Federal Court  Cour fédérale

Date: 20121121

Docket: IMM-9674-11

Citation: 2012 FC 1343

Ottawa, Ontario, November 21, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ALI VAHIT ESENSOY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by Citizenship and Immigration Canada returning the applicant's application to sponsor his mother because "effective November 5, 2011, Citizenship and Immigration Canada (CIC) has temporarily stopped accepting new applications for the sponsorship of parents and grandparents."

[2] Mr. Esensoy submits that his application faxed to CIC on November 4, 2011, fell within the period when applications were being accepted and further submits that the Minister acted outside

his statutory authority in suspending sponsorship of parents, thereby breaching subsection 87.3(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and "frustrating the applicant's rights" under section 13 of the Act. Sections 13 and 87.3, as they read on November 4, 2011, are reproduced and attached as an Appendix to these Reasons.

[3] Mr. Esensoy is a permanent resident of Canada and citizen of Turkey. He and his family discussed sponsoring his 63-year old mother to come to Canada after the death of his father. On Friday November 4, 2011, the applicant learned of a Ministerial Instruction placing a moratorium on sponsorship applications. It was announced that "[e]ffective November 5, 2011, no new family class sponsorship applications for a sponsor's parents (R117(1)(c)) or grandparents (R117(1)(d)) will be accepted for processing." A complete copy of the Ministerial Instruction is attached as an Appendix to these Reasons.

[4] On November 4, 2011, at 3:55 p.m., the applicant paid the online fee; at 9:04 p.m. he sent his application by fax; and at 9:38 p.m. he paid for overnight delivery of his physical application. The physical copy was received after November 5, 2011.

[5] The applicant submits that his application was received at the time it was faxed. In support, he cites *Ghaloghlyan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1252, at para 10 [*Ghaloghlyan*]. I agree with the respondent that *Ghaloghlyan* is not persuasive on the issue of whether the application for sponsorship could be sent by fax. The question asked in *Ghaloghlyan* was "what does it take to prove on a balance of probabilities that a document was sent?": see para 9. The Court answered at paragraph 10 by saying that "[p]roving that a fax went on its way is verified

by producing a fax log of sent messages confirming the sending." The question in the current matter is not whether it was sent, it is whether it could have been sent by that method and, if so, whether it was properly received before November 5, 2011.

[6] As to whether CIC should have accepted the fax, the Minister cites *El Yahyaoui v Canada (Minister of Citizenship and Immigration)*, 2012 FC 283, at para 16 [*El Yahyaoui*] which states:

> [I]t is up to CIC, in accordance with legislation and regulations, to decide on the administrative procedures relating to submitting documents, and it was not unreasonable to decide that the applications for restoration of status could not be sent by fax. Moreover, submitting an application for restoration by fax would not have met the requirements of section 13 of the Regulations since a document sent by fax is not an original document.

[7] The Minister submits, and I agree, that CIC made it clear that family class applications must be submitted by mail and physically received November 5, 2011:

> Applications received on or after November 5, 2011
>
> New FC4 Sponsorship applications for parents or grandparents received by Centralized Processing Centre- Mississauga (CPC-M) on or after November 5, 2011, will be returned to the sponsor with a letter (see Appendix A) advising them of the temporary pause. Applications which are postmarked before November 5, 2011, but are received at CPC-M on or after November 5, 2011 will also be returned to the sponsor. In both cases, processing fees shall be returned. [emphasis added]

[8] I find that the applicant's sponsorship application was required to have been mailed and received by CIC before November 5, 2011. His application was not received prior to the deadline set by the Minister.

[9] Is the Ministerial Instruction valid?

[10] The applicant submits that the Minister acted outside his legislated authority and says that the wording in subsection 87.3(1) of the Act makes it clear that the Minister was statutorily barred from making the November 5, 2011, instructions because it expressly provides that section 87 and the Minister's authority set out in that section apply to applications "other than" family sponsorships in subsection 13(1) of the Act. He says that Parliament purposefully crafted section 87.3 to ensure that the right conferred by section 13 of the Act was not violated.

[11] The Minister submits that while the applicant's reading the English language version of subsection 87.3 could be read in the manner suggested, it cannot be so read in the French language version.

[12] Two meanings can be read into the English text of subsection 87.3(1) of the Act; however, the use of the word "aux" in the French language version clearly indicates that subsection 87.3(1) of the Act applies to section 13. Accordingly, the English-language version must be read consistently with the French-language version. The Minister has the right to "give instructions with respect to the processing of applications and requests, including instructions … setting the number of applications or requests, by category or otherwise, to be processed in any year."

[13] The applicant says that if the Minister has the power to control the number of applications perused, he cannot stop applications completely because section 13 of the Act confers a right to

sponsor a family member. To set the number of such applications at zero, even temporarily, nullifies the right to sponsor granted by Parliament.

[14] This submission has already been rejected by the Court of Appeal in *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, in the context of regulation-making authority in the Act. At paragraphs 42-43, the Court writes:

> Counsel argued that *IRPA*, subsection 13(1) creates a "substantive" right in Canadian citizens, such as Ms de Guzman, to sponsor their children as members of the family class, a right which is removed by paragraph 117(9)(*d*). The argument is that, in the absence of explicit language, section 14 should not be interpreted as authorizing a regulation which removes rights conferred by *IRPA*.
>
> I disagree. First, in view of the breadth of the legislative power delegated by section 14, and the framework nature of *IRPA*, it cannot be argued that regulations may only be made with respect to "non-substantive" matters. Hence, I see no reason why regulations may not be enacted to create exceptions to policies in the Act. Second, the right to sponsor members of the family class created by subsection 13(1) is expressly made "subject to the regulations". Third, the notion that paragraph 117(9)(*d*) deprives Ms de Guzman of a statutory right is further weakened by the fact that *IRPA* does not define "family class" and section 14(2) authorizes the making of regulations that "prescribe and govern any matter relating to" the family class and sponsorship.

[15] Here there is no Regulation restricting the number of sponsorship applications to be assessed; there is a Ministerial Instruction. Subsection 14(2) of the Act allows for regulations in respect to sponsorships; however, there are no such regulations in place. I agree with the respondent that in the absence of regulations, the Minister has authority to issue Directions on the matter. This was so held in *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159, at paras 35 and 37 [*Vaziri*]:

> The Minister is responsible for the administration of IRPA. In the absence of enacted regulations, he has the power to set policies governing the management of the flow of immigrants to Canada, so long as those policies and decisions are made in good faith and are consistent with the purpose, objectives, and scheme of IRPA. The Governor in Council retains the power to direct how the Minister should administer IRPA through regulations, and may oust the Minister's powers. However, where there is a vacuum of express statutory or regulatory authority, the Minister must be permitted the flexible authority to administer the system.
>
> In summary, I am satisfied that, in the absence of regulations made under s. 14(2) of IRPA, the Minister acted lawfully in establishing the 60:40 ratio, in establishing targets for visa approvals by class and in setting procedures for prioritizing sponsored applications within the family class.

[16] Paragraph 87.3(3)(c) of the Act indicates that the Minister can "set the number of applications or requests… to be processed in any year." I see nothing that dictates that the number cannot be reduced to zero, provided that "in the opinion of the Minister, [it] will best support the attainment of the immigration goals established by the Government of Canada." As stated in *Vaziri*, "where there is a vacuum of express statutory or regulatory authority, the Minister must be permitted the flexible authority to administer the system."

[17] The applicant argues that in setting the number at zero, the Minister is effectively nullifying the right to sponsor, which is qualitatively different than setting the number of applications that will be processed. That may be a superficially appealing argument, but it is important not to lose sight of the bigger picture: the Minister's power under paragraph 87.3(3)(c) is indeed robust. Such was Parliament's obvious intention, for if, as the applicant concedes, the Minister can set the number at merely one applicant, then – but for one lucky applicant – the right to sponsor is, at least temporarily, effectively nullified. I am simply not persuaded that Parliament intended for there to

be such a dramatic result if the Minister were to reduce that one to a zero. The better view is that Parliament intended to grant such discretion to the Minister. It is a cardinal rule of interpretation that a provision must be interpreted harmoniously with the scheme of the Act: *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21. It follows that a provision should be internally harmonious in its operation as well. In my view, the interpretation of paragraph 87.3(3)(c) urged by the applicant is highly technical and would render the operation of that provision disjointed and unnatural, and for those reasons cannot be adopted.

[18] The record shows that there was a 165,000 application backlog when the Ministerial Instructions were announced. As of January 2012, the anticipated processing time for applications for permanent residence arising out of Turkey could take up to 81 months. This was arguably an issue that required administrative intervention and the Minister's actions appear to have been bona fide and directed to that backlog issue.

[19] Accordingly, the Minister had the legislative authority to place a temporary moratorium on the filing of sponsorship applications.

[20] Subsequent to the hearing of this application, it was brought to my attention that section 87.3 of the Act had been amended prior to the hearing by adding, in part, the following provisions to section 87.3 of the Act making it clear that the Minister could reduce the number of applications considered to zero:

> Section 87.3 of the [Immigration and Refugee Protection Act, SC 2001, c 27] is amended by adding the following after subsection (3):

> (3.1) An instruction may, if it so provides, apply in respect of pending applications or requests that are made before the day on which the instruction takes effect.
>
> (3.2) For greater certainty, an instruction given under paragraph (3)(c) may provide that the number of applications or requests, by category or otherwise, to be processed in any year be set at zero.

[21] Both parties agreed that this amendment had no impact on this application for judicial review and thus, the amendments were not considered by the Court in reaching this decision.

[22] There was no question for certification proposed by the parties and the Court finds there to be none.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

APPENDIX A

Immigration and Refugee Protection Act, SC 2001, c 27
Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 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.

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

(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.

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

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

(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.

(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).

…

87.3 (1) This section applies to applications for visas or other documents made under subsection 11(1), other than those made by persons referred to in subsection 99(2), to sponsorship applications made by persons referred to in subsection 13(1), to applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada, to applications for work or study permits and to requests under subsection 25(1) made by foreign nationals outside Canada.

…

87.3 (1) Le présent article s'applique aux demandes de visa et autres documents visées au paragraphe 11(1) — sauf à celle faite par la personne visée au paragraphe 99(2) —, aux demandes de parrainage faites par une personne visée au paragraphe 13(1), aux demandes de statut de résident permanent visées au paragraphe 21(1) ou de résident temporaire visées au paragraphe 22(1) faites par un étranger se trouvant au Canada, aux demandes de permis de travail ou d'études ainsi qu'aux demandes prévues au paragraphe 25(1) faites par un étranger se trouvant hors du Canada.

(2) The processing of applications and requests is to be conducted in a manner that, in the opinion of the Minister, will best support the

(2) Le traitement des demandes se fait de la manière qui, selon le ministre, est la plus susceptible d'aider l'atteinte des objectifs fixés

attainment of the immigration goals established by the Government of Canada.

pour l'immigration par le gouvernement fédéral.

(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions

(3) Pour l'application du paragraphe (2), le ministre peut donner des instructions sur le traitement des demandes, notamment des instructions :

(a) establishing categories of applications or requests to which the instructions apply;

a) prévoyant les groupes de demandes à l'égard desquels s'appliquent les instructions;

(b) establishing an order, by category or otherwise, for the processing of applications or requests;

b) prévoyant l'ordre de traitement des demandes, notamment par groupe;

(c) setting the number of applications or requests, by category or otherwise, to be processed in any year; and

c) précisant le nombre de demandes à traiter par an, notamment par groupe;

(d) providing for the disposition of applications and requests, including those made subsequent to the first application or request.

d) régissant la disposition des demandes dont celles faites de nouveau.

(4) Officers and persons authorized to exercise the powers of the Minister under section 25 shall comply with any instructions before processing an application or request or when processing one. If an application or request is not processed, it may be retained, returned or otherwise disposed of in accordance with the instructions of the Minister.

(4) L'agent — ou la personne habilitée à exercer les pouvoirs du ministre prévus à l'article 25 — est tenu de se conformer aux instructions avant et pendant le traitement de la demande; s'il ne procède pas au traitement de la demande, il peut, conformément aux instructions du ministre, la retenir, la retourner ou en disposer.

(5) The fact that an application or request is retained, returned or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.

(5) Le fait de retenir ou de retourner une demande ou d'en disposer ne constitue pas un refus de délivrer les visa ou autres documents, d'octroyer le statut ou de lever tout ou partie des critères et obligations applicables.

(6) Instructions shall be published in the Canada Gazette.

(6) Les instructions sont publiées dans la Gazette du Canada.

(7) Nothing in this section in any way limits the power of the Minister to otherwise determine the most efficient manner in which to administer this Act.

(7) Le présent article n'a pas pour effet de porter atteinte au pouvoir du ministre de déterminer de toute autre façon la manière la plus efficace d'assurer l'application de la loi.

APPENDIX B

MINISTERIAL INSTRUCTIONS

(Le texte français suit le texte anglais)

The following is a copy of the Ministerial Instructions at issue:
(http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob350.asp):

Operational Bulletin 350 - November 4, 2011

Fourth Set of Ministerial Instructions: Temporary Pause on Family Class Sponsorship Applications for Parents and Grandparents

Summary
Effective November 5, 2011, a temporary pause has been placed on new Family Class sponsorship applications for parents and grandparents (FC4). Instructions are provided on what to do with FC4 sponsorship applications received before and after this date.

Issue
This Operational Bulletin (OB) provides guidance on FC4 sponsorship applications and the fourth set of Ministerial Instructions (MI-4) which come into force November 5, 2011.

Background
On June 18, 2008, the Immigration and Refugee Protection Act was amended to give the Minister of Citizenship and Immigration authority to issue instructions that would ensure the processing of applications and requests be conducted in a manner that, in the opinion of the Minister, will best support the attainment of immigration goals set by the Government of Canada.

The MI-4 comes into force on November 5, 2011 and includes changes to the following programs:

•Family Class Sponsorship Applications: A temporary pause on new sponsorship applications for parents and grandparents.
•Federal Skilled Worker Program: Introduction of a new PhD eligibility stream (see OB 351 for more information).
The full text of these instructions can be found at:
www.gazette.gc.ca/rp-pr/p1/2011/2011-11-05/html/notice-avis-eng.html#d108

Processing Instructions
Effective November 5, 2011, no new family class sponsorship applications for a sponsor's parents (R117(1)(c)) or grandparents (R117(1)(d)) will be accepted for

processing. This temporary pause is being implemented to allow for application backlog reduction in the FC4 category to begin in 2012. This measure is being implemented as part of a broader strategy to address the large backlog and wait times in the FC4 category, supporting the attainment of immigration goals set by the Government of Canada.

The temporary pause will remain in place for up to 24 months while a more responsive, sustainable, and long-term approach for the program is being considered.

It does not affect sponsorship applications for spouses, partners, dependent or adopted children and other eligible relatives.

Applications received on or after November 5, 2011
New FC4 Sponsorship applications for parents or grandparents received by Centralized Processing Centre- Mississauga (CPC-M) on or after November 5, 2011, will be returned to the sponsor with a letter (see Appendix A) advising them of the temporary pause. Applications which are postmarked before November 5, 2011, but are received at CPC-M on or after November 5, 2011 will also be returned to the sponsor. In both cases, processing fees shall be returned.

Applications received before November 5, 2011
Complete FC4 sponsorship applications received by CPC-M prior to close of business (5 p.m. EST) on November 4, 2011, should continue to be processed as usual. Cases where FC4 sponsorship applications have been submitted to CPC-M, but the applications for permanent residence have not yet been submitted to the visa office are not affected by the temporary pause.

Cost recovery fee payment made before November 5, 2011
In cases where an applicant has submitted their cost recovery fee payment but CPC-M has not received the FC4 sponsorship application before close of business (5 p.m. EST) on November 4, 2011, the applicant will receive a refund of the processing fees.

Humanitarian and Compassionate Requests
Requests made on the basis of Humanitarian and Compassionate grounds made from outside Canada that accompany any permanent resident application affected by Ministerial Instructions but not identified for processing under the Instructions will not be processed.

Updates to the IP 2 manual are forthcoming.
For further information outlined in this OB, please contact your supervisor or your Regional Program Advisor (RPA). RPAs may in turn contact Operational Management and Coordination Branch at OMC-GOC-Immigration@cic.gc.ca.

(The English text precedes the French text)

INSTRUCTIONS MINISTÉRIELLES

Ce qui suit est une reproduction des instructions ministérielles en cause : (http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob350.asp):

Bulletin opérationnel 350 – le 4 novembre 2011

Quatrième série d'instructions ministérielles : moratoire temporaire sur les demandes de parrainage de parents et de grands parents au titre de la catégorie du regroupement familial

Sommaire
À compter du 5 novembre 2011, on imposera un moratoire temporaire visant les nouvelles demandes de parrainage de parents et de grands-parents au titre de la catégorie du regroupement familial (CF4). La présente fournit des instructions concernant la procédure à suivre pour les demandes de parrainage CF4 reçues avant et après cette date.

Objet
Ce Bulletin opérationnel (BO) fournit des directives sur les demandes de parrainage CF4 et la quatrième série d'instructions ministérielles (IM-4), qui entrera en vigueur le 5 novembre 2011.

Contexte
Le 18 juin 2008, des modifications ont été apportées à la Loi sur l'immigration et la protection des réfugiés en vue d'accorder au ministre de la Citoyenneté et de l'Immigration le pouvoir de produire des instructions qui garantiraient le traitement des demandes de façon qui, de l'avis du ministre, favorisera le mieux l'atteinte des objectifs en matière d'immigration fixés par le gouvernement du Canada.

L'IM-4 entrera en vigueur le 5 novembre 2011 et comprend des modifications aux programmes suivants :

*Demandes de parrainage au titre de la catégorie du regroupement familial : moratoire temporaire visant les nouvelles demandes de parrainage de parents et de grands‑parents;
*Programme des travailleurs qualifiés du volet fédéral: mise en œuvre d'un nouveau volet des travailleurs titulaires d'un doctorat.
(Pour obtenir de plus amples renseignements, veuillez consulter le BO 351)
Vous trouverez les instructions intégrales à la page suivante :
www.gazette.gc.ca/rp-pr/p1/2011/2011-11-05/html/notice-avis-fra.html#d108

Instructions de traitement
À compter du 5 novembre 2011, aucune nouvelle demande de parrainage de parents [R117(1)c)] ou de grands-parents [R117(1)d)] au titre de la catégorie du regroupement familial ne sera acceptée aux fins de traitement. La mise en œuvre de ce moratoire

temporaire vise à permettre la réduction de l'arriéré de demandes au titre de la catégorie CF4 à compter de 2012, ce qui garantira une plus grande équité pour les demandeurs en attente d'une décision à l'égard de leur demande et favorisera l'atteinte des objectifs en matière d'immigration fixés par le gouvernement du Canada.

Le moratoire temporaire sera en place pour une période de 24 mois au maximum, période pendant laquelle on fera l'examen des options visant l'adoption d'une approche mieux adaptée et durable pour le programme.

Il ne touche pas les demandes de parrainage d'époux, de partenaires conjugaux, de conjoints de fait, de personnes à charge, d'enfants adoptés ou d'autres membres de la parenté admissibles.

Demandes reçues le 5 novembre 2011 ou à une date ultérieure
Les nouvelles demandes de parrainage CF4 de parents ou de grands-parents reçues au Centre de traitement des demandes – Mississauga (CTD-M) le 5 novembre 2011 ou à une date ultérieure, seront retournées aux répondants avec une lettre (voir Appendice A) les informant du moratoire temporaire. Les demandes dont le cachet de la poste indique une date antérieure au 5 novembre 2011, mais qui sont reçues au CTD-M le 5 novembre ou à une date ultérieure seront également retournées aux répondants.

Demandes reçues avant le 5 novembre 2011
Les demandes de parrainage CF4 reçues au CTD-M le 4 novembre 2011 avant l'heure de fermeture des bureaux (17 h HNE) doivent être traitées comme à l'habitude. Le moratoire temporaire ne touchera pas les demandes de parrainage CF4 présentées au CTD-M dont la demande de résidence permanente n'a pas encore été soumise au bureau des visas.

Paiement des frais de traitement avant le 5 novembre 2011
Dans les cas où le demandeur acquitte les frais de traitement de sa demande, mais où le CTD-M ne reçoit pas la demande de parrainage CF4 le 4 novembre 2011 avant l'heure de fermeture des bureaux (17 h HNE), le demandeur sera remboursé.

Demandes pour circonstances d'ordre humanitaire
Les demandes pour circonstances d'ordre humanitaire qui accompagnent les demandes de résidence permanente non désignées aux fins de traitement aux termes des instructions ministérielles ne seront pas traitées.

Les mises à jour au guide IP 2 sont à venir.
Pour obtenir de plus amples renseignements au sujet de ce BO, veuillez communiquer avec votre superviseur ou votre conseiller de programme régional (CPR). Les CPR peuvent ensuite communiquer par courriel avec la Direction générale de la gestion opérationnelle et de la coordination, à l'adresse suivante : OMC-GOC-Immigration@cic.gc.ca.

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	November 21, 2012

APPEARANCES:

Aadil Mangalji	FOR THE APPLICANT
Sharon Stewart Guthrie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LONG MANGALJI LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
WILLIAM F. PENTNEY Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT