Federal Court  Cour fédérale

Date: 20120615

Docket: IMM-6395-11

Citation: 2012 FC 764

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 15, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ENRIQUE ANDRES TOBAR TOLEDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision of an immigration officer rendered on September 16, 2011, that the applicant's claim for refugee protection was determined to be ineligible under paragraph 101(1)(*b*) of the IRPA.

[2] In the context of this appeal, the applicant served a notice of constitutional question on the Attorney General of Canada, and the attorney general of each province, in accordance with section 57 of the *Federal Courts Act*, RSC 1985, c F-7. The applicant submits that the interpretation given to paragraph 101(1)(*b*) of the IRPA by the respondent is not consistent with sections 7 and 15 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 with the *Convention on the Rights of the Child*, November 20, 1989, [1992] Can TS No 3 (entry into force: September 2, 1990) (Convention), and that, accordingly, the provision must be declared invalid if the interpretation by the respondent is to prevail. No attorney general has intervened following those notices.

[3] For the following reasons, I have come to the conclusion that the respondent erred in his interpretation of paragraph 101(1)(*b*) of the IRPA and that the eligibility of the applicant's claim for refugee protection must therefore be reassessed by the respondent. Hence, it is not necessary for me to review the legislative provision's compliance with the Charter or Convention.

I. The facts

[4] The facts are not contested and are relatively straightforward.

[5] The applicant, Enrique Andres Tobar Toledo, was born in Chile on November 26, 1984. In 1995, when he was 11 years old, his father made a claim for refugee protection in Canada. The applicant, his mother and his two brothers were included in the claim as accompanying family

members. On March 19, 1997, the Refugee Protection Division of the Immigration and Refugee Protection Board (RPD) rejected that claim.

[6] On July 28, 2011, the applicant arrived in Canada accompanied by his wife. They made a claim for refugee protection on August 11 of that same year, on the basis of their alleged fear of powerful business men in Chile who allegedly attempted to destroy their house and their land and undermined their physical integrity.

[7] The refugee claim of the applicant's wife was found eligible. However, the applicant's claim was found ineligible on the grounds that he had already made a claim in 1995 and it was rejected. The immigration officer expressly mentioned that his claim was rejected in accordance with paragraph 101(1)(*b*) of the IRPA.

[8] On September 26, 2011, the Canada Border Services Agency sent a notice to the applicant advising him of the possibility of applying for a Pre-Removal Risk Assessment (PRRA).

II. Issues

[9] The main issue raised by the application for judicial review is whether the respondent erred in it interpretation of paragraph 101(1)(*b*) of the IRPA.

[10] As regards the constitutional issues raised by the applicant, they read as follows (slightly rephrased):

> Does paragraph 101(1)(*b*) of the IRPA, as interpreted by the respondents, violate section 7 of the Charter and, if so, is it a

> reasonable limit on the applicant's rights within the meaning of section 1 of the Charter?
>
> Does paragraph 101(1)(*b*) of the IRPA, as interpreted by the respondents, violate section 15 of the Charter and, if so, is it a reasonable limit on the applicant's rights within the meaning of section 1 of the Charter?

III. Analysis

[11] The parties do not agree on the applicable standard of review. The applicant insisted on the fact that the issue is essentially legal in nature and concluded that the applicable standard of review should be that of correctness. However, the respondent submitted that the decisions of an immigration officer have been repeatedly subject to the reasonableness standard by this Court.

[12] It is true that the decisions of an immigration officer regarding the eligibility of a refugee claim usually involve questions of fact, or questions of mixed fact and law. As such, they are undeniably subject to the reasonableness standard (see *Gaspard v Canada (Minister of Citizenship and Immigration)*, 2010 FC 29 (available on CanLII)).

[13] In this case, the issues do not involve any discretion and are not based on the determination of facts. The first is statutory interpretation, whereas the other two raise constitutional questions. Consistent with *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, such issues must be dealt with by applying the correctness standard. The first issue does not only raise a question of law, but can be characterized as a question of jurisdiction, insofar as the officer determines whether the RPD can hear a claim for refugee protection. Moreover, I note that my colleague Justice Mosley also expressed the view that the interpretation of paragraph 101(1)(*d*) of the IRPA raised a question that had to be reviewed under the standard of correctness (*Wangden v Canada (Minister of*

Citizenship and Immigration), 2008 FC 1230 at paragraph 18, [2009] 4 FCR 46 aff'd by 2009 FCA 344, 398 NR 265; see also *Charalampis v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1002 at paragraph 34 (available on CanLII) (*Charalampis*)). As for the two other issues, they involve the compatibility of a statutory instrument with the fundamental law of the land and there is no doubt that no error would be tolerated in that regard.

[14] The respondent argues that the immigration officer had no other choice but to find the applicant's claim for refugee protection ineligible under paragraph 101(1)(*b*) the moment his father's claim for refugee protection was rejected by the RPD in 1997. The respondent did not discuss that proposition beyond citing the following excerpt from the decision rendered by Justice O'Keefe in *Charalampis*, *supra*:

> 39. Another argument by the respondent is compelling, namely that there are instances within the Act where children face consequences by way of their legal guardian or parents representations in the immigration process. The respondent outlined the instances where children are excluded from Canada when they are not included on an original permanent residence application and findings of negative credibility of parents in refugee claims which affect the children as well. I agree that these consequences point to an intent of Parliament to make children part and parcel of parents' claims and divorcing children from this would have as in the respondent's words "far-reaching consequences" and may "create something different in nature from what Parliament intended". Therefore, even if I were to assess the constitutionality of subsection 99(3) and paragraph 101(1)(*b*) in this respect, I am not convinced that there is a viable argument.

[15] However, *Charalampis* does not really deal with the issue raised by the applicant in this case. The applicants arrived in Canada with their father and brought successful refugee claims under false pretences by the father. After having admitted having fabricated the story, the father and his daughters lost their refugee status following a decision by the RPD setting aside the initial decision.

While subject to a removal order, the two daughters made a second refugee claim and invoked, *inter alia*, invoked section 15 of the Charter, claiming they were victims of discrimination in view of the fact that they were held responsible for the false statements made by their father.

[16] This case appears to me to be very different from the issue before me. Not only did the paragraph cited above answers an alternative argument of the Minister of Citizenship and Immigration (the Minister) and, therefore, only deals with the interpretation to be given to paragraph 101(1)(*b*) briefly, but also, most importantly, the applicants never left Canada following the setting aside of the initial decision and it therefore appears that their second claim could not but be based on the same facts adduced in evidence by their father.

[17] In this case, the applicant left Canada with his parents over fifteen years ago, following the refusal of the RPD to grant them refugee status. The applicant was only 11 years old at the time and claims to have no knowledge of the grounds on which the claim for refugee protection made by their father was based.

[18] It is true that paragraph 101(1)(*b*) of the IRPA does not distinguish between a claim for refugee protection based on the same facts that led to a prior refusal or different facts. One must therefore presume, as the respondent contends, that a person cannot seek refugee protection more than once, even if the facts alleged in support of a second claim are different from those that were relied upon the first time. When a refugee claimant's previous claim has been rejected, he or she may apply for a PRRA or permanent residence on humanitarian and compassionate grounds but shall not be permitted to file a second refugee claim.

[19] Does the same rationale apply, however, when the claimant is not the person whose first claim was rejected, but rather the son or daughter of the person whose claim has previously been rejected? In that regard, the Act does not provide a clear answer.

[20] The respondent submits that the immigration officer had no other choice but to deem the applicant's claim for refugee protection ineligible, as he made a refugee claim in 1995, even though it was his father who filed the claim for him. It is true that, from a formal viewpoint, minor children are considered to be an integral part of the claim made by their parents and that the outcome for that application carries the same consequences for them. However, should we therefore give equal treatment to both the children and their parents in all circumstances and for all purposes under the Act? Nothing is less certain.

[21] The very words of paragraph 101(1)(*b*) raises a first doubt. While the French version declares a claim ineligible in the case of a "rejet antérieur de la demande d'asile" by the Board, the English version seems to be slightly more specific by providing that a claim is ineligible if "a claim for refugee protection by the claimant" has been rejected by the RPD [emphasis added]. Even if the minor children are included in their parents' application, one cannot accurately state that it is the children who are making the claim. In fact, they often do not have the ability to make such a claim, and that is the reason their interests are represented by either parent. While a minor can certainly make a claim for refugee protection on his or her own behalf, that is not the case here.

[22] However, the applicant is right to argue that Parliament does not always treat minors accompanying refugee claimants in the same way as refugee claimants. While the adult who is denied refugee status and becomes subject to a removal order must request the Minister's authorization to return to Canada, that person's child need not obtain such authorization. That is what is provided for in paragraph 42(*b*) of the IRPA and section 226 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which read as follows:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27
Inadmissible family member	Inadmissibilité familiale
42. A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	42. Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :
(*b*) they are an accompanying family member of an inadmissible person.	*b*) accompagner, pour un membre de sa famille, un interdit de territoire.
Immigration and Refugee Protection Regulations, SOR/2002-227	*Règlement sur l'immigration et la protection des réfugiés*, DORS/2002-227
Deportation order	Mesure d'expulsion
226. (1) For the purposes of subsection 52(1) of the Act, and subject to subsection (2), a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation order was enforced.	226. (1) Pour l'application du paragraphe 52(1) de la Loi, mais sous réserve du paragraphe (2), la mesure d'expulsion oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

Application of par. 42(*b*) of the Act	Application de l'alinéa 42*b*) de la Loi
(2) For the purposes of subsection 52(1) of the Act, the making of a deportation order against a foreign national on the basis of inadmissibility under paragraph 42(*b*) of the Act is a circumstance in which the foreign national is exempt from the requirement to obtain an authorization in order to return to Canada.	(2) Pour l'application du paragraphe 52(1) de la Loi, le fait que l'étranger soit visé par une mesure d'expulsion en raison de son interdiction de territoire au titre de l'alinéa 42*b*) de la Loi constitue un cas dans lequel l'étranger est dispensé de l'obligation d'obtenir une autorisation pour revenir au Canada.
Removal order — certificate	Mesure de renvoi — certificat
(3) For the purposes of subsection 52(1) of the Act, a removal order referred to in paragraph 81(*b*) of the Act obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the removal order was enforced.	(3) Pour l'application du paragraphe 52(1) de la Loi, la mesure de renvoi visée à l'article 81 de la Loi oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

[23] Finally, it is well-established that the interpretation of a legislative provision requires a plain meaning analysis of the provision as well as of its legislative context. In fact, the Supreme Court of Canada adopted the words of Professor Elmer Driedger in *Rizzo & Rizzo Ltd. (Re)*, [1998] 1 SCR 27 at paragraph 21 (available on CanLII):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] Subsection 46.01 of the former *Immigration Act*, RSC 1985 c I-2 (am by SC 1992, c 49) provided for the possibility of making several claims for refugee protection. An unsuccessful refugee claimant could in fact make a new claim for refugee protection provided that he or she stayed abroad for a minimum period of 90 days. The relevant provisions of the Act were as follows:

46.01(1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person	46.01 (1) La revendication de statut n'est pas recevable par la section du statut si l'intéressé se trouve dans l'une ou l'autre des situations suivantes :
(*c*) has, since last coming into Canada, been determined	c) depuis sa venue au Canada, il a fait l'objet :
(i) by the Refugee Division not to be a Convention refugee or to have abandoned the claim, or	(i) soit d'une décision de la section du statut lui refusant le statut de réfugié au sens de la Convention ou établissant le désistement de sa revendication,
(ii) by a senior immigration officer not to be eligible to have the claim determined by the Refugee Division;	(ii) soit d'une décision d'irrecevabilité de sa revendication par un agent principal;
Last coming to Canada	Séjour à l'étranger
(5) A person who goes to another country and returns to Canada within ninety days shall not, for the purposes of paragraph (1)(*c*), to be considered as coming into Canada on that return.	(5) La rentrée au Canada de l'intéressé après un séjour à l'étranger d'au plus quatre-vingt-dix jours n'est pas, pour l'application de l'alinéa (1)c), prise en compte pour la détermination de la date de la dernière venue au Canada de celui-ci.

[25] There is no doubt, in light of the Parliamentary debates surrounding the adoption of the IRPA, that the purpose of paragraph 101(1)(*b*) of the IRPA was to put an end to abusive claims for refugee protection and to the abuses relating to the possibility of making more than one claim for refugee protection (see the debates of the Standing Committee on Citizenship and Immigration of May 17, 2001, Exhibit "A", Affidavit sworn by Dominique Toillon in support of the respondent's memorandum). From the analysis of section 101, that objective could not have been more clear:

> [TRANSLATION]
> The present legislation contains many of these rules regarding eligibility, but Bill C-11 clarifies and strengthens certain aspects. . . . Many non-genuine applicants abused said provision, and instead of returning to their country of origin, went to the United States during the 90-day period and came back to make a new claim, without a change in their situation.
>
> Affidavit of Dominique Toillon, Exhibit "C", p 151.

[26] It is obvious that the applicant's situation is not at all representative, at least at first glance, of the type of abuse Parliament was attempting to eradicate through paragraph 101(1)(*b*). The applicant was only 11 years old when his father made a claim for refugee protection; he left Canada when the claim was rejected, and never came back until nearly fifteen years later. Furthermore, it appears that his claim does not bear any relationship to the one made by his father, although there is very little information in the record in that regard seeing as his claim for refugee protection was found to be ineligible.

[27] In conclusion, I find that the immigration officer erred in determining that the applicant's claim for refugee protection was ineligible simply because his father's claim for refugee protection, in which he was included, was rejected in 1997. Neither the wording of paragraph 101(1)(*b*) nor the

intention of Parliament in adopting it make it possible to give such a scope to said provision. The situation would undoubtedly be otherwise if the applicant's claim was essentially based on the same facts as those in his father's claim; in that case, the letter and spirit of paragraph 101(1)(*b*) would justify rejecting his claim and determining it to be ineligible. However, before such a finding may be made, at a minimum the applicant's claim must be examined on its face; if the claim does not appear to be based on the same circumstances as those in his father's claim, it will have to be referred to the RPD for the purposes of determining whether refugee status can be granted to him.

[28] Having regard to the interpretation it seems to me must be given to paragraph 101(1)(*b*), it is not necessary to decide the constitutional issues raised by the applicant.

[29] The parties were invited to submit questions for certification, and the applicant was also given a few days to do so, but no question was submitted. The Court, however, is not bound by the parties' position in that respect and paragraph 74(*d*) of the IRPA clearly states that a judge may certify a question of general importance for the Court of Appeal's consideration. In this case, I am of the view that the application for judicial review brought by the applicant raises a serious question of general importance which would be dispositive of the appeal (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paragraph 11, 318 NR 365; *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4 at paragraph 4, 51 ACWS (3d) 910 (FCA)).

[30] I therefore certify and state the question as follows:

Does the rejection of a refugee claim submitted by parents accompanied by minor children necessarily render ineligible a later claim submitted by one of those children, having now reached the age of majority, on their own behalf, pursuant to paragraph 101(1)(*b*) of the IRPA, regardless of whether the facts on which the second claim is based are different from those on which the original claim submitted by the parents was based?

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The following question is certified:

> Does the rejection of a refugee claim submitted by parents accompanied by minor children necessarily render ineligible a later claim submitted by one of those children, having now reached the age of majority, on their own behalf, pursuant to paragraph 101(1)(*b*) of the IRPA, regardless of whether the facts on which the second claim is based are different from those on which the original claim submitted by the parents was based?

"Yves de Montigny"
Judge

Certified true translation

Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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