



Immigration Law News

Robert Young

Circle the Wagons, Men! The Injuns (East and West) are Coming!(The courts giveth and the courts taketh away)

Nowadays, delay is everything in Immigration applications. It would be more honest for the Ministry to shut down and say “tough luck, we’re full” than to continue with the present system.

Take the case of *Istvan Szebenyi v. Her Majesty the Queen*, 2007 FCA 118 (March 22nd, 2007). In February of 1993 Mr. Szebenyi applied to sponsor his parents. As part of the application process the parents were examined by an Immigration-designated doctor on May 19th, 1993. The medical examination revealed that mother had diabetes mellitus, making her inadmissible for medical reasons. During an interview at the Canadian Embassy in Budapest in April 1994, the parents were told that they could either apply for a Minister’s Permit (good luck!) or repeat the medical. Mother repeated the medical. The application was finally refused by letter on August 16th, 2000. An appeal was made to the Immigration Appeal Division. It too failed.

The sponsor brought an action against the Crown on February 16th, 1998 claiming to suffer emotional distress and nervous shock as a result of the negligent way in which Immigration was handling his parents’ application.

He had begun to show signs of depression in 1994.

Mr. Szebenyi’s claim was refused at trial and on appeal. Both levels of the Court were content that the Crown did not owe an applicant a civil duty of care to process an application in a timely fashion. The applicant’s only rights are to make the sponsorship application and to appeal a negative decision to the IAD. Shouldn’t the fact that applicants pay a hefty processing fee make a difference?

On a positive note, the Federal Court of Appeal has extended the reasoning of the Supreme Court of Canada in *Hilewitz v. Canada*, [2005] 2 S.C.R. 706 to cover cases involving skilled worker applications. In *Colaco v. MCI*, 2007 FCA 282 (September 12th, 2007) the applicant family included a child who suffered mild mental retardation. The family first applied to come to Canada in 2001. When nothing was heard from Immigration for more than 18 months, they applied again. It was not until June 23rd, 2005 that they were advised that the application (which one?) was denied as the child was deemed to place excessive demands on Canadian social services if allowed to come here. The Court ruled that before such an assessment is made, Immigration should consider the foreign national’s (or his/her parents’) ability and willingness to pay for the services. Given what hap-

pened to Mr. Szebenyi’s mom, how long will that take?

As of September 30th, 2007 there were 32,414 cases waiting to be processed by the Refugee Protection Division. From January 1st to September 30th, 2007 the RPD had 18,617 new cases referred to it. It processed 9,675 in that time. As of September 30th, 2007 the Immigration Appeal Division had 9,629 appeals waiting to be heard. From January 1st, 2007 to September 30th, 2007 it had 5,598 new cases referred to it and it processed 4,861. You do the math.

On December 13th, 2007, the Supreme Court of Canada considered the applications for leave to appeal the Federal Court of Appeal’s decisions in *Thamotharem v. MCI* and two related cases. Leave was refused. The question in *Thamotharem* was whether an inquisitorial model of adjudication, with the trier of fact him/herself starting, and indeed often doing most of, the questioning, offended the principles of fundamental justice enshrined in s.7 of the *Canadian Charter of Rights and Freedoms*. The original justification for following an inquisitorial model was to speed up processing of claims. Pray tell me, what has the RPD done with all of that spare time? ■

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