Federal Court  Cour fédérale

Date: 20240125

Docket: IMM-1636-22

Citation: 2024 FC 128

Ottawa, Ontario, January 25, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The Respondent brings a motion seeking to be relieved from a production order dated September 20, 2023, ("First Production Order") issued pursuant to Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 ("Rules").

[2] The Respondent submits that no Certified Tribunal Record ("CTR") should be provided pursuant to the First Production Order.

[3] For the reasons that follow, the motion is granted. The Respondent is relieved from producing a CTR under the First Production Order.

II. **Facts**

[4] The Canadian Association of Refugee Lawyers ("CARL") is an association seeking public interest standing to challenge the Canada Border Services Agency's ("CBSA") practice of appointing a designated representative ("DR") in the Pre-Removal Risk Assessment ("PRRA") process. The original named applicant discontinued their involvement in this matter. No individual decision is being challenged.

[5] On September 20, 2023, the Court issued a production order to the Respondent pursuant to Rule 14(2) of the Rules, including that the Tribunal "send a certified copy of its record electronically to the parties."

[6] On September 25, 2023, the Respondent sent a letter to this Court seeking relief from this production order. In October 2023, the parties exchanged a series of letters, brought to this Court, on this issue.

[7] On November 30, 2023, this Court advised the Respondent that they could seek relief from this order by way of bringing a motion.

I. **Issue**

[8] The sole issue in this motion is whether the Respondent ought to be relieved of producing a CTR under the First Production Order.

II. **Analysis**

[9] The Respondent submits that the application for leave does not challenge a specific decision, as there is no individual applicant associated with the litigation. The Respondent maintains there is therefore no documents in a CTR to be produced. The Respondent relies on my colleague Justice Pallotta's decision in *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2022 FC 1204 ("CARL I") in support of their position. The Respondent submits that the practice of appointing a DR would be an "action" or "measure taken" under section 72(1) of the *IRPA* only in the context of a specific case, which no longer applies here given the original applicant has withdrawn from the litigation and is no longer in Canada. Additionally, the Respondent submits that the question posed in the leave application is a legal question, and ought to proceed based on affidavit evidence and legal argument.

[10] The Applicant submits that the Respondent should not be relieved from production. The Applicant maintains that the Respondent's Reliance on *CARL I* is misplaced, the production order under issue being affected by separate legal tests for disclosure and the scope of this litigation being broader with the named applicant no longer being a party. The Applicant submits that the Respondent must produce a CTR, the Applicant reasonably expecting the Respondent to produce documents related to CBSA's "practice" of appointing third-party

individuals as DRs in PRRA proceedings insofar as the Applicant's record establishes this practice was not confined merely to the original named applicant. The Applicant submits that should the Respondent continue to assert there is no documentation relevant to this litigation in their possession, the Respondent should produce a CTR containing an affidavit from a CBSA officer with personal knowledge that there are no relevant documents in support of appointment of DRs for PRRAs.

[11] I agree with the Respondent. I am informed by the reasoning of my colleague Justice Pallotta in *CARL I*. There, the Applicant conceded that it does not have standing to seek production of documents pertaining to the original named applicant in this matter (at para 5). I therefore do not see why the Applicant would have standing to seek production of documents in a CTR pertaining to decisions regarding other individuals, whether or not there is a larger scope of documents sought than in *CARL I*. I further bear similar reservations to Justice Pallotta as to the factual basis for this application for leave and judicial review with the original named applicant no longer being a party to this application nor being in Canada. And I have my own reservations about whether the Applicant can bring a freestanding challenge to the impugned practice without an individual affected by this practice being a party to these proceedings. However, as with Justice Pallotta's reservation (at para 8), this question is for the leave or hearing judge to consider.

[12] I further disagree with the Applicant that production of a CTR can be based upon the parties reasonably anticipating that the Court will grant leave in this matter. The issuance of a production order may signal that a leave order is forthcoming (*Shalaby v Canada (Citizenship*

and Immigration), 2022 FC 1699 at para 15), but it is trite law that judicial review commences under subsection 72(1) of the *IRPA* when leave is granted, and that with leave applications "the only test to consider is whether the applicant has raised a 'fairly arguable case' on a serious question to be determined" (*Canada (Citizenship and Immigration) v Huntley*, 2010 FC 407 at para 21 [emphasis in original], citing *Bains v Canada (Minister of Employment and Immigration)*, 109 NR 239 at para 1 (FCA)). I do not accept the Applicant's submissions that the First Production Order and the fact it was made according to this Court's settlement project displaces this jurisprudence, especially in light of there being no specific decision challenged nor specific individual challenging the impugned practice as it affected them.

[13] I also do not accept that *Abu v Canada (Citizenship and Immigration)*, 2021 FC 1031 ("*Abu*") assists the Applicant. *Abu* involved proceedings where a CTR had already been produced, but was alleged to be incomplete (at paras 2-3). Those circumstances do not exist here. Moreover, the parties in *Abu* had been informed that an order granting leave would be issued (*Abu* at para 40). No such guarantee exists here. Moreover, Justice Norris's discussion of Rule 14(2)'s connection to the settlement project was in the context of the parties being "equipped to conduct meaningful settlement discussions within a short timeframe after leave has been granted" (at para 32 [emphasis added]). There is no mention here of settlement discussions, and leave has not been granted. *Abu* does not assist the Applicant.

[14] Furthermore, I agree with the Respondent that they are not obligated to produce evidence the Applicant deems relevant under Rule 17(b) of the Rules. Rules 15-17 of the Rules govern the initiation of judicial review in immigration matters (*Mohammed v Canada (Minister of*

Citizenship and Immigration) (F.C.), 2006 FC 1310 (CanLII) at para 9). Rule 15(1) provides the requirements in an order granting leave. Rule 17 provides the requirements, once leave is granted under Rule 15, or the Court orders production under Rule 14(2) (*Abu* at para 40), for the preparation of a record. Rule 17(b) provides that a CTR must include "all relevant documents that are in the possession or control of the tribunal." The question of "relevance" under this Rule includes whether a document in possession or control of the tribunal in question "may affect the decision that the Court will make on the application," determined in relation to "the grounds of review and any affidavit filed in support of the application" (*Abu* at para 43).

[15] Here, as in *CARL I*, I find that the Applicant has not established the relevancy of the documents requested, which include "any" documentation that is relevant to the practice of contracting DRs, documents that are "similar" to the documents in the Applicant's application record, or an affidavit from a CBSA officer speaking to the existence of relevant documents to appointing DRs. I acknowledge that the Applicant has furnished evidence that individuals are contracted as DRs for PRRAs and that these individuals are paid for their services. But in my view, the Applicant has not established the existence of the documents they request, stating only that there would be an "obvious paper trail that such a practice would create in the modern administrative state." Nor has the Applicant tailored this request's scope for the purposes of relevancy. A production order is not intended to prolong summary proceedings or permit a "fishing expedition" (*Kohl v Canada (Attorney General)*, 2020 CanLII 34694 (FC) at para 20). The vagueness and scope of what the Applicant seeks establishes that these requests are fishing expeditions.

[16] Moreover, the Applicant does not provide any support for the position that the Court should direct the Respondent to produce a CTR containing an affidavit from a CBSA officer who can speak to the existence of relevant documentation for this litigation. Rule 17(b) of the Rules requires that relevant documents be certified by an appropriate officer to be correct: It does not demand that the certifying officer produce an affidavit detailing the existence or non-existence of these documents, thus opening the officer in question to cross-examination. The Applicant does not provide any support in the Rules or the jurisprudence for what amounts to a request compelling a CBSA officer to testify about evidence the Applicant seeks out in an application for leave and judicial review.

III. **Conclusion**

[17] This motion is granted without costs. The Respondent is relieved from the requirement under the production order dated September 20, 2023 that a CTR be produced.

ORDER in IMM-1636-22

THIS COURT ORDERS that:

1. This motion is granted without costs.

2. The Respondent is relieved from the requirement in the Court's order dated September 20, 2023, to produce a Certified Tribunal Record.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1636-22
STYLE OF CAUSE:	CANADIAN ASSOCIATION OF REFUGEE LAWYERS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	AHMED J.
DATED:	JANUARY 25, 2024

APPEARANCES:

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