

Federal Court



Cour fédérale

Date: 20120228

Docket: T-1700-11

Citation: 2012 FC 271

Ottawa, Ontario, February 28, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**DAVID SIVAK, LUCI BAJZOVA, MONIKA
SIVAK, LUCIE BAJZOVA, MIROSLAV
SARKOZI, ANDREJ BALOG, ZANETA
BALOGOVA, GALINA BALOGOVA, VIKTOR
SARKOZI, ANDREJ BALOG, ANDREJ
BALOG, MARIE BALOGOVA, LUKAS
BALOG, MILAN LASAB, MILADA
LASABOYA, and ELVIS KULASIC**

Plaintiffs

and

**HER MAJESTY THE QUEEN and THE
MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Defendants

REASONS FOR ORDER AND ORDER

THE MOTION

[1] The Plaintiffs move that the following classes be certified pursuant to Part 5.1 of the *Federal Courts Rules*, SOR/98-106:

- a. All Czech Roma claimants awaiting disposition of their RPD hearing whose hearing had not commenced prior to the issuance of the “Issue Paper, Fact Finding Mission Report on State Protection Czech Republic, June 2009” (2009 Report);
- b. All Czech Roma claimants whose hearing commenced prior to the 2009 Report, but whose decision was not released until after the issuance of the 2009 Report;
- c. All Czech Roma claimants who received a negative RPD decision in which the RPD relied on the 2009 Report, in whole or in part, to render a negative decision and whose case is,
 - (i) either before the Federal Court on judicial review; or
 - (ii) no judicial review was filed;but in either event in (i) or (ii), the claimants are awaiting a PRRA;
- d. All Czech Roma claimants who were denied by the RPD, based on the 2009 Report, and who have;
 - (i) either filed a PRRA and are awaiting a decision; or
 - (ii) have not filed a PRRA, but are awaiting removal;but in either event in (i) and (ii) have not yet been removed;
- e. All Czech Roma claimants, who were denied by the RPD, based on the 2009 Report, who are “removal ready” and may be legally removed;

- f. All Czech Roma, who were denied by the RPD, based on the 2009 Report, who have been removed.

[2] This motion was heard in conjunction with the Defendants' motion to strike portions of the Plaintiffs' Amended Statement of Claim and, to some extent, the motions are interrelated in that the scope of the pleadings may have some impact upon the Plaintiffs ability to satisfy the criteria for certification and the Court's view of whether a class proceeding is the preferable procedure for the just and efficient resolution of common questions of law or fact.

THE FRAMEWORK

[3] For convenience, the provisions of Part 5.1 of the Rules that have particular importance for this motion are as follows:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un

individual members;

membre;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

(e) there is a representative plaintiff or applicant who

e) il existe un représentant demandeur qui :

(i) would fairly and adequately represent the interests of the class,

(i) représenterai t de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

Matters to be considered

Facteurs pris en compte

(2) All relevant matters shall be considered in a determination of whether a

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou

class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

(d) other means of resolving the claims are less practical or less efficient; and

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

Subclasses

Sous-groupe

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe de sorte que la protection des

members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui :

(a) would fairly and adequately represent the interests of the subclass;

a) représenterait de façon équitable et adéquate les intérêts du sous-groupe;

(b) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

b) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;

(c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;

(d) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

d) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

...

...

334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

334.18 Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d'autoriser une instance comme recours collectif :

(a) the relief claimed includes a claim for damages that would require an

a) les réparations demandées comprennent une réclamation de dommages-

individual assessment after a determination of the common questions of law or fact;

intérêts qui exigerait, une fois les points de droit ou de fait communs tranchés, une évaluation individuelle;

(b) the relief claimed relates to separate contracts involving different class members;

b) les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;

(c) different remedies are sought for different class members;

c) les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;

(d) the precise number of class members or the identity of each class member is not known; or

d) le nombre exact de membres du groupe ou l'identité de chacun est inconnu;

(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.

e) il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe.

[4] The jurisprudence establishes that the onus is on the Plaintiffs to establish some basis in fact for each of the certification requirements, apart from a reasonable cause of action. The list contained in Rule 334.16(1) is to be treated as conjunctive so that if any one of the five listed criteria is not met this certification motion must fail. The common issues do not have to determine the question of liability for all members of the class, or otherwise dispose of the action, but they must have sufficient significance in relation to the claim that their resolution will advance the litigation in a meaningful way. Also, while there are no fixed requirements for the litigation plan mentioned in Rule 334.16(1)(e)(ii), the jurisprudence has established a non-exhaustive list of the matters to be

addressed. See *Buffalo v Samson First Nation*, [2009] 4 FCR 3, 2008 FC 1308; affirmed [2010] FCJ No 814 (FCA).

[5] It is also clear that the mandatory language of Rule 334.16 excludes any overriding discretion to refuse to certify a class proceeding if the prescribed factors for certification are met. In addition, the issue of access to justice is an important consideration. Where it is not economical for any one person to prosecute a claim, and where the Crown has not indicated a willingness to indemnify anyone else for the costs required to prosecute a binding test case, the argument for a class proceeding is enhanced. See *Manuge v Canada* 2008 FC 624, [2009] 1 FCR 416; reversed 2009 FCA 29, [2009] 4 FCR 478; restored 2010 SCC 67, [2010] SCJ No 67.

ISSUES

- [6] In the present case, the Defendants concede that:
- a. The pleadings disclose a reasonable cause of action, provided they are confined to the reasonable apprehension of bias issue arising from the 2009 Report;
 - b. A viable class can be identified, although it cannot be as broad as the Plaintiffs describe it;
 - c. There is a common factual and legal question – the reasonable apprehension of bias arising from the 2009 Report – but this is the only common question.

[7] However, the Defendants say that the Plaintiffs have not satisfied the conjunctive criteria set out in Rule 334.16(1) because:

- a. Under Rule 334(16)(1)(d) a class proceeding is not the preferable procedure for the just and efficient resolution of the common question of fact and law that arises in this case. The most just and efficient resolution can be achieved by deploying Rule 220;
- b. The Plaintiffs have failed to meet the four-part test set out in Rule 334.16(1)(e) to be a representative plaintiff because:
 - There is no evidence from the Plaintiffs indicating they are aware of their obligations and responsibilities as “representative plaintiffs” and that they are able to fairly and adequately represent the interests of the proposed class;
 - The Plaintiffs have failed entirely to provide this Court with any workable litigation plan, which plan should address:
 - (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
 - (ii) the collection of relevant documents from members of the class, as well as others;
 - (iii) the exchange and management of documents produced by all parties;
 - (iv) ongoing reporting to the class;
 - (v) mechanisms for responding to inquiries from class members;
 - (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
 - (vii) the need for experts and, if needed, how those experts are going to be identified and retained;

- (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and
 - (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.
- The Plaintiffs have an interest which is in conflict with other proposed class members, because they have been found to be non-credible by the RPD and, therefore, they cannot adequately advance the proposed class-action effectively on behalf of any class members who may have been found credible by the RPD; and
 - The Plaintiffs have failed to provide a summary of any agreement respecting the fees and disbursements between themselves and the solicitor of record.

ANALYSIS

[8] I really do not have before me a proper affidavit from the Plaintiffs to support the motion for certification and to establish a proper representative plaintiff. Counsel has asked me to read the affidavits submitted on individual files for previous steps in this dispute, and to take into account that the other matters set out in 334(16)(1)(e) can easily be put into place, do not require affidavit evidence, and can be handled by way of counsel's undertaking.

[9] I think, however, that I have to be cognizant of the Federal Court of Appeal's warning in *Buffalo*, above, at paragraphs 13-14:

The burden of satisfying the certification requirements is solely upon those seeking certification and a motions judge, of course, must remain a neutral arbiter of whether those requirements have been met.

...

It is for those seeking certification under Rule 334.16, not the motions judge, to grapple with the substance of the matter and to meet the substantive certification requirements under Rule 334.16...

As matters presently stand before me, I believe that I would cease to be a neutral arbiter if I undertake the kind of exercise the Plaintiffs have asked of me. I would, in effect, be combing the backfiles for evidence to support their case and grappling with the matter on their behalf without giving Defendants' counsel a full opportunity to respond. Plaintiffs' counsel should have done this for the hearing so that Defendants' counsel could have provided a meaningful response. In addition, I do not have a clear picture from Plaintiffs' counsel's undertakings that there is a representative plaintiff who has, at this time, satisfied the requirements of Rule 334.16(1)(e). As Justice Mactavish pointed out in *Samson Cree Nation v Samson Cree Nation (Chief and Council)* 2008 FC 1308, [2009] 4 FCR 3 at paragraph 35,

The parties agree that the list contained in Rule 334.16(1) is conjunctive. As a consequence, if an applicant fails to meet any one of the five listed criteria, the certification motion must fail: see *Sander Holdings Ltd. v. Canada (Minister of Agriculture)*, [2006] F.C.J. No. 451, 2006 FC 327, at paragraph 38.

[10] Further, as matters now stand, and as the pleadings are presently constituted, it seems to me that the Plaintiffs have failed to establish that a class proceeding is the preferable procedure for the just and efficient resolution of what appears to be the common question of law and fact: whether the use of the 2009 Report gives rise to a reasonable apprehension of bias. This means that this motion must fail. The Plaintiffs have not argued that Rule 220 cannot be used in the circumstances of this case. They have argued instead that class proceedings are the preferable procedure. The Plaintiffs' position is by no means self-evident.

[11] As the Defendants point out, now that the Plaintiffs' case is being treated and proceeded with as an action, the Plaintiffs will receive both documentary disclosure and oral examination for discovery pursuant to the Rules applicable to actions. Once that evidence is provided to the Plaintiffs and made available to this Court, it seems to me that the Court will be in a position to decide what is presently the sole and narrow common legal and factual question raised by the Plaintiffs through the preliminary determination of a question of law pursuant to Rule 220.

[12] Should that question be answered in the Plaintiffs' favor, they can, at the appropriate point, renew their request for class certification on behalf of failed Czech Roma claimants where the 2009 Report was in evidence. Should that question be answered in the Defendants' favor, then the Plaintiffs and all other such failed claimants who have commenced challenges to their negative decisions in accordance with IRPA, can proceed to judicially review those decisions on any and all other grounds which arise in their individual cases.

[13] As matters presently stand, it looks to me as though employing Rule 220 is the most practical and efficient means of resolving this issue, within the spirit of Rule 334.16(2)(d). Proceeding as a class-action, "would create greater difficulties" within the meaning of Rule 334.16(2)(e), for the Court and the parties.

[14] A class-action would, in addition, significantly delay the resolution of a large number of pending legal challenges to individual refugee decisions. This is to be avoided, as timely and efficient refugee determination and review are envisioned by the statutory scheme under the *Immigration and Refugee Protection Act* SC 2001 c 27.

[15] The Defendants' suggested approach makes most sense to me in the current action: the common question can and should be decided by the Court pursuant to Rule 220 (after all evidence relevant to that common issue is made available through documentary disclosure and oral examination for discovery) and thereafter failed Czech Roma claimants can continue individually with their legal challenges on other grounds specific to their own claims.

[16] I have no motion before me at this time to deploy Rule 220. This is a matter that counsel should address when advising the Court on subsequent steps and timing issues. At this point, however, it does seem to me that whatever else may eventually find its way into the Plaintiffs' pleadings, the reasonable apprehension of bias issue remains central and determinative. Addressing and determining this issue quickly would, in my view, go a long way towards resolving this dispute and deciding whether there are other issues that might require the implementation of class proceedings.

[17] I also agree with the Defendants that any class of unsuccessful Czech Roma claimants would have to exclude those who failed to commence a leave application pursuant to section 72 of the Act because, as the Supreme Court of Canada concluded in *Bisailon v Concordia University* 2006 SCC 19, [2006] 1 SCR 666 at paragraphs 17 to 22, class proceedings cannot grant renewed litigation rights to those who are otherwise barred from litigation. Class-action regimes are procedural and do not create new substantive rights. At this point, however, the scope of the proposed class does not require consideration for reasons already given.

ORDER

THIS COURT ORDERS that

1. The motion is denied.
2. No order is made as to costs.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1700-11

STYLE OF CAUSE: SIVAK et al. Plaintiffs
- and -
HER MAJESTY THE QUEEN and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION Defendants

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 16, 2012

**REASONS FOR ORDER
AND ORDER:** HON. MR. JUSTICE RUSSELL

DATED: February 28, 2012

APPEARANCES:

Rocco Galati PLAINTIFFS

Marie-Louise Wcislo DEFENDANTS
Prathima Prasad
Susan Gans

SOLICITORS OF RECORD:

ROCCO GALATI LAW FIRM PLAINTIFFS
PROFESSIONAL CORPORATION
Toronto, Ontario

Myles J. Kirvan DEFENDANTS
Deputy Attorney General of Canada