Federal Court of Appeal  Cour d'appel fédérale

Date: 20130627

Docket: A-444-12

Citation: 2013 FCA 168

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

XIONG LIN ZHANG

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Ottawa, Ontario, on June 19, 2013.

Judgment delivered at Ottawa, Ontario, on June 27, 2013.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT BY THE COURT

[1] Mr. Zhang appeals from the judgment of the Federal Court which dismissed his application for judicial review of the decision of a visa officer. The visa officer found Mr. Zhang and his accompanying family members to be inadmissible pursuant to paragraph 38(1)(*c*) and section 42 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), on the ground that Mr. Zhang's son, Zhang Xia Di, suffers from a health condition that might reasonably be expected to cause excessive demands on the health and social services in Canada (2012 FC 1093, [2012] F.C.J. No. 1179).

[2] Mr. Zhang did not contest that Zhang Xia Di is a dependent child and family member within the meaning ascribed to those words in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). Nor did he contest that Zhang Xia Di might reasonably be expected to cause excessive demand on social services so that he would be medically inadmissible should he apply to immigrate to Canada. Rather, Mr. Zhang submitted that it was a complete answer to these concerns that he intended to leave Zhang Xia Di in China with another family member.

[3] The visa officer found Mr. Zhang's plan to leave Zhang Xia Di in China was undermined by Mr. Zhang's signed Declaration of Ability and Intent dated July 8, 2010 in which he agreed to pay for social services in Canada. Indeed, Mr. Zhang signed a number of confused and contradictory declarations of intent:

a. On September 28, 2008, Mr. Zhang signed a declaration in which he stated:

> […] [Xia Di] cannot accompany me to immigrate to Canada neither. […]
>
> Meanwhile, I state here, once I settle down in Canada, I'm willing to reserve the qualification to guarantee him to Canada in future.

b. On May 4, 2010, Mr. Zhang declared:

> […] I state here, once the other family members who accompany me for application and I settle down in Canada, I will fully authorize my younger sister ZHANG Po Mei, who is the aunt of my son ZHANG Xia Di, to take charge of caring for the daily life of my son ZHANG Xia Di in China.

c. On July 8, 2010, he declared:

> I hereby declare that I will assume responsibility for arranging the provision of the required social services

> in Canada and that I am including a detailed plan of how these social services will be provided, along with appropriate financial documents that represent a true picture of my financial situation over the entire duration of the required services.

[4] Contrary to the July 8, 2010 declaration, no plan was included.

[5] The Judge found as a fact that Mr. Zhang failed to provide a credible individualized plan for mitigating the excessive demand on social services in Canada (per *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706).

[6] The Judge went on to find that the visa officer conducted an individualized assessment and came to a reasonable conclusion supported by the evidence on the record. The Judge also noted that the visa officer did not err in law in her interpretation of the various applicable sections of the Act and the Regulations.

[7] Paragraph 74(*d*) of the Act contains an important "gatekeeper" provision: an appeal to this Court may only be made if, in an application for judicial review brought under the Act, a Judge of the Federal Court certifies that a serious question of general importance is raised and states the question.

[8] In the present case, the Judge certified the following question:

> In the aftermath of *Hilewitz v Canada (Minister of Citizenship and Immigration); de Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706, when an applicant is required to submit an individualized plan to ensure

> that his family member's admission will not cause an excessive demand on social services, **is it acceptable for this applicant** to state that the inadmissible family member will not be accompanying him to Canada, considering that he could be sponsored in the future without regard to his inadmissibility pursuant to [subsection] 38(2) of the *Immigration and Refugee Protection Act*?
>
> [emphasis added]

[9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4*; Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

[10] In *Varela*, this Court stated that it is a mistake to reason that because all issues on appeal may be considered once a question is certified, therefore any question that could be raised on appeal may be certified. The statutory requirement set out in paragraph 74(*d*) of the Act is a precondition to the right of appeal. If a question does not meet the test for certification, so that the necessary precondition is not met, the appeal must be dismissed.

[11] In the present case, the question certified by the Judge was a question proposed by the respondent as an alternative submission to his main position that this case did not raise any serious question of general importance that should be certified. Before us, the respondent reiterated that the

Minister's main position remains that the question does not meet the test for certification given that this matter clearly turns on its own set of facts. We agree.

[12] The question certified by the Judge could not, in our view, be determinative of this appeal. Whether something is "acceptable" or not is irrelevant. It has no relation to the applicable standard of review to be applied to the decision of the visa officer. The issue before the Federal Court was whether the decision of the visa officer was reasonable.

[13] Additionally, given the conflicting declarations signed by Mr. Zhang, and the Judge's finding of fact that no credible plan was provided to the visa officer, the certified question does not arise from the evidentiary record before the Federal Court. There was no unequivocal statement that Zhang Xia Di would remain in China and would not come to Canada.

[14] Finally, *Hilewitz* teaches that in every case in which the issue of inadmissibility based on an excessive demand on health or social services in Canada is raised, there must be an individualized assessment of the particular circumstances of each applicant. In such a context, it is difficult to envisage how the adequacy of any individualized plan could raise a question of general importance. To illustrate, in a case where detailed arrangements were in place for a child to remain out of Canada and a visa officer was satisfied that the child could not, or would not, travel to Canada, this might be viewed to be an adequate individualized plan. Other facts could lead to the opposite conclusion. Neither fact scenario by itself raises an issue that transcends the interests of the immediate parties to the litigation.

[15] This is underscored by section 23 of the Regulations which prescribes the circumstances in which a foreign national is inadmissible on the grounds of the inadmissibility of a family member. Pursuant to subparagraph 23(*b*)(iii), in circumstances where a child is in the legal custody of someone other than an applicant or an accompanying family member of an applicant, a visa officer might conclude that the child's inadmissibility does not render the applicant inadmissible.

[16] It follows that the question certified by the Judge does not meet the test for certification and the precondition to the appellant's right of appeal has not been met *(Varela,* paragraph 43). The appeal will, therefore, be dismissed.

"Eleanor R. Dawson"
J.A.

"Johanne Gauthier"
J.A.

"Johanne Trudel"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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