Federal Court  Cour fédérale

Date: 20161110

Docket: IMM-3855-15
IMM-3838-15

Citation: 2016 FC 1259

Ottawa, Ontario, November 10, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

FERENC FEHER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Respondent brings this motion pursuant to Rule 369 of the *Federal Courts Rules* SOR/98-106 [*Rules*] for an Order dismissing these joined applications for judicial review on the basis that there is no live controversy remaining between the parties because the underlying basis for the decisions being reviewed is now moot. The Applicant is seeking judicial review of a refusal by an Inland Enforcement Officer to defer his removal to Hungary and a negative reconsideration of that decision [collectively, "the Decisions"]. However, on December 31, 2015,

the Applicant became eligible for a Pre-Removal Risk Assessment [PRRA]. Therefore, the Respondent submits the applications for review are now moot. The Applicant now cannot be removed without receiving notice of a PRRA at which time he can benefit from a statutory stay of removal. In effect, he has received the deferral he originally sought and the denials he seeks to review are no longer in effect.

[1] The Applicant acknowledges the applications to set aside the Decisions are now moot. However he says there is still a contested issue as, based on his being a national of a Designated Country of Origin [DCO], he was subjected to differential and punishing treatment compared to nationals of non-DCO countries. The Applicant claims the live issue between the parties is the declaration he is seeking that s 112(2)(b.1) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [*IRPA*] is of no force and effect as it applies to DCO nationals because it contravenes s 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, c 11 [*Charter*] and it is not justified under s 1 [the Declaration]. While the Declaration is not relief currently requested in the Applicant's applications for leave and judicial review, the Applicant has moved for leave to amend those applications to add the request for the Declaration.

II. Background Facts

[2] The Applicant is a Hungarian national of Roma descent. He fled Hungary and entered Canada on June 28, 2011 where he made a claim for refugee protection based on persecutory attacks. The Refugee Protection Division [RPD] refused his claim. The central issues were credibility and the availability of state protection. Leave for judicial review was refused. A subsequent application to reopen his refugee claim due to a denial of procedural fairness was

filed with the RPD and was denied. All other members of the Applicant's family have subsequently been found to be Convention refugees.

[3] On August 18, 2015, the day that he received the Direction to Report, the Applicant filed a request to defer his removal. In that request, the Applicant argued that the additional 24 months which a DCO national must wait before receiving a PRRA compared to a non-DCO national was an unjustified infringement of s 15(1) of the *Charter*. The Applicant was to report on August 25, 2015 for removal to Hungary. At that time, 32 months had passed since his refugee claim had been rejected. But for the 36 month bar, the Applicant would have been able to avail himself of the procedures that were available to non-DCO nationals and he would have benefitted from a statutory stay of removal until the PRRA decision was rendered.

[4] On August 20, 2015 the first decision refusing the Applicant's deferral request was received. It did not resolve the constitutional issue raised by the Applicant, as the Inland Enforcement Officer considered the relevant provisions of the *IRPA* to be binding and the officer distinguished other DCO cases in this Court that found s. 15 of the *Charter* had been breached when there was no appeal to the Refugee Appeal Division from an RPD decision.

[5] The next day the Applicant filed an application for leave and judicial review (IMM-3838-15) as well as a motion seeking a stay of his removal to Hungary. As part of the original request for deferral the Applicant had also filed updated country condition documents dealing with deteriorating conditions in Hungary for Roma. Those documents had not been before the original decision-maker so a reconsideration took place (IMM-3855-15) but the deferral request was again denied. The reconsideration decision also did not resolve the constitutionality issue raised

by the Applicant but noted the prior officer's comments and found that a deferral request was "not a forum to argue the constitutionality of legislation."

[6] On August 24, 2015, Mr. Justice Boswell granted the Applicant a stay with respect to the Decisions. He also ordered the two applications be consolidated and heard together. The sole ground argued on the stay motion was the constitutional issue.

[7] On January 21, 2016, the Respondent brought this motion to dismiss the applications on the basis of mootness because the Applicant had become eligible for a PRRA once the 36-month bar expired on December 31, 2015.

III. Analysis

[8] The Applicant seeks as relief that the Decisions be set aside and his applications for deferral be reconsidered by another officer. Both parties agree that aspect of the judicial review application is moot. The Applicant submits that there are, however, a number of contested issues remaining between the parties and they provide a firm factual basis for adjudication.

[9] The chief issue between the parties is that the Applicant claims a right, pursuant to s 52 of the *Charter* to a determination by the Court of whether his *Charter* rights were infringed by the PRRA bar. When the Applicant filed his deferral request the grounds for deferral were: (1) that his removal was being executed pursuant to legislation that was an unjustified violation of s 15(1) of the *Charter* and as such was unconstitutional and therefore unlawful; (2) in the 32 months since his claim for protection was denied by the RPD, country conditions in Hungary had worsened; (3) that fifteen other family members had received protection from the RPD which showed there had been a miscarriage of justice and he was at genuine risk if returned to Hungary.

[10] The Respondent alleges the removal of the PRRA bar makes the issues moot and also denies that any *Charter* infringement took place.

[11] The Applicant has moved to amend his applications to add the Declaration as an additional remedy.

A. *Mootness Test*

[12] It is agreed by the parties that the two-step test set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] applies to determine whether the Respondent's motion should succeed. As summarized by Mr. Justice Diner in *Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026 at paragraph 7, the test is:

> [7] The test for mootness comprises a two-step analysis. The first step asks whether the Court's decision would have any practical effect on solving a live controversy between the parties, and the Court should consider whether the issues have become academic, and whether the dispute has disappeared, in which case the proceedings are moot. If the first step of the test is met, the second step is – notwithstanding the fact that the matter is moot – that the Court must consider whether to nonetheless exercise its discretion to decide the case. The Court's exercise of discretion in the second step should be guided by three policy rationales which are as follows:
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> i. the presence of an adversarial context;
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> ii. the concern for judicial economy;
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> iii. the consideration of whether the Court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government.

[13] The parties have agreed that the aspect of the applications seeking to set aside the Inland Enforcement Officer's decision and require reconsideration of the Applicant's deferral request is moot. The Applicant maintains, though, that he has the standing pursuant to s 52 of the *Charter*

to a declaration striking down the 36-month PRRA bar and therefore the applications are not moot.

[14] In support of his right to relief, the Applicant says he has been directly affected by the 36-month PRRA bar. He submits he has already suffered from discriminatory treatment based solely on his country of origin. As the Applicant put it, he was "compelled to undertake the expense of retaining counsel to prepare and submit a deferral request. When it was refused, he was compelled to undertake the further expense of retaining counsel to prepare and file a motion for a stay of his removal. And while awaiting a decision on his motion, the Applicant was forced to undergo the hardship of packing up his life in Canada and the psychological distress of not knowing until one day prior to his removal whether his deferral request would be stayed." Had he been a national of a non-DCO country, none of that harm would have arisen as he would have been entitled automatically to a PRRA as of right.

[15] The declaratory judgment that the Applicant's *Charter* rights have been infringed or denied is the nature of the relief sought by the Applicant. The actual proceeding is the application to set aside the Decisions. Once those applications are moot, as is conceded, there is no proceeding to anchor the claim for relief. Declaratory relief is not available under s.18.1 of the *Federal Courts Act*, RSC 1985, c F-7 or under Rule 64 of the *Rules* as a free-standing right. The relief sought has to be conveyed by an underlying application that exists on the merits: *Bonamy v Canada (Attorney General),* 2009 FCA 156 at para 12. A declaration of unconstitutionality is a form of relief that can be sought against the federal government in the Federal Court under subs 17(1) of the *Federal Courts Act*, but the *Rules* require that any such proceeding be brought as an action.

[16] For these reasons, the applications are moot.

[17] I turn now to the second stage of the *Borowski test*.

(1) Adversarial Context

[18] The Applicant maintains his *Charter* rights have been infringed and he has suffered real consequences including expenses in retaining counsel to fight his deportation, psychological distress in not knowing whether he would be granted a stay or not and the hardship of packing up his life in Canada in case he had to leave. The Respondent denies that the Applicant's *Charter* rights have been infringed.

[19] Given the positions of the parties with respect to the alleged infringement of the *Charter* rights of the Applicant and, in light of the decisions in this Court of *Y.Z. v Canada (Citizenship and Immigration)*, 2015 FC 892 and *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, I find there is a clear adversarial context between the parties with respect to the constitutionality of s 15(1) and the DCO provisions of the *IRPA*. I also have no doubt that the Applicant's solicitor of record, the Refugee Law Office of Legal Aid Ontario, will diligently pursue the Applicant's constitutional arguments regardless of whether the outcome of this application will affect the likelihood of the Applicant being removed from Canada.

(2) Judicial Economy

[20] The Federal Court is a statutory court. Historically there was some doubt as to whether the Court had the power to grant a declaration in an application for judicial review. As a result, applicants arguing that a decision was unlawful because it was based on an unconstitutional law or *ultra vires* regulation would bring both an application under s 18.1 the *Federal Courts Act* for

judicial review of a decision and, contemporaneously, file a parallel action under subs 17 seeking the declaratory relief. This approach continued for some time as the Court itself was divided on the issue.

[21] The Court of Appeal settled this issue in *Moktari v Canada (Minister of Citizenship and Immigration)*, [2000] 2 FCR 341 (CA) [*Moktari*]. It determined that an applicant would not be required to maintain a parallel action under subs 17(1) of the *Federal Courts Act* simply to pursue the same declaratory relief as was sought on judicial review. The relief sought in *Mokatri* was a declaration that s 52 of the *Immigration Act*, RSC 1985, c I-2 was unconstitutional. The Minister brought a motion to strike the action on the basis that it was unnecessary in light of the applicant's application for judicial review. The Court of Appeal clarified the interpretation of s 18 of the *Federal Courts Act*: the applicant was allowed to add a request for declaratory relief to an existing application for judicial review brought on the same basis. As a result, any action seeking a declaration when the same declaration is sought in a judicial review application discloses no reasonable cause of action and should be struck. In arriving at this determination, the Court reasoned that "constitutional issues raised in immigration proceedings can be conveniently dealt with in a judicial review proceeding" and "to permit parallel proceedings arising from a single decision would diminish the capacity of this Court to dispense justice in an expedient and efficient manner": *Moktari* paras 5-6.

[22] In the concern for judicial economy, it is my view that it would be perverse to dismiss the current application for judicial review. This would force the Applicant to pursue his remedy of declaratory relief in an action under subs 17(1) of the *Federal Courts Act* when such an action, if brought earlier, would have been struck on the basis that the relief could be sought in an

application for judicial review. That would not only be an unnecessary use of judicial resources, but would also be punitive to the Applicant. It would be the other side of the coin to the situation in *Moktari* and, for the reasons delineated in *Moktari,* I do not find it either expedient or efficient to impose such a process on the Applicant.

[23] Recently, another application for judicial review has been received by the Court in which s 112(2)(b.1) is being challenged as unconstitutional. Factually, this other case also involves denial of a PRRA to a DCO national. In that case, the PRRA bar does not expire for approximately two years. The Applicant's solicitor of record is also solicitor of record for the applicant in that case. The issues raised, as well as the relief sought, are the same in both instances. I therefore provided the parties with the opportunity to make further submissions with respect to the current motion to dismiss for mootness in light of the existence of this other case. The Respondent submits that the other case is more suitable for adjudication as the factual basis persists and the outcome will have a practical effect on the parties. The Applicant submitted the existence of the second case was irrelevant because the Applicant's constitutional injury meant that this application was not moot on the first branch of the *Borowski* test.

[24] Given the factual differences between the cases with respect to whether the PRRA bar has expired and the fact that this Applicant has alleged he has suffered concrete damages, it is my view that for complete consideration of the alleged *Charter* infringement it will be useful to have adjudication upon both sets of facts. There is also judicial economy in resolving both aspects of the PRRA bar for DCO nationals by the way of the summary proceeding of an application rather than an action.

(3) Would the Court be Encroaching on the Legislative Sphere

[25] But for the finding that the application is moot because the Applicant is now PRRA-eligible there is no doubt this judicial review would have proceeded to adjudication. Review of decisions that may be unconstitutional is one of the roles of the Court. There is no encroachment on the legislative sphere by allowing this application to continue.

[26] In conclusion, while this application may be technically moot, I will exercise my discretion under the second stage of the *Borowski* test and dismiss the Respondent's motion.

B. *Motion to Amend*

[27] The Applicant has also brought a motion in writing under rule 369 of the *Rules* seeking an amendment to his application for judicial review in order to add a specific request for the Declaration as a remedy. The Respondent did not file a motion record within the timelines specified by rule 369, but did submit a letter stating that because the applications are moot, no amendment to the applications should be granted. The Respondent did not specify any other reasons why the relief should not be granted. For the purposes of this motion, I will regard the Respondent's letter as if it were written submissions in opposition to the Applicant's motion under rule 369.

[28] The basis of the Applicant's motion is that the declaratory relief sought was inadvertently omitted in the Application for Leave and for Judicial Review, although the unconstitutionality of the Decision was specifically referred to as a ground for relief. The request for such a declaration was argued as being part of the relief sought in the Applicant's memorandum of argument on the leave stage but was never formally part of the application itself. The Applicant did include a

request for catch-all relief of "[s]uch further and other remedies as counsel may advise and this Honourable Court may allow."

[29] Under rule 75 of the *Rules*, the Court may allow a party to amend a document on such terms as will protect the rights of all the parties. In *Canderel Ltd v Canada*, [1994] 1 FCR 3 (CA), the Federal Court of Appeal set out the test on whether to grant an amendment: an amendment should help determine the real issue in dispute, must not create prejudice to the opposing party that cannot be compensated by costs and must serve the interests of justice.

[30] It is clear that the real issue in dispute from the beginning has been whether the 36-month PRRA bar violates s 15(1) of the *Charter*. Constitutional issues are determined on the correctness standard. If a statutory provision violates a section of the *Charter* and cannot be saved by s 1, some form of declaratory remedy will normally issue, whether a provision is struck down, read down or whether additional text is read in. In my opinion, including the Declaration as one of the remedies requested in the application will not prejudice the Respondent in any way and will serve the interests of justice. The Applicant's motion to amend is therefore granted.

ORDER

THIS COURT ORDERS that:

1. The Respondent's motion to dismiss these applications is denied.

2. The Applicant is granted leave to amend his Applications for Leave and for Judicial Review substantially in the forms in Exhibit "F" of his motion record. The amended applications shall be filed within fifteen days of this order.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3855-15 IMM-3838-15
STYLE OF CAUSE:	FERENC FEHER v THE MINISTER OF PUBLIC SAFETY AND EMEREGENCY PREPAREDNESS

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

ORDER AND REASONS:	ELLIOTT J.
DATED:	NOVEMBER 10, 2016

WRITTEN REPRESENTATIONS BY:

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