Federal Court Cour fédérale

Date: 20121218

Docket: IMM-8881-11

Citation: 2012 FC 1489

Ottawa, Ontario, December 18, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

G.J.

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant and her husband are among the persons who came to Canada on the MV *Sun Sea*. The husband was found to be inadmissible to Canada under s 37(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In the same decision, the applicant was found to be inadmissible as an accompanying family member under s 42(*b*) of the IRPA. An application for judicial review of that decision was granted on December 12, 2012: *JP and GJ v Canada (Minister of Public Safety and Emergency Preparedness)* 2012 FC 1466.

[2] This is an application for review of the Canadian Border Services Agency (CBSA)'s decision to convoke the applicant G.J. to an interview on December 7, 2011 with a representative of the Canadian Security Intelligence Service (CSIS) under the authority of s 15(1) of the IRPA.

[3] In both matters, a confidentiality order was sought to protect the identity of the applicant and her husband and that of their family members. The respondent took no position but noted that he did not concede the allegations of risk if the motion was not granted. Having read the motion record and in light of the practice that has been adopted in several other cases involving the *Sun Sea* passengers, I considered it appropriate to direct that the names of the applicants be replaced by initials in the style of cause in both proceedings. In doing so, I made no determination as to the reasonableness of the allegations of risk.

BACKGROUND:

[4] On November 2, 2011, a supervisor at the CBSA Greater Toronto Enforcement Centre (GTEC) wrote to the applicant indicating that it was necessary for her to present herself for an interview to be conducted by the Canadian Security Intelligence Service (CSIS) on December 7, 2011 at the GTEC. The letter invoked the terms and conditions of her release from immigration detention to compel her attendance. It was also noted that CSIS "is authorised by Parliament to provide advice on immigrants to the Minister of Citizenship and Immigration Canada relating to security matters contained in the Immigration and Refugee Protection Act". In reply correspondence, the applicant's counsel objected, taking the view that CSIS had no legal authority to compel an interview and that it was improper for CBSA to compel it on behalf of CSIS.

[5] The applicant presented herself at the appointed time and place with counsel in attendance who again voiced an objection to the interview. The CSIS Officer informed them that he was aware that an application for judicial review of the notice to attend had been filed and stated that there was no point going ahead with the interview. No further action was taken to conduct the interview.

ISSUE:

[6] The issue now before the Court is whether CBSA exceeded its jurisdiction under the IRPA in directing the applicant to attend an interview with CSIS.

ANALYSIS:

Standard of Review;

[7] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 59, the Supreme Court established that "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction".

[8] In this instance, the applicant contends that the specific discretionary powers of the agency have been well established. Citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers'*] at paras 30-39, she asserts that this issue

therefore came under the heading of what the Supreme Court had described as "questions regarding the jurisdictional lines between two or more competing specialized tribunals" and "true questions of jurisdiction" (para 30) and thus commanded a standard of correctness.

[9] The respondent submits that, following *Maple Lodge Farms v Canada*, [1982] 2 SCR 2, at 7, the judicial approach 'should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended' and to avoid narrow technical constructions. This suggests, the respondent submits, a standard of reasonableness.

[10] In the present case, CBSA was not applying its home statute but invoking the provisions of the CSIS Act, bringing it under one of the narrow and exceptional "[t]rue questions of jurisdiction" described by the Supreme Court in *Alberta Teachers'* at para 39. There are not "multiple valid interpretations" of whether it was empowered to do this (*Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 39) but only one. The standard of review is therefore correctness.

Did CBSA exceed its jurisdiction under the IRPA in compelling the applicant to attend an interview with CSIS?

[11] The applicant notes that CBSA invoked the wording of section 14 of the *Canadian Security Intelligence Service Act,* RSC, 1985, c C-23 [*CSIS Act*], without specifically naming that statute, in convoking her to the interview. That provision is reproduced here for ease of reference:

Canadian Security Intelligence Service Act	**Loi sur le Service canadien du renseignement de sécurité**
R.S.C., 1985, c. C-23	**L.R.C. (1985), ch. C-23**
14. The Service may	**14.** Le Service peut :
(*a*) advise any minister of the Crown on matters relating to the security of Canada, or	*a*) fournir des conseils à un ministre sur les questions de sécurité du Canada;
(*b*) provide any minister of the Crown with information relating to security matters or criminal activities, that is relevant to the exercise of any power or the performance of any duty or function by that Minister under the *Citizenship Act* or the *Immigration and Refugee Protection Act*.	*b*) transmettre des informations à un ministre sur des questions de sécurité ou des activités criminelles, dans la mesure où ces conseils et informations sont en rapport avec l'exercice par ce ministre des pouvoirs et fonctions qui lui sont conférés en vertu de la *Loi sur la citoyenneté* ou de la *Loi sur l'immigration et la protection des réfugiés*.

[12] The applicant argues that s 14 of the *CSIS Act* allows CSIS to provide advice on immigrants to the Minister of Citizenship and Immigration Canada, but does not provide it with the right to compel people to attend interviews, and that no section of the IRPA authorizes CBSA to convoke people to CSIS interviews. Clause 5 of her Terms and Conditions of release from immigration detention made it clear that the applicant must cooperate with CBSA instructions; she had no choice but to appear. Failure to comply could have resulted in the issuance of a warrant. She asserts that it was not a legitimate use of these Terms and Conditions to compel her to appear for an interview in which she had already indicated that she would not participate, and in which she had no legal obligation to participate. She concedes that it was within the power of the CBSA officer to convoke

her to an examination at which a CSIS officer would be present to assist the agency in carrying out its mandate.

[13] The respondent points out that the Supreme Court has found that Parliament's objectives "as expressed in the *IRPA* indicate an intent to prioritize security", marking an express change in focus from the predecessor statute (*Medovarski v Canada*, 2005 SCC 51 at para 10). It argues that, as held by Justice Snider in *Vaziri v Canada*, 2006 FC 1159 at para 35, "the Minister must be permitted the flexible authority to administer the system." In this case, Parliament intended to give CBSA officers the widest possible range of tools to meet the agency's security objectives.

[14] To find that there was abuse of authority, the respondent asserts, it would have to be established that there was both the power to compel attendance and an improper use of that power. In *Dhahbi v Canada*, 2004 FC 1702 at paras 30 and 37, Justice Martineau noted that CBSA must conduct security checks with the aid of external agencies. Compelling attendance at meetings with such agencies, although not compelling participation, is thus one aspect of the agency's mandate. In distinction from *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*], where there was no authority to act and the action had no legitimate purpose, this was both within CBSA's powers and legitimately within the scope of its role.

[15] The applicant is seeking

a) a declaration and writ of prohibition specifying that CSIS officers do not have the authority under IRPA to conduct examinations;

b) an order prohibiting CSIS officers from conducting such examinations; and

c) an order prohibiting CBSA from convoking the applicant, pursuant to her terms and conditions, to such examinations by CSIS.

[16] There is no evidence that CBSA explained to the applicant that when it convoked her to the CSIS interview, she was compelled to appear but was not compelled to submit to the interview. The respondent contends that there is no obligation on CBSA to do so. However, the exercise of an authority granted by statute carries with it the responsibility to ensure that the discretion is employed fairly. Here, the applicant would not have known that she was not required to participate in the interview with the CSIS officer had she been unrepresented.

[17] I find that CBSA abused its authority but I am not prepared to grant a remedy as broadly framed as that sought by the applicant. CBSA indeed had the power to compel attendance. However, it exceeded the scope of its mandate when it used this power for a purpose not granted to the Agency by its home statute, however desirable this purpose may have seemed. Appropriate discretion to coordinate activity with security agencies does not extend to compelling attendance at interviews in which a person is not obliged to participate, with the strong implication that it would be better for them if they did participate. In *Roncarelli* at p 140, Rand J noted that:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."

[18] The following certified question is proposed:

> Is it an abuse of power for a CBSA officer to compel a person to attend an interview with CSIS where CBSA has no authority to compel the person to participate in that interview?

[19] This question appears to me to be a serious one of general importance, as well as dispositive in this particular case. I will therefore certify the question.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. the application is granted in part;
2. it is declared that CBSA does not have the authority to convoke refugee claimants to interviews with CSIS under the authority of s 15(1) of the IRPA; and
3. The following question is certified:

> *"Is it an abuse of power for a CBSA officer to compel a person to attend an interview with CSIS where CBSA has no authority to compel the person to participate in that interview?"*

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8881-11
STYLE OF CAUSE:	G.J. and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
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APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
Gregory George Samantha Reynolds	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LORNE WALDMAN Waldman & Associates Toronto , Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT