Federal Court  Cour fédérale

Date: 20150508

Docket: IMM-5517-13

Citation: 2015 FC 602

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 8, 2015

Present: The Honourable Madam Justice Bédard

BETWEEN:

RACHAEL OMOBUDE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision rendered on July 30, 2013, by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB). In its decision, the IAD allowed the appeal that the Minister of Citizenship and Immigration (the Minister) had instituted against a decision made by the IRB's Immigration Division (ID). In that

decision, the ID held that paragraph 36(3)(*a*) of the IRPA was unconstitutional and not applicable and that the applicant was therefore not inadmissible on grounds of serious criminality under paragraph 36(1)(*a*). The IAD held that paragraph 36(3)(*a*) of the IRPA was not unconstitutional, that the issuance of a removal order did not engage the constitutional rights guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, constituting Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [the Charter], and that it was premature at the removal order issuance stage to rule on the constitutional arguments raised by the applicant.

[2] The Minister argues that the IAD's decision is an interlocutory decision and that an application for judicial review of that decision is premature.

I. **Background**

[3] The applicant is a Nigerian citizen, who arrived in Canada in 1997 and made a claim for refugee protection that was rejected. However, she was granted permanent resident status in August 2000 after being sponsored by her then spouse.

[4] In October 2006, the claimant was charged with four offences under the IRPA, more specifically of the offence provided for in subsection 117(1) of the IRPA, which concerns organizing entry of persons into Canada. This is a hybrid offence, which may be prosecuted by way of indictment or by summary conviction. A person convicted on indictment is liable, for a first offence, to a term of imprisonment of not more than 10 years (paragraph 117(2)(*a*) of the IRPA). A person convicted summarily is liable to a term of imprisonment of not more than two

years (paragraph 117(2)(*b*) of the IRPA). The charges in the matter at bar were first laid on indictment in October 2006. In December 2007, however, the Office of the Director of Public Prosecutions amended the type of proceeding to prosecute the charges on summary conviction. The applicant pleaded guilty to the first two counts (paragraphs 117(2)(*b*) and 128(*b*) of the IRPA), and the Director of Public Prosecutions applied for a conditional stay of proceedings in respect of the other counts. On April 1, 2008, the applicant was sentenced to two concurrent terms of six months less a day.

[5] On May 15, 2008, a report was prepared under subsection 44(1) of the IRPA providing that the applicant was inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(*a*) of the IRPA because there were reasonable grounds to believe that she had been convicted of organizing the illegal entry of persons into Canada contrary to section 117 of the IRPA. On June 18, 2008, the report was referred to the ID for a hearing.

II. **ID and IAD decisions**

[6] To understand the ID and IAD decisions, it is useful to reproduce paragraphs 36(1)(*a*) and 36(3)(*a*) of the IRPA:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of	*a)* être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de

Parliament for which a term of imprisonment of more than six months has been imposed;	six mois est infligé;
. . .	[…]
(3) The following provisions govern subsections (1) and (2):	(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;	*a)* l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

[7] In its decision, the ID noted that the applicant had not been convicted of the offence provided for under paragraph 117(2)(*a*) of the IRPA, which is punishable by a term of imprisonment of no more than 10 years, but of the offence set out in paragraph 117(1)(*b*) of the IRPA, that is, an offence prosecuted by way of summary conviction, which is punishable by a term of imprisonment of not more than two years. The ID therefore concluded that the applicant did not meet the conditions for inadmissibility on grounds of serious criminality under paragraph 36(1)(*a*) of the IRPA. The ID found, however, that the applicant would become inadmissible under paragraph 36(3)(*a*) of the IRPA, which provides that a hybrid offence is deemed to be an indictable offence even if it has been prosecuted summarily. The ID consequently held that an inadmissibility finding would result in the issuance of a removal order under section 45 of the IRPA.

[8] According to the ID, the issuance of a removal order was in itself sufficient to engage the Charter rights, and it concluded that paragraph 36(3)(*a*) of the IRPA violated the rights

guaranteed by sections 7 (life, liberty and security of person), 11(*d*) (presumption of innocence) and 12 (right to protection from cruel and unusual treatment or punishment) of the Charter.

[9] The Minister appealed the decision before the IAD under subsection 63(5) of the IRPA. The notice of appeal (p. 69 of the Certified Tribunal Record) cites the following grounds of appeal:

> [translation]
>
> 1. The member erred in law in ruling on the constitutionality of paragraph 36(3)(*a*) of the *Immigration and Refugee Protection Act* (IRPA).
>
> 2. The member erred in law in determining that the respondent was not contemplated by paragraph 36(1)(*a*) of the *Immigration and Refugee Protection Act* (IRPA).

[10] The IAD allowed the Minister's appeal and concluded that the applicant was inadmissible on grounds of serious criminality under paragraph 36(1)(*a*) of the IRPA. The IAD further held that paragraph 36(3)(*a*) of the IRPA was valid and that it was premature to rule on the constitutional arguments.

[11] The applicant submits that the IAD's decision is contradictory in that it found that paragraph 36(3)(*a*) of the IRPA was constitutional while concluding that it was premature to rule on the constitutional arguments. She therefore contends that it is impossible to understand whether the IAD disposed of the issue of whether paragraph 36(3)(*a*) of the IRPA is constitutional.

[12] With respect, I can see no contradiction in the IAD's findings. The IAD held that paragraph 36(3)(*a*) of the IRPA was not unconstitutional because the issuance of a removal order was not in itself sufficient to engage the rights guaranteed by sections 7 and 12 of the Charter. It based its conclusions on the case law (specifically *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] FCJ No 381; *Barrera v Canada (Minister of Citizenship and Immigration)*, [1993] 2 FC 3, [1992] FCJ No 1127; *Santana v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 477, [2013] FCJ No 525) and noted the distinction between the issuance of a removal order and its enforcement, which may engage Charter rights.

[13] The IAD concluded that the applicant had not shown that she was deprived of her right to life, liberty and safety solely by the issuance of a removal order (paragraph 43 of the decision) and that it was not until the applicant had exercised all the remedies available to her, in the absence of a stay, that the removal order could engage the rights guaranteed by section 7 of the Charter.

[14] I understand from the IAD's decision that it considered paragraph 36(3)(*a*) of the IRPA to be constitutional because the issuance of a removal order does not violate section 7 rights. It further noted that those rights could be engaged if the removal order were enforced. It was in that sense that it found it premature for the applicant to raise constitutional arguments that could be made with respect to subsequent decisions regarding the enforcement of the removal order.

[15] The IAD applied the same reasoning to section 12 of the Charter, stating clearly that it is the imminent nature of a removal that can engage section 12 rights (paragraph 51 of the decision). It therefore held that paragraph 36(3)(*a*) of the IRPA did not violate section 12 of the Charter, noting, however, that it was premature to argue a section 12 violation since the applicant was not facing removal.

[16] The IAD therefore concluded that the applicant was inadmissible on grounds of serious criminality and invited the parties to submit their evidence on humanitarian and compassionate considerations. It also stated that the parties would be invited to a hearing following the appeal.

III. **Preliminary issue raised by the Minister and analysis**

[17] The Minister argues that the IAD's decision, which is the subject of the application for judicial review, is an interlocutory one that should not be judicially reviewable since the parties must first exhaust the remedies provided for in the administrative process. The Minister cites the case law that has established that interlocutory decisions of administrative bodies may not be judicially reviewed unless exceptional circumstances are established. More specifically, he bases his position on *Coldwater Indian Band v Canada (Indian Affairs and Northern Development)*, 2014 FCA 277 (CanLII) at paras 8-10, [2014] FCJ No 1223 [*Coldwater Indian Band*]; *Black v Canada (Attorney General)*, 2013 FCA 201 (CanLII) at paras 7, 8 and 11, [2013] FCJ No 1001 [*Black*]; *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-33, [2010] FCJ No 274 [*CB Powell Limited*]; *Greater Moncton International Airport Authority v Public Service Alliance of Canada*, 2008 FCA 68 at para 1, [2008] FCJ No 312 [*Greater Moncton International Airport*]; and *CHC Global Operations v Global Helicopter Pilots*

Association, 2008 FCA 345 at paras 2-3, [2008] FCJ No 1579 [*CHC Global Operations*]. The Minister argues that the exceptional circumstances exception is of very narrow scope and that nothing in the case at bar justifies the Court's deviating from the general principle.

[18] The applicant replies that the IAD's decision on the constitutionality of paragraph 36(3)(*a*) of the IRPA is final because the Minister's notice of appeal concerned only this issue and that it can therefore be the subject of an application for judicial review.

[19] With respect, I agree with the Minister. The Federal Court of Appeal has held on numerous occasions that, barring exceptional circumstances, interlocutory decisions cannot be submitted for judicial review before all internal remedies have been exhausted (*Coldwater Indian Band; Black* at paras 8-10; *CB Powell Limited* at paras 30-33; *Greater Moncton International Airport* at para 1; *CHC Global Operations* at paras 2-3). In *CB Powell Limited* at para 32, the Federal Court of Appeal gave the following explanation of the considerations underlying this principle:

> 32 This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun, supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*, *Consolidated Maybrun, supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136

> (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[20] Also in *CB Powell Limited*, at paragraph 33, the Federal Court of Appeal held that the presence of an important legal or constitutional issue is not an exceptional circumstance allowing parties to bypass an administrative process and to seek judicial review of an interlocutory decision. The same principle was reiterated in *Coldwater Indian Band*, at paragraph 10. The Court is bound by these decisions, and I find that the applicant did not establish any exceptional circumstances to warrant the judicial review of the IAD's interlocutory decision.

[21] The applicant argued that the IAD's decision was final because it settled the matter of the constitutionality of paragraph 36(3)(*a*) of the IRPA and that this was the only ground of appeal raised by the Minister against the ID's decision. I do not agree. I am of the view that it is of little importance that the IAD's decision originated from an appeal instituted by the Minister. In any case, in his notice of appeal, the Minister asked the IAD to issue the removal order that should have been issued by the ID.

[22] In any event, it is clear that, in allowing the Minister's appeal and finding the applicant inadmissible, the IAD rendered an interlocutory decision that did not terminate the appeal process. Indeed, the IAD informed the parties that they would be invited to present their arguments on the issue of humanitarian and compassionate considerations under

subsection 69(2) of the IRPA. At paragraph 6 of its decision, the IAD also set out the possible outcomes of the Minister's appeal following the hearing:

> After the hearing, the possible outcomes of the Minister's appeal are as follows. If there are insufficient humanitarian and compassionate considerations to override the seriousness of the inadmissibility, the Minister's appeal is allowed, and the panel issues a removal order. If there are sufficient humanitarian and compassionate considerations to override the seriousness of the inadmissibility, the Minister's appeal is dismissed, the respondent retains her status as a permanent resident, and the panel does not issue a removal order. If the panel determines that there are sufficient humanitarian and compassionate considerations to warrant granting the respondent special relief and that the respondent poses a risk of reoffending, the panel issues a removal order, along with a stay of removal.

[23] I therefore find that the decision that is the subject of the application for judicial review is indeed an interlocutory decision and that the application for judicial review of that decision is premature. It is not impossible that the applicant will win the appeal and that the removal order will never become enforceable.

[24] I therefore find that the applicant has not established any exceptional circumstances that would justify her application for judicial review of the interlocutory decision rendered by the IAD. If the applicant is dissatisfied with the decision the IAD renders following the hearing convened to deal with the humanitarian and compassionate considerations, she will be able to file an application for leave and judicial review of that decision and submit all her arguments, including those respecting the IAD's interlocutory decision on the constitutionality of paragraph 36(3)(*a*) of the IRPA.

In light of this conclusion, it would be pointless to address the arguments made by the parties on the merit of the application for judicial review or the question that the applicant proposed certifying since it concerns the merit of the application and would not dispose of an appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, and no question is certified.

"Marie-Josée Bédard"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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