Federal Court Cour fédérale

Date: 20100930

Docket: T-1772-09

Citation: 2010 FC 977

St. John's, Newfoundland and Labrador, September 30, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KARMJIT MASIH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Minister of Citizenship and Immigration (the "Minister") appeals from the Order of Prothonotary Milczynski dated August 24, 2010. In that Order the Prothonotary dismissed the Minister's motion that this application for judicial review filed by Mrs. Karmjit Masih (the "Applicant") be dismissed. The Minister argued that since this application for judicial review relates to a matter falling within the scope of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA" or "the Act"), the Applicant must file an application for leave and for judicial review. She has not done so.

[2] The following facts are taken from the Motion Record that was filed by the Minister on September 2, 2010 and the Applicant's Reply, filed on September 3, 2010, to that Motion Record. The Motion Record that was filed by the Minister includes two affidavits of Helen Medeiros, a legal assistant to Counsel for the Minister.

[3] On October 27, 2009, the Applicant filed the Notice of Application that began proceeding T-1772-09. In that Notice of Application the Applicant said that she was asking the Court to "issue orders to process the long outstanding Application for Permanent Residence since April 2007". She said that she submitted an application for permanent residence in April 2007 and the application remains outstanding with no decision having been made. She said that she has waited "long enough i.e. Two [sic] and a half years."

[4] By letter dated November 2, 2009, lawyers for the Minister wrote to the Applicant. The letter said the following:

> I am writing to advise that the Applicant has brought an application for judicial review under s. 300 of the *Federal Courts Act*. The Respondent wishes to advise the Court that as the Applicant is applying for mandamus regarding an undecided H&C application, the proper procedure is to file an application for leave and for judicial review under s. 72(1) of the *Immigration and Refugee Protection Act* ("IRPA").
>
> Accordingly, I am seeking the Court's direction in regards to this matter.
>
> Please contact me if you have any questions in this regard, or if I can be of further assistance.

[5] The Prothonotary issued a Direction on November 17, 2009 directing the Minister to proceed by way of Notice of Motion with respect to the letter dated November 2, 2009.

[6] It appears that nothing further was done about the matter and on May 26, 2010, a Notice of Status Review was issued under the provisions of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

[7] Both the Minister and the Applicant filed submissions in response to the Notice of Status Review. The Applicant's submissions were filed on May 31, 2010. The Applicant said that the Minister was "in default" of the Court's direction of November 17, 2009. The Applicant asked that her application not be dismissed "because of default on part of Respondents."

[8] The status review on this file was conducted on June 29, 2010 by Prothonotary Milczynski and by Order issued on the same day, Prothonotary Milczynski said the following:

> The Court issued directions on November 17, 2009, that whatever relief to be sought by the Respondent regarding the application should be sought by the Respondent by way of motion.
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> The Respondent has not brought a motion, and the Applicant has not taken any steps to further the application. The Respondent repeats in its submissions on this status review the substance of its objection to the application and states that it was under no obligation to bring a motion. The Respondent states that the onus was on the Applicant to proceed with her application, and that it ought now be dismissed for delay. It appears, however, from the Applicant's submissions on this status review that she does not understand the requirements under the Rules, and how she is to proceed. The Applicant is under the impression that the Respondent is in default of its obligation to have brought a motion and asks that the Court issue the order of mandamus.

> I am not satisfied in these circumstances that justice would be done or be seen to be done for the application to be dismissed summarily on this status review for delay.

[9] The Prothonotary went on to issue this Order:

> a. This application shall continue as a specially managed proceeding as is referred to the office of the Chief Justice for designation of a Case Management Judge.
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> b. The Respondent may, within thirty days of the date of this Order, serve and file a motion in respect of this application, including a motion record containing an affidavit – failing which the parties shall, within twenty days of the date for the Respondent to have filed its motion having expired, submit a joint proposal for a timetable to govern the remaining steps in this proceeding. In the event the parties cannot agree to a timetable, each shall submit an independent proposal for a timetable within the twenty days provided herein.

[10] By Order dated July 9, 2010 the Chief Justice of this Court assigned Prothonotary Milczynski as the Case Management Judge for this file.

[11] On July 28, 2010, lawyers for the Minister filed a Notice of Motion, requesting an Order dismissing this proceeding on the basis that the application had taken "an incorrect way of proceeding for the relief sought by the Applicant". In other words, the Minister objected to the way the Applicant brought this proceeding in the Court.

[12] The Applicant did not file any arguments in reply to the Minister's motion. By Order dated August 24, 2010, Prothonotary Milczynski dismissed the Minister's motion. In part, she said the following:

> Accordingly, I am not satisfied that the Applicant has followed an incorrect procedure as asserted by the Respondent. Other than the bare assertion in its written representations, the Respondent has not provided any assistance to the Court to make the finding that the application is improper and issue an order dismissing it. If the within application is not completely proper, than certainly not so improper so as to be bereft of any chance of success.
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> Accordingly, the motion will be dismissed, with the additional comment that the order issued or status review on June 29, 2010 required the parties to submit a joint proposal for a schedule to govern the remaining steps in this proceeding, pending the filing and outcome of this motion. The parties shall file their proposed timetable(s) as indicated below.

[13] The Prothonotary made the following Order:

a. The motion be and is hereby dismissed.

b. The parties shall, within twenty (20) days of the date of this Order submit a joint or independent proposals for a timetable to govern the remaining steps in this proceeding, including the service and filing of affidavits, the completion of cross-examinations and the service and filing of the requisition for hearing.

[14] On September 2, 2010 the Minister filed an appeal from this Order of Prothonotary Milczynski. The motion was set down for hearing on September 13, 2010.

[15] On September 13, 2010, the lawyer for the Minister and the Applicant appeared before the Court. The Applicant was accompanied by her son. The lawyer for the Minister presented argument as to why the Order of the Prothonotary is wrong and should be reversed. The Applicant's son was permitted to speak on behalf of his mother with permission from the Court. In the interests of making sure that the Applicant understood the nature of the hearing and understood the case law

that was presented by the lawyer for the Minister, and to allow the Applicant to return to the Court with a Punjabi interpreter at her expense, the hearing of the appeal was set over until Tuesday, September 21.

[16] On September 21, the hearing of the appeal was resumed. The Applicant was accompanied on this day with her son and with a Punjabi interpreter, Mr. Ashok Kumar. The interpreter was duly sworn to translate all submissions to the Applicant.

[17] The lawyer for the Minister presented the arguments as to why the Applicant's application for a "writ of mandamus" is based upon a wrong manner of proceeding and should be dismissed.

[18] The Applicant was also given the opportunity to speak and the Applicant's son was given the opportunity to address the Court on behalf of his mother.

[19] Neither the Applicant nor her son said anything about the legal decisions that were provided by the lawyer for the Minister. Copies of those decisions were given to Mrs. Masih and submitted to the Court on the first day of this hearing, that is September 13, 2010, that is the decisions in *Wong v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1309, a decision of Prothonotary Lafrenière and the decision of Mr. Justice Gibson in *Wong v. Canada (Citizenship and Immigration)* (2007), 64 Imm. L.R. (3d) 153.

[20] These two decisions deal with the same situation that is before the Court right now.

[21] The situation before the Court now is whether the Applicant, Mrs. Masih, can bring an application for judicial review and an order of *mandamus* in relation to her application for permanent residence in Canada, without seeking leave.

[22] The first matter that must be addressed is the standard of review. In *Merck & Co. v. Apotex Inc.,* [2004] 2 F.C.R. 459 (F.C.A.) the Federal Court of Appeal set out the test, as follows:

> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
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> a) the questions raised in the motion are vital to the final issue of the case, or
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> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[23] The Order of the Prothonotary here is reviewable on the *de novo* standard because it deals with a motion that has the effect of a final determination of this proceeding that is striking out the underlying application for *mandamus*. That means that this Court will consider the Minister's motion to strike as if this were the first hearing of that motion.

[24] The Minister's argument is simple. He says that Mrs. Masih should have brought her application for *mandamus* by way of an application for leave, pursuant to the Act. He refers to and relies on subsection 72(1) of the Act which provides as follows:

72. (1) Judicial review by the Federal Court with respect to	72. (1) Le contrôle judiciaire par la Cour fédérale de toute

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.	mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

[25] There is no doubt that Mrs. Masih's application for permanent residence in Canada is a "matter" that falls within the scope of the Act. Likewise, there can be no doubt that an effort by Mrs. Masih to engage the judicial process to encourage the Minister to make a decision, with respect to her application for permanent residence, is also a "matter" that falls within the scope of subsection 72(1). In these circumstances, it follows that the correct procedure for Mrs. Masih to follow is to file an application for leave and judicial review with this Court.

[26] Mrs. Masih has not done so. She has filed an application for judicial review only under the general provision of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The terms of the IRPA require her to follow the specific procedures that are set out in that Act, not the general provisions of the *Federal Courts Act*.

[27] In this motion to strike the application for *mandamus* that Mrs. Masih filed on October 27, 2009, the Minister is not asking the Court to strike out the application for permanent residence. This appeal by the Minister, likewise, is not an effort to strike out the application for permanent residence. The Minister is objecting to the process followed by Mrs. Masih, to date.

[28] In my opinion, the Prothonotary erred in refusing to strike this application for judicial review. The application for *mandamus* is procedurally defective and cannot proceed.

[29] Mrs. Masih is at liberty to bring an application for leave and judicial review, in accordance with the procedure set out in subsection 72(1) of the Act. Of course, her application for permanent residence remains in place and is not affected by this Order.

[30] The Minister has not sought costs and no costs will be awarded.

ORDER

THIS COURT ORDERS that the appeal from the Order of Prothonotary Milczynski dated August 24, 2010 is set aside and the motion of the Minister to strike the underlying application for judicial review is allowed and the underlying application for judicial review is struck out, without leave to amend, no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1772-09
STYLE OF CAUSE:	KARMJIT MASIH v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	September 21, 2010
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	September 30, 2010

APPEARANCES:

Karmjit Masih	FOR THE APPLICANT (Self-Represented)
Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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