Federal Court  Cour fédérale

Date: 20160217

Docket: IMM-3600-15

Citation: 2016 FC 216

Toronto, Ontario, February 17, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THECLA SENDWA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] It is of prime importance to ensure that legislation is read, taking into account the case narrative before a decision-maker, rather than divorcing the legislation from the case at bar; otherwise, legislation would simply be read and considered in the abstract, without taking into account the narrative to be considered in reference to legislation by which to reach a result, thus, a decision. If the case narrative is not considered in reference to the legislation, then legislation is

considered in the abstract, forgetting who is before the law. If such is the case, why have a decision-maker or a tribunal listen to a case?

[2] In *B010*, below, the Supreme Court reiterated the long held principle that statutory interpretation requires the Court "to read "the words of an Act ... in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 7; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26" (*B010*, below at para 29).

[3] Turning to the interpretation of paragraph 117(1)(*h*) of the IRPR, firstly, Justice Peter B. Annis in *Jordano*, below, stated that the purpose and intent of paragraph 117(1)(*h*) of the IRPR is "to favour persons who do not have relations in Canada and have no possibility to sponsor any relations under other provisions" (*Jordano*, below at para 9).

II. Introduction

[4] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, dated June 29, 2015, wherein the IAD upheld a decision of the High Commission in Nairobi, Kenya, rejecting the sponsorship application for a permanent resident visa, in respect of a member of a family class, the Applicant's niece.

III. Background

[5] This case turns around the interpretation of paragraph 117(1)(*h*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]; namely, the interpretation of the words "may otherwise sponsor" at subparagraph 117(1)(*h*)(ii) of the IRPR.

[6] The Applicant, Thecla Sendwa, is a Canadian citizen. She applied to sponsor her niece, Naomi Karlo Sendwa (age 22), citizen of Tanzania, as a member of the family class pursuant to paragraph 117(1)(*h*) of the IRPR.

[7] The Applicant came to Canada in March 2005, became a permanent resident in Canada in October 2008; and, became a Canadian citizen in 2014. The Applicant does not have relatives in Canada.

[8] In a decision dated June 18, 2014, the High Commission in Nairobi, Kenya, rejected the sponsorship application as the Applicant's parents are still alive; hence, it is they who could be sponsored. Therefore, Ms. Naomi Sendwa, the niece could not be sponsored pursuant to paragraph 117(1)(*h*) of the IRPR in respect of her relationship to the sponsor as per the inherent reasoning of the High Commission.

IV. Impugned Decision

[9] In a decision dated June 29, 2015, the IAD dismissed the appeal and upheld the High Commission's findings. The IAD held that Ms. Naomi Sendwa is not a member of the family

class pursuant to paragraph 117(1)(*h*) of the IRPR as paragraph 117(1)(*h*) of the IRPR speaks of the ability of the sponsor to sponsor her parents. The IAD stated that in assessing paragraph 117(1)(*h*) of the IRPR, an officer need not consider admissibility or inadmissibility of relatives of the sponsor, within the meaning of paragraphs 117(1)(*a*) to (*g*) of the IRPR. Given that the parents of the Applicant are still alive, Ms. Naomi Sendwa is not a member of the family class. Thus, the IAD held that it could not, pursuant to section 65 of the IRPA, consider humanitarian and compassionate considerations. (Please see below as to who is sponsoring who in respect of the nomenclature in the legislation; otherwise, confusion, as to who is who, ensues as to who is the sponsor and who is the sponsoree.)

V. Position of the Parties

[10] The Applicant submits that the IAD erred by reading paragraph 117(1)(*h*) of the IRPR in an overly restrictive manner which is frustrating and discouraging the IRPA's objective of family reunification. The IAD misinterpreted the aforementioned section by creating a hierarchy wherein a sponsor would have the obligation to sponsor a relative by means of paragraphs 117(1)(*a*) to (*g*) of the IRPR before resorting to rely on paragraph 117(1)(*h*) of the IRPR (see *Jordano v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1143 [*Jordano*]). Furthermore, the IAD erred by reading subparagraph 117(1)(*h*)(ii) from the perspective of the family member as opposed to the perspective of the Canadian permanent resident or the citizen in Canada without a relative in Canada (*Mahmood v Canada (Minister of Citizenship and Immigration)*, [2001] 1 FCR 563 at para 16). Thereby, the Applicant submits that paragraph 117(1)(*h*) of the IRPR must be read as meaning that an applicant may resort to sponsor a relative within the meaning of paragraph 117(1)(*h*) of the IRPR, if, the sponsor is ineligible to sponsor a

family member within the meaning of paragraphs 117(1)(*a*) to (*g*) of the IRPR, or, a family member, within the meaning of paragraphs 117(1)(*a*) to (*g*) of the IRPR, is inadmissible to Canada.

[11] Conversely, the Respondent submits that paragraph 117(1)(*h*) of the IRPR must be read as stating that the possibility of sponsoring a relative, within the meaning of paragraphs 117(1)(*a*) to (*g*) of the IRPR, precludes an application to sponsor a relative within the meaning of paragraph 117(1)(*h*) of the IRPR. In essence, the Applicant is precluded from sponsoring her niece if the Applicant's parents could be sponsored. The Respondent recognizes that this interpretation of paragraph 117(1)(*h*) of the IRPR may be harsh, as an applicant may have relatives within the meaning of paragraphs 117(1)(*a*) to (*g*) whom they do not wish to sponsor. Nonetheless, this is, according to the Respondent, the clear intent of the legislation. Besides, an applicant may otherwise have recourse to an application for permanent residence based on humanitarian and compassionate grounds pursuant to section 25 of the IRPA; an option not exercised by the Applicant.

VI. Issues

[12] Did the IAD err in its interpretation and application of paragraph 117(1)(*h*) of the IRPR?

VII. Standard of Review

[13] There is a presumption that the interpretation by the IAD of subsection 117(1) of the IRPR attracts the standard of review of reasonableness as deference is owed to administrative

tribunals' interpretation of their own statutes or statutes closely related to their functions (*B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 25 [*B010*]).

[14] The IAD's decision is reasonable if it falls within a range of possible, acceptable outcomes which are defensible in respect of fact and law; and, if, its decision-making process is justifiable, transparent and intelligible (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 47).

VIII. Analysis

[15] The Court agrees with the Applicant that the IAD's interpretation of subparagraph 117(1)(*h*)(ii) of the IRPR falls outside the range of possible and acceptable outcomes; as the IAD read that section from the perspective of the foreign national as opposed to the perspective of the sponsor.

[16] In the present case, the Applicant testified under oath and also had a further significant affidavit stating that she would not be eligible to sponsor her parents as she does not meet the minimal financial requirements; and, in any event, her parents would be inadmissible to Canada due to her father's medical condition. The IAD rejected the Applicant's application as it held that the Applicant's parents are "sponsorable" as they are alive. Both parties have suggested a different interpretation of paragraph 117(1)(*h*).

[17] In *B010*, above, the Supreme Court reiterated the long held principle that statutory interpretation requires the Court "to read "the words of an Act ... in their entire context, in their

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 7; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26" (*B010*, above at para 29).

[18] Turning to the interpretation of paragraph 117(1)(*h*) of the IRPR, firstly, Justice Peter B. Annis in *Jordano*, above, stated that the purpose and intent of paragraph 117(1)(*h*) of the IRPR is "to favour persons who do not have relations in Canada and have no possibility to sponsor any relations under other provisions" (*Jordano*, above at para 9).

[19] Secondly, a plain reading of the French and English language versions of subparagraph 117(1)(*h*)(ii) of the IRPR speaks of the capability of an applicant to sponsor a foreign national's application to enter Canada; neither versions speak of the possible admissibility of a foreign national; nor do they speak of the foreign national's ability to be sponsored:

Member	**Regroupement familial**
117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117** (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(*h*) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the	*h*) tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses parents ou de

mother or father of that mother or father	membre de sa famille qui est l'enfant de l'un ou l'autre des parents de l'un ou l'autre de ses parents, qui est :
(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	(ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

[Emphasis added.]

[20] Moreover, the Court is of the opinion that the aforementioned reading of paragraph 117(1)(*h*) of the IRPR is supported by the finding of Justice Annis in *Jordano*, above at para 4:

> [4] Normally, applications cannot be made pursuant to paragraph 117(1)(h) when the possibility of sponsoring parents is otherwise available under paragraph 117(1)(c), because by subparagraph 117(1)(h)(ii) recourse may not be had to the provision if the "sponsor may otherwise sponsor" the individual to Canada. Inasmuch as the applicant could normally sponsor her mother pursuant to paragraph 117(1)(c), this would make her ineligible to sponsor her mother under paragraph 117(1)(h).
>
> [Emphasis added.]

[21] In the present case, the IAD held that the Applicant's application was rejected simply because her parents were alive. The IAD did not consider whether the Applicant would (even) be eligible (or in position) to sponsor her parents. As a result, the IAD's decision is unreasonable.

IX. Conclusion

[22] Consequently, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted; and, to be considered anew by a differently constituted panel. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Shannon Black	FOR THE APPLICANT
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shannon Black Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT