Federal Court  Cour fédérale

Date: 20121210

Docket: IMM-475-12

Citation: 2012 FC 1461

Ottawa, Ontario, December 10, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SHRINIVAS SHUKLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review pursuant to subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant is requesting an order of *mandamus* with respect to his application for permanent residence in Canada as a member of the Federal Skilled Worker class.

BACKGROUND

[2] The Applicant in a citizen of India. He first submitted an application for Permanent Residence as a Federal Skilled Worker at the High Commission of Canada in New Delhi, India, on or about 25 February 2004.

[3] On 17 July 2008, the Applicant received a letter from the High Commission stating that the law had changed, and offering him a refund on his application fees. The Applicant declined the refund, and opted to submit new forms to the High Commission. The Applicant has since made several inquires to the High Commission about the status of his application, but has never received any indication of when he could expect a decision.

[4] The Applicant has now brought this application for an order of *mandamus*, hoping to require the Minister to make a decision about his application for permanent residence.

STATUTORY PROVISIONS

[5] The following provisions of the Act are applicable in these proceedings:

Application made before February 27, 2008	**Demandes antérieures au 27 février 2008**
87.4 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made before February 27, 2008 is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the	**87.4** (1) Il est mis fin à toute demande de visa de résident permanent faite avant le 27 février 2008 au titre de la catégorie réglementaire des travailleurs qualifiés (fédéral) si, au 29 mars 2012, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres

applicant meets the selection criteria and other requirements applicable to that class.	exigences applicables à cette catégorie.
(2) Subsection (1) does not apply to an application in respect of which a superior court has made a final determination unless the determination is made on or after March 29, 2012.	(2) Le paragraphe (1) ne s'applique pas aux demandes à l'égard desquelles une cour supérieure a rendu une décision finale, sauf dans les cas où celle-ci a été rendue le 29 mars 2012 ou après cette date.
(3) The fact that an application is terminated under subsection (1) does not constitute a decision not to issue a permanent resident visa.	(3) Le fait qu'il a été mis fin à une demande de visa de résident permanent en application du paragraphe (1) ne constitue pas un refus de délivrer le visa.
[…]	[…]

ISSUES

[6] The Applicant raises the following issues in this application:

a. Whether this Court should render an order of *mandamus nunc pro tunc*, allowing the Applicant to avoid subsection 87.4 of the Act;

b. Whether the Court ought to grant an order of *mandamus* requiring the Respondent to make a decision in regards to the Applicant's application for permanent residence.

ARGUMENTS

The Applicant

Nunc Pro Tunc

[7] After the Applicant filed for leave to pursue this application for judicial review, paragraph 87.4(1) of the Act was ratified. This section terminated all applications for permanent resident visas in the Federal Skilled Worker category that were not decided by 29 March 2012. The effect of this section was to terminate the Applicant's application.

[8] The Applicant points out that this is a novel legal issue presented by the enactment of paragraph 87.4(1), and that it is of significant importance as it affects a large number of individuals. In *Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758 [*Liang*], Justice Donald Rennie had the following to say on point:

> [59] Two questions were proposed for certification:
>
> […]
>
> 2. Does the Federal Court have the jurisdiction to backdate its Judgment and Reasons in order to circumvent the effect of validly-enacted legislation?
>
> […]
>
> [62] Question 2 was proposed in response to a request by the applicants that the Court issue its decision *nunc pro tunc*. The Court's authority to do so is not in doubt. Here, however, no such order is warranted or being made. The proposed question is thus academic. It is also vague and otherwise unacceptable for certification, assuming as it does, an unproven intention to negate the effect of an undefined legislative provision.

[9] The Applicant states that the undefined legislative provision Justice Rennie was referring to is the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19. This legislation has since been passed by the House of Commons and has received Royal Assent.

[10] The Applicant submits that this Court has within its powers the ability to render an order *nunc pro tunc*, dating the order prior to 29 March 2012. The application of this discretionary power is usually limited to instances where a party would be prejudiced by issuing an order on that date rather than a date previous (*Trans-Pacific Shipping Co. v Atlantic and Orient Shipping Corp. (BVI)*, 2005 FC 566 at paragraphs 21-26 [*Trans-Pacific Shipping Co.*]).

[11] The Applicant filed his application prior to the legislation being proposed. He could not have foreseen the legislation, or that he would be negatively affected by it. An order rendered today would be moot, as the Applicant's application has been terminated. The Applicant submits that this will prejudice him. The Applicant requests that the Court render its decision *nunc pro tunc* prior to 29 March 2012, so as to avoid inflicting that prejudice.

Mandamus

[12] The Applicant further submits that he has met all the conditions precedent for *mandamus* as were laid out by Justice Danièle Tremblay-Lamer in *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33:

a. There is a public legal duty to the applicant to act;

b. The duty must be owed to the applicant;

c. There is a clear right to the performance of that duty, in particular:

i. The applicant has satisfied all conditions precedent giving rise to the duty;

ii. There was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and

d. There is no other adequate remedy.

[13] The Applicant further submits that he has met all the requirements for a delay to be considered unreasonable. These were laid out in *Mohamed v Canada (Minister of Citizenship and Immigration)*, [2000] 195 FTR 137 (FCTD) [*Mohamed*] as being:

a. The delay has been longer than the nature of the process required, prima facie;

b. The applicant and his counsel are not responsible for the delay; and

c. The authority responsible for the delay has not provided satisfactory justification.

[14] In *Mohamed*, a delay of four years in processing an accepted Convention refugee's application for permanent residence due to "security concerns" was held to be unreasonable. The Applicant also points to the decision in *Bhatnager v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 315 (FCTD) [*Bhatnager*], where Justice Barry Strayer said at paragraph 4:

> The decision to be taken by a visa officer pursuant to section 6 of the Regulations with respect to issuing an immigrant visa to a sponsored member of the family class is an administrative one and the Court cannot direct what that decision should be. But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. I believe that to be the case here. The respondents have in the evidence submitted on their behalf suggested a number of general problems which they experience in processing these applications, particularly in New Delhi but they have not provided any precise explanation for the long delays in this

> case. While I would not presume to fix any uniform length of time as being the limit of what is reasonable, I am satisfied on the basis of the limited information which I have before me that a delay of 4 1/2 years from the time the renewed application was made is unreasonable and on its face amounts to a failure to make a decision.

[15] The Applicant submits that the analysis in *Bhatnager* is applicable to his situation. Also, in *Latrache v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 154 (FCTD) Justice François Lemieux found that an unexplained four-and-a-half year delay in processing an application for permanent residence justified an order of *mandamus*. In *Dee v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1767 (FCTD) a three-and-a-half year delay was deemed "prodigiously" long, and in *Hanano v Canada (Minister of Citizenship and Immigration)*, 2004 FC 998 Justice Carolyn Layden-Stevenson said at paragraph 16 that "a four year delay is well within the range where delays have been held to be unreasonable."

[16] The Applicant points out that one of the factors relevant to whether an order of *mandamus* ought to be granted is whether the decision-making authority kept the applicant informed as to the status of his application and the expected general timeframe for when a decision could be expected (*Papal v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 532 (FCTD)). The Applicant submits that he has cooperated in all aspects of the process, and the Respondent has provided him with no meaningful indication of the status of his application and has provided no justification for the delay.

[17] The Applicant reminds the Court that he is not requesting the granting of Ministerial relief; he simply asks that a decision be rendered in regards to his application. Nearly eight years have passed since the Applicant initially submitted his application, and nearly four years have passed since the Applicant last submitted documents to the High Commission. The Applicant submits that

the delay in processing his application is unreasonable and that an order of *mandamus* would be an appropriate remedy in these circumstances.

The Respondent

Nunc Pro Tunc

[18] The Respondent asserts that, due to the invocation of subsection 87.4 of the Act, the Applicant no longer has a pending application for permanent residence, and thus there is no basis upon which his request for *mandamus* could succeed. The Respondent also asserts it would not be appropriate for the Court to grant an order *nunc pro tunc* in this case.

[19] The Applicant's application for permanent residence as a Federal Skilled Worker was made before 27 February 2008 and no decision was rendered before 29 March 2012. Thus, his application was caught by paragraph 87.4(1) of the Act, and was terminated. The Applicant has stated no authority, principle, or reason why the Court should exercise its power to issue an order *nunc pro tunc* in this case.

[20] The Applicant refers to the decision in *Liang*, above, but admits this decision was made before subsection 87.4 came into force. Thus, at the time of the Court's decision in *Liang* the application at issue had not yet been terminated. Further, the Court did not issue an order *nunc pro tunc* (*Liang* at paragraph 62).

[21] The Applicant also relies upon passages from *Trans-Pacific Shipping*, above. However, this case does not support the Applicant's position, as it does not relate to mandamus in regards to a terminated application, but shows that the Court can ante-date orders in exceptional cases, such as to

prevent prejudice arising from an act of the Court (*actus curiae neminem gravabit*). The Respondent points to *Trans-Pacific Shipping* at paragraphs 24-26:

> As to the factors which govern the proper exercise of this discretion, in *Turner v. London and South Western Railway* (1874), L.R. 17 Eq. 561 (Eng. Ex. Ch.), Vice-Chancellor Hall reviewed prior jurisprudence which was to the effect that where a party to an action died, for example, after the conclusion of a trial and while the Court was considering its judgment, the Court would allow judgment to be entered after the party's death *nunc pro tunc*, in order that the party not be prejudiced by the delay arising from the action of the Court in reserving its judgment. The object of the practice was to put the party in the same position as if judgment had been given immediately following the trial and had not been delayed because the Court took the matter under reserve.
>
> Subsequent English jurisprudence confirmed that this power to antedate ought to be "used on good ground shewn" (*Borthwick v. Elderslie Steamship Co. (No. 2)*, [1905] 2 K.B. 516 (Eng. C.A.) at page 519) and that "there must be something exceptional in the facts to justify the making of the order" (*Belgian Grain and Produce Co. v. Cox and Co. (France) Ltd.*, [1919] W.N. 317 (Eng. C.A.).
>
> This jurisprudence has been adopted in Canada. See, for example, *Crown Zellerbach*, supra at page 284; *Loyie Estate v. Erickson Estate* (1994), 94 B.C.L.R. (2d) 33 (B.C. S.C.); and *Monahan v. Nelson* (2000), 76 B.C.L.R. (3d) 109 (C.A.). The Canadian jurisprudence cited above, and the jurisprudence in turn reviewed in those decisions, is to the effect that no one should be prejudiced by an act of the Court (*Loyie* at page 41 and *Monahan* at page 119 and following, and also at page 140). Therefore, for example, judgments may be antedated in order to avoid injury to a litigant arising from an act or delay by the Court. Put more classically, *actus curiae neminem gravabit*.

[22] The Supreme Court of Canada explained the principle of *actus curiae neminem gravabit* in *Canada (Attorney General) v Hislop*, 2007 SCC 10 at paragraph 77:

> … Nevertheless, it is a long-standing principle of law that a litigant should not be prejudiced by an act of the court (*actus curiae neminem gravabit*): *Turner v. London and South Western Railway* (1874), L.R. 17 Eq. 561 (Eng. Ex. Ch.). Based on this principle, in cases where a plaintiff has died after the conclusion of argument but

> before judgment was entered, courts have entered judgment *nunc pro tunc* as of the date that argument concluded: see *Gunn v. Harper* (1902), 3 O.L.R. 693 (Ont. C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495 (B.C. S.C.); *Monahan v. Nelson* (2000), 186 D.L.R. (4th) 193, 2000 BCCA 297 (B.C. C.A.). We affirm the correctness of this approach and conclude that the estate of any class member who was alive on the date that argument concluded in the Ontario Superior Court, and who otherwise met the requirements under the CPP, is entitled to the benefit of this judgment.

[23] However, the Supreme Court of Canada also made clear that *actus curiae neminem gravabit* does not apply to confer a jurisdiction that has been taken away by statute. In *Re Trecothic Marsh*, [1905] 37 SCR 79, the Supreme Court of Canada said at paragraph 3:

> I would also assent to the proposition that the maxim *actus curiae neminem gravabit* cannot be applied so as to confer a jurisdiction that has been expressly taken away by statute. *Cumber v. Wane*, 1 Sm. L.C. (11 ed.) 338. I also agree that, where the time has expired, a court cannot give itself jurisdiction by antedating its judgment and ordering it to be entered *nunc pro tunc*. That would clearly be overriding the statute and defeating the intention of the law-giver. A court could not so indefinitely extend its jurisdiction in opposition to the law.

[24] The Respondent submits that it would not be appropriate for the Court to issue an order of mandamus *nunc pro tunc* in this case.

Mandamus

[25] The Respondent also submits that, due to the enactment of subsection 87.4 of the Act, it no longer owes the Applicant a public legal duty to act (*Khalil v Canada (Secretary of State)*, [1999] 4 FC 661 (FCA) at paragraph 11). Because the Applicant no longer has a pending application for permanent residency, he has failed to meet the conditions precedent for an order of mandamus

(*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100). The Respondent therefore requests that this application for judicial review be dismissed.

ANALYSIS

[26] It is common ground that the Applicant's application for permanent residence was made before 27 February 2008.

[27] It is also common ground that it was not "before March 29, 2012… established by an officer, in accordance with the regulations, whether the Applicant meets the selection criteria, and other requirements applicable to" the Federal Skilled Worker Class.

[28] This means that, in accordance with paragraph 87.4(1) of the Act, the Applicant's application for permanent residence in Canada has been terminated by act of Parliament. It also means that, under paragraph 87.4(5) of the Act the Applicant has no right of recourse or indemnity against her Majesty in connection with his terminated application.

[29] Notwithstanding these clear statutory provisions and their application to the facts of this case, the Applicant is seeking an order of mandamus that a decision on his application for permanent residence be rendered, and he is asking further that the order be made effective *nunc pro tunc* prior to 29 March 2012 so as to avoid the effect of subsection 87.4 of the Act.

[30] The reality is that the Applicant is asking the Court to treat his application for permanent residence as being extant, even though it has been terminated by subsection 87.4 of the Act. In other words, he is asking the Court to reinstate an application that has been terminated by act of Parliament.

[31] The Applicant does not attack the constitutional validity of subsection 87.4 of the Act, and he does not say that the provision does not apply to his permanent residence application. He simply says that subsection 87.4 should not apply to him, and that the Court should exercise its power to circumvent a clear act of Parliament through the use of a *nunc pro tunc* order. The reason offered is that his judicial review application was commenced before subsection 87.4 of the Act came into force.

[32] The Applicant has attempted to draw analogies between his situation and the cases of *Liang* and *Trans-Pacific Shipping*, above. It seems to me that neither of these cases assists the Applicant. *Liang* was decided before subsection 87.4 came into force, so that the application in that case had not been terminated. That being so, the Court decided that a *nunc pro tunc* order was not warranted in the circumstances.

[33] Nor does *Trans-Pacific Shipping* deal with mandamus in the context of a terminated application. As that case makes clear, the purpose of a *nunc pro tunc* order is to ensure that "no one should be prejudiced by an act of the Court…, for example, judgments may be antedated in order to avoid injury to a litigant arising from an act or delay by the Court."

[34] In my view, the present case has nothing to do with an act or delay of the Court. The Applicant is seeking to avoid the clear intent of an act of Parliament in a situation where the Court has no jurisdiction to countermand Parliament's clear intent. See *Trecothic Marsh (Re)*, above.

[35] In addition, the Applicant is seeking a remedy from this court which the IRPA says can have no force and effect. See *Liang*, above, at paragraph 21. Paragraph 87.4(2) of the Act says that

(2) Subsection (1) does not	(2) Le paragraphe (1) ne

apply to an application in respect of which a superior court has made a final determination unless the determination is made on or after March 29, 2012.	s'applique pas aux demandes à l'égard desquelles une cour supérieure a rendu une décision finale, sauf dans les cas où celle-ci a été rendue le 29 mars 2012 ou après cette date.

In other words, if I were now to make a final determination on the Applicant's judicial review application *nunc pro tunc* as the Applicant suggests, paragraph 87.4(2) says that paragraph 87.4(1) will still apply to terminate the application.

[36] As the Applicant no longer has an extant application for permanent residence, it seems to me that he cannot satisfy the criteria for an order of mandamus. There is no longer a public legal duty to act that is owed to the Applicant. See *Khalil v Canada (Secretary of State)*, [1999] 4 FC 661 (FCA) at paragraph 11.

[37] What authority we have on point makes it clear that *nunc pro tunc* is not available in this kind of situation. In *Trecothic March*, above, the Supreme Court of Canada had the following to say on point:

> I would also assent to the proposition that the maxim *actus curiae neminem gravabit* cannot be applied so as to confer a jurisdiction that has been expressly taken away by statute. *Cumber v. Wane*, 1 Sm. L.C. (11 ed.) 338. I also agree that, where the time has expired, a court cannot give itself jurisdiction by antedating its judgment and ordering it to be entered *nunc pro tunc*. That would clearly be overriding the statute and defeating the intention of the law-giver. A court could not so indefinitely extend its jurisdiction in opposition to the law.

[38] The Applicant does not say that this Supreme Court of Canada case from 1905 has been overruled; he says, however, that these words are obiter and I am not bound by them. He urges the

Court to follow the decision of the Ontario Superior Court of Justice van Rensburg in *Silver v IMAX Corp.*, 2012 ONSC 4881 (CanLII).

[39] *Silver*, however, dealt with the operation of *nunc pro tunc* in the context of a limitation period:

> 43 The authority to make an order *nunc pro tunc* is part of the court's inherent jurisdiction, and is recognized in the Rules of Civil Procedure: *Crown Zellerbach Canada Ltd. v. British Columbia* (1979), 13 B.C.L.R. 276 (C.A.). In Ontario, rule 59.01 states: "An order of the court is effective from the date on which it is made, unless it provides otherwise". This is the authority under the *Rules* to antedate an order of the court, or to give the order retroactive effect.
>
> 44 Our courts grant orders *nunc pro tunc*, or with retroactive effect, in a variety of circumstances, sometimes on consent, in order to do justice between the parties. Many such orders are made in motions court, where typically a time limit will have passed to take certain action, either before the motion is argued, or while the motion is pending. Without a *nunc pro tunc* order, a party's rights are defeated without regard to the merits of the dispute. Examples include orders validating service of a writ or statement of claim, and extending time and granting leave to appeal or to take other actions governed by the *Rules*. In such circumstances a *nunc pro tunc* order is consistent with rule 2.01, providing that a failure to comply with the *Rules* is an irregularity and not a nullity and permitting the court to grant amendments or other relief on such terms as are just "to secure the just determination of the real matters in dispute".
>
> 45 The courts have recognized that *nunc pro tunc* orders are also available where there is a statutory requirement for leave before an action can be commenced. While earlier cases had struggled with the question of whether an action commenced without leave was a nullity (and not subject to revival by a *nunc pro tunc* order) or simply irregular, the Court of Appeal in *Re New Alger Mines Limited* (1986), 54 O.R. (2d) 562 (C.A.) and *Re Montego Forest Products Ltd.* (1998), 37 O.R. (3d) 651 (C.A.), recognized that proceedings commenced without leave may be regularized by an order granting leave *nunc pro tunc*, unless the statute in question precludes such relief. Both cases dealt with leave required to pursue an action under the *Bankruptcy Act*.

46 In *McKenna Estate v. Marshall*, 2005 CarswellOnt 5028, [2005] O.J. No. 4394 (S.C.), the court's authority to make orders *nunc pro tunc* was considered and explained. The plaintiff's action, commenced prior to the expiry of the time period stipulated in its notice of sale under mortgage, contravened section 42 of the *Mortgages Act* which prohibited such actions without leave of the court.

47 Following the above-noted decisions of the Court of Appeal, and referring to other case authorities, Sproat J. explained how the ability to grant orders *nunc pro tunc* enables a court to do justice between the parties, at paras. 23 and 24:

> ... [P]olicy considerations weigh in favour of finding that a *nunc pro tunc* order is available. As a general principle the jurisdiction to make an order *nunc pro tunc* in appropriate circumstances allows the Court to do justice in accordance with the facts of a particular case. A narrow interpretation which denies the Court the option of a *nunc pro tunc* order may exalt form over substance, result in increased costs and cause injustice.
>
> Take the case of a statutory requirement for leave to commence an action. Assume a saintly plaintiff, a meritorious claim, a dastardly defendant with assets and the intervention of a limitation period. If a *nunc pro tunc* order is available justice is done.

48 Sproat J. described the authority of the court to grant orders *nunc pro tunc*, at para. 27:

> The authority of the Court to issue an order *nunc pro tunc* is not of recent origin and certainly all current legislation that requires a Court order prior to taking action has been drafted in the recognition that the Court has this jurisdiction. In my opinion, therefore, a simple statutory requirement for a Court order contemplates that the order may be made *nunc pro tunc*. The question, therefore, becomes whether there is something in the statute that, properly interpreted, indicates that a *nunc pro tunc* order is not permitted. In other words, to paraphrase Associate Chief Justice MacKinnon in *New Alger Mines Ltd., Re*, does the statute "contain an absolute prohibition against a *nunc pro tunc* order ...".

49 In *McKenna Estate,* the failure to obtain leave was due to an oversight by counsel, and there was no prejudice to the defendants other than the loss of the ability to argue that leave was not obtained. If leave were not granted, the claim would be dismissed for that reason alone. Leave was granted *nunc pro tunc* to permit the plaintiff's motion for summary judgment to proceed on its merits.

50 The authority of the court to grant an order with retroactive effect is not limited to cases of correcting a slip or oversight by counsel, although that is an example of a situation where the court might consider exercising its discretion to make such an order, after considering the relative prejudice to the parties: *Hogarth v. Hogarth* [1945] 3 D.L.R. 78; [1945] O.J. No. 165 (H.C.J.); and see *Re Cadillac Fairview Inc.,* [1995] O.J. No. 623 (Gen. Div.) at para. 7, where Farley J. observed that the court's *nunc pro tunc* jurisdiction is not limited to the specific examples cited in *Hogarth,* but that "inherent jurisdiction is a useful tool in an evolving common law matrix to fill gaps and avoid injustice".

51 *Hogarth* cites as an example of *nunc pro tunc* relief, the ability of the court to make an order as of the date when argument before the court has terminated and the decision is reserved, "so as to protect the litigant against injustice resulting from the delay in rendering the judgment" (at para. 4). This is consistent with a line of cases recognizing that an order *nunc pro tunc* may be granted to avoid an injustice that otherwise would flow from delay in the courts which is beyond the control of the parties. The Latin maxim is "*actus curiae neminem gravab*": what the court does ought not to prejudice a litigant.

52 The leading case considering this basis for *nunc pro tunc* relief, which has been cited frequently by courts in our jurisdiction, is *Turner v. London and South-Western Railway Co.* (1874) 17 L.R. Eq. 561. A plaintiff died between the date his case was heard and the delivery of judgment, which had been reserved. Judgment could not issue in the plaintiff's favour effective the date of its release, because of the common law rule that a personal cause of action dies with a litigant. The court held that judgment should be entered *nunc pro tunc* as of the day when argument was completed, as no prejudice would be caused to any party by doing so. Vice-Chancellor Hall noted that, "generally the court would permit a judgment to be entered *nunc pro tunc* when the signing of the judgment has been delayed by the act of a court" (at p. 566).

53 In *Couture v. Bouchard* (1892), 21 S.C.R. 281, the Supreme Court of Canada applied the maxim, invoking the *Turner* decision, in quashing an appeal for want of jurisdiction. At the time the decision of the court below was reserved, the amount of the judgment was below the monetary threshold for an appeal, although legislation had been passed by the date of judgment that would render the decision appealable. Taschereau J. held that the judgment was to be treated as if it had been given the day the case had been placed *en délibéré*, that is, when argument was complete. To conclude otherwise would take away from the respondents a right that had existed at the time the case was argued.

…

55 In nearly all of these cases, the plaintiff's claim abated between the date of the hearing and the date judgment was issued, by operation of a statute or otherwise. That is the situation that arose in the present case, where the limitation period expired between the date my decision respecting leave was reserved, and the date the decision was released. Amending the order so that it operates *nunc pro tunc* would be consistent with the cases I have cited considering *actus curiae*.

56 The *actus curiae* maxim has also been referred to more recently, in cases dealing with the issuance of third party claims for contribution and indemnity, which are now subject to a two year limitation period from the date of service of the original claim on the defendant, under s. 18 of the *Limitations Act, 2002*. In *Numainville v. Nanson,* 2006 CanLII 27868, [2006] O.J. No. 3274 (S.C.), the court granted leave to a defendant to file and serve a third party claim effective the first return date of the motion to add the claim, invoking the *actus curiae* principle, where the limitation period had expired by the time the motion was determined. *Sandrabalan v. Toronto Transit Commission,* 2009 CanLII 18298, [2009] O.J. No. 1610 (S.C.) is to the same effect, although the third party claim that was issued after the expiry of a limitation period was dismissed. Brown J. held that the court could not amend an earlier order of the Master that granted leave to issue the third party claim, where to do so would amount to an appeal of the Master's order where none had been taken. He observed that *nunc pro tunc* relief ought to have been requested before the Master at the time that leave was granted (at para. 19).

57 The ability of the court to make an order *nunc pro tunc* ensures that the rights of the parties will not be impacted arbitrarily by the court's schedule, which is outside the control of the parties.

This is not a modern problem. In an English case near the turn of the last century, *The Queen v. Justices of County of London and London County Council*, [1893] 2 Q.B. 476, Lord Esher, M.R. endorsed the use of *nunc pro tunc* orders to respond to delays within the courts. He stated at p. 488:

> ... There might be general illness among the justices, or, as in this case, an extraordinary glut of business, which was a matter with which each person desiring to appeal had nothing to do, and could not help, could not anticipate, and could not obviate or calculate upon...the glut of business in the Court, and the inability of the Court to cope with it, is not to be brought into play against the parties, who as far as they are concerned, have obeyed the imperative enactment of the statute by putting down their appeal at a time which would enable the Court, according to its ordinary course of practice, to hear and determine the case [by the prescribed deadline].

58 I have referred at some length to relevant case law recognizing the court's authority under the rules and its inherent jurisdiction to grant orders *nunc pro tunc*. In my view, the present case fits squarely within authorities for making a *nunc pro tunc* order where the plaintiffs' rights have abated through no fault of their own, while a decision has been reserved by the court. If the order granting leave is effective the date of final argument, there is no question of expiry of the limitation period. The prejudice to the plaintiffs caused solely by the court's own schedule, is avoided.

59 I turn now to consider the defendants' arguments that *nunc pro tunc* relief is not available. The defendants rely on a number of grounds: first, case law to suggest that *nunc pro tunc* relief cannot be granted where there is an intervening limitation period; second, the argument that such relief would entail the application of the doctrine of special circumstances, which they submit is not available to extend the limitation period under the *OSA*; and third, that *nunc pro tunc* relief is inconsistent with the statutory regime and would undermine the intention of the limitation period in s. 138.14 of the *OSA*.

[40] The court in *Silver* also addressed the Supreme Court of Canada decision in *Trecothic Marsh*, above, and concluded that the case did not prevent the use of *nunc pro tunc* in the context of limitation periods:

> 64 The defendants also rely on a passage in the concurring decision of Taschereau C.J.C. in *Re Trecothic Marsh* (1905), 37 S.C.R. 79. In that case, the court considered an appeal from an order setting aside a writ of *certiorari* in a land assessment case, where the relevant statute provided that no such writ could be granted except within six months of the proceeding, or the proprietor's notice that it was taken. The trial judge heard the application in time, but gave the order after the six months had expired. Taschereau C.J.C. concurred with the majority of the Supreme Court, and concluded that the time limit would not apply where jurisdiction was at issue. In *obiter* however he would have rejected the argument that the order for *certiorari* could have been issued *nunc pro tunc*, as the *actus curiae* maxim could not apply where the court's jurisdiction to grant the remedy had expired.
>
> 65 At issue in *Re Trecothic Marsh* was the jurisdiction of the *court* to grant a particular remedy that existed by statute for a period of only six months after a decision had been made. The particular statutory regime involving land assessment provided a time limit of only six months for the court to grant *certiorari*. The court concluded that an order *nunc pro tunc* could not be used to override the statute and to defeat its intention so as to extend indefinitely the court's jurisdiction to grant the relief in question. The case does not stand for the proposition argued by the defendants, that a court will lack jurisdiction to grant a *nunc pro tunc* order whenever a limitation period is engaged.

[41] The present case does not involve the expiry of a limitation period and I cannot equate the Applicant's situation with any of the jurisprudence referred to in *Silver*. Nor is it the case that the Applicant's claim has abated between the date of the hearing and the date judgment was issued. This is, in my view, a case where "there is something in the statute that, properly interpreted, indicates that a *nunc pro tunc* order is not permitted."

[42] Parliament's clear intent in enacting subsection 87.4 of the Act was to "terminate" permanent skilled worker applications made before 27 February 2008. The Applicant does not dispute this fact and he does not dispute that his application was made before the operative date. His argument is that, notwithstanding valid legislation that terminates his application, the Court can somehow use a *nunc pro tunc* order to grant him an order of mandamus for a skilled worker application that no longer exists because it has been terminated by act of Parliament. To grant such an order, in my opinion, and in the words of the Supreme Court of Canada in *Trecothic Marsh*, above, "would clearly be overriding the statute and defeating the intention of the law-giver." It would amount to the Court extending its jurisdiction in opposition to the law and the clear intention of Parliament.

Certification

[43] The Applicant has proposed the following question for certification:

> Does the Federal Court have jurisdiction to back-date its judgment and reasons in order to prevent prejudice to an applicant whose application falls under section 87.4(1) of IRPA?

[44] The Applicant argues that the answer to this question is of general importance and would be dispositive of the appeal on the facts of this case.

[45] The Respondent says that it is trite and settled law that the Court has no power to extend its jurisdiction and go against the express intent of Parliament.

[46] The Respondent also says that, in the present case, the Applicant does not challenge the validity of subsection 87.4 of the Act; he simply says that it should not apply to him for no principled reason.

[47] In addition, the Respondent says that no analogy can be made to cases where *nunc pro tunc* has been used in limitations cases or otherwise.

[48] I have to agree with the Respondent. I see no analogy between this case and the situations that arose in *Silver* or any cases cited therein. In addition, the back-dating that the Applicant requests would be an assumption of jurisdiction in a situation where Parliament has made its intentions clear, so that the Court would be attempting to thwart the clear and express intent of Parliament. I know of no principal or authority that would allow me to do this and I think the law on point is clear. There would be no purpose in certifying the proposed question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-475-12
STYLE OF CAUSE:	**SHRINIVAS SHUKLA** - and - **MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 6, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	December 10, 2012

APPEARANCES:

M. Max Chaudhary	**APPLICANT**
Asha Gafar	**RESPONDENT**

SOLICITORS OF RECORD:

Chaudhary Law Office North York, Ontario	**APPLICANT**
William F. Pentney Deputy Attorney General of Canada	**RESPONDENT**