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Dockets: IMM-6053-18
IMM-6054-18

Citation: 2019 FC 993

Ottawa, Ontario, July 25, 2019

PRESENT: Mr. Justice Boswell

Docket: IMM-6053-18

BETWEEN:

OTHMAN HAMDAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-6054-18

AND BETWEEN:

OTHMAN HAMDAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Othman Hamdan, is a 37-year old Jordanian citizen of Palestinian origin. He entered Canada in 2002. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] found him to be a Convention refugee in August 2004.

[2] In a decision dated October 18, 2018, the RPD granted the Minister's application to cease the Applicant's refugee protection because the reason for which he sought refugee status had ceased to exist. In another decision dated October 18, 2018, the Immigration Division [ID] of the IRB found the Applicant to be inadmissible for being a danger to the security of Canada under paragraph 34(1)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and issued a deportation order against him.

[3] About three weeks after these two decisions, the Applicant requested that the Canada Border Services Agency [CBSA] defer his removal from Canada pending an assessment of the risk he would face upon removal to Jordan and the outcome of his applications for leave and judicial review of the inadmissibility and cessation decisions. In a decision dated November 28, 2018 an inland enforcement officer denied the Applicant's request to defer his removal. The Applicant has now applied under subsection 72(1) of the *IRPA* (in IMM-6054-18) for judicial review of the Officer's decision. He asks the Court to set aside the decision and return the matter for redetermination by another officer.

[4] The Applicant has also applied (in IMM-6053-18) for orders in the nature of declarations that, unless a risk assessment meeting the requirements of fundamental justice is completed, his removal from Canada to Jordan is in breach of sections 7, 9 and 12 of the *Canadian Charter of*

Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and that paragraph 112(2) (b.1) of the *IRPA* is of no force and effect as it breaches his rights under section 7 of the *Charter* by denying him the right to a timely risk assessment.

I. Background

[5] In September 1999, the Applicant entered the United States on a student visa. While in the United States, he converted from Islam to Christianity. An American lawyer advised him that he would have a better chance of successfully claiming asylum in Canada and, thus, he entered Canada in 2002. The RPD found him to be a Convention refugee in August 2004.

[6] Following two terrorist attacks on Canadian soil in 2014 (allegedly in support of the Islamic State) the Royal Canadian Mounted Police initiated an online review of social media to identify people who could pose a threat to Canadian national security. The RCMP identified the Applicant as part of this review due to his Facebook posts between September 2014 and July 2015.

[7] The RCMP arrested the Applicant on July 10, 2015. He was charged with four terrorism-related offences under the *Criminal Code*. In September 2017, the British Columbia Supreme Court found the Applicant not guilty on the four terrorism-related charges. On the day the Applicant was acquitted of the charges, he was placed in immigration detention pursuant to the *IRPA*.

[8] In a decision dated October 18, 2018, the RPD granted the Minister's cessation application under 108(2) of the *IRPA* on the basis that the reason for which the Applicant sought refugee status had ceased to exist (the Applicant no longer practised Christianity). In another decision dated October 18, 2018, the ID found the Applicant to be inadmissible for being a danger to the security of Canada under paragraph 34(1)(d) of the *IRPA* and issued a deportation order against him pursuant to paragraph 45(d) and paragraph 229(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[9] On November 9, 2018, the Applicant requested that the CBSA defer his removal from Canada pending an assessment of the risk he would face upon removal to Jordan and the outcome of his leave applications challenging the inadmissibility and cessation decisions. Leave for judicial review of these applications was denied on January 31, 2019, but leave for the present judicial review applications was granted that same day.

[10] At the time of his deferral request, the Applicant was not eligible for a pre-removal risk assessment [PRRA] by virtue of paragraph 112(2) (b.1) of the *IRPA* because 12 months had not passed since his cessation hearing. Although the Applicant was removal ready, he refused to meet with the removals officer to complete the steps required to obtain a Jordanian travel document.

[11] On February 5, 2019 Justice Gagné stayed the Applicant's removal from Canada pending the resolution of the present judicial review applications.

[12] On April 4, 2019, the Minister of Immigration, Refugees and Citizenship Canada established a public policy [the Policy] under section 25.2 of the *IRPA* allowing for the waiver of the 12-month PRRA bar for individuals, like the Applicant, whose refugee status had been ceased under paragraph 108(1)(e). A copy of this policy is attached to this judgment as Annex A (there is no end date for this policy, but it may be cancelled at any time).

[13] The Applicant was informed by a letter from CBSA dated April 8, 2019, that he may apply for protection under the PRRA program. The Court was informed at the outset of the hearing of this matter that the Applicant submitted a PRRA application on April 23, 2019.

II. The Officer's Decision

[14] At the outset of the letter denying the Applicant's deferral request, the Officer identified *Baron v Canada (Public Safety & Emergency Preparedness)*, 2009 FCA 81 [*Baron*] and *Shpati v Canada (Public Safety & Emergency Preparedness)*, 2011 FCA 286 [*Shpati*], as providing the framework for assessing a deferral request. The Officer described the test as follows:

> To meet the *Baron/Shpati* test for a deferral based on risk, a removals officer must be satisfied that there is sufficient evidence alleging that there is a risk to the client. The risk must be of death, extreme sanction or inhumane treatment, it must be a new risk or new evidence of risk, and it must be personal to the client.
>
> If I determine that Mr. Hamdan faces these serious elements of risk, I am obliged to defer the removal in order for you to request that a Pre-Removal Risk Assessment (PRRA) be conducted by the Minister of Immigration, Refugees and Citizenship (IRC).
>
> Should this occur, it defeats the application of section 48(2) of the IRPA which legislates that removal **must** occur as soon as possible and the order **must** be enforced as soon as possible.
>
> [Emphasis in original]

[15] The Officer divided his analysis of the risks identified by the Applicant into ten topics: (1) apostasy, (2) political opinion / support of terrorists, (3) risk from the Jordanian government, (4) risk from extremist groups, (5) respect for freedoms, (6) media concerns, (7) torture, (8) the death penalty, (9) possible persecution, and (10) other factors.

[16] The Officer addressed each of these risks in turn. The Officer concluded that, despite the substantial documentation submitted with respect to the Applicant's purported risk, the information did not adequately demonstrate he would face a personalized risk that would amount to death, extreme sanction or inhumane treatment. Thus, the Officer denied the deferral request.

III. Requested Relief

[17] The application for leave and judicial review in IMM-6053-18 requests the following relief:

a. An order in the nature of a declaration that, notwithstanding s. 112(2)(b.l) of the *Immigration and Refugee Protection Act*, the removal of the Applicant from Canada to Jordan, a country where risk is alleged, which CBSA has commenced efforts to execute and for which the Applicant remains detained under s. 58 of the *Immigration and Refugee Protection Act* (*"IRPA"*), is in breach of ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*, of the objectives and intended application of the laws under s. 3 of the *IRPA*, and of Canada's obligations under international law, unless a risk assessment meeting the requirements of fundamental justice is completed and there is a finding of no risk;

b. An order in the nature of a declaration that s. 112(2)(b.1) is of no force and effect under s. 52 of the *Constitution Act*, 1982, in the circumstances of this case - where refugee protection status has been cessated under s. 108(l)(e) upon a finding that the reasons the person sought refugee protection have ceased to exist and where the person remains detained to enforce removal - as it breaches the Applicant's rights under s. 7 of the *Charter*, in that it denies the Applicant the right to a risk assessment with respect to risk factors that have not been assessed by an independent decision maker, thereby exposing the Applicant to a risk of torture, cruel, inhumane and degrading treatment, and a risk to life upon removal to Jordan, and the delay in

initiating this constitutionally protected process infringes the Applicant's liberty rights;

c. An order of mandamus compelling the Respondent to allow the Applicants to submit a Pre-Removal Risk Assessment ("PRRA") immediately and compelling the same to be determined by the Respondent prior to the enforcement of the removal order against the Applicant; and

d. An order in the nature of prohibition prohibiting the Respondent from proceeding with the execution of the removal order until such a time as the Applicant's Pre-Removal Risk Assessment has been duly considered and a risk assessment meeting the requirements of fundamental justice is completed.

[18] The Applicant no longer seeks the relief indicated in paragraphs (c) and (d) above but is still seeking the declarations sought in paragraphs (a) and (b).

[19] The application for leave and judicial review in IMM-6054-18 asks the Court to set aside the Officer's decision and refer the matter back to a different officer for redetermination in accordance with the Court's reasons. The Applicant also asks in his further memorandum of argument for the orders sought in Court file number IMM-6053-18 as stated above.

[20] The Respondent takes the position that the relief sought is now moot because the Minister has established the Policy which provides the Applicant with access to a PRRA.

IV. Are the Applications Moot?

[21] Approximately two weeks before the hearing of this matter, the Respondent filed two motions for orders dismissing the underlying applications for judicial review on the ground that each application had become moot. The Respondent also sought an order adding, independent of any ruling with respect to mootness, an Affidavit of Samantha Goriak, sworn April 9, 2019, in

file IMM-6053-18. These motions were heard at the outset of the hearing of this matter before submissions on the merits of the applications were heard.

V. The Parties' Submissions

[22] The Respondent says the applications are moot because the Applicant has received the remedy he seeks; namely, the opportunity to apply for a PRRA. According to the Respondent, the Applicant meets the eligibility conditions under the Policy as he is in Canada and his protective person status ceased under paragraph 108(1)(e) of the *IRPA* because the reason for which he sought refugee protection has ceased to exist.

[23] Applying the test in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], the Respondent argues that the applications are moot. According to the Respondent, there would be no practical effect in resolving the controversy between the parties because the Policy provides an exemption to the 12-month PRRA bar for persons who have had their protected status cessated under paragraph 108(1)(e) of the *IRPA*.

[24] The Respondent says it is necessary to characterize the issue in dispute by looking at what the Applicant initially sought. In his deferral request, the Applicant requested a deferral of removal pending a risk assessment and the outcome of his applications for leave and judicial review. The Respondent notes that the Applicant now has access to a PRRA and his deportation is stayed until the PRRA application is assessed. In the Respondent's view, any meaningful adversarial relationship between the parties has ceased to exist given the Applicant's ability, as of April 4, 2019, to apply for a PRRA.

[25] Under the second aspect of the *Borowski* test, the Respondent says three principles guide the Court's consideration of whether to exercise its discretion to determine a matter which is otherwise moot: (1) the presence of an adversarial context or relationship; (2) the need to promote judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch of government.

[26] According to the Respondent, there are no special circumstances which warrant the expenditure of scarce judicial resources to hear this matter. In the Respondent's view, challenges of deferral decisions will undoubtedly reoccur and the issues raised in these applications are, for the most part, unique and specific to the facts.

[27] The Respondent says there is no "social cost in leaving the matter undecided" (*Borowski*, at para 39). The Respondent further says this case is unlike *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335, where the applications were heard despite being moot because the constitutional question raised in the applications might otherwise have evaded judicial review. The Respondent notes that if the Court were to hear this matter in spite of the mootness, it would be departing from its usual role of resolving live disputes between parties interested in the outcome of a case.

[28] The Respondent reminds the Court that the Supreme Court of Canada has held that courts ought not to hear *Charter* decisions in a factual vacuum and attempts to do so would trivialize the *Charter* and result in ill-considered opinions. The Respondent says the Court should not decide constitutional issues which are not necessary to the resolution of an application.

[29] The Applicant says the applications are not moot because there remains a live controversy which may still affect his rights and they raise issues of public importance which ought to be resolved. According to the Applicant, the Court should exercise its discretion to hear the applications because it could have collateral consequences for applicants in other proceedings.

[30] In the Applicant's view, the Court should assess the constitutionality of the process to which he has been subjected, despite the mootness, as that will continue to be a relevant consideration in future detention reviews or other proceedings. The Applicant says the declarations he seeks are of ongoing personal relevance to him in demonstrating the unconstitutionality of that process.

VI. Analysis

[31] The Supreme Court of Canada stated in *Borowski* that the doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case" (at para 15). This involves a two-step analysis: first, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic; second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case (at para 16).

[32] Accordingly, in a case where there is "no longer a live controversy or concrete dispute" the case can be determined to be moot (*Borowski* at para 26). Even if a case may be moot because there is no longer a live controversy or concrete dispute, it is nevertheless necessary to determine whether the Court should exercise its discretion to hear and determine the case on the merits where circumstances warrant.

[33] Three overriding principles are to be considered in this second step of a mootness analysis: (1) the presence of an adversarial relationship (*Borowski* at para 31); (2) the need to promote judicial economy (at para 34); and (3) the need for the court to show a measure of awareness of its proper role as the adjudicative branch of government (at para 40). The Court should consider the extent to which each of these principles may be present in a case, and the

application of one or two may be overborne by the absence of the third and vice versa (at para 42).

[34] The Supreme Court in *Borowski* identified several instances where a court's discretion may be exercised to allow it to hear and decide a case which might otherwise be moot. For example, if: (1) there is still the necessary adversarial relationship between the parties even though the live issue or concrete dispute no longer exists (at para 36); (2) the Court's decision will have practical effect on the rights of the parties (at para 35); (3) the case is one of recurring but brief duration, such that important questions might otherwise evade judicial review (at para 36); or (4) where issues of public importance are at stake such that resolution is in the public interest, though the mere presence of a matter of national importance is insufficient (at para 39).

[35] In my view, the applications in this matter have been rendered moot because the Applicant has received the remedy he sought; namely, the opportunity to apply for a risk assessment. A decision by the Court in respect of the applications would have no practical effect on the Applicant's ability to obtain a PRRA and, in fact, he availed himself of that opportunity the day before the hearing of this matter.

[36] The Applicant's challenge to the constitutionality of paragraph 112(2) (b.1) of the IRPA no longer raises a live controversy or concrete dispute because the Policy removes the 12-month PRRA bar for individuals such as the Applicant who have had their protected persons status removed through cessation. His request of the Officer to defer his removal pending an assessment of the risk he would face upon removal to Jordan has been answered by his ability to

apply for a PRRA by virtue of the Policy; and, hence, it is unnecessary to review the reasonableness of the Officer's decision.

[37] This is not an appropriate case for the Court to exercise its discretion to determine the merits of this application for several reasons. First, a decision by the Court on the merits of these applications, declaratory or otherwise, would not have any practical effect on the parties' rights. Second, the presence of an adversarial relationship has disappeared, and the Applicant has now applied for a PRRA. Third, the issues raised by these applications cannot be characterized as being of such a nature that they raise important questions which might otherwise evade review by the Court. Lastly, this application does not raise or concern issues of such public importance that resolution of such issues would be in the public interest.

VII. Conclusion

[38] The applications for judicial review are moot, and this is not an appropriate case for the Court to exercise its discretion to determine or decide the merits or substantive issues raised by the parties with respect to the applications.

[39] Leave will be granted to file the Affidavit of Samantha Goriak, sworn April 9, 2019, in Court file IMM-6053-18.

[40] The Respondent's request that the Court modify the style of cause to reflect the proper Respondent in IMM-6053-18 is granted. The style of cause will be amended, with immediate effect, to name only the Minister of Citizenship and Immigration as the Respondent.

[41] There is no serious question of general importance to be certified under paragraph 74(d) of the *IRPA*.

JUDGMENT in IMM-6053-18 and IMM-6054-18

THIS COURT'S JUDGMENT is that: the applications for judicial review are moot; leave is granted to file the Affidavit of Samantha Goriak, sworn April 9, 2019, in Court file IMM-6053-18; the Respondent in the style of cause in IMM-6053-18 is amended, with immediate effect, to name only the Minister of Citizenship and Immigration as the Respondent; and no question of general importance is certified.

"Keith M. Boswell"
Judge

ANNEX A

Public Policy to Allow for a Risk Assessment for Certain Individuals who have had their Protected Persons Status Removed through Cessation

Cessation of refugee status generally involves a protected person voluntarily taking some action that demonstrates he or she no longer requires Canada's protection, pursuant to section 108 of the *Immigration and Refugee Protection Act* (the *Act*).

As part of a cessation decision, the Canada Border Services Agency hearing officers and the Immigration and Refugee Board members do not examine forward-looking risks and only look at the specific grounds set forth in section 108 of the *Act*. Individuals who have lost their protected status as a result of their refugee protection being ceased may not apply for protection (a Pre-Removal Risk Assessment) for one year.

The intent of the bar is to prevent Pre-Removal Risk Assessment applications from being used as a post-claim recourse by failed refugee claimants and further delaying removals of those without legitimate claims. While there are several exceptions to the application of the Pre-Removal Risk Assessment bar, including for vacation decisions, there is no similar exception for cessation. Most cessation grounds require a claimant to take action which indicates they no longer require protection, however, in cases where the reasons for which the person sought refugee protection have ceased to exist (108(l)(e)), this may not always be the case.

This Public Policy will help ensure that all individuals who have lost their protected status through a cessation process because the reasons for which the person sought refugee protection have ceased to exist have access to a Pre-Removal Risk Assessment prior to removal. Individuals who meet the conditions (eligibility criteria) may be exempted from paragraph 112(2) (b.1) of the *Act*. This will render these individuals eligible for a PRRA prior to removal from Canada.

I hereby establish that, pursuant to my authority under section 25.2 of the *Act*, that there are public policy considerations that justify the granting of an exemption from the application of the Pre-Removal Risk Assessment bar provisions of the *Act* to individuals who meet the conditions (eligibility criteria) listed below.

Conditions (Eligibility Criteria)

Based on public policy considerations, delegated officers may grant an exemption from the provisions of the *Act* listed below to individuals who meet the following condition:

- The individual must be in Canada and have had their protected person status determined to be ceased under subsection 108(2) of the *Act* (cessation) because the reasons for which the person sought refugee protection have ceased to exist (108(l)(e)).

Provisions of the *Act* for which an exemption may be granted

- Paragraph 112(2)(b.1) - Despite subsection (1), a person may not apply for protection if subject to subsection (2.1), less than 12 months, or, in the case of a person who is a

> national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected - unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention - or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;

Start Date

This public policy takes effect on the date of my signature.

End Date

There is no end date for this public policy, however it may be cancelled at any time.

The Honourable Ahmed Hussen
Canada's Minister of Immigration, Refugees and Citizenship
Dated at Ottawa, April 4, 2019

Politique d'intérêt publique permettant la réalisation d'une évaluation des risques pour les personnes dont le statut de personne protégée a été retiré au moyen de la perte de statut

Généralement lorsqu'il y a perte de l'asile, une personne protégée pose volontairement un geste qui démontre qu'elle ne requiert plus la protection du Canada, conformément à l'article 108 de la *Loi sur l'immigration et la protection des réfugiés* (la *Loi*).

Dans le cadre d'une décision de perte d'asile, ni les agents d'audience de l'Agence des services frontaliers du Canada ni les commissaires de la Commission de l'immigration et du statut de réfugié ne doivent aller au-delà des motifs précis énoncés à l'article 108 de la *Loi*. Les personnes dont le statut de personne protégée a été retiré en raison de la perte de l'asile ne sont pas admises à demander la protection (examen des risques avant renvoi) pour une période de douze mois.

L'interdiction vise à empêcher que les demandeurs déboutés utilisent les examens des risques avant renvoi comme recours postérieur à la demande d'asile, retardant ainsi le renvoi de ceux qui font des demandes sans fondement. Bien qu'il y ait plusieurs exceptions à l'interdiction liée à l'examen des risques avant renvoi, y compris les décisions d'annulation, il n'existe aucune exception de la sorte clans les cas de perte de l'asile. Étant donné que majorité des motifs qui mènent à la perte de statut requièrent une action, de la part du demandeur, qui indique que le demandeur n'a plus besoin de protection, il n'y a pas d'exception similaire pour les cas de perte de statut. Pour les cas où les raisons pour lesquelles la personne a demandé le statut de réfugié n'existent plus (108(l)(e)), ceci n'est peut-être pas toujours le cas.

La présente politique d'intérêt public aidera à veiller à ce que toute personne dont le statut de personne protégée est retiré par suite d'une procédure relative à la perte de l'asile parce que les raisons qui lui ont fait demander l'asile n'existent plus (108(l)(e)) ait accès à un examen des risques avant renvoi. Les personnes qui répondent aux critères seront exemptés de l'article 112(2)(b.1) de la *Loi*. Ceci aura pour effet de rendre ces personnes admissibles à un examen des risques avant leur renvoi du Canada.

J'établis donc par la présente, conformément au pouvoir qui m'est conféré en vertu de l'article 25.2 de la *Loi sur l'immigration et la protection des réfugiés* (la *Loi*), que l'intérêt public justifie l'octroi d'une dispense des dispositions sur l'interdiction relative à l'examen des risques avant renvoi de la *Loi* aux étrangers qui respectent les critères d'admissibilité et les conditions ci-après.

Critères d'admissibilité et conditions

Pour des raisons d'intérêt public, les agents délégués peuvent accorder une dispense des dispositions ci-après de la *Loi* aux personnes qui respectent tous les critères d'admissibilité et toutes les conditions suivants :

- Le statut de personne protégée de la personne doit avoir été rejeté au titre de l'article 108(2) de la *Loi sur l'immigration et la protection des réfugiés* (perte de l'asile) parce que les raisons qui lui ont fait demander l'asile n'existent plus (108(l)(e)).

Dispositions de la *Loi* aux termes desquelles il est possible d'accorder une dispense

- L'alinéa 112(2)(b.1) de la *Loi sur l'immigration et la protection des réfugiés* – sous réserve du paragraphe (2.1), moins de douze mois ou, clans le cas d'un ressortissant d'un

> pays qui fait l'objet de la désignation visée au paragraphe 109.1(1), moins de trente-six mois se sont écoulés depuis le dernier rejet de sa demande d'asile – sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu à la section E ou F de l'article premier de la Convention – ou le dernier prononcé du désistement ou du retrait de la demande par la Section de la protection des réfugiés ou la Section d'appel des réfugiés.

Date d'entrée en vigueur

La présente politique d'intérêt public entre en vigueur à la date de ma signature.

Date de fin

Elle n'a aucune date de fin, mais elle pourrait être annulée en tout temps.

L'honorable Ahmed Hussen
Ministre de l'Immigration, des Réfugiés et de la Citoyenneté du Canada
Fait à Ottawa, le 4 avril 2019

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6053-18
STYLE OF CAUSE:	OTHMAN HAMDAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-6054-18
STYLE OF CAUSE:	OTHMAN HAMDAN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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DATED:	JULY 25, 2019

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