Federal Court Cour fédérale

Date: 20150128

Dockets: IMM-7800-14
IMM-7801-14

Citation: 2015 FC 111

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 28, 2015

PRESENT: The Honourable Mr. Justice Roy

Docket: IMM-7800-14

BETWEEN:

FNU KAMUANYA MUBENGA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-7801-14

AND BETWEEN:

FNU KAMUANYA MUBENGA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The respondent in this case, the Minister of Citizenship and Immigration, is presenting to the Court two written motions that have the same purpose. In both cases, the Court is being asked to [TRANSLATION] "peremptorily strike the applicant's application for leave and judicial review".

[2] In docket IMM-7800-14, the applicant submits that an oral decision issued on January 7, 2004, by a refugee protection officer should be judicially reviewed. This so-called application for leave and judicial review for *mandamus* was presented on November 24, 2014. For a reason that was not provided, the respondent's written submissions deal with a decision dated February 19, 2004, as being the decision in respect of which the application for judicial review was made. On its face, the application for judicial review does not in any way address what is alleged to have happened on February 19, 2004.

[3] A brief explanation may clarify the issue. Following a claim for refugee protection by the applicant when she arrived in Canada in 2003, the procedure at that time provided that the applicant could be required to appear at an interview. That was the case here. At the interview, the person designated as the Refugee Protection Officer had the authority to make a recommendation. Here, the record suggests that a recommendation to accept the refugee claim

without a hearing was made. However, that recommendation had to be approved by a member of the Refugee Protection Division. This appears not to have been the case because we have in the record a written note dated February 19, 2004, which on its face rejected the recommendation and stated: "I remit this claim for determination at a hearing." In fact, a decision was issued by the Refugee Protection Division on August 25, 2004. It is that decision that is the subject of the application for judicial review in docket IMM-7801-14.

[4] Although the respondent brought his motion with respect to the decision of February 19, 2004, it was not mentioned in the application for judicial review. The application refers to the recommendation that was favourable to the applicant.

[5] The two motions were heard without having the applicant's submissions because the time limits for responding to the respondent's two motions had already expired. Despite this lack of intervention by the applicant, the Court must review the respondent's submissions to determine their merits. After completing this review, the Court will grant the motion in docket IMM-7800-14 but dismiss the motion is docket IMM-7801-14. My brief reasons follow.

[6] In docket IMM-7800-14, it is difficult to understand how the applicant can wish to challenge a [TRANSLATION] "decision" that was favourable to her. The recommendation made was: "I recommend that this claim be accepted without a hearing." It is understandable that the respondent inferred that the decision the applicant wished to challenge must have been the one dated February 19. But that was not done. It therefore appears that the application for judicial

review with respect to the decision of January 7, 2004, was, by definition, bound to fail. If the applicant wanted to dispute the rejection of the recommendation, she had to do it properly.

[7] But does the Court have jurisdiction to grant the motion? The Minister is attempting to base his motion on rule 4 of the *Federal Courts Rules*, SOR/98-106, which reads as follows:

Matters not provided for	**Cas non prévus**
4. On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.	4. En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce.

Although the applicant was a resident of the province of Quebec, the respondent made no reference to the practice of the Quebec Superior Court. He also did not make an analogy to these Rules. Without more, I am not satisfied that rule 4 can be readily applied in this case.

[8] It seems that the jurisdiction relied on by the respondent in this case arises from the following passage in *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FCR 588 [*David Bull Laboratories*]:

> This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. [Page 600]

In my view, an inherent jurisdiction should be invoked instead. The negative form adopted by Justice Strayer in *David Bull Laboratories* stems from the fact that the Court had dismissed a motion to strike in the context of a judicial review. For example, the following is stated at page 597:

> Thus, the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself. This case well illustrates the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike.

In *David Bull Laboratories*, the Court dismissed the motion to strike the originating notice of motion for prohibition. The Federal Court of Appeal wanted to preserve the ability to have motions heard where the notice of motion for judicial review is so clearly improper as to be bereft of any possibility of success. However, I consider it questionable to rely upon rule 4 because in and since *David Bull Laboratories* the Federal Court of Appeal has addressed the scope of rule 4. Thus, *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223, [2012] 2 FCR 243 states:

> [30] Rule 4 exists to ensure that there are no gaps of a procedural nature. Thus, in cases such as *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1310, [2007] 4 F.C.R. 300 Rule 4 has been applied in order to fill a lacuna in the Rules for dealing with sensitive information. However, in those cases there was no doubt that the proceedings were properly commenced in the Federal Court and that it possessed jurisdiction (see *Mohammed* at paragraphs 18 to 20). What was missing was a procedural mechanism for the protection of sensitive information within the proceeding. Where, however, as in this case the jurisdiction of the Federal Court is in doubt, Rule 4 cannot be relied upon to confer substantive jurisdiction on the Federal Court.

[9] In my view, the application for judicial review in docket IMM-7800-14 is so amorphous as to be bereft of any possibility of success (*Leahy v Canada (Citizenship and Immigration)*, 2009 FC 509, para 12). The applicant seeks judicial review of a [TRANSLATION] "decision" that was completely favourable to her. Perhaps she wanted to object to the decision to not follow the recommendation that was made. But that is not what she did.

[10] The conclusion I have arrived at in docket IMM-7801-14 is different. The applicant's application for judicial review is not amorphous. Although she is seeking judicial review of a decision issued more than 10 years ago, she is requesting an extension of time and relies on grounds that I do not need to examine. The passage from *David Bull Laboratories* cited above seems completely relevant to me. The Court should not encourage "the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike." If inherent jurisdiction can be argued, it seems to me that it must be limited to cases where the notice of motion is so clearly improper as to be bereft of any possibility of success. What the respondent is trying to do here is to examine the merits of the motion for judicial review that has been presented.

[11] Accordingly, he submits that there is no valid reason to grant an extension of time. With respect, this approach appears premature to me. It will be for the applicant to argue the grounds that justify not only that her application for leave should be granted because it satisfies the test in *Bains v Canada (Minister of Employment and Immigration)*, [1989] 3 FC 487, but also that a period of 10 years before bringing her application is justifiable under the Act. In return, the

respondent will be able to argue that the application for leave should be dismissed because of this delay.

[12] In my view, it is good judicial policy to avoid a multiplicity of proceedings in judicial review cases (*David Bull Laboratories*, above). Furthermore, the caveat presented by the Federal Court of Appeal in *David Bull Laboratories* after it indicated the possibility of inherent jurisdiction in cases where the notice of motion is so clearly improper as to be bereft of any possibility of success, should be quoted: "Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion".

[13] I therefore conclude that the motion to strike in docket IMM-7800-14 is one of those exceptional cases, and, accordingly, it is granted. With respect to the motion to strike in docket IMM-7801-14, it is dismissed.

ORDER

THE COURT ORDERS that the motion to strike in docket IMM-7800-14 is granted, and the motion to strike in docket IMM-7801-14 is dismissed.

"Yvan Roy"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-7800-14 AND IMM-7801-14
DOCKET:	IMM-7800-14
STYLE OF CAUSE:	FNU KAMUANYA MUBENGA v MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-7801-14
STYLE OF CAUSE:	FNU KAMUANYA MUBENGA v MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, UNDER RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	ROY J.
DATED:	JANUARY 28, 2015

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