Federal Court  Cour fédérale

Date: 20150205

Docket: T-356-13

Citation: 2015 FC 149

Ottawa, Ontario, February 5, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI AND JUSTICE FOR CHILDREN AND YOUTH

Applicants

And

ATTORNEY GENERAL OF CANADA AND MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

ORDER AND REASONS

[1] For many years, the Government of Canada funded comprehensive health insurance coverage for refugee claimants and others who came to Canada seeking its protection through the Interim Federal Health Program. In 2012, the Governor in Council passed two Orders in Council

which significantly reduced the level of health care coverage available to many such individuals, and all but eliminated it for others pursuing risk-based claims.

[2] On July 4, 2014, I released a judgment in which I concluded that the 2012 changes to the Interim Federal Health Program were inconsistent with sections 12 and 15 of the *Canadian Charter of Rights and Freedoms* and were of no force or effect. I suspended the operation of my judgment for a period of four months in order to give the Governor in Council time to respond to my decision.

[3] My decision is currently under appeal and on October 31, 2014, the Federal Court of Appeal dismissed the Respondents' motion for a stay of my judgment.

[4] On November 5, 2014, the Government of Canada instituted a new Federal Health Program, which it described as "temporary health-care measures … consistent with the Federal Court's ruling".

[5] The applicants are of the view that the 2014 Federal Health Program fails to address the *Charter* violations identified in my judgment. Consequently, they have brought a motion in which they seek "an Order for directions" and "an Order for clarification" in relation to my July 4, 2014 judgment, as well as "an Order compelling the Respondents to comply" with the judgment.

[6] While the applicants may have other avenues of recourse available to them to address their concerns, I have concluded that having already issued a final judgment in relation to this application, I no longer have jurisdiction over this matter. Consequently, the applicants' motion will be dismissed.

I. The Principle of *Functus Officio*

[7] The principle of *functus officio* provides that once a decision-maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors. The policy rationale underlying this doctrine is the need for finality in proceedings: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at paras. 20-21, [1989] S.C.J. No. 102.

[8] In order to engage the principle of *functus officio*, the decision in issue must be final. In the context of judicial decision-making, a decision may be described as final when "... it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain ...": G. Spencer Bower & A.K. Turner, *The Doctrine of Res Judicata* 2d. ed. (London: Butterworths, 1969) at 132, cited in Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Thomson Reuters, 2014) vol. 3 at 12:6222.

[9] I do not understand there to be any disagreement that my July 4, 2014 judgment was indeed a final decision. In it, I disposed of all of the applicants' claims for relief, and granted them some, but not all, of the declaratory relief that they were seeking. I had thus exhausted my jurisdiction over the subject matter of this litigation.

[10] As Justice Pelletier observed in *Halford v. Seed Hawk Inc.*, 2004 FC 455 at para. 6, 253 F.T.R. 122, "[i]n order for a judge to reopen the judgment, there must be some authority for doing so, since the entire system of justice is predicated on the finality of judgments". Indeed, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 116, [2003] 3 S.C.R. 3, Justices LeBel and Deschamps noted that "*only in strictly limited circumstances* can a

court revisit an order or a judgment" [my emphasis]. While Justices LeBel and Deschamps were writing in dissent, it was not on this point.

[11] The *Federal Courts Rules*, SOR/98-106, identify limited circumstances in which a court may revisit a final decision. Rule 397 is a "slip rule" that allows the Court to correct minor errors, and Rule 399 allows the Court to set aside an order in certain defined circumstances. The applicants concede that neither Rule has any application in this case.

[12] The question, then, is whether there is any other basis upon which I could grant the relief that the applicants are seeking. The arguments advanced by the applicants will be addressed in the next section of these reasons.

II. Analysis

[13] The applicants seek "an Order for clarification" with respect to my July 4, 2014 judgment, submitting that courts "have innate jurisdiction" to clarify their judgments. At the same time, however, the applicants acknowledge that my judgment was "perfectly clear". Indeed, the applicants had sought declarations in their Notice of Application declaring, amongst other things, that the 2012 changes to the Interim Federal Health Program were inconsistent with sections 12 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. That is the relief I granted, and no clarification of my judgment is required.

[14] The applicants further submit that this Court has "innate jurisdiction" to ensure compliance with its own judgments, submitting that if litigants were free to ignore court orders,

"anarchy cannot be far behind": *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para. 180, [1990] S.C.J. No. 129.

[15] I accept that a declaratory judgment is binding, that it has legal effect, and that it must be complied with: *Assiniboine v. Meeches*, 2013 FCA 114, at paras. 12-14, [2013] F.C.J. No. 474. I further accept that this Court has the power to enforce its own judgments. However, that is not what the applicants are really asking for in this case. At its core, what the applicants are seeking is not the "enforcement" of my July 4, 2014 judgment, but a ruling that the 2014 Federal Health Program violates sections 12 and 15 of the *Charter*.

[16] I agree with the respondents that the practical effect of what the applicants are now seeking is to have me interpret and amend my July 4, 2014 judgment to stipulate that sections 12 and 15 of the *Charter* require the Government of Canada to fund healthcare to a certain specified level for those seeking the protection of Canada: see the applicants' Written Response at paras. 14 and 15.

[17] The cases that the applicants rely on to support their jurisdictional argument are, moreover, readily distinguishable from the present situation. They do not provide a principled basis for me to "clarify" my judgment, to issue "directions" relating to my judgment, or to issue an order "compelling the Respondents to comply" with my judgment.

[18] For example, in *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2009 FC 34, 338 F.T.R. 74 and *Canada (Minister of Citizenship and Immigration) v. Jaballah*, 2009 FC 33, [2009] F.C.J. No. 23, I had to determine whether the *Charter* rights of persons named in security certificates were being violated by the way in which conditions of release imposed by

the Court were being enforced. While orders had previously been issued in relation to periodic detention reviews for each of Messrs. Mahjoub and Jaballah, the *Charter* motions were brought in the context of *ongoing* security certificate proceedings, and not after the release of the Court's final judgment in each case.

[19] The applicants cite this Court's decision in *MacDonald v. Swecan International Ltée.* (1990), 40 F.T.R. 272, [1990] F.C.J. No. 826 as authority for the proposition that the Court's jurisdiction extends to all proceedings related to the enforcement of its judgments.

[20] It is true that in the *MacDonald* case, the Court stated that its jurisdiction "is not automatically extinguished when judgment is given in the main action, but rather it subsists in any proceedings relating to the enforcement of that judgment". This comment must, however, be read in context.

[21] *MacDonald* involved the seizure of goods pursuant to a writ of *fieri facias*, executing on a judgment issued in a patent matter. The *Federal Courts Rules* contain comprehensive provisions dealing with the enforcement of judgments through execution proceedings such as the seizure of property and the garnishment of wages. These Rules do not, however, create an exception to the principle of *functus officio* that would allow the Court to reopen a final judgment in the circumstances of this case.

[22] The decision of the Alberta Court of Queen's Bench in *Criminal Trial Lawyers' Assn. v. Alberta (Solicitor General)*, 2004 ABQB 534, 364 A.R. 109, a case involving prisoners' telephone access to counsel, is also readily distinguishable from the present situation. Not only

does it appear that a final judgment had not yet issued in that case, the Court had, moreover, specifically retained jurisdiction over the matter: see para. 113.

[23] The remedial discretion conferred on Courts by the Charter allows judges to make supervision orders where it is appropriate and just for them to do so: *Doucet-Boudreau*, above. Such orders permit judges to monitor the implementation of judgments in Charter litigation. No such order was, however, sought or granted in the present case.

[24] In *Wong v. Canada (Minister of Citizenship and Immigration)* (1998), 159 F.T.R. 154, [1998] F.C.J. No. 1791, this Court did issue an order purporting to clarify an earlier judgment in light of subsequent events. However, it appears from the Court's brief reasons that both parties sought the clarification, and no issue was raised as to the Court's continuing jurisdiction over the matter: see para. 8. This decision is thus of limited assistance.

[25] The applicants also submit that they do not have to commence a fresh challenge to the 2014 Federal Health Program because it is not a "new" policy, but merely an "interim" policy that only came into effect because the Federal Court of Appeal refused to stay the operation of my judgment. With all due respect, this is a distinction without a difference.

[26] My July 4, 2014 judgment declared that the 2012 changes to the Interim Federal Health Program (IFHP) were inconsistent with sections 12 and 15 of the *Charter* and were of no force or effect. With the Federal Court of Appeal's refusal to stay this decision, my judgment came into effect four months after its release. The 2012 IFHP is no longer in effect, and has been replaced by the 2014 Federal Health Program. While there may be a question as to whether this

new policy is *Charter*-compliant, that question should be decided in the context of a new application for judicial review, on the basis of a proper evidentiary record.

[27] Indeed, that is precisely what happened in *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121, 54 B.C.L.R. (5th) 286, the case that is most closely analogous to the present situation. There, the British Columbia Supreme Court had issued a declaration that legislation that deleted terms from collective agreements and prohibited collective bargaining in relation to issues related to class size, class composition, and support for special needs students interfered with teachers' collective bargaining rights and breached subsection 2(d) of the *Charter*. The Court suspended the order striking down the legislation for a period of 12 months to allow the Province time to address the Court's decision.

[28] After the suspension period expired, the Province enacted legislation that was virtually identical to the legislation the Court had struck down. In order to challenge the new legislation, the British Columbia Teachers' Federation commenced a new proceeding seeking to have the new legislation struck down and damages awarded for the Government's conduct. The Court agreed that a second application was necessary to challenge the new legislation, and that any remedies relating to the unconstitutionality of the new legislation had to be granted *in the context of that second application*: at para. 649.

[29] The applicants further contend that I must take jurisdiction over this matter as the 2014 Federal Health Program continues to put lives at risk, and the applicants have no other effective remedy. According to the applicants, commencing a new application to challenge the 2014 Federal Health Program is not a realistic alternative given that the 2014 Federal Health Program is only an interim policy, brought in to cover the period during which my decision is under

appeal. According to the applicants, it is not realistic to think that a fresh *Charter* challenge could be mounted and argued before the appeal of my decision is heard.

[30] There are, however, several difficulties with this submission.

[31] The first is that I either have jurisdiction to deal with the applicants' motion or I do not. The fact that it may take time to bring a challenge to the 2014 Federal Health Program does not confer jurisdiction on me where it would not otherwise exist.

[32] It is, moreover, by no means clear that a challenge to the 2014 Federal Health Program could not be dealt with before the issues raised by this case have been finally decided.

[33] No date has been set for the hearing of the appeal from my decision, and the applicants have not brought a motion to have the hearing expedited. As a consequence, the hearing of the appeal is months away. Given the complexity of the issues raised by this case, it could take months more before the Federal Court of Appeal renders its decision. There is, moreover, no guarantee that the Federal Court of Appeal will have the last word in this matter. Given the importance of the issues raised by this case, it is reasonable to assume that leave to appeal to the Supreme Court of Canada may well be sought by the unsuccessful parties, and that the Supreme Court may ultimately grant leave. In other words, the final resolution of this case may be many months, if not years, away.

[34] Additionally, this Court makes every effort to provide timely justice, and can expedite the hearing of applications where it is satisfied that it is in the interests of justice to do so. Indeed, an example of an application for judicial review implicating *Charter* rights that was brought, heard and decided within a six-week period was discussed during the hearing of this motion: see

Tursunbayev v. Canada (Minister of Public Safety and Emergency Preparedness), 2012 FC 504 at paras. 10-13, 409 F.T.R. 176.

[35] A *Charter* challenge to a government policy is undoubtedly a complex matter. However, given that this matter has already been extensively litigated and a substantial evidentiary record compiled, both in this Court and in the Federal Court of Appeal, it is by no means clear that a challenge to the 2014 Federal Health Program could not be dealt with in a relatively expeditious manner.

[36] Both sides also referred to the possibility of contempt proceedings being brought against the Respondent Minister as a means of enforcing my judgment. However, the applicants argue that the procedural requirements of contempt proceedings are such that they could not obtain a timely decision as to whether the Government of Canada has complied with my judgment.

[37] I will leave for another day the question of whether a finding of contempt is in fact available in relation to a declaratory judgment, but would note that contempt proceedings are generally summary in nature and can be dealt with in an expeditious fashion where it is appropriate to do so.

III. Conclusion

[38] For these reasons, I have concluded that having issued a final judgment in this matter, my jurisdiction over this matter has been exhausted. Consequently, the applicants' motion is dismissed.

[39] Having dismissed the motion on jurisdictional grounds, I offer no opinion as to the constitutionality of the 2014 Federal Health Program.

[40] In accordance with the agreement of the parties, each side shall bear their own costs.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Lorne Waldman	FOR THE APPLICANTS CANADIAN DOCTORS FOR REFUGEE CARE, DANIEL GARCIA RODRIGUES AND HANIF AYUBI
Ms. Maureen Silcoff	FOR THE APPLICANT THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS
Ms. Emily Chan	FOR THE APPLICANT JUSTICE FOR CHILDREN AND YOUTH
Mr. David Tyndale Mr. Alex Kam	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS CANADIAN DOCTORS FOR REFUGEE CARE, DANIEL GARCIA RODRIGUES AND HANIF AYUBI
Silcoff Shacter Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS
Justice for Children and Youth Toronto, Ontario	FOR THE APPLICANT JUSTICE FOR CHILDREN AND YOUTH
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS