Contreras v. Canada (Minister of Citizenship and Immigration), 1996 CanLII 3868 (F.C.)

Date:	1996-10-22
Docket:	IMM-3216-95
Parallel citations:	43 Admin. L.R. (2d) 307 • 122 F.T.R. 241
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Noteup:	Search for decisions citing this decision

IMM-3216-95

BETWEEN:

VILMA SONIA LOPEZ CONTRERAS

Applicant

- AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

McKEOWN J.

The applicant, a citizen of Peru, seeks judicial review of the decision of the Appeal Division of the Immigration and Refugee Board (Appeal Division) dated October 27, 1995, wherein it was determined that the Appeal Division did not have jurisdiction to hear the appeal.

The issue is whether the Appeal Division complied with the principles of natural justice in determining that it was without jurisdiction to hear the applicant's appeal.

FACTS

In 1988, the applicant, together with her siblings, made an application for permanent residence in Canada. The application was sponsored by her father. The applicant did not pursue her application until January 1992, and as a result, a visa was issued in March 1992.

In October 1992, the applicant entered Canada. At the point of entry, an immigration officer issued a report under paragraph 20(1)(a) of the ***Immigration Act***, R.S.C. 1985, c. I-2 (the Act) finding that the applicant could not be granted admission to Canada since she was found to have been improperly issued a visa because the condition under which the visa was issued ceased to exist before it was issued, namely, her sponsor, her father had died on August 2, 1990. As a result of the report, an inquiry was held on August 11, 1993, September 8, 1993 and September 28, 1993. At the conclusion of the inquiry, the applicant was found to be inadmissible and an exclusion order was issued against her on September 28, 1993.

The applicant launched an appeal with the Appeal Division and a hearing was heard by Board member Ms. Wiebe on June 9, 1994. Evidence pertaining to the merits of the case was not adduced during the proceedings of June 9th as the Minister of Citizenship and Immigration moved to challenge the jurisdiction of the Appeal Division. The basis for the challenge of the jurisdiction was that the applicant's father, her sponsor of the application, died on August 2, 1990, before the issuance of the visa to the applicant. Counsel for the Minister submitted that as a result, as determined in the ***Minister of Employment and Immigration v. De Decaro***, 1993 CanLII 2945 (F.C.A.), [1993] 2 F.C. 408 (C.A.) and in ***The Minister of Employment and Immigration v. Wong*** (1993), 153 N.R. 237 (F.C.A.), where the condition under which the visa is issued ceased to exist, the visa is no longer valid and, therefore, a nullity. Consequently, the person seeking entry into Canada, the applicant, would have no right of appeal. During the course of the hearing, Ms. Wiebe indicated that she was seized of the matter and the medical report was entered into evidence. Otherwise there was no other evidence entered at that time nor were any witnesses heard. On March 6, 1995, Board member Wiebe gave her decision with respect to the jurisdictional issue. She based her decision on argument by the applicant's counsel that the cases of ***De Decaro*** and ***Wong, supra***, can be distinguished. She went on to say at page 2 of the reasons:

> In the instant case, it is the sponsor who has died. This is a family class application of a dependant daughter, whose father, the sponsor, died. Ms. Lopez-Contreras may still be sponsored in the family class. It is noteworthy that the purpose of sponsorships in the family class category is to foster family reunification. Consequently, in that the Undertaking of Assistance was signed by the sponsor, Romulo Lopez, as well as by his wife, Alanta Lopez, mother of the Appellant, and contained the handwritten statement: "SAs met with co-sponsorship of son Romulo Alberto," I am of the opinion that the sponsorship of the Appellant survives as the mother of the Appellant can sponsor the application of the Appellant as a member of the family class.
>
> Having therefore distinguished both De Decaro and Wong, it is my opinion that the principles expressed therein are inapplicable. I am not prepared to extend the underlying principle to one which reflects that all visas are conditional ...

However, it is not the decision of the Board member Wiebe which is under judicial review before me. It is most important to note what happened next. Although Board member Wiebe stated during the June 9th hearing that she was seized of the matter when the parties reconvened to hear the merits, on July 5, 1995, Board member Ariemma was presiding. Counsel for the applicant raised one preliminary concern before proceeding on the merits and stated and the transcript reads as follows:

> COUNSEL: Miss S. Weibe[sic] was the ward[sic] member in this matter originally.
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> PRESIDING MEMBER: Yes. She heard the motion.
>
> COUNSEL: Right. We were under the impression that she was the Presiding Member and so it came as a surprise that there was a different board member and we just wanted to understand what is happening.
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> PRESIDING MEMBER: There is a hearing, that is all that is happening. Miss Weibe[sic] was not seized on the matter. She heard the motion, adjudicated the motion and that was all and having found, as Miss Weibe[sic] has, that the Board had jurisdiction to hear the matter before us now, that's where we are.
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> COUNSEL: Thank you, sir.
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> PRESIDING MEMBER: I take it that you know that that decision is being appealed by the Minister?
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> COUNSEL: No, sir. In fact ---
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> MR. MACINTYRE: Just for clarification purposes, Mr. Chairman, it was, an action was commenced, however, because the appeal had not been completed in entirety. It was felt by the powers that be that the matter be put over until such time as a definitive ---
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> PRESIDING MEMBER: There is no indication of that in my file, there is only indication of the appeal.
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> MR. MACINTYRE: The Board was notified to that effect, by phone actually, Mr. Chairman.

PRESIDING MEMBER: I see. Well is[sic] was probably not reflected. Thank you, Mr. MacIntyre. In the file there is an application for (inaudible).

COUNSEL: That was discontinued.

Counsel for the applicant in his argument before Mr. Ariemma returned to the question of the jurisdictional issue and whether Ms. Wiebe was seized of the matter. In my view I do not have to deal with the question of whether Board member Ariemma properly heard the case on its merits because there is a preliminary natural justice issue with respect to Mr. Ariemma's finding that the Appeal Division did not have jurisdiction in this matter. It is clear from the transcript that all parties agreed that the jurisdictional issue had been decided by Board member Wiebe. There was no discussion of the jurisdictional issue at the hearing on July 5, 1995. Board member Ariemma then issued his decision on October 27, 1995. He stated at page 3 of the reasons that:

> ... it was agreed by the parties that the hearing could proceed before a different member of the Board ...

This statement is clearly wrong because counsel for the applicant did take issue with his hearing the matter. However, as stated earlier, in my view, I do not have to address this matter because there is a more important question of natural justice to be addressed. Mr. Ariemma stated at page 3 of the reasons:

> In the course of the hearing it became clear that the appellant was not the natural daughter of Alanta Lopez, the widow of the appellant's father. The evidence shows as well that the appellant was never legally adopted by her step-mother. From the transcript of the previous hearing, it would appear that this evidence was not before the colleague who determined the question of jurisdiction of the Appeal Division. However in view of the evidence, it behooves this panel to revisit the question of jurisdiction. In this instance, the Appeal Division finds that at the time the visa was issued to the appellant, the condition on which the visa could be issued had ceased to exist because the sponsor had died and the appellant's step-mother did not have the right to sponsor the appellant.
>
> There is no provision in the Immigration Act to sponsor a person in the circumstances of the appellant. The appellant does not fall within the family class and she did not have a valid visa at the time she entered Canada. Consequently, she does not have the right of appeal and the Appeal Division is without jurisdiction.

Although I sympathize with Board member Ariemma's plight, I am not aware of any statute or common law proceeding that allows a colleague in the same tribunal or in a court to reverse a decision of a colleague even though new evidence may come to light in a different matter which shows that the first decision may not have been correct. In any event, at the very least, the parties should have been offered the opportunity to explore the issue of jurisdiction in light of the new facts. It is hard to imagine a more clear violation of natural justice principles than a decision made on a subject matter which was already resolved and was not even before the Board or tribunal hearing the matter. As was stated by Stone J.A . in ***Yassine v. The Minister of Employment and Immigration*** (1994), 172 N.R. 308 at 312 (F.C.A.):

> ... I do not suggest that a breach of natural justice does not normally require a new hearing. The right to a fair hearing is an independent right. Ordinarily the denial of that right will void the hearing and the resulting decision. An exception to this strict rule was recognized in Mobile Oil Canada Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board, 1994 CanLII 114 (S.C.C.), [1994] 1 S.C.R. 202 where, at page 228, the Supreme Court of Canada quoted the following views of Professor Wade:
>
> > A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.
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> While recognizing that natural justice or procedural fairness had been denied, the Supreme Court gave effect to Professor Wade's distinction by withholding a remedy because the outcome was "inevitable", in that the decision-maker "would be bound in law to reject the application" of the appellant therein.
>
> The limits within which Professor Wade's distinction should operate are yet to be established. Iacobucci J., writing for

> the Court at page 228, regarded the circumstances in Mobile Oil as "exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition", citing Cardinal v. Director of Kent Institution, 1985 CanLII 23 (S.C.C.), [1985] 2 S.C.R. 643. It should be noted that Cardinal involved a complete denial of a hearing. Here it is not necessary to speculate as to the outcome, assuming of course that natural justice was denied and that there has been no waiver. The adverse finding of credibility having been properly made, the claim could only be rejected. It would be pointless to return the case to the Refugee Division in these circumstances.
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> [footnote omitted]

The respondent suggested that the facts in this case are applicable. However, first I point out that there was no hearing whatsoever on the question of jurisdiction by Board member Ariemma. I also note that although the decisions of ***De Decaro*** and ***Wong, supra,*** are controversial, they are the law as far as this Court is concerned and Board member Wiebe distinguished the two cases in her decision. While I have some doubt about the correctness of this distinction, I find it difficult to say that to send it back to the Appeal Division would be futile. The applicant has not been given an opportunity to introduce evidence with respect to perhaps another person who might act as a sponsor in a family class application. The Supreme Court of Canada has made it very clear that only in the most exceptional cases where there has been a material breach of natural justice principles, should the matter not be returned to the tribunal for redetermination. As stated earlier, it also must be remembered that Board member Ariemma made a finding on the question of jurisdiction without any hearing before him on the subject at all. I also do not ignore the submissions of the respondent with respect to the applicability of ***Bruan v. Canada (Minister of Employment & Immigration)*** (1995), 30 Imm. L.R. (2d) 122 (F.C.T.D.). However, in my view, a reviewing court will be in a much better position to review these cases with a full set of facts. Accordingly, the application for judicial review is allowed. The decision of the Appeal Division dated October 27, 1995 is set aside and the matter is returned to the Appeal Division to be redetermined by another panel both on the question of jurisdiction and the merits of the claim should the Appeal Division be found to have jurisdiction. Both the applicant and the respondent shall be entitled to enter such relevant evidence on the question of jurisdiction and the merits as they deem advisable and the Appeal Division deems relevant.

_____

Judge

OTTAWA (ONTARIO)

October 22, 1996

FEDERAL COURT OF CANADA TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: IMM-3216-95

STYLE OF CAUSE: VILMA SONIA LOPEZ CONTRERAS v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING:, September 26, 1996

REASONS FOR ORDER OF the Honourable Mr. Justice McKeown DATED: October 22, 1996

APPEARANCES:

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