Federal Court Cour fédérale

Date: 20140813

Docket: IMM-6793-13

Citation: 2014 FC 798

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, August 13, 2014

Present: The Honourable Mr. Justice Harrington

BETWEEN:

GRACE TIMOTHÉE NGALANGALA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] When Angel Ngala Ngala applied for permanent residence 12 years ago, she did not declare her son, the current applicant, Grace Timothée Ngala Ngala, as a member of the family that did not accompany her.

[2] Ms. Ngala Ngala submitted a subsequent sponsorship application under the family reunification class in favour of the applicant. It was refused in 2012 under paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*.

[3] Paragraph 117(1)(*b*) of the Regulations states:

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
…	[…]
(*b*) a dependent child of the sponsor;	*b*) ses enfants à charge;

[4] However, paragraph 117(9)(*d*) states:

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(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.

[5] However, Mr. Ngala Ngala, the son of the sponsor, had the right to file an application for permanent residency status for humanitarian and compassionate considerations. The Minister may grant permanent residency status under subsection 25(1) of the IRPA "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national".

[6] The immigration officer's decision is brief:

> [TRANSLATION]
>
> I have assessed the application that you presented for humanitarian and compassionate considerations under subsection 25(1) of the *Immigration and Refugee Protection Act*.
>
> After carefully reviewing your application and the supporting information provided, I found that the humanitarian and compassionate circumstances raised in your case do not justify the exemption of all or part of the applicable criteria and obligations of the Act.
>
> I arrived at this finding because Ms. Ngala Ngala, your sponsor, left you when you were only nine years old (i.e. 12 years ago now) and no satisfactory reason was submitted to justify that she waited five years after obtaining a "stable job" before submitting this sponsorship. Ms. Ngala Ngala did not declare you at the time that she submitted her application for permanent residence, on February 25, 2002, or on August 26, 2003, when she obtained her permanent resident status from Canada and it was only once you became an adult that she filed this sponsorship in your name, which was refused by the Case Processing Centre in Mississauga on November 5, 2012, under paragraph 117(9)(*d*) of the Regulations, which does not allow you to be considered to be a member of the family reunification class.
>
> Therefore, I must dismiss your application based on humanitarian and compassionate circumstances and submitted under the above-noted paragraph of the Act.

[7] The immigration officer rendered his decision on August 6, 2013. That is the decision before me. Very recently, in fact on July 25, 2014, after the hearing date was set for this matter, the Federal Court of Appeal rendered a landmark decision: *Seshaw v Canada (Citizenship and Immigration)*, 2014 FCA 181. I directed the parties to duly note this decision and the accompanying decision: *Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180.

[8] Speaking on behalf of the Court, Justice Pelletier ruled in *Seshaw* that:

> [23] In those circumstances, it is tempting for the sponsor to think that explaining why he or she did not declare the non-accompanying family member will go a long way towards satisfying the Minister's concerns. In some cases, this may be true. Where the facts are such as to suggest a deliberate attempt to manipulate the system, providing an innocent explanation for one's behavior may indeed have a positive effect. But in most cases, by the time one is at the stage of assessing an application for humanitarian and compassionate consideration, the focus has shifted from the sponsor's behaviour to the foreign national's personal circumstances. This is apparent from the fact that section 25 requires the foreign national, and not the sponsor, to apply for humanitarian and compassionate relief. What, then, is it about Mr. Seshaw's personal circumstances that would make granting an exemption a humanitarian and compassionate thing to do?
>
> …
>
> [28] It is true that Ms. Gebru's statement contains other information about the quality of her relationship with Mr. Seshaw that is not reflected in the visa officer's notes, information which could have been relevant to the assessment the H&C application. On the other hand, the visa officer had nothing from Mr. Seshaw himself upon which to base a decision as to his personal circumstances. The absence of information from Mr. Seshaw is unexplained. It is very difficult to make a convincing case for humanitarian and compassionate considerations without hearing from the person whose personal circumstances are the issue.

[9] Despite the submission of counsel for the Department arguing that the notes in the record indicated that the personal circumstances of M. Ngala Ngala had been noted by the immigration officer, the only conclusion to be drawn, considering the facts, is that the immigration officer had concentrated on the reasons why the sponsor had not sponsored her son earlier, instead of reviewing the applicant's personal reasons. These reasons were described in a solemn affirmation accompanied by affidavits from his mother, his father-in-law and his grandparents. Consequently, the application for judicial review must be allowed.

[10] The parties do not propose any serious question of general importance to certify and none arose in this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed.

2. The decision of the immigration officer of the Canadian High Commission in Nairobi, made on August 6, 2013, set aside and the matter is referred back to a new immigration officer for redetermination.

3. There is no question of general importance for certification.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6793-13
STYLE OF CAUSE:	NGALANGALA v MCI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	AUGUST 11, 2014
JUDGMENT AND REASONS:	HARRINGTON J.
DATED:	AUGUST 13, 2014

APPEARANCES:

Annie Bélanger	FOR THE APPLICANT
Evan Liosis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bélanger, Fiore Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT