Federal Court  Cour fédérale

Date: 20150508

Docket: IMM-4199-13

Citation: 2015 FC 593

Ottawa, Ontario, May 8, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MAXIM KOZEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Mr. Kozel [the Applicant] is a Russian citizen who first applied for a permanent resident visa as a member of the entrepreneur class in late 2006. His application was completed on September 15, 2008. Although a positive selection decision was entered into the Computer Assisted Immigration Processing System on November 26, 2008, the next stage took several years.

[2] On August 16, 2012, a visa officer [Officer] at the Canadian Embassy in Moscow sent a letter to the Applicant explaining that his application could not be approved unless he met all the requirements and was not inadmissible to Canada. The Officer explained to the Applicant that "[y]our failure to adequately account for the origins of your net worth makes it impossible for me to complete a comprehensive and proper assessment of your admissibility in your case." The Officer asked the Applicant to supply certain information about all electronic transfers of funds [ETFs] ordered by him, his companies, or his family members. The Officer also requested that the Applicant explain how he acquired the funds to found one of his companies in 1991.

[3] The Applicant's response was received on October 29, 2012, but the Officer was concerned that the Applicant had not answered the request truthfully. By a further letter dated March 27, 2013, the Officer stated that the Applicant had failed to disclose many ETFs that his companies either made or benefited from. The Officer also questioned how one of the Applicant's businesses, which started with only 10,000 roubles (USD$166) in 1991, was able to earn enough money by 1995 that the Applicant could afford to buy an apartment that was worth 24,175,012 roubles (USD$5,412). Similarly, the Officer questioned how a building that the Applicant purchased for USD$30,000 in March, 1999, could, even after renovations, grow to be worth USD$1,400,000 in November, 2002. Thus, the Officer gave the Applicant another opportunity to address these concerns, and the Applicant did so in a letter dated April 22, 2013. However, the Officer still refused the Applicant's application for a permanent resident visa in a letter dated May 31, 2013.

[4] On June 20, 2013, the Applicant applied for judicial review of the Officer's decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. He now asks the Court to set aside the Officer's decision and return the matter to a different visa officer for re-determination.

II. Analysis

A. *Section 87.5*

[5] The determinative issue with respect to the matter now before the Court is whether the application for judicial review has been rendered moot by section 87.5 of the *Act*. This section of the *Act* came into force last year on June 19, 2014, and amended the *Act* such that any application by a foreign national for a permanent resident visa as a member of the prescribed class of investors or of entrepreneurs was terminated if, before February 11, 2014, it had not been established by an officer whether an applicant met the selection criteria and other requirements applicable to the class in question.

[6] Section 87.5 provides, in part, as follows:

87.5 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of investors or of entrepreneurs is terminated if, before February 11, 2014, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements	**87.5** (1) Il est mis fin à toute demande de visa de résident permanent faite au titre de la catégorie réglementaire des investisseurs ou de celle des entrepreneurs si, au 11 février 2014, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à la catégorie en

applicable to the class in question.	cause.
(2) Subsection (1) does not apply to	(2) Le paragraphe (1) ne s'applique pas aux demandes suivantes :
(a) an application in respect of which a superior court has made a final determination unless the determination is made on or after February 11, 2014; or	*a)* celle à l'égard de laquelle une cour supérieure a rendu une décision finale, sauf dans les cas où celle-ci a été rendue le 11 février 2014 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 par application du paragraphe (1) ne constitue pas un refus de délivrer le visa.
…	…
(7) No right of recourse or indemnity lies against Her Majesty in right of Canada in connection with an application that is terminated under subsection (1), including in respect of any contract or other arrangement relating to any aspect of the application.	(7) Nul n'a de recours contre Sa Majesté du chef du Canada ni droit à une indemnité de sa part relativement à une demande à laquelle il est mis fin par application du paragraphe (1), notamment à l'égard de tout contrat ou autre forme d'entente qui a trait à la demande.

[7] A press release issued by Citizenship and Immigration Canada on the day this provision came into force stated, in part, that:

> The *Economic Action Plan 2014 Act*, (Bill C-31), received Royal Assent and became law today which resulted in the termination of applications in the backlog of the federal Immigrant Investor Program (IIP) and federal Entrepreneur Program (EN). …

> Eliminating the longstanding backlog of applications in the IIP and EN will allow Citizenship and Immigration Canada (CIC) to focus resources on immigration programs that will bring maximum benefit to Canada's economy.
>
> Large backlogs of applications, particularly in economic immigration programs, are the biggest challenge to Canada's immigration system. The large backlog of IIP and EN applications acted as a drag on the immigration system as a whole. It was one of the last remaining impediments to the creation of the type of fast and flexible economic immigration system that best contributes to Canada's economic success. …

B. *The Applicant's Arguments*

[8] The Applicant argues that the present judicial review application is not moot. According to him, section 87.5 does not and would not apply to his application, since the Officer's decision was made prior to February 11, 2014. The right to judicially review that decision arose prior to the legislative amendment. Furthermore, the Applicant says that section 87.5 was only intended to terminate the backlog that existed on February 11, 2014, and his application could not be considered to have been a part of the backlog at that time.

[9] The Applicant further argues that section 87.5 should not be interpreted to extinguish existing rights or to take away his right to have the Officer's decision reconsidered or judicially reviewed, unless Parliament expressly stated such an intention and it did not do so in this case. The Applicant says that was the conclusion about section 87.4 of the *Act* in *Zhu v Canada (Citizenship and Immigration)*, 2013 FC 155 at paragraph 46, 427 FTR 239 [*Zhu*], and he submits that section 87.4 is identical to section 87.5 except insofar as the latter section pertains to immigrant investors and entrepreneurs and not federal skilled workers. Thus, the Applicant says, section 87.5 does not catch the present judicial review and the matter is not moot.

[10] The Applicant says that the decision in *Tabingo v Canada (Citizenship and Immigration)*, 2014 FCA 191, 377 DLR (4th) 151 (*sub nom Austria v Canada (Citizenship and Immigration)*) [*Tabingo*], is different from his case. The applicants in that case had pending applications under the federal skilled worker class which were terminated, unlike the Applicant here whose application had been determined prior to the coming into force of section 87.5. The Applicant says that, but for the alleged errors in the Officer's decision, the Applicant might have had his visa prior to section 87.5 coming into force.

[11] The Applicant says that if the judicial review application is granted, there is no reason a new visa officer could not reconsider his application for permanent residence.

C. *The Respondent's Arguments*

[12] The Respondent argues that the relief requested by the Applicant would have no practical effect. Even if the Court were to allow the application and set aside the Officer's decision, the Respondent says that subsection 87.5(1) would be triggered and, thus, terminate the application for permanent residence before it could be re-processed. According to the Respondent, that interpretation is supported by a plain reading of section 87.5, and Parliament did not need to use any clearer language since subsection 87.5(2) only permits re-determination by another officer if that was ordered by the Court before February 11, 2014. In the Respondent's view, this Court has to decide the application on the basis of the law as it now stands and has no authority to grant the Applicant a right to a new assessment of his application.

[13] The Respondent says that the Court's reasoning in *Zhu* was wrong and should not be followed. The Respondent also distinguishes *Zhu*, noting that in that case there was an issue of procedural fairness, unlike the case at bar. Furthermore, the Respondent notes that there was no certified question in *Zhu*, and submits that the decision in *Zhu* was rendered without the benefit of the Court of Appeal's comments at paragraphs 75-77 in *Tabingo*.

[14] The Respondent says that there is no reason for the Court to decide this application since there is no controversy. The Officer's negative decision can have no collateral consequences to the Applicant and there is, thus, no adversarial context. The Respondent argues that there is also no public interest that would justify the expenditure of judicial resources. As the legislative amendment has rendered the dispute between the parties moot, the Respondent says that the Court should be conscious of its role as the adjudicative branch of government and decline to decide the matter.

D. *Is the Application for Judicial Review Moot?*

[15] In *Borowski v Canada (AG)*, [1989] 1 SCR 342 at 353, 57 DLR (4th) 231 [*Borowski*], the Supreme Court of Canada stated that the doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case." This involves a two-step analysis: "First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case" (*Borowski* at 353).

[16] I find that this application for judicial review has been rendered moot in view of subsection 87.5(2) of the *Act*, which provides that subsection 87.5 (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 February 11, 2014" [emphasis added]. Put another way, if this Court had made a final determination by way of judicial review in respect of the Applicant's visa application before February 11, 2014, that would have been the end of the matter, one way or the other, since that determination would have been made before section 87.5 was contemplated. Now, however, the exception to subsection 87.5(1) in subsection 87.5(2) is irrelevant since the Court will be making its determination on or after February 11, 2014, and the necessary implication is that subsection 87.5(1) would apply to any application sent back for re-determination. Thus, returning the visa application for re-determination by another visa officer at this time, even if the Court determined that this was an appropriate remedy, would mean that it would then be "terminated" by section 87.5(1) because it will not have been established, before February 11, 2014, whether the Applicant meets the selection criteria and other applicable requirements. This would be a meaningless remedy and serve no practical effect.

[17] The Court's decision in *Zhu* can be distinguished on the basis that the officer's decision in that case was understandably set aside by reason of a breach of procedural fairness, and that the Applicant's circumstances in this case are quite unlike those of the applicant in *Zhu*. In that case, the visa application was refused during the time period between when section 87.4 was proposed in legislation to implement a budget tabled on March 29, 2012, and when that section came into force on June 29, 2012. The applicant in *Zhu* had received one letter from a visa officer before March 29, affording him 120 days within which to submit updated information,

and another letter after March 29, advising that his application would not be processed and to ignore the earlier letter; the Applicant then learned through an Internet chatroom that his application could be processed after all, though the visa office ultimately only informed him of its error after it had refused his application on the merits. In these circumstances, the late Mr. Justice Edmond Blanchard found "that the unusual circumstances that led to the processing of Mr. Zhu's application amount to an unfair process" (at paragraph 31), that "the unfairness lies in the nature of the information communicated to the Applicant about the process and when it was communicated" (at paragraph 33), and further that the Applicant "was prejudiced because he was not afforded a reasonable opportunity to perfect his application before a decision was rendered" (at paragraph 36).

[18] In this case, the Applicant's visa request was made in 2006 and the refusal of this request was in May, 2013, some nine months before section 87.5 was even contemplated by a budget tabled in February, 2014. Moreover, the parties here do not raise any issue of procedural fairness. Also, unlike the present case, the parties before the Court in *Zhu* did not directly raise and argue any issue of mootness. On the contrary, the submissions and decision in that case were directed to whether the provisions of section 87.4 precluded or limited the remedies available on judicial review and not, as in this case, whether the circumstances are such that the Court's decision will have no practical effect on the rights of the parties.

[19] A determination that the dispute between the parties has been rendered moot in view of subsection 87.5(1) is consistent with the decisions in *Zhu* and *Tabingo*. I agree with the late Mr. Justice Blanchard in *Zhu* when he concluded that the analogous provision in subsection 87.4(1)

"cannot serve to strike a validly rendered visa officer's decision" (at paragraph 44), and that: "…if Parliament wished to limit the remedies available on judicial review in such cases, it would have to do so expressly in the statutory scheme. Neither subsection 87.4(2) nor subsection 87.4(5) operate to preclude a remedy on judicial review in circumstances where subsection 87.4(1) does not apply" (at paragraph 46, emphasis added).

[20] I also agree with the conclusion in *Tabingo*, where the Federal Court of Appeal observed as follows:

> [65] Finally, the appellants rely on *Zhu v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 155. I do not consider that decision to be inconsistent with the Minister's interpretation of subsection 87.4(1). Mr. Zhu received a final negative decision dated May 12, 2012. His application file indicated that a negative selection decision had been made on the same day. The judge concluded that because the selection decision was made after March 29, 2012 and a final decision was made before June 29, 2012, subsection 87.4(1) did not apply to his application. Therefore, that provision could not apply to preclude the judge from invalidating the final decision on the basis of procedural unfairness and ordering the application to be reconsidered.
>
> [Emphasis added]

[21] In this case, it is not a question of whether the Court's ability to order a remedy, if need be, has been precluded or limited by section 87.5, but, rather, a question of whether the remedy requested by the Applicant could have any practical effect. In my view, the Applicant's request that the Officer's decision be set aside and the matter returned for determination by a different visa officer should be denied because, even if the Court granted this request, his visa application would be terminated by section 87.5.

[22] While the Court has discretion to determine a matter that is moot, the principles set out in in *Borowski* do not support the use of that discretion in this case. Consequently, it is unnecessary to decide whether the Officer's decision in this case was reasonable.

III. Certified Question

[23] At the hearing of this matter, the Applicant proposed the following question for certification:

> Does section 87.5 of the *Immigration and Refugee Protection Act* operate to negate any remedy granted by the Federal Court on judicial review after February 11, 2014 of a decision made at a Canadian Visa Post on an application under the Entrepreneur program before February 11, 2014?

[24] In post-hearing submissions on this proposed question, the Respondent submitted that this was not a serious question of general importance, while the Applicant submitted that it was.

[25] Under paragraph 74(d) of the *Act*, "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question." As the Federal Court of Appeal recently noted in *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, 372 DLR (4th) 539:

> [23] For the Federal Court to certify a question there must be a serious question of general importance that transcends the interests of the parties to the litigation. The question must be dispositive of the matter. See, generally *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 at paragraphs 12-14; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paragraphs 11-12.

[26] I agree with the Respondent that the proposed question is not a serious question of general importance. It does not transcend the interests of the parties to this matter. Indeed, this proposed question has already been answered negatively and directly by this Court's decision in *Zhu* at paragraph 46, where it was determined that the analogous section 87.4 did not operate to preclude a remedy on judicial review.

IV. Conclusion

[27] The Applicant's application for judicial review is hereby dismissed, and no question of general importance is certified or stated.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and that no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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