Federal Court  Cour fédérale

Date: 20150703

Docket: T-2425-14

Citation: 2015 FC 822

Ottawa, Ontario, July 3, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JUVENAL DA SILVA CABRAL, PEDRO MANUEL GOMES SILVA, ROBERT ZLOTSZ, ROBERTO CARLOS OLIVEIRA SILVA, ROGERIO DE JESUS MARQUES FIGO, JOAO GOMES CARVALHO, ANDRESZ TOMASZ MYRDA, ANTONIO JOAQUIM OLIVEIRA MARTINS, CARLOS ALBERTO LIMA ARAUJO, FERNANDO MEDEIROS CORDEIRO, FILIPE JOSE LARANJEIRO HENRIQUES, ISAAC MANUEL LEITUGA PEREIRA, JOSE FILIPE CUNHA CASANOVA

Plaintiffs

and

MINISTER OF CITIZENSHIP AND IMMIGRATION, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND HER MAJESTY THE QUEEN

Defendants

ORDER AND REASONS

[1] This is a motion for a stay of removal scheduled for July 5, 2015. The motion is brought by Mr Carlos Alberto Lima Araujo [the Applicant] on his own behalf and on behalf of his dependants: his wife Rosa Maria Salgueiro De Brito and their children, Tiago De Brito Araujo and Sandro De Brito Araujo. The Applicant is one of 14 Plaintiffs to an underlying proposed class proceeding against the Defendants which was filed with the Court in November 2014.

I. Background

[2] The Applicant entered in Canada in July 2007 to work for his brother-in-law as a construction worker under a Temporary Work Permit. His wife and children arrived in Canada the following year. In April 2010, the Applicant and his wife decided they would settle in Canada. As a result, the Applicant applied for permanent residence pursuant to subsection 12(2) of the *Immigration and Refugee Protection Act*. SC 2001, c 27 [the Act] and section 87.2 of the *Immigration and Refugee Protection Act Regulations*, SOR/2002-227 [the Regulations] as a member of the Federal Skilled Workers class [the FSW Class]. His application was denied in July 2010. However, his Temporary Work Permit was renewed until the end of January 2012.

[3] In September 2011, the Applicant re-applied for permanent residence under the FSW Class but his application was denied again. On both occasions the Applicant requested, but was allegedly denied, a "substituted evaluation" of his ability to become economically established in Canada, as provided for under subsection 87.2(4) of the Regulations, in the event that he did not get the minimum number of points required under the FSW Class' evaluation system. The Applicant's application for permanent residence was denied on both occasions as a result of his

failure to meet the Regulations' language requirements, despite allegedly meeting all the other requirements.

[4] The Applicant's Temporary Work Permit was extended once more until June 2013. As he was about to file a third application for permanent residence in the Spring of 2013 under the new Federal Skilled Trades Program, the Applicant claims that he was advised by his counsel that the government would, under any circumstances whatsoever, refuse to consider "substituted evaluation" for any permanent residence applications submitted under that Program from now on. Instead of applying for permanent residence, the Applicant was advised to attempt to restore his Temporary Work Permit. That attempt failed in August 2013.

[5] Therefore, the Applicant ended up without status in Canada and in August 2014, he was arrested by the Canada Border Services Agency for working illegally in Canada. An Exclusion Order was issued against him, his wife, and their two children on August 28, 2014.

II. The Underlying Statement of Claim

[6] On November 26, 2014, the Applicant, together with 13 other individuals allegedly similarly situated [collectively referred to as the Plaintiffs], filed a Statement of Claim against the Defendants and brought the action as a proposed class proceeding. The Plaintiffs claim general, aggravated and punitive damages against the Defendants for allegedly exceeding their jurisdiction and committing abuse of process and public misfeasance in rejecting their applications for permanent residence under the Federal Skilled Trades Program. They also claim that, in so doing, the Defendants violated their rights under sections 7 and 15 of the *Canadian*

Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter]. They seek damages in this regard as well.

[7] In particular, the Plaintiffs allege that they all applied for permanent resident status as members of the Federal Skilled Trades Class and met all of the requirements of the Act and Regulations with respect to that Class, except for the language requirement. The language requirement was based on the International English Language Testing System's test [the Language Test], which was created by Cambridge University and adopted by the Defendant, the Minister of Citizenship and Immigration.

[8] The Plaintiffs claim that the Language Test is a higher standard than the Canadian Language Benchmark referenced in subsection 70(2) of the Regulations and is therefore ill-adapted to "Canadian English" speakers. Having failed the Language Test, each Plaintiff requested that Citizenship and Immigration Canada [CIC] perform a substituted evaluation of his or her ability to become economically established in Canada. They allege that this request was rejected without considering whether to conduct a substituted evaluation because of a Ministerial policy directive stipulating that no application under the Federal Skilled Trades Class was to be examined unless the Language Test had been passed.

[9] The Plaintiffs allege that this policy is beyond the Defendants' authority and is unlawful, discriminatory and actionable. They also contend that it favours nationals of English-speaking countries such as England, Ireland, and Australia, to the detriment of applicants of other nationalities.

[10] The Applicant claims that this proposed class proceeding raises a serious issue and that removing him and his family to Portugal before the said proceeding has been disposed of by the Court would be irreparably prejudicial.

III. The Tripartite Test

[11] In order to succeed with his motion for a stay of the pending removal order, the Applicant must establish that: (i) the underlying proposed class proceeding raises a serious issue, (ii) he and his family will suffer irreparable harm if the stay is not granted and the removal order is executed, and (iii) the balance of convenience lies in his favour (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123(FCA) [*Toth*], *RJR-MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*]).

[12] This tripartite test is conjunctive, meaning that the Applicant must satisfy each branch of the test before a stay order can be issued.

A. *Serious Issue*

[13] Relying on the Supreme Court of Canada decision in *RJR-MacDonald*, the Applicant claims that in order for the "serious issue" requirement to be met, the Court need only be satisfied that the underlying proposed class proceeding is neither vexatious nor frivolous, even if it is of the opinion that this matter is unlikely to succeed at trial.

[14] He contends that the proposed class proceeding passed this test when the motion to strike brought by the Defendants soon after the filing of the proceeding was dismissed by my colleague Justice Zinn, but for a few exceptions not relevant to the present motion. In that motion the Defendants argued, *inter alia*, that the proposed class proceeding discloses no reasonable cause of action, is scandalous, frivolous or vexatious, or constitutes an abuse of the Court's process.

[15] The Defendants do not agree that Justice Zinn's refusal to strike the Plaintiffs' proposed class proceeding establishes that there is a serious issue for the purposes of a stay because the legal tests for determining whether a serious issue has been raised and whether a claim should be struck are different. They claim that the latter is more stringent as a proceeding cannot be struck unless it is 'plain and obvious' that it cannot succeed.

[16] While I agree there are some differences between the two tests, there is considerable overlap between them, as was recognized by counsel for the Defendants at the hearing. Both consist of a preliminary assessment of the merits of a case as articulated in the statement of claim or originating application. In my view, it is implicit that, in dismissing the Defendants' motion to strike, Justice Zinn found the proposed class proceeding to be neither vexatious nor frivolous.

[17] If this assumption is incorrect, then I am prepared to accept that the proposed class proceeding meets the very low threshold established in *RJR-MacDonald*. Even if I was of the opinion that this matter is unlikely to succeed at trial, I cannot say that it is vexatious or frivolous.

B. *Irreparable Harm*

[18] However, I am not prepared to conclude that irreparable harm would result if the Applicant was removed to Portugal before the proposed class proceeding is disposed of by the Court.

[19] The Applicant claims in his motion materials that he and his family will suffer irreparable psychological harm by being removed to Portugal at this time. He contends that he and his wife decided to settle in Canada so that their children could rise to the limit of their ambitions since there is no rigid class structure in Canada, contrary to the situation in Portugal and in Europe in general. The Applicant contends that the family's removal would be particularly prejudicial to his children who, after having been in Canada since 2008, consider themselves Canadians, have no connections with Europe, and speak English at home. He also fears that upon return to Portugal, the family will be looked down by those not in their 'class,' something he and his family have not experienced since being in Canada.

[20] As is well established, irreparable harm must be something more than the inherent consequences of deportation, however unpleasant and distasteful they may be (*Melo v Canada (Minister of Citizenship and Immigration)* (2000), 188 FTR 39 at para 21, 96 ACWS (3d) 278 [*Melo*]). There is nothing in the Applicant's circumstances that rises beyond the usual consequences of deportation. In addition, the Applicant is not in a situation where he and his family have enemies or agents of persecution waiting for them in Portugal. A Pre-Removal Risk Assessment [PRRA] conducted under section 112 of the Act determined that the Applicant

would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Portugal. This PRRA, dated March 16, 2015, was not challenged by the Applicant.

[21] It is also well established that pending litigation is not a bar to deportation. As the Court stated at paragraph 8 of *Johnson v Canada (Solicitor General)*, 2004 FC 1286, 134 ACWS (3d) 281, if it was to hold otherwise, any applicant could commence a civil action to avoid removal even though lawsuits against the Crown can be launched or continued from abroad. As a result, this Court has held on many occasions that removal, while litigation is pending, does not constitute irreparable harm (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 ACWS (3d) 547, *Sittampalam v Canada (Citizenship and Immigration)*, 2010 FC 562 at para 46, 370 FTR 23, *Ariyaratnam v Canada (Minister of Citizenship and Immigration)* (2004), IMM-8121-04, per Dawson J (FC) (unpublished), *Hussein v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1266 at para 11, 162 ACWS (3d) 647).

[22] There is no evidence in the present case that the Applicant's removal would impede or effectively bar the proposed class proceeding, as is contended by the Applicant, or that removal would prevent him from participating in the conduct of these proceedings.

[23] Counsel for the Applicant was candid enough to recognize that by these standards, the irreparable harm branch of the *Toth* test is probably not met but he insists that the present case is unique. He argues that this case owes its uniqueness to the fact that what is at stake is the harm

the Applicant's removal would cause to the rule of law given the constitutional dimension of some aspects of the proposed class proceeding.

[24] Counsel asserts that, based on *RJR-MacDonald*, it is appropriate to assume that the damages sought in the proposed class proceeding for breach of the Applicant's Charter rights constitute irreparable harm. However, I am not convinced that this type of assumption is still appropriate today. *RJR-MacDonald* was rendered in 1994. The Supreme Court developed this rule of caution at the time given the "uncertain state of the law regarding the award of damages for a Charter breach" (*RJR-MacDonald* at 342). It was concerned with the fact that "no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter" (*RJR-MacDonald* at 342).

[25] More than 20 years have passed since the *RJR-MacDonald* judgment was issued and I believe that it is safe to say that a body of jurisprudence regarding the principles governing the award of damages under the Charter has now emerged. This is evidenced by the Supreme Court's leading case in this area, *Vancouver (City) v Ward*, 2010 SCC 27, 321 DLR (4th) 1, where the Court proposed a principled and comprehensive approach to the award of damages in Charter cases. The principles developed in *Ward* were reiterated by the Supreme Court very recently (May 1, 2015) in *Henry v British Columbia (Attorney General)*, 2015 SCC 24, 383 DLR (4th) 383, a case involving an award of damages for breaches of sections 7 and 11(d) of the Charter. There is no reason to believe that this principled and comprehensive approach would not also apply where the alleged Charter breach is related to section 15 of the Charter, as relied upon by the Applicant in the proposed class proceeding.

[26] The relief sought in the proposed class proceeding for the alleged Charter breaches is monetary relief. I have not been persuaded that such damages, as the law now stands, could not be quantified or recovered at the time of the judgement on the merits of the proposed class proceeding so as to meet the concerns noted by the Supreme Court in *RJR-MacDonald* in developing the cautionary rule respecting the award of damages in Charter cases.

[27] The Applicant also relied heavily on an Order of my colleague Justice Russell, in *Lee v Canada (Citizenship and Immigration)* (2010), docket IMM-530-10 (unpublished), for the proposition that even though irreparable harm as a result of physical risk or psychological trauma has not been established, removal while litigation is pending can still amount to irreparable harm and can bring the administration of justice into disrepute. However, the basis for Justice Russell's Order was that the minor applicant in that case was ordered to be removed from Canada before her best interests were considered. This is not what the Applicant is asserting in the present case. As a matter of fact, the Applicant made it clear at the hearing that his claim to irreparable harm was not based primarily, if at all, on the alleged harm to his children.

[28] Irreparable harm, if it is to be found, must be found in the circumstances of an applicant and those around him (*Melo* at para 19). As indicated previously, this is not the case in the present matter. The rule of law is without a doubt a central component of our legal system but it is not a panacea to every possible legal situation. I am not satisfied that the rule of law principle is engaged in the manner the Applicant contends in the present case. I have no evidence before me that the Applicant's removal to Portugal at this time will be disruptive of the proposed class proceeding or that it will effectively bar his claim for relief for the alleged Charter violations. In

other words, it has not been shown that the administration of justice would be brought into disrepute as a result of the Applicant's removal. It is worth mentioning at this point that the concept of the administration of justice being brought into disrepute is closely tied to subsection 24(2) of the Charter and the exclusion of evidence obtained in a manner that infringes or denies any rights or freedoms guaranteed by the Charter.

[29] As I pointed out earlier, it has long been the position of this Court that pending litigation is not a bar to deportation because litigation against the Crown can be conducted even if the plaintiff is residing abroad. I see no principled reason to depart from that established position when damages for alleged Charter violations are claimed.

C. *Balance of Convenience*

[30] The remedy of a stay of removal is an exceptional measure (*Tesero v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 at para 47, [2005] 4 FCR 21). Section 48 of the Act, which is presumed to have been adopted in furtherance of the public interest, provides that an enforceable removal order "must be enforced as soon as possible." Given the predictable length of the proposed class proceeding and the Applicant's ability to continue his participation in it from abroad, his interest in the outcome of the proceeding does not outweigh the interest of the public in having removal orders enforced as soon as possible.

[31] In the circumstances, the balance of convenience lies with the Defendants.

IV. Conclusion

[32] For the foregoing reasons, the Applicant's motion for a stay of removal is dismissed.

[33] At the hearing of the present motion, the parties have asked that the motion's style of cause be amended so as to reflect Justice Zinn's order that the Minister of Employment and Social Development be struck as a defendant. Counsel for the Defendants also requested that the Minister of Public Safety and Emergency Preparedness be added as a defendant as he is the Minister responsible for enforcing removal orders issued under the Act. Counsel for the Applicant did not oppose that request. The style of cause will be amended accordingly.

ORDER

THIS COURT ORDERS that:

1. The motion for a stay be dismissed; and

2. The style of cause be amended to remove the Minister of Employment and Social Development as a defendant and to add the Minister of Public Safety and Emergency Preparedness as a defendant.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2425-14
STYLE OF CAUSE:	JUVENAL DA SILVA CABRAL, PEDRO MANUEL GOMES SILVA, ROBERT ZLOTSZ, ROBERTO CARLOS OLIVEIRA SILVA, ROGERIO DE JESUS MARQUES FIGO, JOAO GOMES CARVALHO, ANDRESZ TOMASZ MYRDA, ANTONIO JOAQUIM OLIVEIRA MARTINS, CARLOS ALBERTO LIMA ARAUJO, FERNANDO MEDEIROS CORDEIRO, FILIPE JOSE LARANJEIRO HENRIQUES, ISAAC MANUEL LEITUGA PEREIRA, JOSE FILIPE CUNHA CASANOVA v MINISTER OF CITIZENSHIP AND IMMIGRATION, HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 30, 2015
ORDER AND REASONS:	LEBLANC J.
DATED:	JULY 3, 2015

APPEARANCES:

Me Rocco Galati	FOR THE PLAINTIFFS
Me Meva Motwani Me David Joseph	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Rocco Galati Law Firm Professional Corporation Toronto, Ontario	FOR THE PLAINTIFFS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANTS