Federal Court  Cour fédérale

Date: 20150626

Docket: IMM-8462-14

Citation: 2015 FC 796

Ottawa, Ontario, June 26, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

CHUMIN ZHENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Chumin Zheng [the Applicant] has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. The Applicant challenges the decision of an immigration officer [the Officer] with the Consulate General of

Canada in Hong Kong to refuse the Applicant's application for a permanent resident visa as a member of the family class.

[2] The Minister of Citizenship and Immigration [the Minister] takes the position that this Court is without jurisdiction to hear the application for judicial review. This is because the Officer's decision is also the subject of an appeal by the Applicant's husband to the Immigration Appeal Division of the Immigration and Refugee Board [the IAD]. The Minister says that the application for judicial review is statutorily barred by ss 63(1) and 72(2)(a) of the IRPA.

[3] This case was heard in Toronto on June 17. After hearing the submissions of counsel for the Minister and counsel for the Applicant, I dismissed the application for judicial review with reasons to follow. These are the reasons.

II. Background

[4] The Applicant is a citizen of China. She has been married to Asyaari Ibrahim since August 27, 2009.

[5] Mr. Ibrahim initially applied to sponsor the Applicant as his wife in July, 2011. The application was refused and Mr. Ibrahim appealed to the IAD. The IAD confirmed the decision of the immigration officer, finding that the marriage was not genuine and was entered into for the primary purpose of assisting the Applicant to gain status in Canada.

[6] The Applicant was sponsored by Mr. Ibrahim a second time in March, 2014. This application was refused on October 27, 2014; again because the Officer concluded that the marriage was not genuine and was entered into primarily in order to gain status in Canada.

[7] On October 31, 2014 Mr. Ibrahim filed a Notice of Appeal with the IAD in respect of the Officer's decision. The appeal remains before the IAD.

[8] On December 29, 2014 the Applicant filed an application for leave and for judicial review of the Officer's decision. Leave was granted by this Court on March 25, 2015.

III. Issue

[9] The sole issue addressed in these reasons is whether this Court has jurisdiction to decide the Applicant's application for judicial review.

IV. Analysis

[10] The issue before the Court concerns the interpretation and application of its own jurisdiction, and accordingly no question regarding the applicable standard of review arises (*Manesh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 765 [*Manesh*] at para 16).

[11] Sections 62 and 63(1) of the IRPA provide that the IAD is the proper venue for appealing family class sponsorship applications which have been refused:

62. The Immigration Appeal Division is the competent Division of the Board with respect to appeals under this Division.	62. La Section d'appel de l'immigration est la section de la Commission qui connaît de l'appel visé à la présente section.
63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[12] Sections 72(1) and 72(2)(a) of the IRPA provide that an application for judicial review may be brought in this Court only after "any" right of appeal provided by the IRPA has been exhausted:

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation:
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

[13] A conjunctive reading of these provisions leaves little doubt that the availability of an appeal to the IAD acts as a statutory bar to judicial review in this Court. This was confirmed by the Federal Court of Appeal in *Somodi v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 288 [*Somodi*].

[14] In *Somodi*, the Court of Appeal considered whether an application for judicial review of a decision denying a permanent resident application was statutorily barred while the sponsoring spouse was pursuing an appeal under s 63(1) of the IRPA. The Court concluded at para 24 that the operation of s 72(2)(a) of the IRPA prevails over s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, which provides a general right to apply for judicial review.

[15] There is nothing to distinguish *Somodi* from the case at bar. A sponsor's right to bring an appeal before the IAD abrogates the foreign national's right to bring an application for judicial review (*Habtenkiel v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180 [*Habtenkiel*] at para 36). To allow the concurrent proceedings would create the potential for an impermissible collateral attack on the IAD's decision before it has even been rendered and would run contrary to the IRPA's objectives (*Chinenye v Canada (Minister of Citizenship and Immigration)*, 2015 FC 378 [*Chinenye*] at paras 29-31).

[16] As noted by Justice Mosley in *Chinenye* at para 25, judicial review is an "avenue of last resort" and this Court is under an obligation to "respect Parliament's intention that internal review mechanisms be followed". Other decisions of this Court have also confirmed that the purpose of s 72(2)(a) of the IRPA is to avoid multiple inconsistent proceedings (*Huot c Canada*

(Ministre de la Citoyenneté et de l'Immigration), 2011 FC 180 [*Huot*] at para 16; *Sadia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1011 at para 11; *Landaeta v Canada (Minister of Citizenship and Immigration)*, 2012 FC 219 at paras 27 and 28; *Seshaw v Canada (Minister of Citizenship and Immigration)*, 2013 FC 396 at para 23, aff'd 2015 FCA 181).

[17] I am therefore satisfied that the Applicant in this case is statutorily barred from pursuing an application for judicial review in this Court. I agree with the Minister that the application for judicial review is premature. As Justice Russell explained in *Manesh*:

> [42] The combined effect of ss. 62, 63(1), 72(1) and 72(2)(a) of the [IRPA] makes it clear that the Applicant's Sponsor must exhaust her rights of appeal under the Act before either of them can come to this Court. This has been confirmed by the Federal Court of Appeal in *Somodi*, above, and more recently by Justice Scott in *Sadia*, above.
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> [43] As the Respondent points out, the Sponsor, pursuant to her right of appeal to the IAD, has filed an appeal; the appeal is pending. The Federal Court of Appeal has determined that having concurrent applications before the IAD and the Federal Court is contrary to the intention of the IRPA. Paragraph 72(2)(a) precludes an application for judicial review in the family class context until the foreign national's proposed sponsor has exhausted his or her right of appeal to the IAD under s. 63 of the IRPA. It is the IAD's mandate to determine the validity of the sponsorship, not that of the Federal Court. In this case, given that this application raises the same issues as does the appeal to the IAD, and given that the Applicant has not sought H&C [humanitarian and compassionate] relief, as admitted by the Applicant, s. 72(2)(a) precludes an application to this Court until the right of appeal has been exhausted. The fact that the appeal to the IAD may be taking longer than the Sponsor would have hoped is not sufficient ground to find otherwise.

[18] The Applicant points out that the Federal Court of Appeal has recognised that judicial review is permitted where there is no effective right of appeal. In *Seshaw v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 181, the Court of Appeal held:

> [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 [s 117(9)(d)] of the [*Immigration and Refugee Protection Regulations*, SOR 2002-2007] are not bound by the limitation on the right to apply for judicial review found at paragraph 72(2)(a) of the [IRPA] 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

[19] Section 65 of the IRPA reads as follows:

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

[20] Because the IAD has no jurisdiction to hear an appeal on H&C grounds if the appellant has previously been found not to be a member of the family class, there is no effective right of appeal and judicial review is permissible (*Huot*; *Habtenkiel*; *Phung v Canada (Minister of*

Citizenship and Immigration), 2012 FC 585; *Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479).

[21] The Applicant and her spouse did not request consideration of H&C grounds before the Officer, the IAD or this Court. However, the Applicant says that the doctrine of issue estoppel deprives them of a meaningful right of appeal to the IAD. This is because the IAD has previously found the marriage of the Applicant and her husband not to be genuine. Subject to a narrow exception, the Applicant says that it is highly unlikely that the IAD will revisit its previous determination.

[22] The Supreme Court of Canada said the following about issue estoppel in *Penner v Niagara Regional Police Services Board*, 2013 SCC 19 at paras 28-30:

> [28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation
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> [29] The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. <u>However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.</u>
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> [30] The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk* at para 1;

> see also, *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63 at paras. 52-53.
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> [31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *New Brunswick (Board of Management) v. Dunsmuir,* 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts…
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> [Emphasis added.]

[23] Counsel for the Applicant acknowledges that there is a chance, albeit slim, that the appeal by the Applicant's husband to the IAD may succeed and their marriage may be found to be genuine. In this respect, the Applicant's assertion that this Court has jurisdiction to hear the present application for judicial review is even weaker than the one considered and rejected by Justice Russell in *Manesh*. In that case, counsel for the applicant conceded that the appeal to the IAD was bound to fail, and had asked that the IAD dismiss it without delay so that the matter could be brought before this Court by means of an application for judicial review. Justice Russell nevertheless found that this Court could not take jurisdiction until the IAD had rendered its decision and an application for leave and for judicial review was filed in the normal manner:

> [45] I am not aware of whether a final decision dismissing the appeal has in fact been issued by the Board, but for the purposes of the present application, it does not matter. The IAD's decision is separate from the Decision under review here, which is the

> Decision of the Officer dated February 22, 2013. I am not empowered to consider a challenge to the IAD's decision within the context of this application. While the Court has discretion to allow more than one decision to be challenged within a single application in appropriate circumstances (see Rule 302, *Federal Courts Rules*, SOR/98-106), I am not aware of any instance where the Court has allowed an amendment to the Notice of Application after the hearing to permit a second decision to be challenged. No motion for such an amendment is before me, nor do I think it would be appropriate to grant it in the circumstances.
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> [46] If the Applicant wishes to challenge the IAD's decision, he must follow the normal process and seek leave to commence an application for judicial review of that decision under s. 72(1) of the Act. Such an application would be brought before the Court in the usual manner contemplated by the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22…

[24] I would add that an attempt to circumvent the operation of the doctrine of issue estoppel by seeking relief in this Court rather than at the IAD is incompatible with the policy rationales that give rise to the doctrine. The Minister notes that if the Applicant and her spouse are estopped from re-litigating the genuineness of their marriage before the IAD, then they are similarly estopped from re-litigating the matter before this Court.

[25] I conclude these reasons with a further excerpt from the decision of the Federal Court of Appeal in *Somodi* at paras 21 and 22:

> [21] In the IRPA, Parliament has established a comprehensive, self-contained process with specific rules to deal with the admission of foreign nationals as members of the family class. The right of appeal given to the sponsor to challenge the visa officer's decision on his or her behalf to the benefit of the foreign national, as well as the statute bar against judicial review until any right of appeal has been exhausted, are distinguishing features of this new process. They make the earlier jurisprudence relied upon by the appellant obsolete.

> [22] Parliament has prescribed a route through which the family sponsorship applications must be processed, culminating, after an appeal, with a possibility for the sponsor to seek relief in the Federal Court. Parliament's intent to enact a comprehensive set of rules in the IRPA governing family class sponsorship applications is evidenced both by paragraph 72(2)(*a*) and subsection 75(2).

[26] For the foregoing reasons, the application for judicial review is dismissed. Neither party identified a serious question of general importance in this case, and none arises. The matter is governed by the previous jurisprudence of the Federal Court of Appeal and this Court, and accordingly no question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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