Federal Court Cour fédérale

Date: 20161104

Docket: IMM-2052-16

Citation: 2016 FC 1238

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 4, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MARIEM KLEIB
MOULAYE AHMED NOUEISSERI
AHMED NOUEISSERI
BEBAHA NOUEISSERI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary Issue

[1] A somewhat unprecedented situation was presented. Before the application for judicial review was heard, the Court authorized the respondent to submit a supplementary affidavit. That

affidavit revealed that the applicants left Canada on August 14, 2016, and probably returned to their home country, Mauritania.

[2] What the affidavit fails to mention is that the applicants did indeed leave Canada, but seemingly not entirely of their own accord. Counsel for the applicants informed the Court that the applicants were complying with a removal order following the refusal of an administrative deferral. The applicants left Canada on August 14, 2016, two days before this Court decided that it was appropriate to grant leave for judicial review. It was not until a certificate of departure was reviewed that a removal order was noted. The Court is entitled to expect more transparency. There can be a significant difference between voluntary departure, which may be seen as renouncing refugee status under certain circumstances, and being subject to a removal order and complying with it after suspension of the order is denied.

[3] The Minister claims that hearing the judicial review would now be "futile" because the remedy sought, i.e., the case being referred back for review, cannot be granted. According to the respondent, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], provides that a claim for refugee protection made by a person outside Canada must be made by making an application for a visa (subsection 99(2) of the IRPA), or, if made by a person inside Canada, must be made to an officer (subsection 99(3) of the IRPA). Making solely a textual argument, the Minister claims that if section 97 is invoked, the person must be in Canada ("A person in need of protection is a person in Canada [...]"). Similarly, a person who invokes section 96 must be outside each of their countries of nationality. The applicants, who reportedly returned to their country of citizenship, Mauritania, were no longer outside their country of nationality. Therefore,

their claim for refugee protection must be made by applying for a visa (subsection 99(2) of the IRPA). Given this syllogism, considering that the applicants were no longer in the country and there was no foreign visa application, the Refugee Protection Division [RPD] would no longer have jurisdiction to hear a remedy from this Court, if applicable.

[4] Counsel for the applicants did not object to the application made by the respondent. This is understandable. She would not have received a mandate as to whether or not to dispute the application made by the respondent.

[5] The respondent claimed that the application for judicial review had become "futile." He did not cite the doctrine of mootness and did not base his argument on *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. Instead, he sought to make a textual argument, which he claimed resulted in futility but not mootness within the meaning of *Borowski*. I fail to see the distinction. Regardless, the Court was not enlightened on the legal basis of the futility, which is apparently not a moot issue as in *Borowski*. The counsel avoided citing *Borowski*, but is essentially seeking the same outcome, i.e., the rejection of the application for judicial review without disposing of it on merit.

[6] In the absence of an opposing argument, the Court preferred not to rule on a textual argument. However, I note in passing that sections 96 and 97 simply define who is a refugee or person in need of protection. Both sections include the words "is a person [who]." If the application for judicial review were to be allowed, it would be so that the RPD could begin the initial exercise again and not so a new claim for refugee protection could be made. From the

outset, there was never a question as to whether the applicants had the required qualities because their claim did not meet the provisions of section 99: they were in Canada and therefore made the claim to an officer (subsection 99(3)). The question would then be whether deportation from Canada negates the initial quality that met the fundamental condition of the applicant being in Canada. What led to the decision to start again with what had originally been undertaken is not the failure to meet the geographical requirement, but rather that the Court saw the decision as not being reasonable or correct. In other words, according to the administrative decision-maker, the problem had another source: when the case was referred back, it was not on the basis that the individuals are not refugees or persons in need of protection who were not in Canada when the claims were made. The remedy granted is typically a new determination of status and not that a new claim for refugee protection be made. That claim had already been made, and it is not disputed that it was done correctly pursuant to section 99: when the claim was made, the claimant was in Canada. Rather, it is the merit of the claim that is under dispute.

[7] In this case, no effort was made to present an argument that accounts for the most fundamental rule of interpreting legislation. As has been reiterated numerous times since *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, the phrase from E. A. Driedger establishes that, according to the Court, "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21). Driedger's well-known phrase is translated as follows in the decision: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[8] The outcome of the interpretation proposed by the Minister would seem to be as follows. Despite the claim made to obtain the status set out in sections 96 and 97 of the IRPA, if the RPD denies the claim, it is sufficient that the applicant be deported to render the application for judicial review of that refusal "futile." Even though the Court found that the decision to refuse status merits judicial review, the administration could prevent this through deportation because, according to the Minister, it would be futile to hear the judicial review because the legislation, as interpreted by the Minister, would not provide for any remedy. The result is that a judicial review of the situation of a person claiming refugee protection would be futile. Even if the Court were to find a flaw leading to a positive decision, according to the Minister, the entitlement to the remedy ordered would be impossible to execute. There could be no redetermination of the refugee status because the administrative tribunal would have lost jurisdiction simply as a result of the deportation. In my opinion, such a situation would merit further examination than what was provided in this case.

[9] I have no doubt that section 99 is the correct provision to be applied to a person claiming refugee status (according to section 97, a person in need of protection is inside Canada) and who wishes to make such a claim. However, in this case, the original claim was made in due and proper form. When the claim was made, the person was in Canada. Nevertheless, this case is before the courts. It is unclear that if a remedy had to be ordered, it would require that a new refugee claim be made, rather than considering that the claim was duly made and the review, if it were ordered, cannot be carried out on that sole basis. Given the lack of arguments, it is wiser to maintain the *status quo* and dispose of the case on merit. Moreover, the Minister provided no authority to justify a [TRANSLATION] "doctrine of futility" and did not discuss the legal nature of

sections 96 and 97, which appear to be provisions defining the status, whereas section 99 defines to whom a claim is made.

[10] In my opinion, it is uncertain that the RPD can state that it has no jurisdiction if a case is referred back to it on the initial basis. This could be a debate for another day.

II. The decision on the application for judicial review

[11] The applicants in this case are a family from Mauritania. Their claim to be recognized as refugees or persons in need of protection was rejected in a decision by the RPD on April 20, 2016. They have come before this Court to obtain judicial review of that decision pursuant to section 72 of the IRPA. For the reasons that follow, the application for judicial review is dismissed.

[12] The issue on which the claim was rejected before the RPD was that the applicants' credibility was so damaged that the claim had to be rejected.

[13] Issues of that nature are reviewed by our Court according to the reasonableness standard. Just after the Supreme Court's decision was rendered in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, Mr. Justice Martineau of our Court stated that the reasonableness standard of review applies when a person claiming refugee protection is deemed not credible (*Garay Moscol v Canada (Citizenship and Immigration)*, 2008 FC 657). Our case law has not reneged this since then.

[14] Thus, the burden is on the applicants to satisfy the Court that the decision made in this case is unreasonable. Does the decision fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, and is the decision-making process transparent and intelligible, thus providing justification for the decision?

[15] The applicants never succeeded in demonstrating that. The decision, carefully written by the RPD, identifies numerous inconsistencies and contradictions that make the applicants' version not credible. When entering Canada (the applicants passed through the United States, where they had an entry visa but remained only very briefly), the main applicant failed to indicate on the form to be completed that he had previously been detained. As for his spouse, she also failed to indicate that she had apparently been confined by her family. The entire story of how the spouses met was confusing. One of the reasons cited for leaving Mauritania was that the family of Mr. Kleib's spouse did not know that the main applicant is from a family of slaves. However, it is highly unlikely that this was the situation, because it is hard to see how that could have been hidden for long, especially since the families were neighbours. Moreover, upon entry, Mr. Kleib's spouse confirmed that it was her mother who had introduced her to her future husband.

[16] What I find even more significant is that the main applicant reported that he had been detained by authorities in his country for much different periods than those his spouse reported. He claimed that he had been detained two days, 12 days and 14 days, while his spouse said it was three days, two days and five days. Nevertheless, she says she visited him. If he was indeed detained, it is difficult to understand how the periods of time could be so different. It is even

harder to believe considering that the spouses contradict each other on the locations where he was apparently detained. It is particularly troubling that when confronted with the differences, the applicant's wife chose to try to align her version with the one she heard her husband had provided. Changes to a testimony based on the questions asked inevitably have a significant effect on the credibility to be given to the story.

[17] Similarly, it is impossible to understand how, in an entry form, someone who says they have been detained can answer no to the question as to whether he has been detained, incarcerated or imprisoned. The explanation provided only makes matters worse. The applicant apparently responded that he was tired, stressed and afraid when he filled out the form. Afraid of what? After passing through the United States, the only reason for coming to Canada was to claim refugee status on the basis of the treatment he allegedly received in Mauritania. There is no doubt in my mind that these applicants had chosen Canada to make a refugee claim. The least that can be hoped is that, upon arriving in Canada, the individuals would declare the reasons why they are seeking refuge. There is nothing wrong with declaring, as required by the form, that one has been detained, incarcerated or imprisoned. That is the very basis of the claim for refugee protection in Canada.

[18] After having heard the parties (counsel for the applicants deferred to the memorandum of fact and law) and read the transcripts of the RPD hearings, it has not been demonstrated how the decision made could be unreasonable. In fact, it is eminently reasonable. At best, the applicants repeated the same explanations that the RPD rejected. I see nothing abusive or arbitrary in the RPD's finding that the testimonies provided are not credible, given the obvious inconsistencies

and contradictions that were noted. This finding is clearly one of the possible, acceptable outcomes which are defensible in respect of the facts and law, and the RPD's decision is transparent, justified and intelligible. The application for judicial review is dismissed. There are no questions of importance to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2052-16
STYLE OF CAUSE:	MARIEM KLEIB, MOULAYE AHMED NOUEISSERI, AHMED NOUEISSERI, BEBAHA NOUEISSERI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 27, 2016
JUDGEMENT AND REASONS:	ROY J.
DATED:	NOVEMBER 4, 2016

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