Federal Court of Appeal  Cour d'appel fédérale

Date: 20140725

Docket: A-177-13

Citation: 2014 FCA 181

CORAM: **PELLETIER J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

ANDENET GETACHEW SESHAW

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Winnipeg, Manitoba, on January 15, 2014.

Judgment delivered at Ottawa, Ontario, on July 25, 2014

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DAWSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Andenet Getachew Seshaw is an Ethiopian refugee living in Sudan. He appeals from the decision of the Federal Court, reported as *Seshaw v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 396, [2013] F.C.J. No. 443 (QL), which dismissed his application for judicial review of the Minister's refusal to grant him a permanent resident visa on humanitarian and compassionate grounds.

[2] Mr. Seshaw's application for a permanent resident visa was sponsored by his wife, Ms. Zafu Woldegebri Gebru. In her dealings with immigration officials at the consular post and at the Canadian port of entry, Ms. Gebru did not declare Mr. Seshaw as a non-accompanying family member with the result he was not examined by a visa officer. As a result, when Ms. Gebru attempted to sponsor him as a member of the family class, he was found to be excluded from the family class by paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The issue in this case is whether Mr. Seshaw was precluded from bringing an application for judicial review by the combined effect of section 63 and subsection 72(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and, if not, whether the visa officer's disposition of his application for humanitarian and compassionate consideration was reasonable.

[3] Depending on how those issues are decided, there is another issue which may complicate Mr. Seshaw's case. It appears that Ms. Gebru is in default of an immigration loan. The visa officer found that Ms. Gebru was ineligible to sponsor Mr. Seshaw, presumably by reason of paragraph 133(1)(*h*) of the Regulations. While Mr. Seshaw's memorandum of fact and law does not refer to this issue, it was a live issue before the application judge and is the subject of argument in the respondent's memorandum of fact and law.

[4] For the reasons set out below, I would dismiss the appeal.

I. FACTS

[5] Ms. Gebru and her father were Ethiopian refugees living in Sudan. Ms. Gebru's father applied for a Canadian permanent resident visa through the United Nations High Commissioner for Refugees. Years passed; Ms. Gehru's father died. Then, in January 2010, she received an invitation to attend at the Canadian visa post in Cairo in for an interview.

[6] In the meantime, Mr. Seshaw came to live in the compound occupied by Ms. Gebru and her father. When Ms. Gebru's father died in 2007, she and Mr. Seshaw became close and, according to Mr. Seshaw's visa application, started living together in March 2010: see Appeal Book, p. 52. In her statement in support of Mr. Seshaw's application for humanitarian and compassionate consideration, Ms. Gebru suggests that they were cohabiting before she attended at the visa post: see Appeal Book pages 60-61. In any event, they were formally married on October 5, 2010 and Ms. Gebru left for Canada on October 13, 2010.

[7] Ms. Gebru alleges that she advised the Cairo visa post as well as the Canada Immigration Center in Winnipeg of her marriage but there is no record of any such communication. In March 2011, Ms. Gebru sponsored Mr. Seshaw's application for a permanent resident visa as a member of the family class. Mr. Seshaw's application made note of the fact that he was applying as a member of the family class and as "Spouse H & C".

[8] As noted earlier, the visa officer concluded that Mr. Seshaw was not a member of the family class as he was not examined prior to his wife entering Canada because she did not declare him as a non-accompanying family member. Paragraph 117(9)(*d*) of the Regulations provides that, in such a case, the non-accompanying family member is excluded from the family

class. In addition, routine checks disclosed that Ms. Gebru was in default of an immigration loan, which was presumably extended to her to help her resettle in Canada. Section 133(1) of the Regulations provides that a sponsorship application will only be approved if the sponsor is not in default of repayment of a debt owed to Her Majesty in Right of Canada.

[9] The visa officer reviewed Ms Gebru's submissions in support of the application for humanitarian and compassionate considerations (the H&C application). He concluded that he was not satisfied that there were grounds to overcome Mr. Seshaw's exclusion pursuant to paragraph 117(9)(*d*) of the Regulations.

[10] The refusal letter sent to Mr. Seshaw identified two deficiencies in his application. The first was his exclusion from the family class by reason of Ms Gebru's failure to declare him as a family member to the visa post or at the port of entry to Canada. The second was Ms Gebru's ineligibility to act as a sponsor due to her default in repayment of an immigration loan.

II. THE DECISION UNDER REVIEW

[11] After setting out the facts, the application judge noted the parties' positions.

[12] Mr. Seshaw, by his counsel, argued that the visa officer erred in finding that Ms. Gebru was in default of an immigration loan and that the visa officer's decision with respect to the H&C application was unreasonable.

[13] The Minister argued that the decision on the immigration loan issue was immaterial but correct. The Minister also argued that the visa officer's decision on the H&C application was reasonable.

[14] The application judge found that the question of whether or not Ms. Gebru was in default on an immigration loan was not a matter which could be considered on judicial review. She treated the question of Ms. Gebru's eligibility to act as a sponsor as a preliminary matter which must be appealed to the Immigration Appeal Division (IAD) before an application for judicial review could be brought.

[15] The application judge then held that Mr. Seshaw's right to make an application for judicial review was abrogated by the sponsor's right of appeal found at section 63 of the Act and the limitation on the right to bring an application for judicial review set out at paragraph 72(2)(*a*) of the Act. The application judge found that this Court's decision in *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 F.C.R. 26 dictated this conclusion.

[16] Finally, the application judge considered the reasonableness of the visa officer's decision with respect to the H&C application, in the event that she was found to be wrong about Mr. Seshaw's right to bring an application for judicial review. In her view, the visa officer considered the relevant factors and came to a reasonable conclusion.

[17] As a result, Mr. Seshaw's application for judicial review was dismissed. The application judge certified the following question:

> In light of sections 72(2)(*a*), 63(1) and 65 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and the case of *Somodi v. Canada (Minister of Citizenship and Immigration)*, [2010] 4 F.C.R. 26 (F.C.A.), where the applicant has made a family class sponsorship application and requested humanitarian and compassionate considerations within the application, is the applicant precluded from seeking judicial review by the Federal Court before exhausting their right of appeal to the Immigration Appeal Division where the right of appeal is limited pursuant to paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

III. ISSUES

1. Is Mr. Seshaw precluded from bringing an application for judicial review?
2. What is the effect of the visa officer's finding that Ms. Gebru was in default on an immigration loan?

IV. DISCUSSION

A. *Is Mr. Seshaw precluded from bringing an application for judicial review?*

[18] The application judge found that the combined effect of section 65 and paragraph 72(2)(a) of the Act, together with this Court's decision in *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 FCR 26, precluded Mr. Seshaw from bringing an application for judicial review. This is a conclusion of law arising from the application judge's interpretation of the Act and the jurisprudence and, as such, is reviewable on the standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8.

[19] The issue of a foreign national's ability to challenge an adverse finding with respect to an H&C application was decided in the case heard at the same time as this one, *Habtenkiel v. Canada (Minister of Citizenship and Immigration)* 2014 FCA 180. In that case, we decided that persons who are excluded from the family class by paragraph 117(1)(*d*) of the Regulations are not bound by the limitation on the right to apply for judicial review found at paragraph 72(2)(*a*) of the Act when they seek to challenge a dismissal of an H&C application. We came to that conclusion because the limitation in section 65 of the Act on the IAD's ability to invoke humanitarian and compassionate considerations means that there is no effective right of appeal to the IAD from the Minister's dismissal of an H&C application. The absence of a right of appeal leaves it open to challenge such a decision by way of judicial review.

[20] On the basis of the reasoning in *Habtenkiel*, Mr. Seshaw had the right to bring an application for judicial review from the visa officer's dismissal of his H&C application.

[21] The application judge found that the standard of review of the visa officer's decision was reasonableness. I agree: see *Kanthasamy v. Canada (Minister of Citizenship and Immigraion)*, 2014 FCA 113, [2014] F.C.J. No. 472, at paragraph 32.

[22] It is important to keep in mind that the application in issue in these proceedings is Mr. Seshaw's application to be exempted from the requirement that he apply as a member of the family class on humanitarian and compassionate grounds. Like many, if not most, of the people who find themselves in this position, Mr. Seshaw does not require an exemption because of his behavior; he requires it because of something his sponsor did or failed to do. His sponsor's

failure to declare him as her husband at the relevant time now means that he must ask the Minister to exercise his discretion to allow him to enter Canada to rejoin his wife.

[23] In those circumstances, it is tempting for the sponsor to think that explaining why he or she did not declare the non-accompanying family member will go a long way towards satisfying the Minister's concerns. In some cases, this may be true. Where the facts are such as to suggest a deliberate attempt to manipulate the system, providing an innocent explanation for one's behavior may indeed have a positive effect. But in most cases, by the time one is at the stage of assessing an application for humanitarian and compassionate consideration, the focus has shifted from the sponsor's behaviour to the foreign national's personal circumstances. This is apparent from the fact that section 25 requires the foreign national, and not the sponsor, to apply for humanitarian and compassionate relief. What, then, is it about Mr. Seshaw's personal circumstances that would make granting an exemption a humanitarian and compassionate thing to do?

[24] In this case, the visa officer had nothing before him from Mr. Seshaw other than his application for a permanent resident visa. He did have Ms. Gebru's statement as to the circumstances of her relationship with Mr. Seshaw and her communication with the visa post in Cairo.

[25] Ms. Gebru explained that she did not declare her husband because, in January 2010 when she attended at the visa post in Cairo, she was not married though she now understands that she could have declared Mr. Seshaw as her common law husband as they were living together by

that time. The difficulty with this explanation is that Mr. Seshaw's application for his permanent resident visa says that he and Ms. Gebru began living together in March 2010, after she attended at the visa post. To that extent Ms. Gebru's statement is not helpful to her cause or to Mr. Seshaw's.

[26] Along the same lines, Ms. Gebru's assertion that she communicated her marriage to the visa post in Cairo and to the immigration office in Winnipeg upon her arrival coupled with the fact that no record exists (or can be found) of those communications does nothing to dissipate any reservations which the visa officer may have had about Ms. Gebru's truthfulness.

[27] To the extent that the visa officer saw Ms. Gebru's statement as an attempt to explain how it came to be that she did not declare that she was married to Mr. Seshaw, one can understand his comment that the humanitarian and compassionate considerations (i.e. those contained in Ms. Grebu's statement) were not sufficient to displace the failure to declare Mr. Seshaw as a non-accompanying family member.

[28] It is true that Ms. Gebru's statement contains other information about the quality of her relationship with Mr. Seshaw that is not reflected in the visa officer's notes, information which could have been relevant to the assessment the H&C application. On the other hand, the visa officer had nothing from Mr. Seshaw himself upon which to base a decision as to his personal circumstances. The absence of information from Mr. Seshaw is unexplained. It is very difficult to make a convincing case for humanitarian and compassionate considerations without hearing from the person whose personal circumstances are the issue.

[29] In the result, I find that the visa officer's decision, though terse, was reasonable in the circumstances.

B. *What is the effect of the visa officer's finding that Ms. Gebru was in default on an immigration loan?*

[30] To the extent that there is an issue concerning whether Ms. Gebru was in default of repayment of an immigration loan, I am inclined to agree with the application judge that Mr. Seshaw's remedy was an appeal to the IAD. But I need not decide this issue.

[31] In light of my conclusion concerning the reasonableness of the visa officer's decision, a successful appeal on the default of repayment issue would not assist Mr. Seshaw. The visa officer's decision on his H&C application would stand and he would not be granted a permanent resident visa in any event.

V. CONCLUSION

[32] I would therefore dismiss the appeal and answer the certified question as follows:

> Q: In light of sections 72(2)(a), 63(1) and 65 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and the case of *Somodi v. Canada (Minister of Citizenship and Immigration)*, [2010] 4 F.C.R. 26 (F.C.A.), where the applicant has made a family class sponsorship application and requested humanitarian and compassionate considerations within the application, is the applicant precluded from seeking judicial review by the Federal Court before exhausting their right of appeal to the Immigration Appeal Division where the right of appeal is limited pursuant to paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

A. No

"J.D. Denis Pelletier"

J.A.

“I agree
Dawson J.A.

“I agree
Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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