Federal Court  Cour fédérale

Date: 20210907

Docket: IMM-648-20

Citation No.: 2021 FC 922

Toronto, Ontario, September 07, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

LEYLA HAJIYEVA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The respondent has commenced this motion in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106, for an Order dismissing the applicant's application for leave to appeal and for judicial review of a decision by an officer under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] The respondent submitted that the application is moot. The applicant responded that it is not, and raised a series of procedural issues.

[3] For the reasons below, the respondent's motion is dismissed.

I. Facts and Events Leading to this Motion

[4] In 2001, the applicant entered Canada and claimed refugee status. In 2002, the Refugee Protection Division ("RPD") granted the applicant's refugee claim. In 2004, she became a permanent resident of Canada.

[5] In 2015, the Minister of Citizenship and Immigration made an application to cease the applicant's refugee protection, on the grounds that she had repeatedly re-availed herself of the protection of her country of nationality. On July 4, 2019, the RPD granted the Minister's application to cease the applicant's refugee protection. On August 10, 2019, a report was prepared under *IRPA* s. 44, finding that the applicant was inadmissible to Canada.

[6] On December 30, 2019, a departure order was issued against the applicant. Her departure from Canada was later scheduled for March 2020.

[7] On January 9, 2020, the applicant was invited to attend an interview at the offices of the Canada Border Services Agency ("CBSA") on January 22, 2020. At that interview, the officer gave the applicant a written Notification of Pre-Removal Risk Assessment. The officer testified on this motion that he did so in error.

[8] On January 24, 2020, the applicant submitted a PRRA application.

[9] On January 27, 2020, the officer advised the applicant that her PRRA application would not be processed due to the error.

[10] On January 31, 2020, the applicant filed an application for leave and for judicial review of the officer's decision to cancel the applicant's application for a PRRA and an Order in the nature of *mandamus* compelling the respondent to complete the processing of that application.

[11] The applicant was scheduled to attend at the offices of the CBSA on March 13, 2020, to finalize removal arrangements. Her removal was cancelled due to the pandemic.

[12] On July 3, 2020 the applicant became eligible for a PRRA, owing to the expiry of the 12-month period in paragraph 112(2)(*b.1*) of the *IRPA*.

[13] On February 22, 2021, this Court, *per* Shore J., issued an Order requiring the preparation of a certified copy of the tribunal record, prior to the disposition of the application for leave to commence an application for judicial review. The parties referred it as a "Production" Order.

[14] By letter dated March 5, 2021, to counsel for the applicant, the respondent's counsel confirmed that CBSA would be contacting the applicant to initiate offering her an opportunity to file a PRRA application. The letter also took the position that the litigation was moot upon being notified by the CBSA about her eligibility for a PRRA. The respondent requested that the applicant discontinue the litigation, failing which, the respondent would file a motion for

Judgment and include a request for an Order to rescind the Production Order dated February 22, 2021.

[15] A flurry of correspondence and events ensued, some of which are described below.

[16] By letter dated March 11, 2021, CBSA advised the applicant to present herself at a CBSA office on March 25, 2021. The letter attached a PRRA information sheet. This document is different from a Notification of Pre-Removal Risk Assessment.

[17] On March 15, 2021, the respondent made an informal request for an extension of time to deal with the Production Order dated February 22, 2021.

[18] By letter dated March 23, 2021, counsel for the applicant advised counsel for the respondent that the applicant was not in a position to attend the March 25, 2021 meeting with CBSA. The applicant took the position that the CBSA's apparent intention to offer the applicant an opportunity to apply for a PRRA was premature due to the live litigation (i.e. the application for leave and for judicial review concerning the officer's earlier decision to cancel the applicant's PRRA application filed on January 24, 2020). Counsel also advised, on a "separate, but more important note", the applicant was in self-quarantine due to close contacts with a person who had tested positive for COVID-19.

[19] On March 24, 2021, the respondent filed this motion to dismiss the application for leave and for judicial review. The respondent filed an affidavit of Mr. Ramesh Patel affirmed on

March 23, 2021, to support the motion. The respondent requested that the affidavit be used not only for the purposes of the motion, but that leave be granted to file the affidavit in the underlying application for leave and for judicial review.

[20] Also on March 24, 2021, the applicant served a Direction to Attend under the *Federal Courts Rules* requiring Mr. Patel to attend for cross-examination on his affidavit by videoconference on March 25, 2021.

[21] The applicant did not attend the CBSA offices on March 25, 2021.

[22] Mr. Patel did not attend for cross-examination on March 25, 2021.

[23] The applicant filed a responding record on this motion dated March 31, 2021. In her written submissions, the applicant took the following positions:

- Justice Shore should hear the respondent's motion, because it included a request to vary the Production Order dated February 22, 2021;
- leave should not be granted to the respondent to file Mr. Patel's affidavit for the purposes of the application for leave and for judicial review;
- the applicant should be permitted to cross-examine Mr. Patel on his affidavit;
- the Production Order dated February 22, 2021, should not be vacated;
- the respondent's motion should be heard orally, not in writing under Rule 369 of the *Federal Courts Rules*;

- the application for leave and for judicial review was not moot, so the respondent's motion should be dismissed.

[24] The respondent filed a reply motion record on April 6, 2021. The respondent's written submissions answered the applicant's positions as follows:

- the respondent took no position as to which member of the Court should determine the motion;
- the applicant had no right to cross-examine Mr. Patel prior to leave being granted to apply for judicial review, and any cross-examination would amount to a fishing expedition;
- the purpose of the Production Order was to encourage settlement before an application for leave is formally adjudicated, and was made under a Notice to the Profession issued by the Court (entitled "Pilot Project (Toronto Local Office Only): Settlement Discussions in Proceedings under the *Immigration And Refugee Protection Act*" as revised July 4, 2019). The motion based on mootness should be decided before compliance with the Production Order;
- the application for leave and for judicial review was moot;
- an oral hearing of this motion is not warranted because the motion was not complicated;
- the Court should consider a costs award against the applicant's counsel personally, owing to the positions taken and arguments made in response to the motion.

[25] On April 7, 2021, the applicant filed a written argument by way of sur-reply. It made a number of submissions impugning the accuracy and propriety of the respondent's reply submissions. The applicant restated her request for an oral hearing of this motion.

[26] By letter on the same date, the respondent objected to the applicant's sur-reply.

[27] After reviewing the motion materials, I issued a Direction inviting the parties to clarify their respective positions on issues related to whether the applicant had been notified, in March 2021, under subs. 160(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 *(the "IRPR"*) that she may apply for protection by way of a PRRA application.

[28] Subsection 160(1) of the *IRPR* contemplates that a person may apply for protection under *IRPA* s. 112 after they are given notification to that effect. Subsections 160(3) and (4) provide:

PRE-REMOVAL RISK ASSESSMENT	**EXAMEN DES RISQUES AVANT RENVOI**
Notification	**Avis**
(3) Notification shall be given	**(3)** L'avis est donné :
(a) in the case of a person who is subject to a removal order that is in force, before removal from Canada; and	**a)** dans le cas de la personne visée par une mesure de renvoi ayant pris effet, avant son renvoi du Canada;
(b) in the case of a person named in a certificate described in subsection 77(1) of the Act, when the summary of information and other evidence is filed under subsection 77(2) of the Act.	**b)** dans le cas de la personne nommée dans le certificat visé au paragraphe 77(1) de la Loi, lorsque le résumé de la preuve est déposé en application du

paragraphe 77(2) de la Loi.

When notification is given

(4) Notification is given

(a) when the person is given the application for protection form by hand; or

(b) if the application for protection form is sent by mail, seven days after the day on which it was sent to the person at the last address provided by them to the Department.

Délivrance

(4) L'avis est donné :

a) soit sur remise en personne du formulaire de demande de protection;

b) soit à l'expiration d'un délai de sept jours suivant l'envoi par courrier du formulaire de demande de protection à la dernière adresse fournie au ministère par la personne.

[29] The effect of notification under subs. 160(3) is described in s. 232 of the *IRPR*:

Stay of removal — pre-removal risk assessment

232. A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, and the stay is effective until the earliest of the following events occurs:

(a) the Department receives confirmation in writing from the person that they do not intend to make an application;

(b) the person does not make an application within the period provided under section 162;

Sursis : examen des risques avant renvoi

232 Il est sursis à la mesure de renvoi dès le moment où le ministère avise l'intéressé aux termes du paragraphe 160(3) qu'il peut faire une demande de protection au titre du paragraphe 112(1) de la Loi. Le sursis s'applique jusqu'au premier en date des événements suivants :

a) le ministère reçoit de l'intéressé confirmation écrite qu'il n'a pas l'intention de se prévaloir de son droit;

b) le délai prévu à l'article 162 expire sans que l'intéressé fasse la demande qui y est prévue;

(c) the application for protection is rejected;	c) la demande de protection est rejetée;
(d) [Repealed, SOR/2012-154, s. 12]	d) [Abrogé, DORS/2012-154, art. 12]
(e) if a decision to allow the application for protection is made under paragraph 114(1)(a) of the Act, the decision with respect to the person's application to remain in Canada as a permanent resident is made; and	e) s'agissant d'une personne à qui l'asile a été conféré aux termes du paragraphe 114(1) de la Loi, la décision quant à sa demande de séjour au Canada à titre de résident permanent;
(f) in the case of a person to whom subsection 112(3) of the Act applies, the stay is cancelled under subsection 114(2) of the Act.	f) s'agissant d'une personne visée au paragraphe 112(3) de la Loi, la révocation du sursis prévue au paragraphe 114(2) de la Loi.

[30] The applicant responded to the Direction by letter dated August 19, 2021. The respondent answered by letter dated August 23, 2021.

[31] The applicant then filed a further submission by letter dated August 23, 2021. In it, the applicant took issue with certain submissions of the respondent and again requested an oral hearing of this motion.

[32] The Court understands that the applicant has not applied for a PRRA since July 2020 when the 12-month period expired under *IRPA* paragraph 112(2)(*b.1*).

[33] I also understand from the parties' correspondence that CBSA has recently re-invited her to attend its offices on September 8, 2021.

[34] Neither party filed an affidavit or made submissions on this motion to explain the practices of CBSA in providing notice to individuals under *IRPR* s. 160 about a PRRA application. As noted, the documents filed on this motion include a PRRA information sheet and a "Notification of Pre-Removal Risk Assessment".

II. Analysis

[35] I will summarily address the procedural issues raised by the applicant and then explain my conclusion on the respondent's motion.

A. *Procedural Issues*

[36] First, I do not believe that Justice Shore is required to hear and determine this motion. The respondent made no formal request under Rule 399, but asked that the Order be vacated as a consequence of the mootness of the application for leave and for judicial review. The Production Order dated February 22, 2021, appears to have been made under the Court's Notice to the Profession, rather than arising from a motion commenced by a party that was argued on the merits. In the result, the contents of Production Order dated February 22, 2021, will not be affected by the Order in this motion.

[37] Second, there is no need for an oral hearing. I believe I can justly determine these matters in writing. A hearing would cause further expense to the parties and delay.

[38] Third, the respondent filed Mr. Patel's affidavit on this motion to support the request for a dismissal of the application for leave and for judicial review, based on mootness. The applicant's objection to its use on this motion is misplaced. Under the *Federal Courts Rules*, leave of the Court is not required to file an affidavit to support a motion. Rule 363 requires a party to a motion to set out in an affidavit any facts to be relied upon by that party that do not appear on the Court file. Rule 312 does not apply.

[39] Fourth, the parties disagreed on whether the applicant had a right to cross-examine Mr. Patel on his affidavit for the purposes of the motion. The applicant referred to Rule 83 of the *Federal Courts Rules*, while the respondent maintained that Rule 12(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules,* SOR/93-22 (as amended) precluded cross-examination on an affidavit before leave to commence an application for judicial review is granted. Given the result I have reached on the merits of the respondent's motion, cross-examination of Mr. Patel would serve no purpose because his answers would not affect the outcome. It is therefore unnecessary to decide the legal questions raised by the parties' submissions or (if the applicant were to prevail on the argument) to adjourn this motion to enable cross-examination to occur.

[40] Fifth, leave of the Court is required under Rule 312(a) to file Mr. Patel's affidavit for the purposes of the application for leave and for judicial review. Leave is denied at this time. If the application for leave is granted, the respondent may renew the request for leave to file an affidavit under Rule 312(a) – presumably an affidavit updated to reflect the then-current facts. It

would be natural for the applicant to seek leave to cross-examine on that affidavit, if so advised, by concurrent cross-motion under Rule 312(b).

[41] Sixth, the Production Order dated February 22, 2021 remains extant. If it has not already been complied with, the time periods for compliance set out in it shall begin to run effective on the date of the Order below.

[42] I turn now to the respondent's motion for a dismissal of the application for leave and for judicial review, based on mootness.

B. ***Is the application for leave and for judicial review moot?***

[43] The parties agree that the Supreme Court of Canada established the test for mootness in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. Sopinka J. described the underlying policy and test to be applied at p. 353:

> Mootness
>
> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or

> practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

Sopinka J. concluded that there was no longer a live controversy or concrete dispute between the parties (at page 357*a*).

[44] The respondent submitted that in applying *Borowski*, the Court should conduct a two-stage analysis. At the first stage, the Court is to consider whether its decision on the merits would have a practical effect on the rights of the parties. At the second stage, the Court should determine whether it should exercise its discretion to make a determination on the merits, notwithstanding that the matter is technically moot.

[45] For the analysis at stage one, the respondent submitted that the applicant is now able to apply for a PRRA. The relief sought in her application for leave and for judicial review was an order quashing and setting aside the officer’s decision to cancel the PRRA filed on January 24, 2020, and an order compelling the respondent to complete the processing of the PRRA application. Because the applicant is now able to file a PRRA application due to the passage of time, the respondent argued that the practical effect of any success on the application for judicial

review would not have any effect on the rights of the parties. It would simply allow her to have the PRRA application processed, which can be done immediately if she were to apply for a PRRA now. The respondent relied on *Hamdan v. Canada (Citizenship and Immigration)*, 2019 FC 993 (Boswell J.).

[46] The respondent's initial written submissions took the position that because the applicant's was eligible to apply for a PRRA as of July 3, 2020 and was notified on March 11, 2021, she had been granted the remedy sought in her application for leave. Should she choose to make such an application, she would not be removed prior to her PRRA application being "fully considered, assessed and determined". The submission did not elaborate or refer to any statutory or other authority, but contended that the application for leave was moot as of March 11, 2021 (i.e. which coincides with the date on which CBSA mailed the applicant the PRRA information sheet).

[47] The applicant submitted that her application was not moot. She argued that, if she is successful on the application for leave and on her subsequent application for judicial review, she will have demonstrated that she was notified of her ability to apply for a PRRA under *IRPR* s. 160 on January 22, 2020, that she made that application on January 24, 2020 in response to that notification, and that this PRRA application was not cancelled and should be processed. Having been notified under s. 160 and having applied for a PRRA within 15 days of that notification, the applicant would be entitled to a stay of her removal from Canada by operation of law: *IRPR* subss. 160(3) and (4) and s. 232. The applicant did not make any submissions on any new or different risk factors that may apply if her PRRA application were considered to be filed as of now, versus the risks that may be considered if it were considered filed as of January 24, 2020.

[48] The applicant referred to the respondent's public guidance entitled "Processing pre-removal risk assessment (PRRA) applications: Intake". It provides that a foreign national who is subject to a removal order that is in force and whose previous PRRA application has been refused, abandoned or withdrawn may apply for a "subsequent" PRRA as long as they are not subject to the 12-month bar on PRRA applications. However, "subsequent PRRA applicants do not benefit from a regulatory stay of removal". From the applicant's perspective, she has already applied for a PRRA and would therefore be a subsequent PRRA applicant if she were to file today.

[49] The respondent's reply submissions did not directly answer this point, but advised that the applicant was "notified of her ability to apply for a PRRA" by the CBSA. I note that this submission used the word "notified" (like *IRPA* subss. 160(3) and (4) and *IRPR* s. 232) but did not expressly advise or confirm that such an application by the applicant would in fact result in a stay in this case.

[50] The respondent's later submissions, in response to my Direction, advised that the applicant must be notified prior to removal under subs. 160(3) and that a stay would apply when notification is given. However, those submissions advised that the applicant did not attend the March 25, 2021 interview and consequently she had <u>not</u> been notified under *IRPR* s. 160 in March 2021.

[51] CBSA could presumably give notification under *IRPR* s. 160 when the applicant attends CBSA's office for an interview on September 8, 2021 – assuming the applicant complies with

the CBSA requirement to do so and the CBSA notifies her under s. 160 in a manner that triggers a stay under s. 232. No affidavit or representation from counsel advised what CBSA intends to do at the September 8 interview and, in particular, whether the CBSA will notify the applicant under s. 160. For her part, the applicant did not advise whether she intends to attend CBSA's offices on September 8. Nor did she explain how the existence or contents of the pending application for leave could, in law, justify her failure to comply with a CBSA requirement to attend that interview. It is not the role of this Court to provide either or both parties with advice on the just resolution of their differences. My task is only to decide the respondent's motion.

[52] In my view, in the current circumstances, the applicant's request for leave and for judicial review, if successful, could result in the applicant being entitled to a stay of her removal by operation of the *IRPR*, something she would not have if she were to apply for a PRRA now without being notified by CBSA under *IRPR* s. 160. The applicant's position is different from the circumstances of *Hamdan* (at paras 31-37), in which the applicant had applied for a PRRA and there was no issue as to a possible stay by operation of the *IRPR*.

[53] The applicant has identified a live controversy with a practical effect on her, on the assumption that she is correct and succeeds on her application for leave and for judicial review of the decision to cancel or decline to process her PRRA application. That assumption leads to a further question: does her application for leave have any merit? Put alternatively, which side's characterization of the facts in January 2020 is preferable? The applicant's position was that she was notified by CBSA and in response, filed her PRRA application. The respondent's position

was that the erroneous notification and PRRA application were within the statutory 12-month period barring such applications under *IRPA* paragraph 112(2)(*b.1*).

[54] The parties did not make substantive submissions on the merits of the application for leave during their submissions on this motion. The motion for leave has not been decided and in my view, it is not appropriate to make any comments on its merits or on the better characterization of the events in January 2020. Those issues are for the judge determining the application for leave.

[55] In addition, waiting for the leave decision may not tell us much to assist with this motion. The Court does not ordinarily provide reasons for granting or denying leave under *IRPA* s. 72. Leave will be granted where a "fairly arguable case" is disclosed: *Bains v. Canada (Minister of Employment and Immigration)* (1990), 47 Admin LR 317; 109 NR 239 (FCA); *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, [2020] 2 FCR 299, at para 19. However, the Court's application of the "fairly arguable case" standard could consider not only the legal merits of the prospective application but possibly also other related factors: see the discussion in another statutory context in *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224, [2020] 1 FCR 362, at paras 14-16.

[56] The respondent has the burden on this motion to demonstrate that there is no live controversy or that the application would not have a practical effect on the rights of the applicant. That burden has not been discharged on the evidence and submissions. I must

conclude that, as of the writing of these Reasons, there exists a live controversy that affects the applicant's rights.

[57] In the circumstances, I am not persuaded that the application is moot. It is unnecessary to consider the discretion to hear the matter at stage two of *Borowski*.

[58] Accordingly, I will dismiss the respondent's motion for an Order dismissing the application for leave and for judicial review.

C. ***Costs***

[59] There will be no order as to costs. It is appropriate in this case to explain that conclusion briefly. Some of the submissions on this motion went beyond the usual argy-bargy between advocates in litigated matters.

[60] The respondent asked the Court to consider a costs award against the applicant's counsel personally owing to, in effect, the various issues and arguments raised by the applicant's counsel to defend this motion to dismiss the application for leave and for judicial review. The applicant raised a number of procedural arguments that caused the motion to be more involved that it might have been, with resulting additional time spent by the respondent to answer them. The applicant had mixed success on those procedural arguments and none of them affected the outcome. However, in my view, the positions taken by the applicant reveal advocacy with a layering of technical and substantive arguments, but do not rise to the extraordinary level that may justify a costs award against her counsel personally.

[61] The applicant filed a sur-reply argument and, later, an additional reply argument in response to the Direction. Both are inherently extraordinary in nature and should be filed only in rare circumstances. In this case, they appeared to be an attempt to get the last word.

[62] The applicant's submissions in sur-reply also purported to seize on alleged or perceived improprieties in the respondent's written submissions in reply. The applicant's sur-reply alleged "gross misrepresentations" in the respondent's reply, and made a number of specific claims of a similar nature. In my view, these comments were unwarranted – and ultimately unpersuasive. Fortunately, the respondent's letter objecting to the filing of the sur-reply was, aptly, succinct.

[63] Considering these circumstances, I make no costs Order on this motion.

III. Conclusion

[64] The respondent's motion will be dismissed, without costs.

ORDER in IMM-648-20

THIS COURT ORDERS that:

1. The respondent's motion to dismiss the application for leave and for judicial review on the basis of mootness is dismissed.
2. This Order does not prevent the respondent from seeking leave to adduce additional affidavit evidence under Rule 312 of the *Federal Courts Rules* or from arguing later that the application for judicial review is, or has become, moot.
3. If the Order dated February 22, 2021, has not already been complied with, the time periods for compliance set out in it shall begin to run as of the date of this Order.
4. There is no costs Order on this motion.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-648-20
STYLE OF CAUSE:	LEYLA HAJIYEVA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	SEPTEMBER 7, 2021

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