Federal Court  Cour fédérale

Date: 20160209

Docket: IMM-2334-15

Citation: 2016 FC 159

Ottawa, Ontario, February 9, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

TSISKARA KARDAVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Background

[1] The Respondent filed a motion record on January 13, 2016 in support of a motion in writing under Rule 369 of the *Federal Court Rules* [the Rules] to dismiss the Applicant's application for judicial review and to vacate the hearing date of January 27, 2016;

[2] The Applicant's underlying application seeks judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated April 27, 2015 that the Applicant had abandoned his claim for status as Convention refugee pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] or a person in need of protection pursuant to section 97 of IRPA.

[3] The grounds for the motion are that the application is moot, because on July 27, 2015 the Applicant filed an application with the RPD to have his claim reopened, and on July 30, 2015 the RPD allowed that application.

[4] The Applicant, who is self-represented, did not file any response to the Respondent's motion within the time provided by the Rules. Because I did not wish to rule on the motion without the benefit of submissions from the Applicant, I issued an Order under Rule 369(4) on January 25, 2016, scheduling the Respondent's motion to proceed by way of oral hearing when the parties appeared for the hearing of the application for judicial review.

[5] After hearing the parties' oral submissions on the motion on January 27, 2016, I ruled from the bench that the motion was granted, the application dismissed, and the hearing date vacated, with an Order with Reasons to follow. This is that Order and Reasons.

II. Issue

[6] The sole issue to be considered on this motion is whether the Applicant's application for judicial review should be dismissed as moot.

III. Positions of the Parties

A. *Respondent's Submissions*

[7] The Respondent recognizes that the Court is generally reluctant to dismiss applications for judicial review on motion but cites authority that mootness represents a ground for finding no possibility of success and striking out or dismissing an application (see *Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 at paras 8-10 [*Rahman*]).

[8] The Respondent then refers to the principles surrounding the analysis of mootness as advanced in *Borowski v Attorney General of Canada*, [1989] 1 SCR 342 [*Borowski*]. The Respondent notes that the test for mootness involves a two-stage analysis. At the first stage, the Court must consider whether its decision will have a practical effect on the rights of the parties. At the second stage, the Court must consider whether to exercise its discretion and make a determination on the merits, notwithstanding that the matter is technically moot.

[9] The Respondent argues that a decision on the merits in this case will not have the effect of resolving a controversy between the parties, as the Applicant has already been granted by the RPD the relief that he is seeking in his judicial review application. The Respondent further submits that the Court should not exercise its discretion to hear and decide the matter notwithstanding that it is moot. Its position is that judicial economy militates against this. It is preferable to determine disputes in a genuine adversarial context unless the circumstances suggest that the dispute will always disappear before it is ultimately resolved, and this is not a

case where it is in the public interest to address the merits in order to settle the law or to avoid some social cost.

B. *Applicant's Submissions*

[10] At the hearing of the motion, the Applicant communicated with the Court through a Russian-English interpreter. I explained the nature and basis of the Respondent's motion to the Applicant and asked if he opposed the motion. It appeared from his responses that he did. Accordingly, I asked him to explain if there were any benefits that he thought would be achieved if I were to hear and decide his judicial review application, in the context of his claim for refugee protection having already been reopened, and whether there were any other submissions he wished to make in response to the motion.

[11] The Applicant referred to concern that the "other court", by which I understood him to be referring to the RPD, had not believed him in the past and would not believe him in the future. He referred to having advised the RPD at his abandonment hearing that he saw devils present and stated that the RPD disbelieved him and thought he was lying or trying to buy time.

IV. Analysis

[12] As a preliminary point, I note and rely on the decision in *Rahman*, as authority for dismissing an application for judicial review on motion, without hearing the application itself, where the application is without any possibility of success because it is moot.

[13] In the recent decision in *Harvan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1026, Justice Diner succinctly outlined the principles relevant to a mootness analysis, as derived from *Borowski*:

> [7] The test for mootness comprises a two-step analysis. The first step asks whether the Court's decision would have any practical effect on solving a live controversy between the parties, and the Court should consider whether the issues have become academic, and whether the dispute has disappeared, in which case the proceedings are moot. If the first step of the test is met, the second step is — notwithstanding the fact that the matter is moot — that the Court must consider whether to nonetheless exercise its discretion to decide the case. The Court's exercise of discretion in the second step should be guided by three policy rationales which are as follows:
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> i. the presence of an adversarial context;
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> ii. the concern for judicial economy;
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> iii. the consideration of whether the Court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government.
>
> (See *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (S.C.C.) at paras 15-17, and 29-40 [*Borowski*])

[14] My decision is to grant the Respondent's motion and dismiss the Applicant's application for judicial review, on the basis that it is moot and that the relevant factors do not warrant an exercise of discretion to hear the application despite such mootness.

[15] The application seeks to set aside a decision of the RPD that the Applicant had abandoned his claim for refugee protection. The application is moot because the Applicant has applied to the RPD to have his claim re-opened, and that application was granted on July 30, 2015. The Respondent's counsel advised at the hearing that she had checked with the

Immigration and Refugee Board the previous day and confirmed that the Applicant's claim was re-opened and that the Applicant would have an opportunity to put forth his entire claim for refugee protection, although that had not yet been scheduled. As such, a decision on the application for judicial review would not have any practical effect in solving a live controversy between the parties.

[16] Turning to the second step of the *Borowski* analysis, I have considered the relevant factors in the context of the Applicant's submissions. Any concerns he has about the RPD believing him in his re-opened refugee proceeding will have to be addressed before the RPD in that proceeding. The present judicial review application is not capable of addressing those concerns. As such, I find that this application does not represent an adversarial context in which his concerns can be addressed. For the same reasons, I see no compelling reason why judicial resources should be expended on hearing and adjudicating this application.

[17] On the subject of the third *Borowski* factor, I do not consider that deciding the application would raise concerns about the Court encroaching upon the legislative sphere as opposed to fulfilling its adjudicative role. However, I also note the analysis in *Sogi v Canada (Minister Citizenship and Immigration)*, 2007 FC 108, which considers, as part of third factor, whether performing the adjudicative function to decide a matter that is otherwise moot would generate new law that is needed from the Court. I see no scope for such a benefit arising from the case at hand.

[18] As such, having taken into account the *Borowski* factors, I have not identified any basis for an exercise of discretion to hear the application notwithstanding that it is moot.

[19] My Order accordingly grants the Respondent's motion, dismisses the application, and vacates the hearing date for the application. The Respondent did not seek costs, and none are awarded.

ORDER

THIS COURT ORDERS that

1. The Respondent's motion is granted;
2. The Applicant's application for judicial review is dismissed and the hearing date of January 27, 2016 for such application is vacated; and
3. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2334-15
STYLE OF CAUSE:	TSISKARA KARDAVA AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 27, 2016
REASONS FOR ORDER AND ORDER:	SOUTHCOTT J.
DATED:	FEBRUARY 9, 2016

APPEARANCES:

Tsiskara Kardava	FOR THE APPLICANT (Self-represented Applicant)
Aleksandra Lipska	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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