Federal Court  Cour fédérale

Date: 20190725

Docket: IMM-966-18

Citation: 2019 FC 1000

Ottawa, Ontario, July 25, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

BARAKAT KABASHI MOHAMMED DAFALLA AL-ABBAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of Sudan who claimed refugee protection in Canada. His claim was referred to the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on July 6, 2012. For reasons dated October 2, 2017 (released January 4, 2018), the RPD rejected the claim.

[2] On January 22, 2018, the applicant filed a Notice of Appeal of this decision with the Refugee Appeal Division [RAD] of the IRB. However, on January 30, 2018, the RAD dismissed the appeal for lack of jurisdiction. Specifically, the RAD noted that section 36(1) of the *Balanced Refugee Reform Act*, SC 2010, c 8 [*BRRA*], provides that a decision made by the RPD in respect of a matter referred to the RPD before the day on which that section comes into force is not subject to appeal to the RAD. Section 36(1) of the *BRRA* came into force on August 15, 2012. Since his matter was referred to the RPD on July 6, 2012, the applicant did not have an appeal to the RAD.

[3] While not entirely germane to the present matter given the date of referral, the August 15, 2012, cut-off for appeals to the RAD resulted from a legislative drafting error and was actually earlier than Parliament had intended. Provisions of the *Protecting Canada's Immigration System Act*, SC 2012, c 17, which established and implemented the RAD were not in force at the time. They did not come into force until December 15, 2012. This error was rectified by section 167 of the *Economic Action Plan 2013 (No 1) Act*, SC 2013, c 33, s 167, which provided that the RAD may not consider appeals with respect to matters referred to the RPD between August 15, 2012, and December 14, 2012, inclusive, either. Thus, legislation now provides that all refugee claims in process prior to December 15, 2012, are to be dealt with under the former system and are precluded from an appeal to the RAD.

[4] The applicant has brought an application for judicial review of the RAD's decision under section 74(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The sole ground advanced in this application is that section 36(1) of the *BRRA* is constitutionally invalid

because it is an unjustified limitation on the rights guaranteed by sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*. This issue was not raised before the RAD.

[5] For the following reasons, I have concluded that this application should be dismissed. The respondent raised a preliminary objection that the applicant should not be permitted to raise this constitutional issue now when it was not raised before the RAD. While I would not bar the applicant from pursuing the constitutional challenge for this reason, I nevertheless have concluded that it would not be appropriate to adjudicate the constitutional issues raised by the applicant. The application for judicial review will, therefore, be dismissed.

[6] I begin by observing that there was some difficulty getting the hearing of this application off the ground due to the initial failure of the applicant to serve and file a Notice of Constitutional Question as required by section 57(1) of the *Federal Courts Act*, RSC, 1985, c F-7 (as amended). When the matter was finally re-scheduled to proceed on February 7, 2019, the Notice of Constitutional Question had been served but not at least 10 days in advance, as required by section 57(2) of the *Federal Courts Act*. So that the matter could proceed, I exercised my jurisdiction under the same provision to abridge the time for service. As it happened, no provincial or territorial Attorney General has indicated an interest in the matter. While the Attorney General of Canada did not participate directly either, the respondent was of course represented by counsel from the Department of Justice who was instructed (at least notionally) by the Attorney General of Canada.

[7] Turning to the constitutional challenge itself, the general rule is that, except in cases of urgency, "constitutional questions cannot be raised for the first time in the reviewing court if the administrative decision-maker under review has the power and the practical capability to decide them" (*Erasmo v Canada (Attorney General)*, 2015 FCA 129 at para 33).

[8] There is no suggestion of urgency in the present case. The determinative question is whether the RAD has the power to consider the constitutional issues the applicant wishes to raise. In my view, it does not.

[9] The jurisdiction of administrative tribunals to hear constitutional arguments and grant *Charter* remedies has evolved and expanded over the last few decades. This determination is now made under the test articulated in *R v Conway*, 2010 SCC 22 at paras 81-81. The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, then it is a court of competent jurisdiction and can consider and apply the *Charter* (and grant *Charter* remedies) unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction. If this threshold question is resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the statutory scheme under which it operates.

[10] Section 162(1) of the *IRPA* provides that each Division of the IRB "has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction." There can therefore

be no question that the RAD, a Division of the IRB, generally has the power to decide questions of law. Further, there is no suggestion that Parliament intended to carve the *Charter* out from this power. On the contrary, Rule 25 of the *Refugee Appeal Division Rules*, SOR/2012-257, sets out the procedure to follow when a party "wants to challenge the constitutional validity, applicability or operability of a legislative provision." Indeed, looking at the matter even more broadly, paragraph 3(3)(d) of the *IRPA* provides that the Act is to be "construed and applied" in a manner that "ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*." Obviously, in the exercise of its appellate role the RAD is making decisions under the *IRPA*.

[11] The critical question for present purposes is whether Parliament intended to bar individuals in the applicant's circumstances from seeking a constitutional remedy from the RAD. In my view, the enactment of section 36(1) of the *BRRA* clearly demonstrates that it did. The specific purpose of the provision is to carve out individuals in the applicant's position from the jurisdiction of the RAD. While it may appear circular to rely on the very provision whose constitutionality is in issue, at this stage what must be determined is Parliament's intent and whether the presumption that the RAD can deal with the constitutional issues the applicant wishes to raise has been rebutted. I find that this intent is demonstrated by section 36(1) of the *BRRA* and that the presumption is thereby rebutted.

[12] While Parliament has clearly conferred *Charter* jurisdiction on the RAD, it is equally clear that it intended to preclude individuals in the applicant's situation from access to the RAD for any purpose, including the making of constitutional arguments. This is a nuance that does

not usually arise in the jurisprudence dealing with the *Charter* jurisdiction of administrative tribunals. I note, however, that similar results have been reached by this Court with respect to bars to access to the Immigration Appeal Division: see *Kroon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 697 at paras 32-33; *Ferri v Canada (Minister of Citizenship and Immigration)*, [2006] 3 FCR 53, 2005 FC 1580 at paras 35-48 [*Ferri*]; *Benavides Livora v Canada (Minister of Citizenship and Immigration)*, 2006 FC 104 at para 10; and *Singh v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 455 at paras 55-56. While not determinative, it is also worth noting that the RAD itself has reached a similar conclusion with respect to its lack of jurisdiction to hear any appeal barred by section 110(2) of the *IRPA*, even one challenging the constitutionality of that provision: see, for example, *Re X*, 2013 CanLII 76400 at paras 14-18 (CA IRB) and *Re X*, 2016 CanLII 106279 at paras 6-17 (CA IRB).

[13] Even though the applicant therefore cannot be faulted for not raising his *Charter* challenge before the RAD, the question still remains whether it is appropriate for this Court to decide the challenge now in the context of this application for judicial review. In my view, it is not.

[14] The rationale for the general rule that constitutional issues should not be raised for the first time in judicial review proceedings is discussed by Justice Stratas in *Forest Ethics Advocacy Association v Canada (National Energy Board)*, [2015] 4 FCR 75, 2014 FCA 245 at paras 42-47; see also *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26. At the heart of this rationale is respect for the role that Parliament has assigned to administrative tribunals. For the reasons set out above, however, this rationale

does not apply with respect to the RAD in the present case. On the contrary, it is clearly Parliament's intent that the RAD should not deal with any issue raised by someone in the applicant's position. Determining this issue in the present proceeding would not impermissibly bypass the decision-maker who has been entrusted to determine the issue in the first place.

[15] Nevertheless, I have concluded that it is not appropriate to address the merits of the applicant's constitutional arguments because of the inadequacy of the record before me.

[16] Another general rule is that a court determining an application for judicial review is restricted to the record that was developed before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19). Since the constitutional issues were not raised before the RAD, no record of relevant evidence was developed before that body for my consideration. The applicant did not seek to file any new evidence before this Court in support of his challenge. The respondent provided a helpful account of the emergence of the cut-off date for appeals to the RAD out of a rather tangled legislative history but otherwise did not provide any evidence in support of the constitutionality of the provision.

[17] The Supreme Court of Canada has stressed the importance of an adequate evidentiary record when deciding constitutional issues. As Justice Cory put it in an oft-quoted passage from *MacKay v Manitoba*, [1989] 2 SCR 357 at 361-62,

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather,

> it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[18] I recognize that the applicant has framed this application as a facial challenge to section 36(1) of the *BRRA* and that the respondent has answered in kind. Nevertheless, I am not satisfied that this challenge can be considered properly in a complete factual vacuum. For example, there are serious questions about whether section 7 of the *Charter* is even engaged and, if so, how. These critical questions cannot be determined without at least some evidence. The paucity of evidence in this case stands in marked contrast to the comprehensive records developed in applications for judicial review challenging the constitutionality of other barriers to access to the RAD (see *YZ v Canada (Citizenship and Immigration)*, [2016] 1 FCR 575, 2015 FC 892, and *Kreishan v Canada (Citizenship and Immigration)*, 2018 FC 481).

[19] Chief Justice Lamer observed in *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at 28-29, that while a party may have a right to seek judicial review before this Court, it does not follow that the Court must undertake that review. Judges of the Federal Court "have discretion in determining whether judicial review should be undertaken." In my view, given the state of the record, it would not be appropriate to rule upon the constitutionality of section 36(1) of the *BRRA* in the context of this application for judicial review.

[20] This determination does not leave the applicant without a means by which to pursue his constitutional challenge to section 36(1) of the *BRRA* if so advised. It has always been open to

him to commence an action in this Court seeking a declaration that the impugned provision is unconstitutional (cf. *Ferri* at para 48).

[21] Accordingly, the application for judicial review is dismissed.

[22] The parties requested the opportunity to consider their positions with respect to whether to request certification of a serious question of general importance under section 74(d) of the *IRPA* after having had an opportunity to review the Court's reasons for judgment. They are asked to provide their respective positions within seven days of receipt of these reasons. If more time is required, they may contact the Court.

JUDGMENT IN IMM-966-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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