Date: 20080908

Docket: IMM-71-08

Citation: 2008 FC 998

Ottawa, Ontario, September 8, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

Marta Elena JIMENEZ QUIROS
ABRILL FRANZOA
ADOLFO ALEJANDRO

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of the decision of an immigration officer (the officer) dated December 4, 2007, refusing the applicant, Marta Elena Jimenez Quiros, permanent resident status as a member of the spouse in Canada class (the decision).

II. Factual background

[2] The principal applicant, Marta Elena Jimenez Quiros, was born on April 21, 1957, in Cartago, Costa Rica. She is a citizen of that country. She has two children, Adolfo Alejandro born January 30, 1996, and Abril Franzoa born on April 19, 1997. The children are also citizens of Costa Rica and are co-applicants.

[3] On December 17, 2003, the applicants arrived in Canada.

[4] On February 13, 2006, the principal applicant filed an application for permanent residence in Canada. On that same date, the applicant's then common-law partner, Richard Wagner, a Canadian citizen, signed an Application to Sponsor and Undertaking Form for her. A little more than three weeks later, on March 7, 2006, Mr. Wagner sent a letter to the Vègreville Processing Unit (PU) of Citizenship and Immigration Canada (CIC) withdrawing his application to sponsor and undertaking.

[5] On September 28, 2006, the PU advised the applicant that her permanent residence application had been transferred to CIC Montréal.

[6] On October 31, 2006, CIC Montréal sent a copy of the principal applicant's application to sponsor and undertaking to the Ministère des Communautés culturelles du Québec (MICC), for an assessment of the ability to make an undertaking, stating that it was a matter that was part of the public policy on "Spouses/Common-law Partners in Canada."

[7] On August 29, 2007, the MICC advised CIC Montréal, in a memorandum, that they had closed their file because the guarantor Mr. Wagner, had not followed up on his sponsorship undertaking application.

[8] On December 4, 2007, the immigration officer at CIC Montréal refused the principal applicant's permanent residence application since there was no longer a valid sponsorship undertaking for her in accordance with the regulatory requirements.

[9] This application challenges the negative finding of the immigration officer refusing the principal applicant's permanent residence application.

III. Issue

[10] In her written submissions, the principal applicant, alleged that her permanent residence application [TRANSLATION] "had been approved by Canada's immigration service" and, accordingly, claimed that the negative finding dated December 4, 2007, had been made after her permanent residence application had already been approved, which amounts to an error. At the hearing, the applicants' counsel recognized that the permanent residence application was only approved in principle before December 4, 2007. Therefore, with Mr. Wagner's withdrawal of the application to sponsor and undertaking, the applicant no longer met the regulatory requirements, because at the time the decision was made by the officer, there was no longer a valid application to sponsor and undertaking in her favour. There is only one issue raised by the applicants to be decided in this judicial review, namely:

> [TRANSLATION]
>
> In failing to allow the applicant to make comments following the withdrawal of Mr. Wagner's sponsorship application, did the officer make a procedural error or breach the rules of natural justice?

IV. Standard of review

[11] The case law is consistent that questions bearing on a breach of the principles of natural justice are reviewable under the standard of correctness. See *Sketchley v. Canada (Attorney General)* 2005 FCA 404, [2005] F.C.J. No. 2056 (Lexis) at paragraph 46, and *Olson v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 458, [2007] F.C.J. No. 631 (Lexis), at paragraph 27.

V. Analysis

[12] The relevant sections of the *Immigration and Refugee Protection Act* (the Act) and the *Immigration and Refugee Protection Regulations* (the Regulations) are annexed to this decision.

[13] The applicant alleges that the officer erred in failing to attempt to communicate with her before rendering his decision. Therefore, she did not have the opportunity to submit her observations regarding the withdrawal request made by her ex-partner. Also according to the applicant: [TRANSLATION] "procedural fairness requires that the applicant be given the opportunity to be made aware of the officer's concerns and to dissipate them before rendering his decision."

[14] The respondent claims, first, that the agent's refusal is primarily based on sections 126 and 127 of the Regulations. The officer does not have any discretion and the moment that

Mr. Wagner withdrew his undertaking, the officer could not make a decision that was favourable to the applicant. Therefore, the officer was not obligated to contact the applicant to inform her of the withdrawal of her ex-partner's sponsorship since he could not make any decision other than the one that he made on December 4, 2007. Second, the respondent points out that the applicant's counsel had also represented Mr. Wagner when he withdrew his sponsorship undertaking on March 7, 2006. So, the applicant cannot claim that she was surprised by the withdrawal of her ex-partner's undertaking since her counsel had been aware of it. For the reasons that follow, I agree with the first argument raised by the respondent which will be the basis for the dismissal of this application for judicial review. It will therefore be unnecessary to address this second argument.

[15] The evidence in the record indicates that on September 28, 2006, the principal applicant received a letter from CIC Vègreville advising her that her application had been transferred to CIC Montréal. I refer below to the passage from this letter informing her to [TRANSLATION] "update any other change in information regarding your application:"

> [TRANSLATION]
>
> We hereby advise you that your file has been transferred to the MONTRÉAL Canada Immigration Centre to be decided. This office may contact you for an interview or if it believes that it requires more information or clarifications from you. When the processing has been completed, the local office will send you its decision by mail.
>
> Please contact the Call Centre as soon as possible to update any other change in information regarding your request. The telephone number appears at the bottom of this letter. [Emphasis added.]

[16] Mr. Wagner withdrew his sponsorship undertaking on March 7, 2006, nearly 7 months before the letter was sent by CIC Vègreville. Yet, the applicant never updated the status of her

relationship with Mr. Wagner, a determinative factor in her permanent residence application. Indeed, at page 3 of Appendix 1 of her permanent residence application, the applicant signed a statement providing that "[s]hould my answers to any of the questions on this application form change at any time prior to my being granted permanent residence status in Canada, I will report these changes to the Canada Immigration Centre or Call Centre." However, on March 7, 2006, more than three weeks after the date that the applicant filed her permanent residence application, her relationship with Mr. Wagner ended. The applicant failed to advise the appropriate authorities of this. It was the applicant's responsibility to follow up on and update her file. The officer did not have any obligation to contact the applicant or to update her file or, if need be, ask for explanations. To the contrary, the agent did not have any discretion in the circumstances and had to ensure that his decision complied with the provisions in sections 126 and 127 of the Regulations. The burden of respecting the regulatory requirements was on the applicant. Given the withdrawal of Mr. Wagner's sponsorship application, the officer could not decide the permanent residence application (section 126). The applicant therefore did not establish that she was the subject of a sponsorship application (paragraph 124(*c*)). Given this omission by the applicant, the officer had no choice but to dismiss the permanent residence application.

[17] Further, even if it had been established that the principal applicant had not been informed of the sponsorship withdrawal, she would not have been prejudiced in any way. Her additional submissions could not change the effects of a voluntary withdrawal of sponsorship, which necessarily gave rise to the immigration officer's negative decision.

VI. Conclusion

[18] For the above-stated reasons, I am of the opinion that the officer did not in any way breach the rules of natural justice, as alleged, and that under the circumstances, the Court's intervention is not warranted.

VII. Certified question

[19] The applicants proposed the following question for certification:

> [TRANSLATION]
>
> Is an immigration officer obliged to inform a sponsoree of the withdrawal of a sponsorship application filed by their spouse or common-law partner and, if so, within what period of time?

[20] I am of the opinion that the proposed question need not be certified. In this case, the refusal of the permanent residence application is prescribed by the regulatory regime based on the withdrawal of the Application to Sponsor and Undertaking Form. Under circumstances such as this, there cannot be an obligation to inform the interested party, since nothing can alter the effects of a voluntary withdrawal of a sponsorship, which necessarily results in the refusal of the permanent residence application pursuant to the Regulations. It would therefore be futile for the principal applicant to submit additional submissions. In such circumstances, there cannot be a breach of the principles of procedural fairness for the reasons alleged. The proposed question cannot have a consequence on the appeal (*Lyanagamage v. Canada (Minister of Citizenship and Immigration)* [1994] F.C.J. No. 1637; (1994), 174 N.R. 4). This is no basis for certifying a question of general importance, as provided under paragraph 74(*d*) of the Act.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review be dismissed.

2. No serious question of general importance be certified.

"Edmond P. Blanchard"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

ANNEX

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

13. (1) A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.

(2) A group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province, and an unincorporated organization or association under federal or provincial law, or any combination of them may, subject to the regulations, sponsor a Convention refugee or a person in similar circumstances.

(3) An undertaking relating to sponsorship is binding on the person who gives it.

(4) An officer shall apply the regulations on sponsorship referred to in paragraph 14(2)(*e*) in accordance with any instructions that the Minister may make.

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.

(2) The following provisions govern an application under subsection (1):

(*a*) the application may not be made until any right of appeal that may be provided by this Act is exhausted;

(*b*) subject to paragraph 169(*f*), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court (“the Court”) within 15 days, in the case of a matter arising

13. (1) Tout citoyen canadien et tout résident permanent peuvent, sous réserve des règlements, parrainer l'étranger de la catégorie « regroupement familial ».

(2) Tout groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial -- ou tout groupe de telles de ces personnes --, peut, sous réserve des règlements, parrainer un étranger qui a la qualité, au titre de la présente loi, de réfugié ou de personne en situation semblable.

(3) L'engagement de parrainage lie le répondant.

(4) L'agent est tenu de se conformer aux instructions du ministre sur la mise en oeuvre des règlements visés à l'alinéa 14(2)*e*).

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) Les dispositions suivantes s’appliquent à la demande d’autorisation :

a) elle ne peut être présentée tant que les voies d’appel ne sont pas épuisées;

b) elle doit être signifiée à l’autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de

in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

(*c*) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;

(*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

l'alinéa 169*f*), la date où le demandeur en est avisé ou en a eu connaissance;

c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

Immigration and Refugee Protection Regulations, S.O.R.S./2002-227.

124. A foreign national is a member of the spouse or common-law partner in Canada class if they

(*a*) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;

(*b*) have temporary resident status in Canada; and

(*c*) are the subject of a sponsorship application.

124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :

a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;

b) il détient le statut de résident temporaire au Canada;

c) une demande de parrainage a été déposée à son égard.

126. A decision shall not be made on an application for permanent residence by a foreign national as a member of the spouse or common-law partner in Canada class if the sponsor withdraws their sponsorship application in respect of that foreign national.

126. Il n'est pas statué sur la demande de résidence permanente d'un étranger au titre de la catégorie des époux ou conjoints de fait au Canada si la demande de parrainage a été retirée à l'égard de l'intéressé.

127. For the purposes of Part 5, a foreign national who makes an application as a member

127. Pour l'application de la partie 5, l'engagement de parrainage doit être valide à

of the spouse or common-law partner in Canada class and their accompanying family members shall not become a permanent resident unless a sponsorship undertaking in respect of the foreign national and those family members is in effect and the sponsor who gave that undertaking still meets the requirements of section 133 and, if applicable, section 137

l’égard de l’étranger qui présente une demande au titre de la catégorie des époux ou conjoints de fait au Canada et à l’égard des membres de sa famille qui l’accompagnent au moment où il devient résident permanent et le répondant qui s’est engagé doit continuer à satisfaire aux exigences de l’article 133 et, le cas échéant, de l’article 137.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-71-08
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