Federal Court Cour fédérale

Date: 20240110

Docket: IMM-4449-22

Citation: 2024 FC 39

Ottawa, Ontario, January 10, 2024

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

UMME HABIBA
UME AREEBA
SALMAN AHMAD
CANADIAN COUNCIL FOR MUSLIM WOMEN
NATIONAL COUNCIL OF CANADIAN MUSLIMS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED ORDER

I. Overview

[1] The Respondent, the Minister of Citizenship and Immigration [the Minister], brought a motion in writing asking that the Applicants' judicial review application not proceed to a

hearing. The Minister asks the Court to grant the application for judicial review in part and order the matter be sent back to be redetermined by a different visa officer. The Applicants oppose the Respondent's motion, arguing that a hearing is required to address the unresolved constitutional issues raised in this judicial review.

[2] The Applicants are three individual Applicants and two public interest organizations. The individual Applicants applied for permanent residence as family members of a Protected Person in Canada. An officer at the High Commission of Canada in the UK rejected their application, finding that the three children were not "family members" because their adoption process was not in accordance with the definition of "adoption" under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. The Officer also found there were insufficient humanitarian and compassionate factors to grant the application in spite of this ineligibility.

[3] Subsection 3(2) of *IRPR* provides that "*adoption* … means an adoption that creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship." The Applicants argue that in Pakistan, adoption is governed exclusively by Islamic law (*"kafala"*) which does not permanently sever the pre-existing legal relationship between children and their biological parents. On judicial review, the Applicants challenge the constitutionality of the definition of adoption contained in subsection 3(2) of the *IRPR*, arguing the provision is in breach of sections 2, 7, and 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*] and is not saved by section 1.

[4] The individual Applicants also argue, in the alternative, that the Officer's consideration of the humanitarian and compassionate factors was unreasonable.

[5] The Minister concedes on this motion that the Officer's determination on the humanitarian and compassionate factors was unreasonable and requires redetermination. It is on this basis that the Minister is asking the Court to grant the application for judicial review in part. It is "in part" because the Minister makes no concession with respect to the Applicants' constitutional argument.

[6] The Minister makes two principal arguments supporting the granting of this motion. First, the Minister argues it would be a waste of the court's resources, and inconsistent with Rule 3 of the *Federal Court Rules*, SOR/98-106, to proceed to a hearing, where the final outcome, sending the matter back to be redetermined, has already been agreed to by the Minister. Second, because the Minister has agreed to send the matter back to be redetermined on the humanitarian and compassionate grounds, the application is moot because there is no longer a live controversy between the parties.

[7] I am not persuaded that either of the Minister's arguments favours granting the motion. The constitutionality of subsection 3(2) of *IRPR* remains in dispute between the parties; its application is key to an officer's assessment of the individual Applicants' application on redetermination. Further, I do not accept the Minister's suggestion that without a formal court ruling finding that the public interest applicants have standing, their interests in the application can essentially be ignored.

[8] Based on the reasons below, the Minister's motion is dismissed.

II. Procedural History

[9] On May 12, 2022, the individual Applicants filed an application for leave and judicial review challenging the Officer's decision. Soon after, the Applicants retained new counsel and in July 2022 obtained an extension of time to file their materials by consent. In August 2022, the individual Applicants filed their application record and also brought a motion seeking to amend their application for leave and judicial review in order to: i) add two public interest parties as co-applicants: the Canadian Council for Muslim Women and the National Council of Canadian Muslims; ii) to add a ground for relief, namely asking for a declaration that the definition of "adoption" in subsection 3(2) of *IRPR* breaches sections 2, 7, and 15 of the *Charter* and is not saved by section 1; and iii) that the grounds on which the application for judicial review is based include *Charter* arguments.

[10] The Minister opposed the Applicants' motion to make these amendments. In December 2022, Associate Judge Horne granted the Applicants' motion, allowing for the addition of the two public interest parties as co-applicants and further amendments to the relief sought and grounds of the application to reflect the *Charter* arguments being made. Associate Judge Horne noted that in allowing the two public interest parties to be co-applicants, he was not determining whether they had public interest standing and that this issue could be resolved at a later step in the litigation.

[11] On July 6, 2023, Justice Pamel ordered the production of the certified tribunal record. The certified tribunal record was produced on July 28, 2023.

[12] After not being able to reach an agreement on settlement, the Minister filed this motion for judgment on September 22, 2023. The Applicants opposed the motion, filing their own responding motion record including affidavits from one of the individual Applicants and representatives from the public interest Applicants.

[13] On January 3, 2024, Justice Pamel granted leave and a hearing was scheduled for April 2, 2024.

III. Constitutional Issue Remains Unresolved

[14] In my view, granting the Minister's motion would end this litigation without addressing the key issue raised by the Applicants namely the constitutionality of subsection 3(2) of *IRPR*.

[15] I agree with the Applicants that if the matter was sent back at this stage, with no determination about the constitutionality of the adopted child definition, the individual applicants are likely to again be found ineligible under the class for which they are applying because they would not be considered "family members" under s 176(1) of *IRPR*. Once found ineligible, their application could only be granted if an officer decided to provide discretionary relief due to humanitarian and compassionate factors under s 25 (1) of the *Immigration and Refugee Protection* Act, SC 2001, c 27. Further, as noted by both the individual and public interest Applicants, the broader issue raised by the application, the constitutionality of these provisions,

would remain unresolved for other applicants who are subject to similar adoption laws in their home countries.

[16] In these circumstances, both the Minister's arguments that granting the motion would be i) the most just, expeditious and least expensive way to proceed, or ii) that the application would be moot given the Minister's concession, cannot succeed. Ultimately, there remains a live controversy that affects the rights of the Applicants that would not be resolved by granting this motion.

[17] The Minister argues that it is well established that the "doctrine of mootness may not be avoided merely by seeking declaratory relief" because "declaratory relief, in itself, does not provide a basis to establish a live controversy" (*Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC 1181 at para 42). But in this case, the Applicants are not simply seeking a declaration in the air; the declaration they seek is directly relevant to how the applications of the individual Applicants will be assessed on a determinative question: are they "family members" who can be included as dependents on an application for permanent residence?

[18] The Minister also relies on the Federal Court of Appeal's decision in *NO v Canada (Citizenship and Immigration)*, 2016 FCA 214, where the Court found the application was moot in spite of an unresolved constitutional issue. This authority does not assist the Minister's position. The Federal Court of Appeal found that no live controversy remained because the applicant was already a permanent resident, and the applicant's concern that the constitutional

issue was relevant because they could lose their status in the future was speculative. The Applicants' concern about the application of the definition of "adoption" in subsection 3(2) of *IRPR* is not speculative; it will be applied to their circumstances on redetermination.

[19] As explained by one of the individual Applicants in their affidavit filed with their response to the Minister's motion:

> It is very important for our family to resolve the constitutional question inherent in our application. We are concerned that if we cannot put forward our constitutional challenge through an oral hearing, we will simply face the same denial of our applications due to regulation 3(2). The IRCC officer will face the very same regulation that does not recognize *kafala* adoption.

[20] The Minister argues that this Court's decision in *Chakra v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 112 [*Chakra*] supports their position. I disagree. In *Chakra*, this Court found that there remained no live controversy between the parties because the Minister had agreed that the decision at issue, the finding of inadmissibility, had to be redetermined because the "decision had been improperly delegated" (at para 6) and there was no consideration of whether an exemption could apply.

[21] In this case, the potential administrative law remedy only arises once the provision that is being challenged is applied. The first step on redetermination is determining whether the individual Applicants are family members under s 176(1) of *IRPR*. This would involve considering whether they are "dependent child[ren]" under s 1(3) of *IRPR,* which in turn requires a consideration of whether their adoption meets the requirements set out in subsection 3(2) of *IRPR*. This is the very provision that is being challenged as unconstitutional. It is only after this

core issue is determined and the Applicants are found not to be "family members" that the officer would then consider if there are humanitarian and compassionate factors favouring an exercise of their discretion.

[22] Further, none of the cases relied on by the Minister have public interest co-applicants as this one does. The Minister argues that the public interest co-applicants are irrelevant to this motion because there has been no court order confirming that they have standing. This is an untenable position that is inconsistent with the jurisprudence on public interest standing and Associate Judge Horne's December 2022 Order [the Order] with respect to amending this application to include the public interest groups as co-applicants. That Associate Judge Horne did not decide standing in his Order, finding it should be decided at a later step in the litigation, does not support the Minister's position that the potential interests of the co-applicants on this application can simply be ignored.

[23] As was already explained by Associate Judge Horne at paragraph 11 of the Order:

> A party, including a public interest group, can assert standing when an application for leave and judicial review is commenced. It need not seek a determination of standing by way of a preliminary motion. In such cases, a party's standing to bring the application will typically be dealt with at the hearing on the merits (*Canadian Counsel for Refugees v Canada (Immigration Refugees and Citizenship),* 2017 FC 1131 at para 21).

[24] A core purpose of public interest standing is: "to prevent the immunization of legislation or public acts from any challenge" (*Canadian Council of Churches v Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236 at pp 250, 252 cited in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 40). The

Supreme Court of Canada has cautioned against the screening out of public interest groups prematurely (*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 paras 27–28).

[25] By asking the Court to ignore the public interest co-applicants' interests, the Minister, in effect, asks the Court to determine that they have no standing without the benefit of any argument on the issue, ending the litigation in its entirety. As noted by Justice Diner, "the discretion to make a determination of standing at an early stage of the proceeding must be explicitly exercised, but should only be exercised sparingly" (*Canadian Counsel for Refugees v Canada (Immigration Refugees and Citizenship)*, 2017 FC 1131 at para 24, citing *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at paras 13–14). The potential existence of a further complex issue arising from this litigation—whether the public interest litigants have standing to challenge the provision at issue—also supports dismissing the Minister's motion.

[26] Overall, as I have set out above, I am satisfied that there remains a live controversy between the parties that is best addressed by the Court when hearing the judicial review with the benefit of the full record. The motion for judgment is accordingly dismissed.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4449-22
STYLE OF CAUSE:	UMME HABIBA, UME AREEBA, SALMAN AHMAD, CANADIAN COUNCIL FOR MUSLIM WOMEN, NATIONAL COUNCIL OF CANADIAN MUSLIMS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
ORDER:	SADREHASHEMI J.
DATED:	JANUARY 8, 2024
AMENDED:	JANUARY 10, 2024

SOLICITORS OF RECORD:

Landings LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS UMME HABIBA UME AREEBA SALMAN AHMAD
Lenczner Slaght LLP Barristers & Solictors Toronto, Ontario	FOR THE APPLICANT CANADIAN COUNCIL OF MUSLIM WOMEN
Nusaiba Al-Azem Daniel Kuhlen Dalal Souraya Barrister & Solicitor Ottawa, Ontario	FOR THE APPLICANT NATIONAL COUNCIL OF CANADIAN MUSLIMS
Attorney General of Canada Department of Justice Canada Toronto, Ontario	FOR THE RESPONDENT