Federal Court  Cour fédérale

Date: 20120320

Docket: IMM-2883-11

Citation: 2012 FC 331

Ottawa, Ontario, March 20, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

BUONG NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Buong Nguyen tried to sponsor his daughter to become a permanent resident of Canada. A visa officer dismissed Mr. Nguyen's application on the basis that he had not disclosed his daughter's existence when he previously sponsored his three sons. In fact, he was unaware of his daughter's existence at that point. Mr. Nguyen asked the officer to consider the humanitarian and compassionate [H & C] grounds supporting his application, but the officer appeared not to have considered them.

[2] Mr. Nguyen appealed the officer's decision to a panel of the Immigration Appeal Division [IAD]. The IAD confirmed that Mr. Nguyen's daughter could not be sponsored because she had not been identified in his earlier application. It also stated that it had no jurisdiction to consider H & C factors in the circumstances. Only the Minister of Citizenship and Immigration could do so.

[3] Mr. Nguyen argues that the IAD erred by failing to appreciate that he was not asking the IAD to consider H & C factors; rather, he had argued that the officer had committed an error of law by failing to consider H & C factors. The IAD has jurisdiction to overturn an officer's decision if it was based on an error of law.

[4] I agree with Mr. Nguyen that the IAD misapprehended the grounds of his appeal. He argued before the IAD that the officer had failed to consider the H & C grounds he had put forward; he was not asking the IAD to conduct the H & C analysis afresh. The question was whether the officer had erred in law, a matter over which the IAD clearly had jurisdiction. I must, therefore, allow this application for judicial review and order the IAD to reconsider Mr. Nguyen's appeal.

[5] The sole issue is whether the IAD erred in law by failing to consider the basis of Mr. Nguyen's appeal.

II. Factual Background

[6] Mr. Nguyen fled Vietnam in 1989 and lived in a refugee camp in Malaysia until 1993, when he immigrated to Canada. He sponsored three sons to join him; they are now Canadian citizens.

[7] In 2005, Mr. Nguyen learned that he had a daughter. He tried to sponsor her, too, but he could not do so because he had not declared her existence on his original application (based on s 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]; see Annex). He appealed that decision unsuccessfully, and failed in his application for judicial review (*Nguyen v Canada* (*Minister of Citizenship and Immigration*), 2010 FC 133).

[8] Mr. Nguyen made a second sponsorship application asking that H & C factors be considered. A visa officer in Singapore denied the application, again citing s 117(9)(*d*) of IRPR and noting that his previous application was dismissed on the same ground. It was, therefore, *res judicata*.

[9] Mr. Nguyen appealed that decision to the IAD.

III. The IAD's Decision

[10] The IAD concluded that the doctrine of *res judicata* did not apply. However, it reiterated the officer's conclusion that s 117(9)(*d*) foreclosed Mr. Nguyen's application. Further, it had no H & C

jurisdiction, so it could not consider that aspect of the application. It dismissed the appeal.

IV. Did the IAD fail to consider the basis for Mr. Nguyen's appeal?

[11] In his submissions to the officer, Mr. Nguyen specifically requested that his application be considered on H & C grounds. The officer made no reference to H & C factors in his decision letter, although there is passing reference to them in his notes.

[12] Before the IAD, Mr. Nguyen argued that the officer's failure to consider the H & C factors underlying his application amounted to an error of law. The IAD appears to have misunderstood this submission. It concluded that it had no jurisdiction over H & C matters. Since s 117(9)(*d*) of IRPR applied to Mr. Nguyen, the IAD could go no further.

[13] As I see it, the IAD was not asked to conduct an H & C analysis. It was invited to conclude that the officer, who did have authority to carry out an H & C analysis, had erred in law in failing to do so. This is a valid basis for an appeal to the IAD, and the IAD has authority to grant relief against such an error. The Minister argues that the appropriate relief in this situation should be sought by way of judicial review of the officer's decision, rather than an appeal to the IAD. While that may be a possibility, I see no reason why an appeal to the IAD, based on an alleged error of law, should not be available in the circumstances.

V. Conclusion and Disposition

[14] By failing to appreciate the grounds of appeal before it, the IAD itself committed an error of law. Accordingly, I must allow this application for judicial review and order another panel of the IAD to reconsider Mr. Nguyen's appeal.

[15] Counsel for Mr. Nguyen proposed the following question for certification:

> Do sections 63 and 65 of the *Immigration and Refugee Protection Act* operate to exclude all appeals to the Immigration Appeal Division against a decision not to issue a foreign national a permanent resident visa where the sponsor has filed an application to sponsor the foreign national under the family class claiming humanitarian and compassionate consideration under s 25 of the Act, where the foreign national is found not to be a member of the family class?

[16] I find that the proposed question should not be certified as it does not correspond with the basis on which I have decided this application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The matter is referred back to the Board for a new hearing before a different panel.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlements sur l'immigration et la protection des réfugiés*, DORS/2002-227
Excluded relationships	Restrictions
117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if.	**117.** (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
…	[…]
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Vancouver, British Columbia
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