Federal Court  Cour fédérale

Date: 20121109

Docket: IMM-1968-12

Citation: 2012 FC 1309

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, November 9, 2012

Present: The Honourable Mr. Justice Simon Noël

BETWEEN:

DIAKARIDIA CAMARA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by a removal officer pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC (2001), c 27 [IRPA]. The officer's decision, dated February 24, 2012, was to deny the request to stay the removal pending a decision in his application for a pre-removal risk assessment [PRRA]. The applicant claims that he is entitled to a PRRA decision before his removal despite section 166 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], and that a stay of removal should be granted accordingly. On September 14, 2012, he was notified of a negative PRRA decision.

[2] A decision having been rendered with respect to the PRRA application, the parties agree that the application for judicial review is now moot. However, the applicant is persisting and seeks public interest standing so that the questions of law related to section 166 of the Regulations can be decided. This raises constitutional issues and issues of interpretation.

[3] A preliminary issue is whether this Court should exercise its discretion to hear this case despite its mootness. This requires examining the facts at the basis of the application for judicial review and the legal framework for evaluating the exercise of this Court's discretion, in light of the arguments presented by the parties.

I. Facts and decision under review

[4] Mr. Camara arrived at Pierre-Elliott Trudeau Airport from Mali with a visitor's visa on February 16, 2012.

[5] A removal order was issued against him at the point of entry. The order was issued because the applicant had made contradictory statements, first saying that he had come to Canada as a visitor and later saying that he had come to work. He stated at that time that he did not fear returning to his country. He was placed in detention.

[6] The applicant made a claim for refugee protection on February 18, 2012. He alleges that he was persecuted in Mali because of his sexual orientation. He states that he did not discuss this

situation with the immigration officers upon his arrival because he believed that they were police officers and did not trust them.

[7] On February 20, the Immigration Division of the Immigration and Refugee Board conducted a review of the reasons for the applicant's detention.

[8] He was given the opportunity to make a pre-removal risk assessment [PRRA] application. The application was prepared and filed on an urgent basis on February 22, 2012, in Montréal.

[9] The applicant asked the removal officer to stay his removal pending the outcome of his PRRA application. The officer replied in a letter dated February 22, 2012, that pursuant to section 166 of the Regulations, he could not obtain an administrative stay of the removal order while the PRRA application was under review. The officer also notified the applicant that an application for a stay is generally only considered once a removal date has been set.

[10] On February 24, 2012, the applicant met with the removal officer, who explained the removal proceedings to him. The officer reiterated his position that the applicant could be removed prior to a PRRA decision.

[11] On February 27, 2012, the applicant was notified by letter that his removal was scheduled for the next day.

[12] The next day, the applicant filed an application for judicial review. The applicant also applied for a judicial stay, which was granted by the Federal Court. It ordered a stay of the removal order pending the outcome of the application for leave and judicial review.

[13] He was notified of the negative PRRA decision on September 14, 2012.

II. Applicant's submissions

[14] The applicant acknowledges that this application is moot and asks that the Federal Court exercise its discretion to hear his constitutional challenge of section 166 of the Regulations in light of section 7 of the *Canadian Charter of Rights and Freedoms* as well as his challenge of the legality of the removal officer's interpretation of section 166.

[15] The applicant states that the parties retain an adversarial stake in the issues. He also submits that judicial economy weighs in favour of this Court's exercising its discretion, given that the legality of section 166 of the Regulations might otherwise evade review by the Court; the resulting social and human cost favours the applicant.

[16] Finally, the facts leading to this judicial review are repetitive and short-term, and it appears that similar cases have been identified. The applicant claims that the situation could recur without it being possible for the person to exercise his or her rights on account of an expedited removal and the lack of resources of those who find themselves in such a situation.

[17] Furthermore, for this issue to come before the Federal Court for a decision without being moot, an application for judicial review of the removal officer's decision would have to be brought and an application for stay granted. There is a risk that the factual framework of this case will repeat itself and that another applicant's challenge will become moot before the constitutional issue can be decided.

[18] Finally, it is argued that the social and human cost at stake in this case is considerable. The constitutional issue relates to section 7 of the Charter, which enshrines the right to life, liberty and security.

III. Respondent's submissions

[19] The respondent submits that the Court should not hear this case because the issue is moot, as the PRRA application has been decided and the applicant does not have the necessary standing to challenge the constitutionality of section 166 of the Regulations or the legality of the removal officer's decision.

[20] The respondent submits that the applicant lacks the necessary standing given that he has no interest in the outcome of this dispute. Moreover, it is clear that section 166 of the Regulations does not limit the removal officer's discretion to grant a stay and that the parties retain no adversarial stake in the issues.

[21] Also, an application could be brought to the Court relating to the validity of section 166 of the Regulations in a different set of circumstances from that of the applicant. The applicant is

in fact asking this Court to render a judicial opinion on the interpretation of the Charter in the abstract, as no dispute remains between the parties.

[22] As for whether the applicant has public interest standing, the respondent is of the view that the criteria are not met in this case. First, the applicant has not raised any serious judicial issue. Furthermore, the applicant has no real interest in the outcome of the issue, and this application is not a reasonable and effective way to bring the issue before the courts.

IV. Issue

[23] Since the dispute is now moot, should the Court exercise its discretion and hear the application?

V. Analysis

[24] Given that the applicant's PRRA was rejected, it is clear that this application for judicial review is moot. The application sought to quash the removal officer's decision refusing to grant a stay of his removal order pending the outcome of his PRRA application. A decision has been reached; his PRRA application was rejected.

[25] The proper framework for the discretion analysis is found in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC) [*Borowski*], which establishes the criteria to be applied by the Court in determining whether it should exercise its discretion and hear the parties despite the mootness of the application. It must then be decided whether the

applicant has the necessary standing to challenge the constitutionality of a legislative provision and the legality of the officer's interpretation of that provision.

[26] When a case involving a challenge to a law is moot, the judge may exercise his or her discretion and decide to hear the case. In performing the analysis, the Court should be guided by three criteria, as stated by the Supreme Court in *Borowski*, above, at paragraph 15:

> 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. . . .

[27] In this case, the first criterion is not met, given that no live controversy remains between the parties. The refusal of the PRRA application brought the matter to a close.

[28] As for the second criterion, *Borowski*, above, states that applying judicial resources to cases that are capable of repetition and are of a short duration may be a reason for the judge to exercise his or her discretion. However, it would still be preferable to decide the issue in a genuinely adversarial context, as the issues of the constitutionality of section 166 of the Regulations and the legality of the removal officer's refusal to grant a stay pursuant to this

legislative provision will eventually arise in a dispute where their resolution will have an impact on the applicant's rights.

[29] Moreover, should the Court decide to deal with the issues in this case, the decision would have no practical effect on the parties' rights. Since the stay of the applicant's removal was obtained pending the outcome of his PRRA application, the decision regarding the constitutionality of section 166 of the Regulations and the legality of its interpretation by the removal officer will have no effect on his rights.

[30] Finally, with respect to the third criterion, the Supreme Court states that "[p]ronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch" (*Borowski*, above). It is more appropriate for the Court to review the legality of a legislative provision when the outcome has a real impact on the rights of a party. That way, a decision is rendered that takes into account the facts in the case, and the result will therefore have a practical effect on the rights of a party. If it were otherwise, the result would be an encroachment of judicial power on the power of the executive, through the transformation of an appeal into a reference.

[31] *Gonzalez-Rubio Suescan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 438, 2007 CarswellNat 1027 [*Suescan*], involves a factual situation similar to the one before me. The applicant was subject to a removal order upon his arrival at the port of entry. It had been decided that he was not eligible for refugee protection pursuant to paragraph 101(1)(*c*) of the IRPA. He applied for judicial review of that decision, seeking to be constitutionally exempted

from the application of paragraph 101(1)(*c*) of the IRPA, alleging that removing him to his country while a decision was still pending with respect to the risks he faced there was contrary to the Charter. However, between the time the applicant filed his application for judicial review and the time of the hearing, his PRRA application was rejected. The Court therefore held that "[s]ince this case arises out of a concern that the absence of a risk assessment violates the Charter, any live controversy between the parties has been dissolved by the PRRA decision" (*Suescan*, above, at paragraph 25). The judge therefore declined to hear the case on that basis.

[32] Although, in that case, the applicant sought a constitutional exemption from the application of paragraph 101(1)(*c*) of the IRPA and was not challenging its constitutionality, as in this case, the principle of mootness of an application for judicial review established in that case remains applicable here.

[33] I would add that the removal officer's decision is brief and not particularly informative. It would have been useful to have had a decision containing a clear explanation of the precise reasons for the refusal, the importance of the PRRA application to this case, the involvement of section 166 of the Regulations and the facts connected with the applicant. For example, what was the effect of the contradictions in the explanations provided by the applicant to the immigration officer at the point of entry on the exercise of the removal officer's discretion?

[34] The applicant has also filed two affidavits from individuals that relate, in the form of hearsay, the experiences of people upon their arrival in Canada. Janet Dench of the Canadian Council for Refugees and Jennifer Jeanes of Action Réfugiés Montréal describe, in their

respective affidavits, how in the performance of their duties, they have met individuals who, like the applicant, were prevented from applying for refugee protection and who were subject to removal before a decision was rendered with regard to their PRRA applications. This type of evidence is not necessarily as useful as is being argued. There are certainly other ways to file more compelling evidence. It is important to have an appropriate factual backdrop when asking a Court to decide an issue of constitutional law. The usefulness of the facts in this case is minimal.

[35] The constitutional issue involving section 166 of the Regulations and the issue of the interpretation of that section by removal officers are certainly of interest. However, this case, as presented, does not have a factual backdrop that would enable the Court to reach an informed decision. On its face, the question of law is theoretically interesting, but the factual foundation underlying it is weak.

[36] A case will eventually arise that combines the constitutional issue with an appropriate set of facts, which will enable the Court to deal with it. This case does not bring together these two aspects in a way that would allow the Court to render an informed decision.

[37] To determine whether the applicant has public interest standing, I must apply the test described in *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575, and reiterated in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paragraph 37 [*Downtown Eastside Sex Workers United Against Violence Society*]:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious

> justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[38] First of all, no serious judicial issue is raised in this case. As mentioned above, a decision has been reached with respect to the applicant's PRRA application. Therefore, no live controversy remains between the parties.

[39] In this case, the applicant has no real stake in the outcome of the case, as a decision regarding the constitutionality of section 166 of the Regulations and the legality of the removal officer's interpretation of his discretionary power to order a stay of the removal pursuant to this legislative provision will have no effect on the applicant's legal position.

[40] A reasonable and effective manner for the courts to decide the issue of the constitutionality of section 166 of the Regulations and the legality of its interpretation by the removal officer is to decide it in a specific factual context so as to render a decision that would have a real impact on a party's rights. This is not the case here. A situation will eventually arise in which the legal issue at stake can be thoroughly analyzed with supporting evidence. Otherwise, a social agency can bring the case forward, as was done in *Downtown Eastside Sex Workers United Against Violence Society*, above. In such a case, the parties can mount a

complete case with evidence and submissions on the law, and the public interest would be well represented.

[41] In this case, the applicant is seeking public interest standing, but it is important to remember that he is in Canada illegally. The stay he was granted allows him to remain on Canadian soil only for the duration of this judicial review. By claiming public interest standing, he is in fact delaying the outcome of the decision, even though the only possible outcome for him is negative. If a Court hearing this action were to decide that section 166 of the Regulations is unconstitutional, this would not strengthen the applicant's position. It is difficult to grant the applicant public interest standing in light of his status in Canada and the circumstances of his arrival. I am of the view that this is not a factor in favour of granting public interest standing in such a situation.

[42] Given the particular fact situation of this case, the PRRA decision communicated on September 14, 2012, the fact that the dispute between the parties is now moot and that the Court, for the above-mentioned reasons, does not intend to exercise its discretion to hear the constitutional issue raised, it would appear to me that no question need be certified. The matter is fact-specific and not of general importance. However, if a party wishes to submit a question, it may do so within five days of receiving this order, and the other party will have five additional days to comment on it.

ORDER

THIS COURT ORDERS that this application for judicial review of the removal officer's decision be dismissed, the dispute between the parties now being moot. With respect to the preliminary issue, the Court chooses not to exercise its discretion to hear the application for judicial review. The parties may submit a question for certification within five days of receiving this order; if a party chooses to do so, the other party will have five additional days to comment on it.

"Simon Noël"

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Judge

Certified true translation
Francie Gow, BCL, LLB

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1968-12
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