Federal Court Cour fédérale

Date: 20180905

Docket: IMM-3546-18

Citation: 2018 FC 890

Ottawa, Ontario, September 5, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

MUHAMMAD AFZAL WATTO

Applicant

and

IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL AND MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

ORDER AND REASONS

I. INTRODUCTION

[1] The Immigration Consultants of Canada Regulatory Council [ICCRC] is the national regulatory body that oversees licensed immigration consultants. It regulates individuals who provide advice or representation on immigration matters to paying clients and who are not otherwise subject to regulation by virtue of membership in another professional body (as, for

example, lawyers are by virtue of their membership in provincial bars). Among other things, the ICCRC has established entry-to-practice requirements; it oversees the professional development and conduct of its members; it receives, investigates and adjudicates complaints against members; and it administers a disciplinary process to sanction members who fail to meet the applicable standards. As a result of the designation of the ICCRC in June 2011 by the Minister of Citizenship and Immigration under subsection 91(5) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], its members may represent or advise paying clients concerning matters relating to that Act. (A similar designation was made under subsection 21.1(5) of the *Citizenship Act*, RSC 1985, c C-29.) A very helpful discussion of the background to the creation of the Canadian Society of Immigration Consultants, the predecessor to the ICCRC, may be found in *Onuschak v Canadian Society of Immigration Consultants*, 2009 FC 1135 at paras 11-19.

[2] The applicant is an immigration consultant and a member of the ICCRC. In December 2015, he became the subject of a complaint to the ICCRC. Following an investigation, the complaint was referred to the ICCRC Discipline Committee for a hearing.

[3] The hearing commenced on February 8, 2018, before a three-member panel. At the outset of the hearing, the applicant raised several preliminary issues, including an objection to the composition of the panel on the basis that one of its members (the Chairperson) is not a member of the ICCRC. The applicant's objections to the matter proceeding before the panel as constituted were dismissed in a written decision released on July 12, 2018. The discipline hearing was then scheduled to resume on August 30, 2018.

[4] By Notice of Application dated July 26, 2018, the applicant seeks to judicially review the July 12, 2018, decision of the discipline committee. By Notice of Motion dated August 22, 2018, the applicant also seeks, among other things, an interlocutory stay of the discipline hearing pending the final determination of the judicial review application.

[5] The stay motion came before me on August 28, 2018. It was opposed by the respondent ICCRC. Counsel from the Department of Justice appearing on behalf of the respondents the Attorney General of Canada and the Minister of Citizenship and Immigration [the Minister] took no position on the stay motion. She also asked that the Attorney General of Canada and the Minister be removed from the present proceeding. I will address this request below.

[6] Shortly after the hearing, I issued an order granting the motion and staying the discipline hearing pending the final determination of the judicial review application. I stated that my reasons for so ordering would be provided at a later date. They are set out below. Before turning to those reasons, however, some preliminary issues must be addressed as they have a direct bearing on how this matter will proceed from this point forward.

II. JURISDICTION

[7] The first preliminary issue is the jurisdiction of this Court to deal with the application for judicial review. In part, this issue can be dealt with easily because of the recent decision of the Federal Court of Appeal in *Zaidi v Immigration Consultants of Canada Regulatory Council*, 2018 FCA 116 [*Zaidi*]. However, while this decision does answer some key questions

concerning judicial review of decisions of the ICCRC, it leaves others unresolved. To understand the implications of the decision in *Zaidi,* some background is required.

[8] Mr. Zaidi wished to become a Regulated Canadian Immigration Consultant. The ICCRC is responsible for determining and administering the qualifications to be granted this designation. The ICCRC denied Mr. Zaidi's application because he failed to obtain the minimum required score on language testing. Representing himself, Mr. Zaidi challenged the ICCRC's determination by way of an application for judicial review. The matter proceeded as an application under section 18.1 of the *Federal Courts Act,* RSC 1985, c F-7. The ICCRC and the Minister had been named as respondents but, upon the latter's request, the Minister was ordered removed from the proceeding at an early stage.

[9] Justice McDonald dismissed Mr. Zaidi's application for judicial review (*Zaidi v Immigration Consultants of Canada Regulatory Council*, 2017 FC 141). Among other things, she determined that the ICCRC had not made a "decision" which was subject to review by the Federal Court pursuant to section 18.1 of the *Federal Courts Act* (see para 16).

[10] Still representing himself, Mr. Zaidi appealed this decision to the Federal Court of Appeal. Neither the Attorney General of Canada nor the Minister was a party to the appeal. The ICCRC was the sole respondent.

[11] In disposing of the appeal, the Federal Court of Appeal made two important determinations. First, the ICCRC is a federal board, commission, or tribunal pursuant to

subsection 18(1) of the *Federal Courts Act* and, as such, the Federal Courts have jurisdiction over it in matters of judicial review. Writing for the Court, Near JA explained the basis for this conclusion as follows (at para 9):

> In this case, the appellant has asked to review an alleged decision at the core of the ICCRC's mandate to regulate who is able to practice a profession. Further, the source of that power is federal legislation, the IRPA, by which the government has delegated its regulatory power to the ICCRC. In my view, this decision is public in nature and made with authority delegated by the federal government and the Federal Courts have jurisdiction to hear it pursuant to subsection 18(1) of the *Federal Courts Act*.

[12] As a result of this determination, there can be no question that this Court has jurisdiction to consider the applicant's application for judicial review. The conduct of a discipline proceeding concerning a member clearly is at the core of the ICCRC's mandate as a self-governing body for the regulation of immigration consultants whose source of authority is federal legislation.

[13] Second, the Federal Court of Appeal determined that judicial review proceedings concerning the ICCRC are subject to sections 72 and 74 of the *IRPA*. This meant that, in the absence of a certified question, the Federal Court of Appeal lacked jurisdiction to hear Mr. Zaidi's appeal. (Since she had been dealing with the matter under section 18.1 of the *Federal Courts Act,* Justice McDonald was not asked to certify a question under subsection 74(d) of the *IRPA*.)

[14] As the Federal Court of Appeal held, the fact that the ICCRC derives its authority to regulate immigration professionals from the Minister's designation of that organization under

subsection 91(5) of the *IRPA* is sufficient to make it subject to the jurisdiction of the Federal Courts. However, the Court does not explain in any detail why it also found that this entails that decisions of the ICCRC, a self-governing body of professionals, are “matters” under the *IRPA* within the meaning of subsection 72(1) of that Act and, thus, are subject to the more restrictive judicial review process set out therein.

[15] This latter determination has important implications for how the present matter moves forward. One is that, under subsection 72(1) of the *IRPA*, an applicant must first obtain leave to proceed with an application for judicial review. No such requirement applies to judicial review applications brought under section 18.1 of the *Federal Courts Act.*

[16] As it happened, the applicant framed his application for judicial review with express reference to subsection 72(1) of the *IRPA* and included a request for leave. While his motion returnable on August 28, 2018, originally sought the granting of leave to proceed with the application for judicial review as part of the relief requested, the applicant later recognized that this was not the appropriate way to proceed. Not all of the necessary steps to prepare the leave application for the Court’s consideration had been completed at that point and, in any event, the usual practice of the Court is to dispose of leave applications without personal appearance (cf. *IRPA*, subsection 72(2)). I will return below to the question of what remains to be done to complete the leave application.

[17] A second important implication of the determination that judicial review of decisions of the ICCRC is subject to sections 72 and 74 of the *IRPA* is the identification of the appropriate respondent(s). The Federal Court of Appeal did not address this issue in *Zaidi*. I turn to it next.

III. IDENTIFICATION OF THE APPROPRIATE RESPONDENT(S)

[18] The applicant named the ICCRC, the Attorney General of Canada and the Minister of Citizenship and Immigration as respondents on his judicial review application. The Attorney General of Canada and the Minister have asked to be removed as respondents. Further, while none of the parties raised this issue, I queried whether the ICCRC can be a respondent to a judicial review application that is subject to sections 72 and 74 of the *IRPA*.

[19] Rule 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules,* SOR/93-22, provides that, unless he or she is the applicant, the respondent to an application for leave is "in the case of a matter under the *Immigration and Refugee Protection Act*, each Minister who is responsible for the administration of that Act in respect of the matter for which leave is sought." I note that no other potential respondent is mentioned.

[20] Having regard to this Rule, and in the absence of any objection from any other party, I agree with counsel from the Department of Justice that the Attorney General of Canada should not have been named as a respondent. I will direct that the Attorney General of Canada be removed from the proceeding and that the style of cause be amended accordingly.

[21] With regard to the Minister of Citizenship and Immigration, counsel from the Department of Justice acknowledged that, on its face, Rule 5(2)(b) requires that he be named as a respondent on the judicial review application given his responsibility for designating the ICCRC under subsection 91(5) of the *IRPA*. Counsel submitted, however, that I should interpret this rule in accordance with Rule 3 of the *Federal Courts Rules*, SOR/98-106,which is incorporated into the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* by Rule 4(1) of the latter. Rule 3 of the *Federal Courts Rules* states that the rules of the Federal Courts "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." Counsel submitted that removing the Minister would promote the just, most expeditious and least expensive determination of this matter.

[22] There is much force to counsel's submission that the Minister is not well-placed to defend the ICCRC's decision and, therefore, has little, if anything, to contribute to the judicial review proceeding. However, without finally deciding the matter, I remain unconvinced that the principle articulated in Rule 3 of the *Federal Courts Rules* could authorize me to ignore the express, unambiguous language of Rule 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*. Further, it is not clear to me at this point that the Minister's participation would necessarily complicate or prolong the judicial review application unduly. Finally, at this early stage I cannot rule out the possibility that the Minister would be able to assist the Court on general questions of law that could arise in the judicial review application. As a result, I am not prepared to remove the Minister as a respondent at this time. This determination is made without prejudice to the right of the Minister to renew his request at a later stage of these proceedings, if so advised.

[23] The last preliminary issue is whether the ICCRC was properly named as a respondent on the application for leave and judicial review. The legal basis for so naming the ICCRC is far from clear to me, even though one of its decisions is the subject of the application. The *IRPA* itself does not provide for this. Rule 303 of the *Federal Courts Rules*, which establishes the general rule for naming respondents on judicial review applications, does not apply to judicial review proceedings that are subject to the *IRPA* (see Rule 4(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*). As noted above, Rule 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* only provides for the naming of a Minister (or Ministers) as respondent(s) to an application for judicial review under the *IRPA*. It does not provide for the tribunal whose decision is in issue to be a respondent. In this respect, Rule 5(2)(b) is consistent with well-established common law restrictions on the scope of participation of tribunals whose decisions are being challenged on judicial review (see, for example, the discussion of these restrictions by Stratas JA in *Canada (Attorney General) v Quadrini,* 2010 FCA 246, at paras 15-24). Moreover, the inapplicability of Rule 303 of the *Federal Courts Rules* entails that one mechanism by which the ICCRC could have been named as a respondent (i.e. under Rule 303(3), where the tribunal may be substituted for the Attorney General of Canada when, upon the latter's request, the Court is "satisfied that the Attorney General is unable or unwilling to act as a respondent" after having been so named) is not available. On the other hand, it bears noting that the decision at issue was not made by the ICCRC *per se* but, rather, by a panel of its discipline committee and that the ICCRC appeared as a party in the proceedings before that committee.

[24] All this being said, I have decided that it is not necessary or desirable to resolve this issue at this stage of the proceedings. The applicant named the ICCRC as a respondent (indeed, as the principal respondent, having named the Attorney General of Canada and the Minister of Citizenship and Immigration only out of an abundance of caution) and he has not suggested that it should be removed. The ICCRC clearly has an interest in the issues before the Court, both on the motion for a stay of the discipline proceeding and on the underlying application for judicial review. I also note that the Federal Court of Appeal did not raise any issue concerning the standing of the ICCRC in *Zaidi*. Accordingly, subject to further order of the Court, I am satisfied that the ICCRC should continue to participate in this application for judicial review as a respondent, at least for the time being.

IV. THE STAY MOTION

[25] This brings me, finally, to my reasons for allowing the applicant's motion for an interlocutory injunction staying the discipline proceedings. In keeping with the Court's usual practice, my reasons explaining my decision to grant the motion will be relatively brief.

[26] The test for an interlocutory injunction is well-known. The applicant must demonstrate three things: (1) that his application for judicial review raises a "serious question to be tried," in the sense that the application is neither frivolous nor vexatious; (2) that he will suffer irreparable harm if an injunction is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits) favours granting the injunction. See *R v Canadian Broadcasting Corp*, 2018 SCC 5, at para 12 (references omitted); *Manitoba (Attorney General) v*

Metropolitan Stores Ltd, [1987] 1 SCR 110; and *RJR -MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

[27] Looking first at whether the judicial review application raises a serious issue, the applicant focused his submissions on the stay motion on the question of whether the discipline panel may include an individual who is not a member of the ICCRC. In particular, the applicant contends that the participation of a non-member on the panel of the discipline committee is contrary to section 158 of the *Canada Not-for-profit Corporations Act*, SC 2009, c 23, the statue under which the ICCRC is constituted.

[28] Section 158 of the *Canada Not-for-profit Corporations Act* provides as follows:

> The articles or by-laws may provide that the directors, the members or any committee of directors or members of a corporation have the power to discipline a member or to terminate their membership. If the articles or by-laws provide for such a power, they shall set out the circumstances and the manner in which that power may be exercised.

[29] The panel of the discipline committee found that the application of the relevant principles of statutory interpretation resulted in there being "two plausible interpretations of this provision from which this Panel could choose." It set out these two interpretations as follows:

1. Section 158 is intended to place limits on the membership on a discipline committee, such that a corporation may not have articles or by-laws providing for a discipline committee composed of anyone other than directors of the corporation, members of the corporation, or any committee of directors or members;

2. Section 158 is not intended to be exhaustive, and does not limit a corporation's ability to make by-laws to create a discipline committee that includes individuals who are not directors or members.

[30] The panel ultimately adopted the second of these interpretations, a choice the correctness of which the applicant now challenges in his application for judicial review. Given the panel's own acknowledgment that both interpretations of the provision were "plausible," and given the panel's detailed reasoning defending the interpretation it adopted, I am satisfied that the issue of whether it adopted a defensible interpretation of section 158 of the Act meets the "serious question to be tried" threshold. (In framing the issue this way, I am deliberately avoiding any comment at this stage on what is the applicable standard of review.)

[31] Second, I am also satisfied that the applicant has established that he would suffer irreparable harm if a stay of the discipline hearing were not ordered. I base this conclusion on two considerations. First, if the applicant were to succeed on his application for judicial review, the time, effort and other resources he would have had to devote to the discipline hearing would be thrown away. Given the nature of the underlying proceeding, there could be no recovery of his losses through an award of damages against the ICCRC. Second, given the very early stage at which the discipline hearing stands at the moment, the exposure of the evidence supporting the allegation of misconduct at the hearing could cause unwarranted reputational injury to the applicant (at least, unwarranted for the time being) in the event that the judicial review application were to succeed. In this respect, the applicant's position is much closer to those considered in *Adriaanse v Malmo-Levine*, 1998 CanLII 8809 (FC), and *Bennett v British*

Columbia (Superintendent of Brokers) (1993), 77 BCLR (2d) 145 (CA), where stays of discipline proceedings were ordered at an early stage of the proceedings, than it is to the one considered in *Camp v Canada (Attorney General)*, 2017 FC 240 [*Camp*], where a stay of a discipline proceeding that was almost completed was refused. See, in particular, the discussion of the importance of timing in *Camp* at paras 24-28.

[32] Finally, I am satisfied that the balance of convenience favours granting a stay. Again, I base this conclusion on two considerations. First, while the ICCRC and, indeed, the public at large have a legitimate interest in seeing the complaint against the applicant adjudicated and disposed of in a timely way, they have no interest in this being done before a tribunal that is not constituted in accordance with the law. The application for judicial review will resolve this foundational question. Second, while counsel for the ICCRC quite properly stressed the importance of not allowing administrative proceedings to be fragmented by interlocutory applications for judicial review, I am satisfied that the legal issue raised by the applicant concerning the composition of the discipline tribunal panel falls within the "exceptional circumstances" exception to this general rule: see *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-33; and *Singh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 683 at paras 28-37. In light of this, I am also satisfied that an interlocutory stay of the discipline proceedings against the applicant will avoid, rather than promote, the fragmentation of that proceeding. Conversely, refusing a stay would have the opposite effect in the event that the applicant is successful in his application for judicial review while the discipline hearing is still underway.

V. NEXT STEPS

[33] Having determined that it is appropriate to order an interlocutory stay of the discipline proceedings regarding the applicant, I hasten to add that it is in the interests of all concerned that the application for leave and judicial review be determined as expeditiously as possible. As noted above, the complaint against the applicant was first made in December 2015. Its adjudication has already been long-delayed. Proceedings before this Court ought not to add to the delay any more than is absolutely necessary.

[34] The applicant perfected his leave application in accordance with Rule 10 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* on August 27, 2018. In view of the discussion above concerning the role of the Minister in this matter, the Minister may well intend to take no position on the leave application. I would therefore direct the Minister to advise the other parties and the Court of whether this is so no later than 4:00 p.m. EST on September 7, 2018. Of course, if the Minister intends to oppose the application for leave, he will have the time provided by Rule 11 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* to serve and file his responding materials.

[35] Similarly, I note that the ICCRC provided written submissions opposing leave as well as a stay in connection with the motion heard on August 28, 2018. While the ICCRC has the right to file a response on the leave application in accordance with Rule 11 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, it may well be prepared simply to rely on the written materials already filed as its submissions opposing leave to proceed with the

judicial review. I would therefore direct the ICCRC to advise the other parties and the Court whether this is so no later than 4:00 p.m. EST on September 7, 2018. In the event that the ICCRC wishes to file responding materials on the leave application proper, it will have the time provided by Rule 11 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* to do so.

[36] If the Minister takes no position on the leave application, and if the ICCRC elects to rely on its prior written submissions, the applicant shall have until 4:00 p.m. PST on September 12, 2018, to file any reply submissions. Otherwise, the time limit for reply submissions set out in Rule 13 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* will apply.

[37] In the event that leave is granted, the scheduling of the hearing of the application for judicial review as well as the service and filing of further materials will be addressed in accordance with section 74 of the *IRPA* and Rule 15 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules.*

VI. COSTS

[38] Finally, for the sake of completeness, I should address the issue of costs.

[39] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* states:

> No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

[40] No doubt being aware of the exceptional nature of costs awards in respect of judicial review proceedings under the *IRPA*, the applicant properly did not seek costs either in relation to the underlying application or in relation to the motion for an interlocutory stay. In the circumstances, there will be no order as to costs.

ORDER IN IMM-3546-18

THIS COURT ORDERS that

1. The motion for an interlocutory stay of the proceeding of the panel of the ICCRC Discipline Tribunal scheduled to resume on August 30, 2018, is granted;
2. The request of the Attorney General of Canada to be removed from the present proceeding is granted and the style of cause will be amended accordingly;
3. The request of the Minister of Citizenship and Immigration to be removed from the proceeding is denied without prejudice to the right of the Minister to renew that request at a later stage of the proceeding;
4. The Minister of Citizenship and Immigration is directed to advise the other parties and the Court no later than 4:00 p.m. EST on September 7, 2018, whether he will be taking a position on the application for leave to proceed with an application for judicial review. If the Minister intends to oppose the application for leave, he will have the time provided by Rule 11 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* to serve and file his responding materials;
5. The ICCRC is directed to advise the other parties and the Court no later than 4:00 p.m. EST on September 7, 2018, whether it is content to rely upon the materials already filed with respect to the question of whether leave to proceed with an application for judicial review should be granted or if, instead, it wishes to file additional responding materials in accordance with Rule 11 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*; and
6. If the Minister takes no position on the leave application, and if the ICCRC elects to rely on the written submissions already filed, the applicant shall have until

4:00 p.m. PST on September 12, 2018, to file any reply submissions. Otherwise, the time limit for reply submissions set out in Rule 13 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* will apply.

7. There will be no order as to costs.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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