Federal Court  Cour fédérale

Date: 20150724

Docket: T-401-14

Citation: 2015 FC 907

Toronto, Ontario, July 24, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KIEN BENG TAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Kien Beng Tan (the "Applicant") seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985 c. F-7 of a decision by the Canadian Human Rights Commission (the "Commission") refusing to deal with the Applicant's complaint of religious discrimination against Correctional Services Canada ("CSC").

[2] In its decision, dated August 21, 2013 the Commission found that it did not have jurisdiction to hear the complaint because the Applicant was not "lawfully present" in Canada for the purposes of the *Canadian Human Rights Act*, R.S.C. 1985 c. H-6 (the "Act").

[3] Pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, the Attorney General of Canada is the Respondent in this Application for Judicial Review.

II. BACKGROUND

[4] The Applicant is a citizen of Malaysia. He is currently serving a life sentence for second degree murder at the Kent Institution, a federal prison in British Columbia.

[5] The Applicant came to Canada on a temporary visa. In 2004 he was involved in an incident that resulted in the death of another individual. Following the incident, the Applicant fled Canada and was arrested in Belgium in 2008. He was extradited to Canada from Belgium on March 28, 2008 to stand trial on criminal charges, pursuant to a bilateral extradition treaty.

[6] On February 11, 2011, the Applicant was convicted of second degree murder and sentenced to a life sentence with eligibility to apply for parole after serving ten (10) years.

[7] In consequence of his criminal conviction, an Inadmissibility Report on the Applicant was prepared pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (the "IRPA"). A deportation order was issued but that order was stayed pursuant to subsection 50(b) of the IRPA, until the Applicant had served his sentence.

[8] The Applicant is Buddhist and continues to practice his religion from prison. On December 12, 2012 he made a written complaint to the Commission, alleging that CSC was discriminating against him on the basis of religion by failing to renew contracts with chaplains representing minority faiths, while continuing to retain Christian chaplains.

III. DECISION UNDER REVIEW

[9] The Commission issued its decision on December 27, 2013, refusing to deal with the Applicant's complaint of discrimination on the basis that it lacked jurisdiction because the Applicant was not "lawfully present" in Canada, for the purposes of the Act.

[10] Pursuant to subsection 40(6) of the Act, the Commission referred the question of the Applicant's legal status in Canada to the Minister of Citizenship and Immigration. By letter dated August 1, 2013 the Minister replied, expressing the opinion that the Applicant is not lawfully present in Canada because he is not a citizen, visitor, permanent resident or person in possession of a Minister's permit pursuant to subsection 24(1) of the IRPA.

[11] The Commission also considered a section 40/41 Investigation Report (the "Report") dated August 21, 2013, and adopted the Report's opinion that because the Applicant's status was not resolved in his favour, the Commission could not proceed with the complaint, pursuant to subsection 40(6) of the Act. The Commission concluded that it did not have jurisdiction, and did not deal with the complaint pursuant to paragraph 41(1)(c).

IV. ISSUES

[12] The first issue to be addressed is the appropriate standard of review applicable to the Commission's decision that it does not have jurisdiction to deal with the complaint.

[13] The principal issue raised by this application for judicial review is whether the Commission erred in its interpretation of the phrase "lawfully present in Canada" as requiring that individuals either be citizens or have immigration status.

[14] The Applicant also challenges the constitutionality of paragraph 40(5)(a) of the Act, specifically, whether that section infringes subsection 15(1) 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").

V. PARTIES' SUBMISSIONS

A. *Applicant's Submissions*

[15] Concerning the issue of the applicable standard of review, the Applicant submits that this is a jurisdictional question, reviewable on the standard of correctness pursuant to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 59.

[16] In respect of the main issue, that is whether the Commission erred in its interpretation of paragraph 40(5)(a) of the Act, the Applicant argues the Commission erred in failing to consider

the different between the use of the phrase "lawfully present" in paragraph 40(5)(a) and the word "status" in subsection 40(6) of the Act. He submits that when Parliament uses different words relative to the same subject, that choice is considered intentional and indicates a change in meaning; see Ruth Sullivan, *Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at pages 214-216.

[17] The Applicant argues that the word "status" subsumes whether an individual is "lawfully present", "entitled to return to Canada", "a Canadian citizen", or "lawfully admitted to Canada for permanent residence". As such, lawful presence is not limited to whether an individual is a temporary or permanent resident under the IRPA.

[18] The Applicant submits that the Court should depart from the precedent set in *Forrest v. Canada (Attorney General)* (2004), 357 N.R. 168 (F.C.A.) because the underlying application meets the criteria for re-considering a previously decided matter, as set out in *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1102.

[19] As for the constitutional question, the Applicant argues that paragraph 40(5)(a) violates subsection 15(1) of the Charter because it draws a distinction based on immigration status by barring prisoners who do not have immigration status from filing human rights complaints, while allowing prisoners who have immigration status to file complaints, relying on the decision in *Quebec (Attorney General) v. A.*, [2013] 1 S.C.R. 61 at paragraph 85.

[20] The Applicant acknowledges the jurisprudence that rejects immigration status as an analogous ground; see the decision in *Canadian Doctors for Refugee Care et al. v. Attorney General of Canada et al.*, 2014 FC 651 at paragraphs 856-870. However, the Applicant submits his case is distinguishable because he cannot change his immigration status due to his inadmissibility status arising from his criminal conviction.

[21] Further, the Applicant submits that the Supreme Court of Canada has held that non-citizens are a vulnerable group and suffer from political marginalization, stereotyping and historical disadvantage; see the decision in *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at paragraph 45.

[22] The Applicant further argues that paragraph 40(5)(a) cannot be saved by section 1 of the Charter because it does not fulfill a pressing and substantial objective. He submits that the exclusion of individuals present in Canada from the protections of the Act is not rationally connected to the objective of the Act, which is a quasi-constitutional statute aimed at extending the laws in Canada to give effect to the principles of equality and non-discrimination.

B. *Respondent's Submissions*

[23] The Respondent argues that the standard of reasonableness applies where a tribunal is interpreting its home statute. In this regard, he relies on the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association*, [2011] 3 S.C.R. 654 at paragraphs 33 and 34.

[24] The Respondent submits that the Commission's power to deal with complaints is limited by the provisions of the Act.

[25] The Respondent notes that pursuant to section 3 of the *Immigration Guidelines*, SI/80-125 (the "Guidelines"), a person is considered lawfully present in Canada for the purposes of section 40 if that individual is a citizen, permanent resident, visitor, or person in possession of a valid Minister's permit. He relies on the decision in *Forrest, supra* at paragraph 9 for the proposition that the Commission does not have jurisdiction to deal with a complaint of discrimination by a complainant who is incarcerated and who does not have status.

[26] The Respondent argues that a liberal and purposive interpretation of the Act cannot replace a textual analysis of its terms, relying in this regard on the decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),*[2011] 3 S.C.R. 471 at paragraph 62. He submits that in the present case, there is a clear statutory restriction on the jurisdiction of the Commission to deal with complaints from individuals who lack immigration status in Canada.

[27] The Respondent notes that legislative history can assist in interpreting legislation and submits that in drafting subsection 40(5), the House of Commons debates show that Parliament chose not to follow a recommendation to remove the word "legally". The Respondent submits that this demonstrates that Parliament did not intend that the Act apply to foreign nationals in Canada without immigration status.

[28] As for the constitutionality of paragraph 40(5)(a) of the Act, the Respondent argues that neither immigration status nor status as an incarcerated individual is an analogous ground of discrimination for the purpose of subsection 15(1) of the Charter.

[29] In this regard, the Respondent relies on the decisions in *Toussaint v. Canada (Attorney General)* (2011), 420 N.R. 364 at paragraph 99 (F.C.A.), and *Alcorn v. Canada (Commissioner of Corrections),* 2002 FCA 154. Further, in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at page 736 the Supreme Court of Canada rejected the proposition that status as a permanent resident convicted of a criminal offence is an analogous ground.

[30] The Respondent submits there is no merit to the Applicant's argument that his immigration status is immutable, because that status is not a personal characteristic. Rather, it is the Applicant's criminal conviction and his resulting status as inadmissible that makes his immigration status unchangeable. The Respondent argues that the Applicant's lack of status and resulting disadvantage arises from his criminality, rather than a social condition rooted in stereotyping.

[31] The Respondent further argues that there is a reasonable correspondence between the limit in paragraph 40(5)(a) of the Act and the Applicant's circumstances, having regard to the purpose of subsection 40(5). The purpose of that subsection is to define the limits of the Commission's jurisdiction. The Respondent submits that the exclusion of the Applicant from the

application of the Act is consistent with the purpose of protecting against discriminatory practices with a sufficient connection to Canada.

[32] Finally, the Respondent argues that if paragraph 40(5)(a) violates subsection 15(1) of the Charter, the breach is justified under section 1 of the Charter and the test set out in *R v. Oakes*, [1986] 1 S.C.R. 103 at paragraphs 69-71.

[33] The Respondent submits that the Act's objective is pressing and substantial because Parliament has a legitimate interest in defining the limits of its application and ensuring that individuals who are lawfully present in Canada have the rights contemplated by section 2 of the Act.

[34] The Respondent also argues that limiting the Commission's jurisdiction to hear complaints from individuals lawfully present in Canada is rationally connected to the objective of ensuring that only discriminatory practices with sufficient connection are within the Commission's jurisdiction.

[35] The Respondent submits that the limitation in the Act is minimally impairing because the Applicant still has recourse to the Charter to challenge any violations to his rights.

VI. DISCUSSION AND DISPOSITION

[36] The first issue to be addressed is the applicable standard of review. The central issue in this application is the determination that the Commission lacked jurisdiction to entertain the Applicant's complaint.

[37] The Applicant submits that this is a "true" jurisdictional issue reviewable on the standard of correctness.

[38] I do not agree with this argument in light of the 2011 decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner), supra* at paragraphs 33 and 34, where the Court said the following:

> [33] Finally, the timelines question does not fall within the category of a "true question of jurisdiction or vires". I reiterate Dickson J.'s oft-cited warning in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233, cited in Dunsmuir, at para. 35). See also Syndicat des professeurs du collège de Lévis-Lauzon v. CEGEP de Lévis-Lauzon, [1985] 1 S.C.R. 596, at p. 606, per Beetz J., adopting the reasons of Owen J.A. in Union des employés de commerce, local 503 v. Roy, [1980] C.A. 394. As this Court explained in Canada (Canadian Human Rights Commission), "Dunsmuir expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing Dunsmuir, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since Dunsmuir, this Court has not identified a single true question of jurisdiction…
>
> [34] … However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since Dunsmuir, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have

> particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[39] The prevailing view is that interpretation by a tribunal of its home statute should be reviewed on the standard reasonableness. According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47, the reasonableness standard requires that a decision be justifiable, transparent and intelligible and fall within a range of possible acceptable outcomes that are defensible in light of the facts and the law.

[40] In order to determine if it had jurisdiction to entertain the Applicant's complaint the Commission first had to interpret subsections 40(5) and 40(6) of the Act. For ease of reference, I repeat those provisions below:

No complaints to be considered in certain cases	Recevabilité
40.(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice:	40.(5) Pour l'application de la présente partie, la Commission n'est validement saisie d'une plainte que si l'acte discriminatoire :
(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;	a) a eu lieu au Canada alors que la victime y était légalement présente ou qu'elle avait le droit d'y revenir;
(b) occurred in Canada and was a discriminatory practice within the meaning of section 5, 8, 10 or 12 in respect of which no particular individual	b) a eu lieu au Canada sans qu'il soit possible d'en identifier la victime, mais tombe sous le coup des articles 5, 8, 10 ou 12;

is identifiable as the victim;	
(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence	c) a eu lieu à l'étranger alors que la victime était un citoyen canadien ou qu'elle avait été légalement admise au Canada à titre de résident permanent.
Determination of status	Renvoi au ministre compétent
40.(6) Where a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister and shall not proceed with the complaint unless the question of status is resolved thereby in favour of the complainant.	40.(6) En cas de doute sur la situation d'un individu par rapport à une plainte dans les cas prévus au paragraphe (5), la Commission renvoie la question au ministre compétent et elle ne peut procéder à l'instruction de la plainte que si la question est tranchée en faveur du plaignant.

[41] The Commission was required, by the Act, to request an opinion from the Minister. The Minister provided his opinion as to the Applicant's status. That opinion was considered by the Investigator who conducted an investigation pursuant to paragraph 41(1)(c) of the Act and prepared a Report.

[42] The Report details the steps taken to determine the Applicant's immigration status. The parties were not asked for their position on the issue but were advised that such inquiry was being made to the Minister. Counsel for the Applicant wrote to suggest that the appropriate "Minister" in this case was either the Attorney General of Canada or the Minister of Justice.

[43] The Commission, through the Investigator, communicated with the Minister of Citizenship and Immigration and Multiculturalism. A response was received from the Deputy Minister of Citizenship and Immigration Canada, by letter dated August 1, 2013. The Deputy Minister provided details about the Applicant's status in Canada, concluding that the Applicant "did not have any status as a temporary resident, permanent resident, or citizen in Canada" at the relevant time, and was not lawfully present in Canada.

[44] Relative to the Commission's interpretation of subsection 40(6) of the Act, I see no error in the Investigator's decision to communicate with the Minister of Citizenship and Immigration, rather than with the Attorney General or the Minister of Justice. The Minister of Citizenship and Immigration is tasked with the regulation of the admission of non-citizens into Canada and with establishing the criteria by which Canadian citizenship is obtained.

[45] As for the interpretation of subsection 40(5) of the Act, in *Forrest v. Canada (Attorney General)* (2006), 357 N.R. 168 (F.C.A.) the Federal Court of Appeal considered a human rights complaint arising from similar facts as in the within proceedings. In that decision, the Federal Court of Appeal clearly rejected the argument that a non-citizen who is lawfully incarcerated in Canada, as the result of criminal proceedings in Canada, is "lawfully present" in Canada, for the purposes of the Act. At paragraphs 8 and 9 of that decision, the Court stated the following:

> [8] Basically, the appellant submits on appeal as his first argument that he is lawfully present in Canada within the terms of paragraph 40(5)(a) of the Act because he is here in lawful custody.
>
> [9] In my respectful view, the appellant looks at the issue from the wrong end of the telescope. His custody is lawful because he is unlawfully present in Canada. It is also lawful because he has been convicted of serious crimes…From an immigration perspective, the legality of his custody is determined both by the legality of his

> presence in Canada and his criminal convictions, not the other way around as suggested by the appellant. The fact that he is in lawful custody does not clothe him with immigration status.

[46] Insofar as the Federal Court of Appeal has addressed the interpretation of section 40(5) of the Act, that decision is binding upon me by operation of the doctrine of *stare decisis*. That doctrine requires that lower courts make decisions that are consistent with previous decisions of higher courts; see the decision in *Pfizer Canada v. Apotex Inc.* (2014), [2015] 465 N.R. 306 at paragraph 114.

[47] As noted above, the merits of the Commission's decision are also reviewable on the standard of reasonableness.

[48] The Investigator's recommendations, once adopted by the Commission, are to be considered as the reasons for the decision of the Commission. In this regard, I refer to the decision in *Sketchley v. Canada (Attorney General)*, [2006] 2 F.C.R. 392 at paragraph 37.

[49] I am satisfied that the Investigator conducted the necessary inquiries in a thorough and neutral manner, having regard to the nature of the question in issue. The Report refers to the Federal Court of Appeal's interpretation of subsection 40(5) of the Act in *Forrest, supra*.

[50] The Commission's interpretation of subsections 40(5) and 40(6), in asking the Minister to determine the status of the Applicant, accords with the law. Its decision was reasonable.

[51] I turn now to the arguments about an alleged breach of the Applicant's rights pursuant to subsection 15(1) of the Charter, which provides as follows:

Equality before and under law and equal protection and benefit of law	Égalité devant la loi, égalité de bénéfice et protection égale de la loi
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[52] The accepted approach to a section 15 Charter argument is set out in *Quebec (Attorney General) v. A.* [2013] 1 S.C.R. 61.

[53] That analysis requires first, consideration of whether the impugned law creates a distinction based on an enumerated or analogous ground, and second, whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping; see the decision in *Quebec (Attorney General), supra* at paragraph 86.

[54] In my opinion, there is no such distinction arising in the present proceedings.

[55] In its decision in *Toussaint v Canada (Attorney General)* (2011), 420 N.R. 364 at paragraph 99, the Federal Court of Appeal found that immigration status is not an analogous

ground for the purposes of subsection 15(1) because it is not an immutable personal characteristic, that is a personal characteristic that is unchangeable, or can only be changed at great personal cost; see also the decision in of the Ontario Court of Appeal in *Ishrad (Litigation Guardian of) v. Ontario (Minister of Health)* (2001), 55 O.R. (3d) 43 (C.A.) at paragraphs 133 - 136.

[56] Status as an incarcerated individual has also been rejected as an analogous ground; see the decision in *Alcorn v. Canada (Commissioner of Corrections)*, 2002 FCA 154. Further in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at page736, the Supreme Court of Canada found that status as a permanent resident convicted of a criminal offence is not an analogous ground.

[57] Since there is no legal basis to support a challenge pursuant to subsection 15(1) of the Charter, it is not necessary to engage with the arguments advanced pursuant to section 1.

[58] In the result, this application for judicial review is dismissed. The Respondent does not seek costs. In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, no costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Fadi Yachoua	FOR THE APPLICANT
Thomas Bean	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Group Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT