Federal Court  Cour fédérale

Date: 20150826

Docket: IMM-2965-13

Citation: 2015 FC 1010

Toronto, Ontario, August 26, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

DARSHAN SINGH DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On June 19, 2014, the *Immigration and Refugee Protection Act* (SC 2001, c 27) [the Act, IRPA] was amended to terminate all visa applications by foreign nationals under the investor or entrepreneur classes which had not met certain requirements by February 11, 2014.

[2] In this judicial review, Mr. Dhaliwal is the Representative Applicant for a number of individuals affected by the legislative amendment and seeks to have the provision declared unconstitutional for offending the rule of law and violating section 7 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. Furthermore, he seeks an order of *mandamus* to compel the Minister of Citizenship and Immigration Canada [Minister] to process his application for permanent residence.

[3] The issues raised in the matter are the same as those in a companion case before me, *Singh v Minister of Citizenship and Immigration* (IMM-3716-13). By agreement of the parties, the matters were argued together given the similarities in the legal issues to be decided by the Court.

[4] For the reasons below, I would dismiss the judicial review.

II. Facts

[5] On May 21, 2010, the Applicant, a citizen of India, filed an application for permanent residence under the Federal Investor Class. He received a letter from the Canadian High Commission in New Delhi a few days later, acknowledging its receipt and advising him that he would be informed of the status of his application in twenty months (Applicant's Record [AR], p. 16).

[6] However, a little less than 3 years later, the Applicant's file was still yet to be processed. Consequently, on April 22, 2013, the Applicant filed the underlying application for judicial review seeking an order of *mandamus* to process his permanent residence application. Before the

judicial review was heard on its merits, on June 19, 2014, section 303 of the *Economic Action Plan 2014 Act, No 1* (SC 2014, c 20) amended the Act to include section 87.5:

> 87.5 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of investors or of entrepreneurs is terminated if, before February 11, 2014, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to the class in question.
>
> (2) Subsection (1) does not apply to
>
> (a) an application in respect of which a superior court has made a final determination unless the determination is made on or after February 11, 2014; or
>
> (b) an application made by an investor or entrepreneur who is selected as such by a province whose government has entered into an agreement referred to in subsection 9(1).
>
> (3) The fact that an application is terminated under subsection (1) does not constitute a decision not to issue a permanent resident visa.
>
> (4) Any fees paid to the Minister in respect of the application referred to in subsection (1) — including for the acquisition of permanent resident status — must be returned, without interest, to the person who paid them. The amounts payable may be paid out of the Consolidated Revenue Fund.
>
> (5) If an application for a permanent resident visa as a member of the prescribed class of investors is terminated under subsection (1), an amount equal to the investment made by the applicant in respect of their application must be returned, without interest, to the applicant. The amount may be paid out of the Consolidated Revenue Fund.
>
> (6) If the provincial allocation of an investment made in respect of an application for a permanent resident visa as a member of the prescribed class of investors that is terminated under subsection (1) has been transferred to an approved fund, as defined in subsection 88(1) of the Immigration and Refugee Protection Regulations, the province whose government controls the approved fund must return an amount equal to that provincial allocation to the Minister without delay. The return of the amount extinguishes the debt obligation in respect of that provincial allocation.

> (7) No right of recourse or indemnity lies against Her Majesty in right of Canada in connection with an application that is terminated under subsection (1), including in respect of any contract or other arrangement relating to any aspect of the application.

[7] Pursuant to section 87.5(1), the Applicant's permanent residence application was terminated by operation of law.

[8] Before diving into the substantive analysis of this case, it should be noted that recently, the Federal Court of Appeal [FCA] decisively ruled on a matter involving a similar set of applicants. *Jia v Canada (Citizenship and Immigration)*, 2015 FCA 146 [*Jia*] and its trial decision, *Jia v Canada (Citizenship and Immigration)*, 2014 FC 596 [*Jia FC*], was, like this matter, brought to the Federal Courts by way of a *mandamus* application. Also similar to this case were the underlying circumstances, including the type of permanent residence applications at issue (business category), place of filing (visa offices in Asia), projections of processing times, and allegations of unconstitutionality by the applicants. Those applicants were unsuccessful at both levels of the Federal Courts.

[9] I now turn back to the analysis of this case, and will return to a discussion of *Jia* at the end of my decision.

III. Submissions

[10] Since the Applicant's Investor Class application has already been terminated pursuant to section 87.5 of the Act, it is apparent that the remedy he is seeking, an order of *mandamus* directing the Minister to process his application, hinges on the constitutionality of this provision.

[11] The Applicant argues that section 87.5 is unconstitutional in two respects: (i) the provision offends the constitutional principle of the rule of law, and (ii) the provision violates the Applicant's rights under section 7 of the *Charter*.

[12] The Respondent argues that as a foreign national residing outside of Canada, the Applicant lacks standing to bring *Charter* or constitutional claims. In any event, there is no breach of section 7, because the Applicant's life, liberty or security of the person were not engaged nor did the constraints imposed on the Investor Class permanent residence applications violate the principles of fundamental justice. As the Supreme Court of Canada held in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 69-72 [*Imperial Tobacco*], retrospective statutes do not violate the rule of law, and there is no vested right to an application of the law as it stood prior to its retrospective amendment.

IV. Analysis

A. *Preliminary Matters*

[13] Procedurally, the Respondent argues that the Applicant's arguments regarding the constitutionality of section 87.5 are improperly before the Court and should not be entertained because they were raised for the first time in the Applicant's Further Memorandum of Fact and Law. As noted by the Federal Court of Appeal in *Erasmo v Canada (Attorney General)*, 2015 FCA 129 at para 33, the general rule is that, absent cases of urgency, constitutional questions cannot be raised for the first time in the reviewing court if the administrative decision maker under review had the power and the practical capability to decide them.

[14] In this case, the contested provision come into effect after the application for judicial review for delay in processing had already been filed. Thus, the judicial review before me is the first practical opportunity for the Applicant to assert these arguments. For the Applicant to have to circle back and seek leave of the Minister's decision to terminate the Investor Class application, based on the same facts as the judicial review currently before this Court, would be to waste scarce judicial resources. As stressed by Justice Karakatsanis in *Hryniak v Mauldin*, 2014 SCC 7 at para 25 in a decision regarding the shift in culture required to facilitate Ontario's summary judgement rules, "[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives" (see also *Jia FC* at para 11). I also see little prejudice to the Respondent in this case, given the opportunity to address the Applicant's constitutional arguments through written submissions in the Further Memorandum of Fact and Law and at the hearing.

B. *Rule of Law and Constitutionality of Section 87.5*

[15] The rule of law is a fundamental constitutional principle which provides, at the very least, that (i) the law is supreme over officials of the government as well as private individuals, (ii) requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order and (iii) the actions of state officials be legally founded (*Re Manitoba Language Rights*, [1985] 1 SCR 721 at paras 59-61; *Imperial Tobacco* at para 59).

[16] The Applicant relies on *R v Ferguson*, 2008 SCC 6 at para 68, wherein the Chief Justice of the Supreme Court of Canada made it clear that for laws to conform to the principle of the rule of law, they must be accessible, intelligible, clear and predictable:

> [68] The principles of constitutionalism and the rule of law lie at the root of democratic governance: Reference re Secession of Quebec, [1998] 2 S.C.R. 217. It is fundamental to the rule of law that "the law must be accessible and so far as possible intelligible, clear and predictable":

[17] At its core, the Applicant's argument is this: the Minister owed a duty to the Applicant to process his application upon its submission, and section 87.5 is unconstitutional because it retrospectively eliminated this duty, violating the virtue of predictability the rule of law must encompass.

[18] The law, however, must be capable of adapting to changing circumstances. The ability of Parliament to craft solutions to shifting social, financial or political problems implicates another constitutional principle which is that the rule of law must be balanced against parliamentary sovereignty (*Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 55 [*Babcock*]). Parliament is provided the freedom, subject to constitutional constraints, to legislate as it sees fit (*Babcock* at para 57). Indeed, no Parliament, through ordinary legislation, may prohibit future iterations from modifying a law (*Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 25, 44).

[19] Justice Major in *Imperial Tobacco* addressed the constitutionality of retrospective statutes, stating that aside from the criminal context, "there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution" (at para 69) and went on to acknowledge the frustration that certain individuals may feel when retrospective statutes upset preconceived expectations:

> [71] The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 U.B.C. L. Rev. 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": Landgraf v. USI Film Products, 511 U.S. 244 (1994), at p. 268.

[20] In short, the unfortunate accompaniment of disruption or unfairness when a retrospective law is passed does not render that new law in violation of the rule of law.

[21] The Applicant attempts to distinguish this situation by arguing that in *Imperial Tobacco*, no prior duties had been supplanted or nullified by the retrospective legislation at issue.

[22] The hurdle the Applicant cannot overcome, however, is that a higher Court ─ the FCA ─ has held on two separate occasions within the past two years that the elimination of a duty to process a visa application is constitutional in nearly identical circumstances.

[23] In *Austria v Canada (Citizenship and Immigration)*, 2014 FCA 191 [*Tabingo*] the Federal Court of Appeal heard the appeal of a judicial review decided by Justice Rennie (as he then was) in *Tabingo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 377 [*Tabingo FC*]. The applicants in that case challenged a similar provision, section 87.4(1) of the Act, which had terminated permanent resident visa applications of foreign nationals who applied before February 27, 2008 as members of the Federal Skilled Worker class. The FCA rejected the

applicants' argument that the provision was so arbitrary that it offended the rule of law, finding that "this Court cannot, in the face of *Imperial Tobacco*, accept the argument of the appellants that subsection 87.4(1) offends the rule of law because it is retrospective" (*Tabingo* at para 74).

[24] Second, the FCA came to a similar result in *Jia*, not on constitutional grounds, but rather on the grounds that the requested *mandamus* order to compel the processing of outstanding investor and entrepreneur applications was rendered moot due to the enactment of section 87.5, the same provision at issue in today's request for a similar *mandamus* order.

[25] Consequently, in light of the comments of the Supreme Court of Canada in *Imperial Tobacco* and the Federal Court of Appeal in *Tabingo* on retrospectivity, the Applicant's arguments regarding the legitimacy of the retrospective legislation at issue in this case must also fail.

C. *Section 7 of the Charter*

[26] The Applicant's second argument posits that section 87.5 is unconstitutional because it violates his rights under section 7 of the *Charter*. For support, he cites *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 116 [*Chaoulli*], wherein Chief Justice McLachlin and Justice Major found in concurring reasons that the psychological side effects of waiting for critical health care may engage a section 7 protection for security of the person. The Applicant argues that psychological damage can be wrought in waiting for a visa application to be processed, only to see it ultimately terminated without adjudication.

[27] A similar argument was rejected in *Tabingo*. The Federal Court of Appeal concluded that while profoundly disappointing, the evidence in that case did not establish the high threshold of psychological harm necessary to establish a deprivation of the right to security of the person (*Tabingo* at para 99). Looking at the record before me in this case, I would reach the same conclusion.

[28] In this case, there is insufficient evidence before me to indicate that the Applicants suffered physiological effects beyond ordinary stress or anxiety due to the termination of their application (*Chaoulli* at para 116). Even so, the reasons why section 7 would not be engaged were well articulated by Justice Rennie in paragraph 99 of *Tabingo FC*:

> [99] I accept that the applicants have experienced stress and hardship; I also accept that the circumstances of some of the applicants are compelling. However, immigration is not of such an intimate, profound and fundamental nature as to be comparable with a woman's right of reproductive choice, or the freedom of parents to care for their children. The ability to immigrate, particularly as a member of an economic class, is not among the fundamental choices relating to personal autonomy which would engage section 7. While it may have life-altering consequences, the possibility of immigrating to Canada as a successful FSW applicant does not engage life or liberty interests. (Aff'd by the FCA in *Tabingo* at para 96)

[29] In *Jia FC*, Justice Gleason (as she then was) adopted the section 7 analysis of Justice Rennie, and relied on many of the same cases cited by him, in noting "the significant jurisprudence" of the Federal Courts holds that foreign citizens outside of Canada have no rights under the *Charter* in respect of activities that occur outside of Canada (*Jia FC* at paras 108 and 114; see also for instance *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22; *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336;

Amnesty International Canada v Canada (Chief of the Defence Staff), [2009] 4 FCR 149; *Arora v Canada (MCI)*, IMM-5901-99, Date: 2001-01-10).

[30] While there is no binding jurisprudence from a higher court on the constitutionality of section 87.5 (*Jia* at para 7), many of the same arguments in this judicial review were addressed by Justice Gleason in *Jia FC*. For instance, she concluded that the rule of law was not blemished by the passage of the provision, though the argument in that case was framed through the lens of section 15 of the *Charter* (*Jia FC* at paras 128-130). Further, as Justice Gleason found for the same reasons that Justice Rennie set out in *Tabingo FC*, section 7 was not engaged as a result of the passage of section 87.5 (*Jia FC* at para 114). I agree with and adopt the reasoning behind these conclusions on the rule of law and constitutionality of section 87.5.

[31] After the rulings of Justices Rennie and Gleason in *Tabingo FC* and *Jia FC*, three other judges of this Court have arrived at similar conclusions in related facts.

[32] First, Justice Boswell declined to return a case for redetermination, as the visa application would be terminated by section 87.5 in any event (*Kozel v Canada (Citizenship and Immigration)*, 2015 FC 593 at para 21).

[33] Second, in *Sin v Canada*, 2015 FC 276 at para 4 [*Sin*], Justice O'Reilly struck a claim for damages for loss of opportunities brought by an applicant who had a pending investor application for failing to disclose a cause of action. While the applicant argued that bilateral treaties protect the rights of investors, Justice O'Reilly concluded that "provisions enacted by

Parliament that terminate investors' permanent residence applications and limit the extent to which they can seek compensation for the termination of their applications simply do not conflict with those agreements" (*Sin* at para 12).

[34] Third, Justice Mosley also declined to order *mandamus* for an Investor Class application affected by section 87.5, substantially for the reasons Justice Gleason gave in *Jia FC* (*Hui v Canada (Minister of Citizenship and Immigration)*, 2014 FC 666 at para 5).

[35] For all of the reasons above, I reject the constitutional law arguments advanced by the Applicant in this judicial review.

[36] Finally, before the rulings in this consistent line of Federal Court jurisprudence, Justice Russell also arrived at the same outcome in *Shukla v Canada (Citizenship and Immigration)*, 2012 FC 1461. *Shukla* was an early ruling on section 87 of the Act, where a Federal Skilled Worker applicant, who had filed at the New Delhi Visa office, declined a refund of fees from New Delhi when the law changed, and resubmitted his application with new forms. Justice Russell dismissed the *mandamus* and the *nunc pro tunc* request of the Applicant, stating:

> In addition, the back-dating that the Applicant requests would be an assumption of jurisdiction in a situation where Parliament has made its intentions clear, so that the Court would be attempting to thwart the clear and express intent of Parliament. I know of no principal or authority that would allow me to do this and I think the law on point is clear.

[37] Similarly, when the FCA upheld Justice Gleason's decision in *Jia FC* nearly three years after *Shukla*, Justice Ryer conclusively ruled for the Court that because section 87.5 terminated

all investor applications, "the issue of whether the Minister could be forced [via *mandamus*] to process these applications was no longer a live controversy" (*Jia* at para 6). That ruling binds me, and I therefore also reject the *mandamus* component of the Applicant's requested order.

V. Certification

[38] The Applicant proposed three questions for certification:

i. Does the court have the jurisdiction to grant a Mandamus Order, even when the class of immigrant has been terminated, in cases when the Mandamus Order was sought prior to the coming into force of the legislation terminating the said class?

This question has been answered conclusively in *Jia* and other cases.

ii. If the Respondent acted in bad faith before the coming into force of section 87.5 of IRPA and ignored its duty to process in accordance with section 3(1)(f) of IRPA, can the court order that such files which were submitted in accordance with section 11(1) of IRPA, and for which it would have been reasonably expected that a decision should have been made, be processed and decided in accordance with the law in existence prior to coming into force of the said section?

I agree with the Respondent that there was no evidence of bad faith in these matters (including the unchallenged Respondent Affidavit of Larry Penn at para 6). There is no evidence that files were not being processed according to the law, even if not at the pace the Applicant would have liked, or one that provided a decision before the new law came into effect.

iii. In light of the bad faith in the implementation of section 87.5 of the IRPA and willfully ignoring of the duty imposed on the Respondent by Parliament, is the legislation *ultra vires*, as allowing its operation under the present circumstances is a clear and fundamental breach of the rule of law, and the core values expressed in the Constitution and fundamental to our democracy?

Given that there is no evidence of bad faith, and the Courts have rejected the notion that the Respondent had a duty to process the applications prior to the entry into force of section 87.5, this question also fails to meet the certification test. The Court of Appeal, first in *Tabingo* and then in *Jia*, decided these issues. While I note that Justice Ryer found no need to address constitutional issues in *Jia*, due to the FCAs findings on the *mandamus* issue (reviewed above), the FCA found the new legislative provisions to be constitutional in *Tabingo*, as did my colleagues, Justices Rennie and Gleason, in their comprehensive decisions in *Tabingo FC* and *Jia FC*, respectively.

[39] I am satisfied that these questions have been addressed by both levels of our Federal Courts, per the clear and consistent line of jurisprudence reviewed above. Certification, accordingly, is not warranted in this matter, per the criteria set out in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9.

VI. Conclusion

[40] Having carefully reviewed the facts of this case, I see no compelling reasons to deviate from the clear and consistent body of jurisprudence. While I recognize it is a bitter pill to

swallow for the applicants who wanted to see their files processed through to conclusion, this application for judicial review will accordingly be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. There is no award as to costs.

3. No questions will be certified.

"Alan S. Diner"

Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2965-13
STYLE OF CAUSE:	DARSHAN SINGH DHALIWAL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 3, 2015
JUDGMENT AND REASONS:	DINER J.
DATED:	AUGUST 26, 2015

APPEARANCES:

Wennie Lee	FOR THE APPLICANT
Negar Hashemi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT