Federal Court  Cour fédérale

Date: 20110331

Docket: IMM-6306-09

Citation: 2011 FC 402

Ottawa, Ontario, March 31, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DAVID SIVAK, LUCI BAJZOVA, MONIKA SIVAK, and LUCIE BAJZOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-6448-10

AND BETWEEN:

MILAN LASAB, MILADA LASABOYA, and ELVIS KULASIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5543-10

AND BETWEEN:

**MIROSLAV SARKOZI, ANDREJ BALOG,
ZANETA BALOGOVA, GALINA BALOGOVA,
VIKTOR SARKOZI, ANDREJ BALOG,
ANDREJ BALOG, MARIE BALOGOVA,
and LUKAS BALOG**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

THE MOTIONS

[1] I have before me three related motions that raise important procedural issues about how to deal with applications before the Court currently being pursued by Roma people from the Czech Republic.

[2] The common thread to the materials is that the cases involve claimants of Roma ethnicity who unsuccessfully asserted refugee claims against the Czech Republic and that, in each case, the RPD in rendering its decisions relied upon a document authored by the Research Directorate of the

Immigration and Refugee Board (IRB). The document is called "Issue Paper, Czech Republic, Fact-Finding Mission Report on State Protection" (Issue Paper) and is dated June 2009.

[3] The Applicants feel that the RPD's reliance upon the Issue Paper, and the context in which it was produced, gives rise to an institutional bias (real or apprehended) that affects their claims as well as those of other Roma claimants where adequate state protection findings were made that relied, in whole or in part, upon the Issue Paper.

[4] Specifically, on file IMM-6306-09, the motion is for:

1. An order, pursuant to section 18.4 (2) of the *Federal Courts Act*, converting the within judicial review into an action and to be joined with the proceedings in IMM-5543-10 as well as joining the within proceeding(s) with any action for damages filed by the Applicants herein and/or in IMM-5543-10;
2. In the alternative to (1) above, an order compelling the Respondent's affiant, Mr. Gordon Ritchie, to answer the questions refused on cross-examination, and compelling production of the documents refused as part of the Tribunal Record;
3. Certification of the within proceedings, whether by way of action or judicial review, as a class-action proceeding with the following classes:
    a. all Czech Roma claimants awaiting disposition of their RPD hearing whose hearing has not commenced prior to the issuance of the Issue Paper;
    b. all Czech Roma claimants whose hearing commenced prior to the June, 2009 Issue Paper, but whose decision was not released until after the issuance of the June, 2009 Report;

c. all Czech Roma claimants who received a negative RPD decision in which the RPD relied on the June, 2009 Issue Paper, in whole or in part, to render a negative decision and whose case is,

   i. either before the Federal Court on judicial review; or

   ii. no judicial review was filed;

   but in either event in (i) or (ii), the claimants are awaiting a PRRA;

d. all Czech Roma claimants who were denied by the RPD, based on the June, 2009 Issue Paper, and who have;

   i. either filed a PRRA and are awaiting a decision; or

   ii. have not filed a PRRA but are awaiting removal;

   but in either event in (i) or (ii) have not yet been removed;

e. all Czech Roma claimants, who were denied by the RPD, based on the June, 2009 Issue Paper, who are "removal ready" and may be legally removed;

f. all Czech Roma, who were denied by the RPD, based on the June, 2009 Issue Paper, who have been removed.

4. Costs of this motion and such further relief as counsel may advise and this Court deems just.

[5] On file IMM-5543-10, the motion is for:

a. An order, granting oral argument on the within leave application, and the granting of leave, for special circumstances, as set out by the Federal Court in *Aguiar v Canada*, [1991] F.C.J. No. 181;

b. An order that the within motion be heard at the same time as the motion proposed in *Sivak, et al. v Canada*, IMM-6306-09;

c. In all other respects, order(s), *Mutatis Mutandis*, to those sought in *Sivak, et al., v. Canada*, IMM-6306-09, and the motion record therein, to be heard concurrently with the within motion;

d. Costs of this motion and such further relief as counsel may advise and this Court deems just.

[6] On file IMM-6448-10, the motion is for:

a. An order granting oral argument on the within leave application, and the granting of leave, for special circumstances, as set out by the Federal Court in *Aguiar v Canada*;

b. An order that the within motion be heard at the same time as the motions proposed in *Sivak, et al. v Canada*, IMM-6306-09 and *Sarkozi et al. v. Canada*, IMM-5543-10;

c. In all other respect, order(s), *Mutatis Mutandis*, to those sought in *Sivak, et al., v. Canada*, IMM-6306-09,

d. Costs of this motion and such further relief as counsel may advise and this Court deems just.

[7] While each motion is related to the central issue of institutional bias and the most just and expeditious way of dealing with applications before the Court that involve this concern, I think it is best to address each motion in turn rather than attempt a global assessment of what is at stake substantively and procedurally.

[8] At the hearing of these motions before me in Toronto on February 11, 2011 counsel agreed and suggested to the Court that the motions be modified in the following ways:

a. That the class action certification issue should be argued and dealt with at a separate hearing following my determination on the other issues raised. The time of that further hearing will be set following consultation with counsel;

b. That instead of the Applicants in IMM-6448-10 and IMM-5543-10 seeking to have their leave applications determined following oral argument on the basis of special circumstances, I will personally review and decide these leave applications as a prelude to and as part of these motions.

The Court is an agreement with these modifications.

IMM-6306-09

[9] This motion is about how best to deal with the allegations of institutional bias arising from the Issue Paper in the case of these particular Applicants, as well as how to address numerous other applications by failed claimants who may feel they have been similarly mistreated.

[10] The Applicants feel that the usual judicial review process has not served them well to date and they are asking the Court to impose a more thoroughgoing approach that will allow them and the Court to examine whether the use of the Issue Paper by the RPD, and the full context in which it was produced, does give rise to an institutional bias, apprehended or otherwise.

[11] The Applicants have cross-examined Mr. Gordon Ritchie (the Director of the Research Directorate with the operations branch of the national headquarters office of the IRB) on the affidavit he swore on behalf of the Respondent, and they do not think that Mr. Ritchie has provided all of the answers and the documentation to which they feel they are entitled, or that the Court will need to decide this matter. Hence, they want the Court to either order Mr. Ritchie to answer the refused questions and produce the refused documents, or to convert their judicial review application to an action so that they can avail themselves of the full discovery process.

The Refused Questions

[12] In my view, the Respondents are correct to emphasize that cross-examination during the course of judicial review differs significantly from examination for discovery. As Justice Hugessen made clear in *Merck Frosst Canada Inc. v Canada (Minister of Health)*, [1997] F.C.J. No. 1847, at paragraph 4:

> It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:
>
> a. the person examined is a witness not a party;
> b. answers given are evidence not admissions;
> c. absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;

d. production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;
e. the rules of relevance are more limited.

[13] I also agree with the Respondent that judicial review is a summary process and is not intended to involve the procedural thoroughness that comes with an action. This is why cross-examination on affidavits in judicial review proceedings is far more limited in scope than examination for discovery and, apart from questions going to a witness' credibility, is limited to relevant matters arising from the affidavit itself. See *Hoffmann-La Roche Ltd. v Canada (Minister of National Health and Welfare)*, [1997] 2 F.C. 681, 126 F.T.R. 21, 72 C.P.R. (3d) 362 (T.D.).

[14] Having reviewed the transcript of the cross-examination, it is my view that if the Court now orders Mr. Ritchie to answer the refused questions, the Court would in effect, be allowing the Applicants to treat their judicial review application as equivalent to an action by allowing cross-examination to become more like discovery. In my view, if something approaching discovery is required before this dispute can be effectively adjudicated, then the Applicants should be required to satisfy the test under section 18.4(2) of the *Federal Courts Act* to have their judicial review application converted to an action, rather than distorting the summary process and creating some kind of hybrid. Section 18.4 (1) of the *Federal Courts Act* says that an application "shall be heard and determined without delay and in a summary way." This sounds peremptory to me. To order Mr. Ritchie to answer the refused questions and produce the refused documents would, in my view, change the nature of these summary proceedings. The only exception to section 18.4 (1) is specifically provided for in section 18.4 (2) of the Act:

> The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

I will come to this subsection later but, for the moment, I think that, because of the range and depth of information that the Applicants are seeking through Mr. Ritchie, they should really have to satisfy the test for conversion rather than retain a summary procedure in conjunction with what would, in effect, be a substantial amount of discovery.

[15] Where I do part company with the Respondent on this first issue is with regard to the Minister's assertion that the refused questions are just not relevant. The fact that Mr. Ritchie has already answered almost 500 questions and voluntarily provided answers to six undertakings, which included another 600 additional pages of documents, does not render answers to the refused questions unnecessary or irrelevant. My review of the transcript and the questions refused suggests to me that they are all directly relevant to the issues surrounding institutional bias that are focused upon the Issue Paper and which the Applicants want the Court to assess.

[16] In effect, then, if this matter were to proceed as a summary judicial review application, it is my view that relevant information would be missing that is required for the Court to determine the central issue of institutional bias.

Access to Information

[17] The Respondent also says that the type of information sought by the Applicants through the 13 refused cross-examination questions is available to them through an access to information

request and, because the Applicants have not made such a request, they should not be entitled to the information through cross-examination of Mr. Ritchie.

[18] In fact, the Respondent goes so far as to say that the Applicants failure to make an access request "signifies their view that such information is not crucial or important to their case; if they really wanted such information, an access request could have been made when this litigation was commenced in December of 2009."

[19] I find neither of these arguments convincing. In my view, it is mere speculation to suggest that the Applicants could find out through an access request all of the relevant facts that Mr. Ritchie can provide to the Applicants and the Court. An access request involves many pitfalls and contingencies that could result in an inadequate evidentiary base for this application. In any event, the Respondent has put forward Mr. Ritchie and the Applicants are entitled to cross-examine him. The right to cross-examine is not curtailed simply because the Applicants may be able to obtain relevant information from another source. In my view, the prime concern must be whether the Court can decide the issues raised in the application on the basis of the evidence that is now on the record.

[20] The suggestion that the Applicants do not really want this information because they did not initiate an access request in December of 2009 is not tenable. Mr. Ritchie swore his affidavit in June 2010. Given the issues raised in their application, I see nothing insincere in the Applicants attempting to obtain as part of these proceedings what they feel the Court will need to decide a crucial issue of their application.

Additional Documents

[21] Similar issues arise under this topic as discussed above. The Respondent points out that the Applicants just will not accept that the obligation on the RPD to produce documents as part of the Certified Tribunal Record pursuant to Rule 17 of the Federal Court's *Immigration and Refugee Protection Rules* is far different from, and much more limited, than the onus upon a defendant in an action to locate, list and produce relevant documents.

[22] The record that the RPD is required to produce under Rule 17 is hardly likely, in my view, to assist the Court in a situation where there are allegations of bias on the part of the decision maker. The Respondent seeks to sidestep this problem on the grounds that the Applicants have produced no factual evidence of bias and are simply on a fishing expedition to find evidence that will support their bare allegations. In particular, the Respondent attacks the admissibility of the affidavit sworn by Ms. Amina Sherazee on behalf of the Applicants because it "suffers from exactly the same fatal defects and legal shortcomings as her affidavit filed in *Huntley*: it is speculative, fails to explain the basis for her beliefs or knowledge, contains argument and legal opinion and constitutes no more than an expression of her own unsubstantiated and argumentative conclusions."

[23] As the Respondent points out, if additional documentary disclosure is sought due to an allegation of some impropriety on the part of the tribunal, adequate facts to support the allegation of impropriety must be presented. As the Federal Court of Appeal confirmed in *Access Information Agency Inc. v Canada (Transport)*, 2007 FCA 224 at paragraph 21:

> When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes

> of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case. (Emphasis added)

[24] In *The Access Information Agency* case the Federal Court of Appeal was dealing with Rule 317 of the *Federal Court Rules*. Rule 17 may be even more restrictive in terms of what the RPD is compelled to produce, and the jurisprudence concerning the limits on cross-examination of a witness may well mean that very little emerges as part of the usual document production process that will help the Court in situations where bias is alleged. This does not mean, of course, that an applicant can make a bare allegation of bias and then be allowed to go on a fishing expedition to find evidence that will support that allegation. I do not believe, however, that this is the case before me.

[25] I have reviewed Ms. Sherazee's affidavit. It suffers from many of the faults mentioned by the Respondent, but it is not totally on a par with the inadmissible affidavit Ms. Sherazee swore in *Huntley*, and there are portions of her affidavit in this case that cannot be dismissed out of hand:

1. Ms. Sherazee represents Roma people on a regular basis and she has personal knowledge of this area of law and the conditions under which Roma people come to her for advice;
2. She refers to public statements made by the Minister of Immigration to the effect that refugee claims from the Czech Republic can be false or bogus;

3. She refers to the fact-finding mission to the Czech Republic that, in her experience, was unprecedented and that was intended to determine whether there was state protection for Roma refugees in the Czech Republic;
4. She cites and produces comments of the Minister of Immigration on the Issue Paper following its release and the imposition of visa restrictions on the Czech Republic;
5. She points to the statistics regarding overall acceptance rates for Czech Roma and their decline during the time when the Minister of Immigration was making his public comments and following the release of the Issue Paper.
6. She points out (and a large component of her legal practice involves Roma refugees) that, to her knowledge, nothing has happened to improve the plight of the Czech Roma between 2008 and the present that would account for the severe drop in positive acceptance statistics;
7. She also points out deficiencies in the Issue Paper and the way it was produced, and the extent to which it remains inexplicably silent about the vast majority of persecution suffered by the Czech Roma. In other words, she questions its methodology.

[26] It is possible to take issue with this affidavit and, possibly, to exclude portions of it for the reasons given by the Respondent, and there may well be justifiable explanations for the facts presented that will alleviate or dispel any concerns about bias. I am not in a position at this stage to assess the significance of what Ms. Sherazee has brought to the Court's attention through her affidavit. In my view, however, it contains sufficient acceptable evidence by someone who is knowledgeable about Roma refugees to justify the request for further disclosure, whether that

disclosure occurs as part of the judicial review process or as a result of conversion of this application to an action. It renders the Applicants' allegations of bias as something more than bald, unsupported, assertions.

Conversion to Action

[27] In my view, the important question for the Court at this juncture is whether this application should be converted to an action under subsection 18.4 (2) of the *Federal Courts Act*.

[28] To begin with, I agree with the principles and accept the authorities dealing with conversion put forward by the Respondent.

[29] A judicial review application should only be converted to an action in those infrequent cases where the relevant facts cannot be satisfactorily established and weighed through affidavit evidence. The test is not whether trial evidence would be superior, but whether affidavit evidence is inadequate. See *Macinnis v Canada (Attorney General)*, [1994] 2 F.C. 464 (F.C.A.); and *Chen v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1573.

[30] I would like to point out, however, that in *Drapeau v Canada (Minister of National Defense)*, (1995), 179 N.R. 398 (Fed. C.A.), the Federal Court of Appeal made it clear that subsection 18.4(2) of the *Federal Courts Act* places no limits on those considerations which may be taken into account in deciding whether to allow a judicial review application to be converted into an

action, but that the desirability of facilitating access to justice and avoiding unnecessary cost and delay are relevant factors.

[31] I would also like to point out that, in the more recent case of *Assoc. des crabiers acadiens inc. v Canada (Attorney General)*, 2009 FCA 357, the Federal Court of Appeal again set out the purpose and scope of conversion under section 18.4(2) of the *Federal Courts Act* at paragraphs 34-39:

> 34. Nonetheless, Parliament did provide an exception to judicial review at subsection 18.4(2) of the Act. This measure overrides the usual procedure and allows judicial review applicants to have their existing application for judicial review converted into an action.
>
> 35. The conversion into an action is not effected by operation of law. It is submitted to the Federal Court for review and must be justified. The Court is vested with the discretionary authority to accept an application for conversion "if it considers it appropriate."
>
> 36. The proceedings that citizens may use to challenge administrative decision, namely, the application for judicial review and its conversion into an action when judicial review is applied for in the Federal Court, are ultimately aimed at attaining and meting out administrative justice that is timely, efficient and equitable, both for citizens and the administration.
>
> 37. The courts have developed certain analysis factors that apply to an application for conversion so as to better frame the exercise of the discretion set out at subsection 18.4(2). <u>It goes without saying that each case involving an application for conversion turns on its own distinct facts and circumstances. And, depending on those facts and circumstances, the individual or collective weight of the factors may vary.</u> We will now go over those factors. [Emphasis added.]
>
> 38. The conversion mechanism makes it possible, where necessary, to blunt the effect of the restrictions and constraints resulting from the summary and expeditious nature of judicial review. These are, for example, far more limited disclosure of evidence, affidavit evidence instead of oral testimony, and different and less advantageous rules for cross-examination on affidavit than for examination on discovery (see *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1998), 146 F.T.R. 249 (F.C.)).

> 39. Therefore, conversion is possible (a) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (*Haig v. Canada*, [1992] 3 F.C. 611 (F.C.A.)), (b) when the facts allowing the Court to make a decision cannot be satisfactorily established through mere affidavit evidence (*Macinnis v. Canada)* [1994] 2 F.C. 464 (F.C.A.)), (c) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (*Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and (d) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Hinton v. Canada*, [2009] 1 F.C.R. 476. [Emphasis added.]

[32] I also note that my colleague, Mr. Justice Pinard, has recently looked at this issue in *Huntley v Canada (Minister of Citizenship and Immigration)*, 2010 FC 407 at paragraphs 7 and 8 and has noted that, in order to convert, the Court must find procedural or remedial inadequacies with the normal judicial review process and that conversion should only be granted "in the clearest of circumstances" and only on an exceptional basis when the Court "feels the case cries out for the full panoply of a trial."

[33] This is a case about institutional bias. It is also a case in which the Applicants are claiming damages. If this matter proceeds as a judicial review application I do not believe that the Court will have before it all that it needs to decide the principal issues, nor do I believe that, in this case, the Applicants are merely engaged upon a fishing expedition and that they are simply speculating that, if conversion occurs, hidden evidence will come to light.

[34] I do not believe that every institutional bias case requires conversion to an action and I am well aware that this Court and the Federal Court of Appeal have decided allegations of institutional

bias in the past without the need to convert. See, for example, *Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124.

[35] Looking at what has transpired to date in this application, however, I think the following have to be noted:

a. For all of its faults, the Sherazee affidavit convinces me that the Applicants' allegations of institutional bias cannot be safely disregarded as mere speculation. Something significant happened around the time of the Issue Paper and there is some evidence to suggest that what happened could at least be perceived in full context as giving rise to a reasonable apprehension of bias. It is worth remembering that, in writing the reasons for the Federal Court of Appeal in *Geza*, Justice Evans acknowledged that he could not "point to a single fact which, on its own, is sufficient to establish bias" (paragraph 58), but he concluded that the apprehension of bias test was satisfied in that case "given the high standard of impartiality to which the Board is held in its adjudicative capacity…";

b. The rules of cross-examination and document production as they pertain to the judicial review context have not, in my view, yielded the evidence that the judge who hears this matter will need to decide the issue of institutional bias. The Respondent has chosen to assert those rules – in my view appropriately – and has pointed out that cross-examination is not discovery. On the facts of this case, however, that means that the Court will not be able to decide the bias issue on the basis of affidavit evidence;

c. If I were to order Mr. Ritchie to answer the refused questions and produce relevant documents required to decide this case in the context of judicial review, I would, in effect, be obscuring the important distinctions between cross-examination and discovery;

d. In my view, this case "cries out for the full panoply of a trial" because it raises issues of the utmost importance to the integrity of, and public perception regarding, our immigration system, and I do not think these issues can be decided on the basis of the record that has been assembled, or that could be assembled, for judicial review

The *TeleZone* Decision

[36] The Respondent says that the Applicants cannot claim damages in the same action as they are seeking to have their negative refugee decision subjected to administrative law remedies. The Respondent says that, if the Applicants wish to claim damages, then they have to commence a separate action. As authority for this position, the Respondent cites the recent Supreme Court of Canada decision in *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 and, in particular, paragraph 52 of that decision which reads as follows:

> All of the remedies listed in s. 18(1)(*a*) are traditional administrative law remedies, including the four prerogative writs -- *certiorari*, prohibition, *mandamus* and *quo warranto* -- and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

[37] It is not entirely clear to me why the Respondent is raising this issue at this time. Presumably, if the Respondent's position is correct, then the judge who eventually hears and deals with this dispute will rule accordingly. At this stage, however, the Respondent appears to be suggesting that the Court should not convert this application to an action because the Applicants are seeking damages and so are required to commence separate proceedings if they want to claim compensatory relief, which they can do at any time. Hence, the Respondent argues, the judicial review application should continue without conversion and there are no remedial inadequacies to justify conversion because the Applicants can, and must, commence a separate action for their damages claim.

[38] In so far as it is necessary for me to consider this argument at this stage of the proceedings, it is my view that the Respondent is mistaken in reading *TeleZone* to say that separate proceedings in this Court are required in a case such as the one before me.

[39] In *TeleZone*, the Supreme Court of Canada was dealing with a case that had come out of an Ontario court. In the present case, I am dealing with proceedings that began in the Federal Court so that there are no Federal Court domain issues that stand in the way of this Court dealing with the traditional administrative law remedies as set out in section 18 of the *Federal Courts Act*, and where section 18.4(2) of the *Federal Courts Act* specifically allows conversion to an action where the Court feels it is appropriate.

[40] In *TeleZone*, the Supreme Court of Canada made it clear that plaintiffs in an action for damages in the courts of Ontario are not entitled to add a supplementary claim that will result in a trespass on the jurisdiction of the Federal Court.

[41] The Respondent concedes that there is no bar to the Applicants claiming damages in this Court. The section 18 relief they seek is the exclusive domain of this Court; and section 18.4 (2) specifically permits conversion to an action. Hence, in my view, there is no jurisdictional bar to allowing the Applicants to seek damages and section 18 relief in the same action.

[42] In the related Supreme Court of Canada case of *Parrish & Heimbecker Ltd., v Canada (Agriculture and Agri-Food)*, 2010 SCC 64, I think this position is made clear at paragraphs 17-18 and 21:

> For the reasons given by Binnie J. in the companion decision of *Canada (Attorney General) v. TeleZone*, 2010 SCC 62, the Crown's arguments must fail.
>
> Unlike in *TeleZone*, the Federal Court's jurisdiction is not at issue in this appeal. Parrish brought its action in the Federal Court. However, the correct procedure – action or application for judicial review – is at issue. Section 17 of the *Federal Courts Act* gives the Federal Court concurrent jurisdiction over claims for damages against the Crown. Section 18 of the *Federal Courts Act* does not derogate from this concurrent jurisdiction. There is nothing in ss. 17 or 18 that requires Parrish to be successful on judicial review before bringing its claim for damages against the Crown.
>
> […]
>
> For the reasons given in *TeleZone*, the Federal Court should have decided Parrish's claim for damages without requiring it to first be successful on judicial review.

[43] In *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 CarswellNat 1937, 2008, the Federal Court of Appeal made it clear that section 18.4 (2) addresses the procedural shortcomings of a judicial review application, but also the remedial ones, including the inability to claim damages on judicial review. Once an application for judicial review is converted to an action, a claim for damages can be advanced in that action. I see nothing in *TeleZone* that changes this authority. *TeleZone* does not say, in my view, that section 18 remedies and damages cannot be claimed in the same action in the Federal Court.

[44] I believe the following paragraphs from *Hinton* are instructive in this case:

> 49. I am not convinced that subsection 18.4(2) should be read narrowly so as to only apply to the procedural aspects of an action, such as discoveries, the admission of *viva voce* evidence, and the like. It is well recognized that the right to treat an application as if it were an action is to compensate for certain procedural inadequacies with the process underlying applications. In my mind, however, I think it may sometimes also be appropriate to consider the remedial inadequacies of an application for judicial review, as well. One problem with applications for judicial review is that a remedy for damages cannot be sought. In most applications for judicial review, this is not a major concern as the desired remedy will usually lie in the form of *mandamus, certiori*, or a declaration. Where it is of concern, however, is when a totally separate action afterwards may be necessary in either Federal Court or a provincial court to advance a claim for damages: this is a potentially undesirable situation.
>
> 50. Sometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review. Instead of attempting a joinder, which is sometimes inevitable, employing subsection 18.4(2) of the *Federal Courts Act* to allow a claim for damages in a "converted" action should also be available. In cases such as this one, it may even economise on scarce judicial resources.

> 54. I conclude on this issue with one caveat. It would be an error to permit a claim for monetary relief to be decided prior to determining the underlying basis for liability – namely, the validity of the governmental decision, or in this case, the regulation. Indeed, this is the logical way in which other actions proceed. In patent infringement cases, the questions of the validity of the patent and infringement of the patent are considered before one explores the question of damages. Similarly, in tort law cases, liability is established before damages are addressed. In a case such as this one, although all the evidence on both issues may be heard together, *vires* ought to be decided first before the question of whether the class members are entitled to a partial refund is addressed.

Conclusions

[45] Notwithstanding various arguments advanced by the Respondent, I think the central issue for me to decide at this stage is whether the Applicants have satisfied the test laid out in the relevant jurisprudence for conversion to an action. For reasons given above, I believe that they have.

IMM-5543-10

[46] As agreed by counsel at the hearing, there is no need for me now to consider whether the leave application in this case should be argued orally. I have reviewed the leave application and I have granted leave.

[47] In my view, there is sufficient commonality between IMM-6303-09 and IMM-5543-10 in terms of legal and factual issues, parallel evidence and the likelihood that the outcome of one case will resolve the other to warrant joinder. See *Sivamoorthy v Canada (Minister of Citizenship and Immigration)*, 2003 CarswellNat 650, 2003 FCT 307. As I see nothing to distinguish this case from

IMM-6306-09 as regards conversion to an action, I adopt my own reasons and determine that this application shall be converted to an action and joined with IMM-6306-09.

IMM-6448-10

[48] As agreed by counsel at the hearing, there is no need for me now to consider whether the leave application in this case should be argued orally. I have reviewed the leave application and I have granted leave.

[49] As I see nothing to distinguish this case from IMM-6306-09 and IMM-5543-10 as regards joinder and conversion to and an action, I adopt my own reasons and determined that this application shall be converted to an action and joined with IMM-6306-09 and IMM-5543-10.

Class Action Certification

[50] As counsel requested, and the Court has agreed, the class-action certification aspects of these motions will be dealt with at a further hearing following the decision on conversion, leave and joinder. The time will be set after consultation with counsel to address the certification issue and to decide costs issues on all of the motions. Following the issuance of these reasons and judgment counsel should provide the Court with availability dates or, if a brief case management conference is required, let the Court know when they could be available for that.

Certification of Questions

[51] As regards the issues I have decided in this portion of the motions, I agree with the submissions of Respondent's counsel that no serious question for certification arises at this stage.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Leave to commence judicial review is granted in IMM-6448-10;

2. Leave to commence judicial review is granted in IMM-5543-10;

3. The judicial review applications in IMM-6306-09, IMM-6448-10, and IMM-5543-10 are converted to actions in accordance with section 18.4 (2) of the *Federal Courts Rules* and said actions shall be consolidated.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-6306-09, IMM-6448-10, and IMM-5543-10

Docket: IMM-6303-09

DAVID SIVAK, LUCI BAJZOVA, MONIKA SIVAK, and LUCIE BAJZOVA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-6448-10

AND BETWEEN

MILAN LASAB, MILADA LASABOYA, and ELVIS KULASIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-5543-10

AND BETWEEN:

MIROSLAV SARKOZI, ANDREJ BALOG, ZANETA BALOGOVA, GALINA BALOGOVA, VIKTOR SARKOZI, ANDREJ BALOG,

ANDREJ BALOG, MARIE BALOGOVA, and LUKAS BALOG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 11, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	March 31, 2011

APPEARANCES:

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Mary-Louise Wcislo Prathima Prashad	FOR THE RESPONDENT

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