Federal Court  Cour fédérale

Date: 20190301

Docket: IMM-2237-18

Citation: 2019 FC 260

Ottawa, Ontario, March 1, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

SANDRI HIRAJ

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This case is highly unusual. After making a claim for refugee protection, Mr. Hiraj left Canada and entered the United States, where he was detained for illegal entry. The Canadian Border Services Agency [CBSA] denied his request to give written assurances that he would be readmitted to Canada, should the United States authorities bring him to the border. He now seeks judicial review of this refusal. Despite the difficult situation in which he finds himself, I must

dismiss his application, as the refusal to give assurances is not a decision subject to judicial review.

I. Facts

[2] Mr. Hiraj, a citizen of Albania, came to Canada in March 2017 and claimed asylum. In December 2017, for reasons that have not been explained to me, Mr. Hiraj entered the United States by crossing the land border at a place that is not an official port of entry. He was arrested shortly thereafter and charged with illegally entering the United States. He later pled guilty to that charge and was sentenced to time already served.

[3] Mr. Hiraj remains in custody of the United States immigration authorities. He would now like to return to Canada to pursue his claim for asylum. The United States authorities have advised that they would be prepared to bring him to the Canadian border, only if Canadian authorities gave some indication that they would allow him to enter Canada.

[4] Canadian counsel for Mr. Hiraj then communicated with the regional director general of CBSA, asking him to provide such assurances. In an email sent to Mr. Hiraj's counsel on May 2, 2018, the director general declined to do so. He wrote:

> After reviewing your letter and the circumstances of the case, the Canada Border Services Agency has determined that Mr. Hiraj does not have a right of entry to Canada as per section 19 of the *Immigration and Refugee Protection Act*. As your client left Canada and has no right of entry, the Agency is not in a position to put in writing (as per your request) that Mr. Sandri Hiraj will be accepted back into the country.
>
> Note that an application for protection can be declared abandoned by the Immigration and Refugee Board of Canada pursuant to

> section 169(b) of the *Immigration and Refugee Protection Regulations* in the case of an applicant who voluntarily or otherwise departs Canada.

[5] Mr. Hiraj now seeks judicial review of the director general's refusal to give assurances.

II. Analysis

[6] The respondent Minister's most basic point in response to Mr. Hiraj's application is that the refusal to give assurances about Mr. Hiraj's readmittance to Canada is simply not a decision that this Court can review. I agree with that argument. To understand why this is so, it is necessary to lay out in some detail the legal framework governing entry into Canada.

[7] Before proceeding to do so, I want to highlight an error in the director general's decision. The director general refers to section 169 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] as allowing the Board to declare an application for refugee protection abandoned. Section 169, however, does not deal with applications for refugee protection, but with pre-removal risk assessments [PRRA]. The abandonment of a claim for refugee protection is dealt with in section 168 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Under section 169 of the Regulations, a PRRA application is automatically abandoned when the applicant leaves Canada. In contrast, leaving the country does not lead to the automatic abandonment of a claim for refugee protection. Section 168 of IRPA requires the Board to make a decision to this effect. In this case, no such decision has yet been made and Mr. Hiraj's claim for refugee protection is still pending.

A. *The right to enter Canada*

[8] Section 19 of IRPA recognizes that Canadian citizens, status Indians and permanent residents have a right to enter Canada. With respect to Canadian citizens, this also flows from section 6 of the *Canadian Charter of Rights and Freedoms*. In contrast, foreign nationals have no such right and may merely apply, under section 20 of IRPA, for an authorization to enter Canada. In both cases, all persons who wish to enter Canada must appear before an immigration officer for an examination, as required by section 18 of IRPA. The admission of persons falling under section 20 is discretionary, but the admission of persons listed in section 19 is not.

(1) Asylum seekers

[9] Section 20 of IRPA does not expressly provide for the admission of asylum seekers. The process for making a claim for refugee protection is laid out in sections 99-111.1 of IRPA. If a claim is successful, it will result in the granting of permanent residence to the claimant, which is one of the bases for allowing entry under section 19.

[10] Section 37(2) of the Regulations provides that the examination of a person who makes a claim for refugee protection ends only when a decision is made on the eligibility of the claim, on the admissibility of the person or on the merits of the claim. This suggests that the entire refugee status determination process is considered to be an examination under section 18.

[11] Nevertheless, the assumption seems to be that asylum seekers are admitted into Canada while theirs claims are examined. In this regard, section 23 of IRPA provides that an officer may

allow a person to enter Canada "for the purpose of further examination," which would include the refugee determination process.

[12] Such an interpretation, to the effect that asylum seekers must be allowed into Canada while their claim is being determined, would also be consistent with the principle of *non-refoulement* enshrined in Article 33 of the *United Nations Convention Relating to the Status of Refugees*.

[13] At the hearing of this application, counsel for the respondent recognized that persons who present themselves at a port of entry and claim refugee protection must normally be admitted to Canada. Asked whether the same would apply to a person who has already claimed protection and who seeks entry for a second time, counsel replied that CBSA would have discretion to admit such an individual, but would not be required to do so. I must confess that I have difficulty finding any relevant distinction between the two situations.

(2) Section 39 of the Regulations

[14] At the hearing of this application, Mr. Hiraj argued that section 39 of the Regulations affords him a right of entry. Section 39 reads as follows:

39. An officer shall allow the following persons to enter Canada following an examination:	**39.** L'agent permet, à l'issue d'un contrôle, aux personnes suivantes d'entrer au Canada :
(a) persons who have been returned to Canada as a result of a refusal of another country to allow them entry after they were removed from or	**a)** la personne retournée au Canada du fait qu'un autre pays lui a refusé l'entrée, et ce après avoir été renvoyée du Canada ou l'avoir quitté à la

otherwise left Canada after a removal order was made against them;	suite d'une mesure de renvoi;
[…]	[…]

[15] Mr. Hiraj argues that he comes within the purview of section 39, as he was refused entry in the United States, he would be "returned to Canada" as a result, and all this took place after a removal order was made against him in Canada. In this regard, one should bear in mind that the standard practice is that a removal order is made against all refugee claimants. According to section 49(2) of IRPA, however, such a removal order is conditional and comes into force only when a negative determination is made with respect to the refugee claim.

[16] Thus, Mr. Hiraj's argument fails, simply because there was no enforceable removal order against him when he left Canada. This is perhaps clearer in the French version of section 39: "*à la suite d'une mesure de renvoi*" suggests a causal link between the removal measure and the departure from Canada. Mr. Hiraj did not leave Canada because of a removal order.

[17] More fundamentally, the purpose of subsection 39(a) appears to be to readmit to Canada persons whose removal failed because the country to which CBSA attempted to remove them denied them entry. Such persons would have nowhere else to go. In Mr. Hiraj's case, however, no attempt was made to remove him from Canada. His departure, from what we can infer, was entirely voluntary. Thus, section 39 does not assist Mr. Hiraj.

(3) Summary

[18] Thus, while the legislation does not expressly say so, it seems that the government has always been acting on the assumption that persons who claim refugee status must be admitted to Canada while they await a determination of their claim. That practice is implemented by the machinery provided for in sections 18 and 20 of IRPA: a discretionary admission process. The officer's discretion may become quite narrow when a person claims asylum, but the process has to be followed. The same would be true of a person who, like Mr. Hiraj, left Canada after claiming asylum and who seeks entry for a second time to pursue his claim.

B. *Is there a reviewable decision?*

[19] In *Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957, [2012] 1 FCR 413 [*Toronto Coalition*], this Court held that statements made by government officials as to the manner in which the discretion afforded by section 18 of IRPA would be exercised with respect to a given individual do not constitute a decision amenable to judicial review.

[20] In that case, officials from the Minister's office had made statements to the effect that one Mr. Galloway, a member of the British Parliament who intended to come to Canada to give a series of lectures, would not be allowed entry. My colleague Justice Richard Mosley found that these statements did not constitute a decision affecting Mr. Galloway's rights. A decision as to his entry would only be made if and when he presented himself at a port of entry to seek admission. As he had not done so, there was no decision to review.

[21] I see no reason to depart from Justice Mosley's decision.

[22] In addition, Mr. Hiraj's application for judicial review is akin to a *mandamus*, as the purpose is to require CBSA to exercise a power it allegedly has. The conditions for issuing a *mandamus*, as set forth in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA) at 766-769 [*Apotex*], affirmed [1994] 3 SCR 1100, would not be met in this case. The legislation does not impose on CBSA any public duty to provide assurances of admittance to Canada. If one considers that Mr. Hiraj's application is targeted at the officer's discretionary power, under sections 18 and 20 of IRPA, to admit a foreign national to Canada, *mandamus* could not issue because one of the conditions precedent to the exercise of this discretionary power is not met, namely that Mr. Hiraj has not presented himself at a port of entry for examination.

[23] Mr. Hiraj argues that in reality, he was not seeking "assurances," but something lesser, perhaps an "indication." I fail to see any relevant difference. If anything, that would bring the director general's actions farther away from a decision reviewable in this Court.

[24] Mr. Hiraj also argues that in his peculiar circumstances, the conduct of the United States authorities transforms what would otherwise be a non-binding assurance into a decision that affects his rights and that must, therefore, be reviewable. If I understand the argument correctly, Mr. Hiraj is saying that CBSA's refusal to give assurances has the practical effect of keeping him detained in the United States and preventing him from attending a Canadian port of entry. That, however, is the result of the actions or decisions of United States authorities. On my part, I can only make a decision based on Canadian law, which, as I have explained above, does not

consider that refusing to give assurances is a reviewable decision. Moreover, I have little evidence regarding Mr. Hiraj's situation, rights or recourses under United States law and what might happen to him if he is not allowed entry in Canada.

[25] This is not a situation that can be compared to the one in *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44, where the conduct of Canadian officials abroad contributed to the breach of Mr. Khadr's Charter rights. In this case, Mr. Hiraj does not allege any breach of his Charter rights.

C. *Legitimate expectation*

[26] Mr. Hiraj also argues that the director general's refusal to give written assurances breaches a legitimate expectation created by previous communications. Of course, a legitimate expectation cannot relate to the merits of an application: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 26. Mr. Hiraj attempted to reframe his claim so as to give it a procedural flavour, for example by saying that the director general had to make a "proper, fair and correct determination," but I am not persuaded. With respect to procedure, I have reviewed the communications between the parties and I cannot find any expectation that was not fulfilled.

[27] For those reasons, the application for judicial review will be dismissed.

JUDGMENT in IMM-2237-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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