Date: 20080225

Docket: IMM-4534-06

Citation: 2008 FC 245

Ottawa, Ontario, February 25, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CAMILO ORLANDO VELANDIA BARON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns a decision by a Canadian Border Services Agency (CBSA) officer that Mr. Baron did not qualify for exemption under the Safe Third Country Agreement (STCA) between Canada and the United States. He had claimed exemption on the basis of having a family member in Canada.

II. FACTUAL BACKGROUND

[2] The Applicant alleged that threats had been made against him in Colombia so he fled. He travelled through Miami, to Buffalo and then entered Canada.

[3] Mr. Baron was interviewed by a CBSA officer to determine if he qualified for exemption under the STCA as a class of persons who would otherwise be returned to the United States. He relied on the fact that his sister had made a refugee claim.

[4] The CBSA officer determined that the sister's claim had been rejected by the Immigration and Refugee Board (IRB), that there was no stay of her removal and therefore the sister did not qualify as an "anchor relative" to ground the request for exemption. The Applicant received notice of that decision on August 3, 2006 as well as a s. 44(1) report and exclusion order.

[5] The sister sought judicial review of the IRB's decision, which judicial review was dismissed on May 16, 2006. The Court certified a question and her appeal acted as an automatic stay. The Applicant's request for reconsideration by the IRB was denied.

[6] The sister's appeal was still pending when this matter came before the Court. Subsequently, the sister's appeal was dismissed and this Court issued its decision in *Canadian Council for Refugees v. Canada*, 2007 FC 1262, finding, in part, that the Regulations related to the STCA are

invalid. That decision is stayed before the Court of Appeal. The parties were provided an opportunity to make further submissions in light of these circumstances.

III. ANALYSIS

[7] Assuming that the applicable regulations were valid, the issue in this judicial review was whether the sister's (anchor relative) claim must be finally rejected before the claimant himself is ineligible to rely on the existence of her claim in support of his plea for exemption from the STCA.

[8] The relevant legislation and regulations are:

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if	**101.** (1) La demande est irrecevable dans les cas suivants :
…	…
(*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or	*e*) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
159.1 The following definitions apply in this section and sections 159.2 to 159.7.	**159.1** Les définitions qui suivent s'appliquent au présent article et aux articles 159.2 à 159.7.
…	…
"family member" , in respect of a claimant, means their	«membre de la famille» À l'égard du demandeur, son

spouse or common-law partner, their legal guardian, and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece. (membre de la famille)

époux ou conjoint de fait, son tuteur légal, ou l'une ou l'autre des personnes suivantes : son enfant, son père, sa mère, son frère, sa soeur, son grand-père, sa grand-mère, son petit-fils, sa petite-fille, son oncle, sa tante, son neveu et sa nièce. (family member)

159.5 Paragraph 101(1)*(e)* of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)*(a)* to *(c)* establishes, in accordance with subsection 100(4) of the Act, that

159.5 L'alinéa 101(1)*e)* de la Loi ne s'applique pas si le demandeur qui cherche à entrer au Canada à un endroit autre que l'un de ceux visés aux alinéas 159.4(1)*a)* à *c)* démontre, conformément au paragraphe 100(4) de la Loi, qu'il se trouve dans l'une ou l'autre des situations suivantes :

…

…

(c) a family member of the claimant who has attained the age of 18 years is in Canada and has made a claim for refugee protection that has been referred to the Board for determination, unless

c) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et a fait une demande d'asile qui a été déférée à la Commission sauf si, selon le cas :

(i) the claim has been withdrawn by the family member,

(i) celui-ci a retiré sa demande,

(ii) the claim has been abandoned by the family member,

(ii) celui-ci s'est désisté de sa demande,

(iii) the claim has been rejected, or	**(iii) sa demande a été rejetée,**
(iv) any pending proceedings or proceedings respecting the claim have been terminated under subsection 104(2) of the Act or any decision respecting the claim has been nullified under that subsection;	(iv) il a été mis fin à l'affaire en cours ou la décision a été annulée aux termes du paragraphe 104(2) de la Loi;
(Emphasis added)	(Non souligné dans L'original)

[9] As this is a matter of statutory interpretation, it ought to be reviewed on a standard of correctness. There are no aspects of the pragmatic and functional test that support a different level of standard of review.

[10] In addition to s. 12 of the *Interpretation Act* directing that a fair, large and liberal construction should be given to ensure that enactments obtain their objects, the Supreme Court has confirmed that words must be read in context, in their grammatical and ordinary sense harmoniously with the scheme and objects of the legislation and the intent of Parliament (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27). In that regard, legislative history assists in determining the true intent and object of the words.

[11] This Court in *Ballie v. Canada (Minister of Employment and Immigration)*, (1993) 101 D.L.R. (4th) 761, held that a change in the former *Immigration Act* to remove the words "finally

determined" indicated a legislative intent that a claim is considered rejected even where a judicial review was pending.

[12] The current wording of the *Immigration and Refugee Protection Act* (IRPA) where the term "rejected" is used without qualifiers indicates a similar intent to that found in *Ballie*.

[13] This interpretation is reinforced in the current IRPA where the intent to ensure finality of a decision to include completion of all further legal process is evidenced by the qualifier "finally". As an example, s. 21(2) of the IRPA, concerning the granting of permanent residence to refugees, uses the qualifier "finally" to indicate a complete resolution of the matter with no further avenues of appeal being available.

21. (2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in	**21.** (2) Sous réserve d'un accord fédéro-provincial visé au paragraphe 9(1), devient résident permanent la personne à laquelle la qualité de réfugié ou celle de personne à protéger a été reconnue en dernier ressort par la Commission ou celle dont la demande de protection a été acceptée par le ministre — sauf dans le cas d'une personne visée au paragraphe 112(3) ou qui fait partie d'une catégorie réglementaire — dont l'agent constate qu'elle a présenté sa demande en conformité avec les règlements et qu'elle n'est pas interdite de territoire pour l'un des motifs visés aux articles 34 ou 35, au paragraphe 36(1) ou aux

section 34 or 35, subsection 36(1) or section 37 or 38.	articles 37 ou 38.

[14] Section 232*(c)* of the *Immigration and Refugee Protection Regulations* (Regulations), similar to s. 159.5(1)*(c)*(iii), uses the word "rejected" without indicating finality.

232. A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, and the stay is effective until the earliest of the following events occurs:	**232.** Il est sursis à la mesure de renvoi dès le moment où le ministère avise l'intéressé aux termes du paragraphe 160(3) qu'il peut faire une demande de protection au titre du paragraphe 112(1) de la Loi. Le sursis s'applique jusqu'au premier en date des événements suivants :
…	…
(c) the application for protection is rejected;	*c)* la demande de protection est rejetée;

[15] Under s. 232*(c)* of the Regulations, the stay of removal is lifted as soon as the negative PRRA decision is made. If a leave or judicial review is pending, a person must apply to the Court for a stay, otherwise removal is effected.

[16] In my view, s. 159.5(1)*(c)*(iii) should be interpreted and operated in the same way. The provision does not contemplate finality of all appeal processes.

[17] The term “rejected” should be given consistent meaning and it is not one that includes “finally rejected”. Once the sister’s claim was rejected, she ceased to be the anchor relative.

[18] As matters have developed, even if that were not the case, the sister’s case has reached finality and her claim has continued to be rejected.

IV. CONCLUSION

[19] Therefore, this judicial review will be denied.

[20] As to a certified question, there are grounds for certification of a question both on the assumption that the STCA is valid and on the assumption that it is not. Two questions will be certified:

1. Does the term “rejected” in the phrase “unless the claim has been rejected” in s. 159.5*(c)*(iii) of the *Immigration and Refugee Protection Regulations* include the final determination of all reviews and appeals which may flow from the initial rejection decision?
2. What are the consequences to those persons whose claim was denied under s.159.5*(c)*(iii) if the decision in *Canadian Council for Refugees v. Canada*, 2007 FC 1262, is upheld in respect of the *ultra vires* of s. 159 of the Regulations?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

(a) This application for judicial review is denied.

(b) The following questions are certified:

1. Does the term "rejected" in the phrase "unless the claim has been rejected in s. 159.5*(c)*(iii) of the *Immigration and Refugee Protection Regulations* include the final determination of all reviews and appeals which may flow from the initial rejection decision?

2. What are the consequences to those persons whose claim was denied under s. 159.5*(c)*(iii) if the decision in *Canadian Council for Refugees v. Canada*, 2007 FC 1262, is upheld in respect of the *ultra vires* of s. 159 of the Regulations?

"Michael L. Phelan"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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