

Federal Court



Cour fédérale

Date: 20171117

Docket: IMM-2328-17

Citation: 2017 FC 1050

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 17, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DJENABOU MATHOS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This applicant was granted leave for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [IRPA]. This is an application for judicial review of the decision by the Refugee Appeal Division [RAD], which refused to assume jurisdiction to hear Ms. Mathos' appeal of the decision by the Refugee Protection Division [RPD].

[2] In what could seem like a comedy of errors surrounding the coming into force of the provisions creating the RAD, which greatly complicated what could have been simple, this judicial review seeks the finding that the RAD has jurisdiction to hear an appeal of an RPD decision. That is not the case based on a systematic examination of the coming-into-force provisions of legislative texts, while avoiding entanglement.

I. Coming-into-force provisions

[3] Originally, Parliament had chosen to set a cut-off date for RPD decisions that could be appealed before the RAD when it was ultimately created. Thus, only RPD decisions rendered after the coming into force of section 36 of the *Balanced Refugee Reform Act*, S.C. 2010, c 8 [BRRA] could be subject to an appeal. Subsection 36(1) read as follows:

No appeal to Refugee Appeal Division

36 (1) A decision made by the Refugee Protection Division before the day on which this section comes into force is not subject to appeal to the Refugee Appeal Division.

Aucun appel en cas de rejet de la demande

36 (1) N'est pas susceptible d'appel devant la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés rendue avant la date d'entrée en vigueur du présent article.

Obviously, that meant that cases filed with the RPD in which it had not yet rendered a decision on the day section 36 came into force were subject to appeal before the RAD.

[4] The date on which that provision came into force clearly had to be specified if that date was not to be the date of royal assent (*Interpretation Act*, R.S.C., 1985, c I-21, subsection 3(2)). Section 42 of the BRRA serves that purpose by stipulating that the section will come into force

two years after the BRRRA receives royal assent. If the government were to decide to bring the BRRRA into force before the two-year period elapsed, it was authorized by the BRRRA to do so by order in council:

Order in council

42 (1) Subject to subsection (2), the provisions of this Act, except sections 3 to 6, 9, 13, 14, 28, 31, 32, 39 and 40, come into force two years after the day on which this Act receives royal assent or on any earlier day or days that may be fixed by order of the Governor in Council.

Décret

42 (1) Sous réserve du paragraphe (2), les dispositions de la présente loi, à l'exception des articles 3 à 6, 9, 13, 14, 28, 31, 32, 39 et 40, entrent en vigueur deux ans après la date de sanction de la présente loi ou, dans cet intervalle, à la date ou aux dates fixées par décret.

The BRRRA received royal assent on June 29, 2010. Under subsection 42(1), section 36 would come into force no later than June 29, 2012.

[5] However, things would not be so simple. Sections 36 and 42 of the BRRRA would be amended by the *Protecting Canada's Immigration System Act*, S.C. 2012, c 17 [PCISA], which came into force on June 29, 2012. With the amendment of sections 36 and 42 in section 68 of the PCISA, not only would the decisions rendered by the RPD before section 36 came into force not be subject to appeal before the RAD, but also refugee protection claims that were referred to the RPD before subsection 36(1) came into force:

68 Sections 36 to 37.1 of the Act are replaced by the following:

No appeal

36 (1) A decision made by the

68 Les articles 36 à 37.1 de la même loi sont remplacés par ce qui suit :

Aucun appel

36 (1) N'est pas susceptible

<p>Refugee Protection Division in respect of a claim for refugee protection that was referred to that Division before the day on which this section comes into force is not subject to appeal to the Refugee Appeal Division.</p>	<p>d'appel devant la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés à l'égard de toute demande d'asile qui lui a été déférée avant la date d'entrée en vigueur du présent article.</p>
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Rather than have a set date for subsection 36(1) to come into force, as was the case in 2010, this time flexibility was maximized, and subsection 36(1) was only to come into force by an order in council of the government once subsection 42(1) was amended by section 69 of the PCISA:

69 Section 42 of the Act is replaced by the following:

Order in council

42 (1) The provisions of this Act, except sections 3 to 6, 9, 13 and 14, subsection 15(3) and sections 28, 31, 32, 39 and 40, come into force on a day or days to be fixed by order of the Governor in Council.

69 L'article 42 de la même loi est remplacé par ce qui suit :

Décret

42 (1) Les dispositions de la présente loi, à l'exception des articles 3 à 6, 9, 13 et 14, du paragraphe 15(3) et des articles 28, 31, 32, 39 et 40, entrent en vigueur à la date ou aux dates fixées par décret.

[6] Things were now clear. By order in council, the category of cases that could not be subject to appeal was broadened, as cases referred to the RPD before the date set out in the order in council would not be subject to appeal. In other words, the only cases referred to the RPD after the second version of section 36 came into force were now forwarded for a process leading to an appeal before the RAD. Thus, the RAD would not be created with cases pending (known in government as a “backlog”). The dates set out in the BRRRA for the coming into force of section 36 were no longer relevant. Only the date set by order in council applied. The cut-off date of June 29, 2012, no longer applied, nor did the BRRRA rule that created a “backlog.”

[7] Thus, an order in council dated August 15, 2012 (SI/2012-65) set the coming-into-force date for the new section 36 as August 15, 2012. As a result, refugee protection claims referred to the RPD under the PCISA after that date would be subject to appeal before the RAD. But that was a mistake. It seems that the RAD would not be ready until later in 2012.

[8] The error therefore had to be corrected. Parliament did so with its budget implementation act entitled *Economic Action Plan 2013 Act, No. 1*, S.C. 2013, c 33, by moving back the date on which appeals would be heard by the RAD. The period during which appeals to the RAD should not have been possible was from August 15, 2012, to December 15, 2012. The 2012 Act (PCISA) would have allowed an eventual appeal to the RAD for refugee protection claims referred to the RPD after the date set by the order, on August 15, 2012. The 2013 budget implementation act corrected that date retrospectively, setting it as December 15, 2012 (see *Interprétation des lois*, P.A. Côté, Éditions Thémis, 4th Ed., at page 508 *et seq.*), by way of section 167 of the *Economic Action Plan 2013 Act, No. 1*:

No Appeal to the Refugee Appeal Division

167 A decision made by the Refugee Protection Division under subsection 107(1) of the *Immigration and Refugee Protection Act* in respect of a claim for refugee protection that was referred to that Division after August 14, 2012, but before December 15, 2012 is not subject to appeal to the Refugee Appeal Division if the decision takes effect in accordance with the *Refugee Protection Division Rules* after the day on which this section

Aucun appel devant la Section d'appel des réfugiés

167 N'est pas susceptible d'appel devant la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés, prise en application du paragraphe 107(1) de la *Loi sur l'immigration et la protection des réfugiés*, à l'égard de toute demande d'asile qui lui a été déférée après le 14 août 2012, mais avant le 15 décembre 2012, lorsque cette décision ne prend effet conformément aux *Règles*

comes into force.

*de la Section de la protection
des réfugiés qu'après la date
d'entrée en vigueur du présent
article.*

[9] Although section 167 did not come into force until the *Economic Action Plan 2013 Act, No. 1* received royal assent on June 26, 2013, its retrospective effect was limited to the period from August 15 to December 15, 2012. It applies only to applications referred to the RPD during that time. Refugee protection claims referred to the RPD after December 15, 2012, are subject to appeal before the RAD. But what about claims referred between August 15, 2012, and December 15, 2012? If the RPD decision was rendered after June 26, 2013, for a claim referred between August 15 and December 15, 2012, it is not subject to appeal before the RAD. Parliament wanted to avoid creating a “backlog” during the four-month period from August 15 to December 15, 2012. Moreover, for those who received a decision before June 2013 for cases referred after August 15, 2012, section 167 would have no effect, retroactive or retrospective. One might think that Parliament wanted to give the benefit of the full effect of the legislation to those who had completed the process before the RPD prior to June 26, 2013.

[10] The retrospective portion of the legislation must be expressly ordered or necessarily implied by the language of the Act (*Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, at paragraph 43). Here, the sole purpose of section 167 is to have a retrospective effect for a specific category of cases, that is, cases referred between August 15 and December 15, 2012, in which there was no decision before June 26, 2013. There is no doubt that Parliament acted expressly. Moreover, no constitutional right to an appeal before the RAD was argued, which would not have been an easy task regardless given the state of the law.

[11] One question thus remains. When does a decision take effect? The answer is found in rule 68 of the *Refugee Protection Division Rules* (SOR/2012-256):

When decision of single member takes effect

68 (1) A decision made by a single Division member allowing or rejecting a claim for refugee protection, on an application to vacate or to cease refugee protection, on the abandonment of a claim or of an application to vacate or to cease refugee protection, or allowing an application to withdraw a claim or to withdraw an application to vacate or to cease refugee protection takes effect

(a) if given orally at a hearing, when the member states the decision and gives the reasons; and

(b) if made in writing, when the member signs and dates the reasons for the decision.

Prise d'effet des décisions rendues par un seul Commissaire

68 (1) Une décision rendue par un seul commissaire de la Section accueillant ou rejetant une demande d'asile, portant sur une demande d'annulation ou de constat de perte de l'asile, prononçant le désistement d'une demande d'asile, d'annulation ou de constat de perte de l'asile ou accueillant une demande de retrait d'une demande d'asile, d'annulation ou de constat de perte de l'asile prend effet :

a) si elle est rendue de vive voix à l'audience, au moment où le commissaire la rend et en donne les motifs;

b) si elle est rendue par écrit, au moment où le commissaire en signe et date les motifs.

II. Facts

[12] No one is disputing that Ms. Mathos submitted her refugee protection claim on December 13, 2012, during the period in question, that is, between August 15, 2012, and December 15, 2012. That refugee protection claim was not heard until March 7, 2017, and was rejected by the RPD on March 23, 2017, well after June 26, 2013. The applicant did not submit any arguments to the contrary.

III. Conclusion

[13] Therefore, by operation of the Act alone, that is, section 167 of the *Economic Action Plan 2013 Act, No. 1*, no appeal is permitted. In fact, the refugee protection claim was “referred” (in French, “déférée”) before December 15, 2012. The first condition set out in section 167 is met. The second is also met. Under section 167, the condition is that the RPD decision must be rendered after June 26, 2013. In this case, it was rendered on March 23, 2017.

[14] Since the two conditions are met, no appeal of the RPD decision before the RAD was permitted. Therefore, the application for judicial review must be dismissed, because the RAD did not have jurisdiction.

[15] The parties agree that this is a matter of the application of interim measures to the specific facts of the case. There are no serious questions of general importance.

JUDGMENT in IMM-2328-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. There is no serious question of general importance to certify.

“Yvan Roy”

Judge

Certified true translation
This 10th day of October 2019

Lionbridge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2328-17

STYLE OF CAUSE: DJENABOU MATHOS v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: NOVEMBER 16, 2017

JUDGMENT AND REASONS: ROY J.

DATED: NOVEMBER 17, 2017

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