Date: 20071128

Docket: IMM-5343-06

Citation: 2007 FC 1249

Ottawa, Ontario, November 28, 2007

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

THI THIET TRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Minister of Citizenship and Immigration (the Minister) has moved pursuant to Federal Court Rule 397 for a reconsideration in writing of my Judgment and Direction of July 31, 2007 (the Motion). It read as follows:

> **UPON** noting that no questions were posed for certification pursuant to section 74 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and for the reasons given above;
>
> **THIS COURT ORDERS THAT** the application for judicial review is allowed and the H&C Application is to be re-determined by a different immigration officer who is hereby directed to grant the H&C Application.

[2] The purpose of the reconsideration is to have Court certify the following question (the Proposed Question):

> Does subsection 18.1(3)(b) of the *Federal Courts Act* permit a judge to direct an officer to grant an application made pursuant to s. 24 of the *Immigration and Refugee Protection Act* asking the Minister to grant an exception on humanitarian and compassionate grounds from the statutory requirement in s. 11(1) of *IRPA* that otherwise requires foreign nationals to apply for a permanent resident status from outside Canada?

[3] The Minister relies on the Federal Court of Appeal's decision in *Huynh v. Canada (Minister of Citizenship and Immigration)*, [1996] 2 F.C. 976 (C.A.). At paragraph 23, the Court held that former Federal Court Rule 1733 could be used to vary a judgment or order to add a new certified question of general importance. The Court said that such new questions could arise if a Judge decided a case on a point that was not argued or based his decision on his interpretation of a higher Court decision which was not the subject of submissions.

[4] Former Rule 1733 read as follows:

1733. A party entitled to maintain an action for the reversal or variation of a judgment or order upon the ground of matter arising subsequent to the making thereof or subsequently discovered, or to impeach a judgment or order on the ground of fraud, may make an application in the action or other proceeding in which such judgment or order was delivered or made for the relief claimed.	1733. Une partie qui a droit de demander en justice l'annulation ou la modification d'un jugement ou d'une ordonnance en s'appuyant sur des faits survenus postérieurement à ce jugement ou à cette ordonnance ou qui ont été découverts par la suite, ou qui a droit d'attaquer un jugement ou une ordonnance pour fraude, peut le faire, sans intenter d'action, par simple demande à cet effet dans l'action ou autre procédure dans laquelle a été rendu ce jugement ou cette ordonnance.

[5] Rule 1733 clearly did allow the variation of a judgment on the basis of a new matter or one subsequently discovered and the Federal Court of Appeal concluded that this could include a certified question.

[6] The difficulty is that Rule 397(1), which is the only rule relied on for the order sought, does not, in my view, cover new matters. It reads as follows:

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that *(a)* the order does not accord with any reasons given for it; or *(b)* a matter that should have been dealt with has been overlooked or accidentally omitted.	**397.** (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes : *a)* l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier; *b)* une question qui aurait dû être traitée a été oubliée ou omise involontairement.

[7] Instead of dealing with new matters, this rule looks backwards to reasons and orders already issued to ensure that they accord with one another. It also looks at matters that should have been dealt with (presumably because they were before the Court) but were overlooked or omitted. I am therefore unable to conclude that the Court of Appeal's decision in *Huynh* has any bearing on this motion.

[8] In my view, Rule 397(1) does not permit the Minister to move to add a question for certification to a judgment.

[9] This conclusion disposes of the motion but, it might be helpful to consider as well whether the Proposed Question is one of general importance which I would have certified.

[10] To show that the Proposed Question is one of general importance, the Minister suggested that the law is not settled on the question of whether a judge can direct the outcome when a matter is referred back after judicial review. On this issue, the Minister relies on a statement made in *obiter* by the Federal Court of Appeal in *Lazareva v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 181. In that case, the Trial Judge directed the Minister to allow the applicant to apply for landing from within Canada and refused to certify a question on a motion under Rule 397 about whether such a direction was within his jurisdiction.

[11] The Court of Appeal concluded that, without a certified question, it was not entitled to entertain the Minister's appeal. The Court also said the following at paragraph 6 of its decision:

> The Minister may well be correct when he says that the judge did not have the authority to grant the ancillary relief he granted. But for paragraph 74(d) of the Immigration and Refugee Protection Act, it is more than likely that this appeal would succeed. However, it would not be appropriate to express a final opinion on the merits of the Minister's submissions because, even if they are well founded, there is no certified question.

[12] However, this was a statement by the Court of Appeal in *obiter* and it does not appear that the Court of Appeal was referred to in its earlier decision on the point.

[13] The Court of Appeal has clearly said that the Federal Court can issue directions under paragraph 18.1(3)(b) of the Federal Courts Act which are in the nature of a directed verdict. In this regard, see the Federal Court of Appeal's decision in *Turanskaya v. Canada (Minister of Citizenship and Immigration)* (1997), 145 D.L.R. (4th) 259 and the discussion of this topic in *Marsh v. Canada (Royal Canadian Mounted Police)*, 2006 FC 1466.

[14] In my view, this case is one in which the uncontested evidence on the record is so conclusive that there is only one possible conclusion if the terms humanitarian and compassionate are to be given any meaning. Accordingly in the circumstances of this case, the law is settled and I would not have certified the Proposed Question.

ORDER

THIS COURT ORDERS that the Motion is hereby dismissed.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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