fulsome textual, contextual, and purposive analysis of section 117(1)(h) and concluded the provision was clear. This Court found that where a sponsor has an enumerated relative, they cannot use section 117(1)(h) to sponsor a non-enumerated relative (*Bousaleh* at para. 55). It explicitly held that "[u]nder subparagraph 117(1)(h)(i), the only thing to consider is whether or not such a listed relative exists" (at para. 56).

[21] The appellant submits that the phrase "may otherwise sponsor" in section 117(1)(h) expands the operation of s. 117(1)(h) and gives a sponsor the right to select any non-enumerated relative they choose in circumstances where they are not actually able to sponsor an enumerated relative due to their inability to meet the financial requirements. I do not accept this proposition and agree with the conclusion of this Court in *Bousaleh* that no non-enumerated relative can be sponsored where an enumerated relative exists. To the extent that *Sendwa 1* may stand for the proposition that a sponsor with living enumerated relatives may have resort to section 117(1)(h) to sponsor a non-enumerated relative, in my respectful view, it is wrongly decided.

[22] In light of the Federal Court's finding in *Sendwa 1* that it was unreasonable for the IAD to have dismissed the appellant's appeal on the ground that her parents were alive in its initial decision, the IAD's redetermination decision focused its analysis on the finality of a determination that an applicant is ineligible for failure to satisfy the financial requirements set out in section 133(1)(j)(i)(B). The IAD interpreted the legislative scheme to find that neither an appellant's self-assessment that she did not meet the financial requirements for sponsorship of a parent, nor the assessment of a hypothetical visa officer to that effect, enabled the appellant to

access the last-resort section 117(1)(h). In my view, this interpretation was reasonable given the circumstances, which required the IAD to follow the guidance provided by the Federal Court in *Sendwa 1*.

[23] In any event, I am of the view that, in accordance with the principles of statutory interpretation and the case law prior to *Sendwa 1*, the fact that the appellant's parents were alive at the time that she sponsored her niece is in itself determinative of the appellant's inability to sponsor her niece under section 117(1)(h) and dispositive of this appeal. This Court held as follows at paragraph 69 of *Bousaleh*:

> Mr. Bousaleh's argument that there is no hierarchy among family members is correct as between family members enumerated in paragraphs 117(1)(a) to (g). It is not correct as between enumerated and non-enumerated family members. A non-enumerated relative can only be a member of the family class <u>if</u> the sponsor <u>does not have</u> another relative listed in the introduction of paragraph 117(1)(h) who is a Canadian citizen, an Indian or a permanent resident or who he or she may otherwise sponsor.
>
> (Emphasis in original)

[24] It is therefore not necessary for me to make any findings with respect to the appellant's potential financial eligibility under section 133(1)(j)(i)(B), nor the finality of the hypothetical determinations of any decision-maker with respect to the appellant's financial eligibility.

[25] For these reasons, I would dismiss the appeal <u>without</u> costs. I would answer the certified questions as follows:

i. In determining an application for permanent residence under section 117(1)(h) of the *Immigration and Refugee Protection Regulations* (IRPR) is consideration of the financial eligibility criteria in section 133(1)(j)(i)(B) of the IRPR required by subparagraph 117(1)(h) of the IRPR?

No.

ii. If so, does the existence of a right of appeal to the Immigration Appeal Division require a sponsor to appeal the denial of an application to sponsor such a relative because of the financial ineligibility of the sponsor in order to establish that there are no relatives whom the sponsor may otherwise sponsor?

Since the answer to (i) is no, this question is not answered.

"D. G. Near"
J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
George R. Locke J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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