Federal Court  Cour fédérale

Date: 20181116

Docket: IMM-5019-17

Citation: 2018 FC 1160

Ottawa, Ontario, November 16, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

NKAFU FONDU FOMENKY

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] On October 6, 2017, the applicant, a citizen of Cameroon, was arrested by members of the Hamilton Police Service and charged with obstructing a peace officer. Later the same day, while he was still in police custody, the applicant was interviewed by a Canada Border Services Agency [CBSA] officer.

[2] The applicant was initially detained on the criminal charge as well as under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. At a detention review hearing before a member of the Immigration Division [ID] of the Immigration and Refugee Board of Canada held on October 26, 2017, the applicant sought the exclusion of the CBSA officer's notes of the interview on October 6, 2017. The applicant contended that the information had been obtained in violation of his rights under section 10(b) of the *Charter* and that it should be excluded under section 24(2) of the *Charter*. The ID member denied the application, finding that there was no violation of the applicant's rights under section 10(b).

[3] The October 26, 2017, detention review resulted in the applicant's continued detention but he was subsequently ordered released by the ID. Despite this, on this application for judicial review the applicant seeks to challenge the ID member's ruling on the admissibility of the CBSA interview.

[4] For the reasons that follow, I have concluded that this application for judicial review is moot and, further, that I should not exercise my discretion to address the merits of the application notwithstanding its mootness. The application is, therefore, dismissed.

II. BACKGROUND

[5] The applicant entered Canada irregularly from the United States on an unknown date in 2017 and remained here without status.

[6] For reasons that are not apparent from the record apart from a statement that the police were conducting a fraud investigation, on October 6, 2017, the applicant came into contact with members of the Hamilton Police Service. It was alleged that, in the course of his dealings with them, the applicant provided police with several false identities before finally disclosing his true identity. The applicant was arrested and charged with obstructing a peace officer. He was held in police custody for a bail hearing.

[7] Later the same day, while he was still in custody at the police station, the applicant was interviewed by a CBSA officer. The officer questioned the applicant about his immigration status but also asked him questions about a number of other matters. Among other things, the officer asked the applicant about his time in the United States and elsewhere, why he left the United States, why he was in Canada, when he arrived, who he knew in Canada, and where he was staying. The applicant told the officer he was a member of the Southern Cameroon National Council. He had been smuggled out of Cameroon. He did not want to return there because he feared he could be killed but he would like to go back to the United States. He confirmed to the officer that he had made a number of applications to enter Canada in the past but they had been rejected.

[8] Following this interview, the CBSA officer arrested the applicant under section 55 of the *IRPA*. The officer's grounds for arresting the applicant are set out in a document attached to the Notice of Arrest. This document includes a summary of information the officer had obtained from questioning the applicant while the latter was in police custody.

[9] On October 17, 2017, the applicant was ordered released on bail on the criminal charge.

[10] The applicant's first detention review hearing under the *IRPA* occurred on October 19, 2017. The ID member ordered the detention to continue.

[11] As noted, the applicant's detention was continued after his second detention review on October 26, 2017, but at the third detention review, on November 23, 2017, he was ordered released on conditions.

[12] At the October 26, 2017, detention review, the applicant sought the exclusion of the CBSA officer's notes of the October 6, 2017, interview. These notes, together with the Notice of Arrest and a statutory declaration by a CBSA officer stating that the applicant's only criminal history in Canada was the outstanding obstruct peace officer charge, had been filed without objection at the first detention review and marked collectively as Exhibit DR#1. (The applicant was not represented by counsel at the time.)

[13] In ruling on the application to exclude the applicant's statement to the CBSA officer, the member stated that there is no right to counsel when a CBSA officer conducts an initial interview to determine someone's immigration status. The member also commented, regrettably, that one of the concerns he had with the application was that "it would be difficult to exclude this information because I have seen it, I have read it in preparation for this matter." This concern is clearly erroneous. In the end, however, it did not figure in the decision because the member

found that there was no legal basis to exclude the evidence: section 10(b) of the *Charter* could be violated only if it applied, and the member concluded that it did not apply in the circumstances.

[14] The present application for judicial review was commenced by a Notice of Application dated November 23, 2017. Some of the grounds relate to the applicant's then-ongoing detention but they have obviously been overtaken by events. The applicant also challenges the October 26, 2017, ruling on the admissibility of the CBSA interview. His central contention is that the ID "erred in its interpretation of section 10(b) of the *Canadian Charter of Rights and Freedoms* by finding that an immigration interview of a person detained on criminal charges is not a sufficient change in circumstances to trigger a renewed right to counsel." The applicant seeks "a declaration that [his] rights under section 10(b) of the *Canadian Charter of Rights and Freedoms* were violated when the Canada Border Services Agency questioned him about his immigration status while he was detained by the Hamilton Police on criminal charges without giving him notice of his right to contact counsel or providing him with an opportunity to exercise that right." He also seeks an order quashing the October 26, 2017, decision of the ID.

III. ISSUES

[15] This matter turns on the following issues:

a) Is the application for judicial review moot?

b) If the application for judicial review is moot, should I nonetheless exercise my discretion to decide it on its merits?

IV. ANALYSIS

[16] A mootness analysis proceeds in two stages. The first question is whether a live controversy remains that affects or may affect the rights of the parties. If this question is answered in the negative, the proceeding is moot but the court must still consider whether it should nonetheless exercise its discretion to decide the matter on the merits (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353-63 [*Borowski*]; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10 [*Democracy Watch*]).

[17] I will consider each of these questions in turn.

1) *Is there still a live controversy affecting the applicant's rights?*

[18] 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" (*Borowski* at 353). This 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" (*ibid.*). Thus, "[i]f the decision of the court will have no practical effect on such rights, the court will decline to decide the case" (*ibid.*). This general principle is subject to the court's discretion to decide the case notwithstanding its mootness, as discussed below.

[19] The question at this stage is "whether the required tangible and concrete dispute [between the parties] has disappeared and the issues have become academic" (*ibid.*).

[20] The applicant obviously accepts that there is no longer a live controversy about whether the ID member erred in ordering his detention on October 26, 2017. Since he has now been released, this question is entirely academic. He contends, however, that there is still a live controversy concerning whether the member erred in concluding that the CBSA interview did not violate his rights under section 10(b) of the *Charter* because this ruling may affect his rights in the future. The applicant submits that, if the member's ruling is left undisturbed, he will have to overcome the doctrine of issue estoppel if the contents of the interview were to be tendered in another proceeding and he applied to exclude this evidence. On the other hand, if this Court were to quash the member's decision (which, of course, the applicant maintains it should do), he would face no such impediment to seeking the exclusion of the evidence in the future.

[21] In my view, the applicant's argument expands the notion of "live controversy" unduly. The "tangible and concrete" dispute between the parties concerned whether the applicant should be released from detention. This disappeared when the applicant was released under a subsequent order of the ID. The applicant's situation is indistinguishable from those considered in *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 [*Winko*], and *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 SCR 326, 2006 SCC 7 [*Mazzei*], where appeals of orders of the British Columbia Review Board were found to be moot because they had been overtaken by subsequent orders of the Board. In *Mission Institution v Khela*, [2014] 1 SCR 502, 2014 SCC 24, an appeal concerning Mr. Khela's security classification as a federal inmate was moot because, by the time the appeal reached the Supreme Court of Canada, another classification decision had been made. Similarly, in *R v Oland*, [2017] 1 SCR 250, 2017 SCC 17 [*Oland*], an appeal of an order detaining Mr. Oland in

custody pending the appeal of his murder conviction was moot because, by the time the case reached the Supreme Court of Canada, the conviction appeal had been allowed by the New Brunswick Court of Appeal and Mr. Oland had been released on bail pending the new trial.

[22] There were continuing controversies about legal questions and these questions could arise again in future cases involving the very same parties but it was never suggested that this meant that the appeals were not moot. Rather, this was a factor the Court considered in deciding to hear the appeals notwithstanding the fact that they were moot. In *Oland*, for example, the Court dealt with the appeal on its merits despite its mootness in part because Mr. Oland could find himself facing the same legal issues again following his re-trial (at paras 17-18).

[23] I am prepared to accept that the applicant could be confronted with things he said to the CBSA officer on October 6, 2017, in a future proceeding. In fact, there is evidence before this Court that the applicant has made a refugee claim, that the Minister of Citizenship and Immigration intends to intervene, that the package of documents provided by the Minister in connection with this intervention includes notes from the CBSA officer's interview with the applicant, and that the applicant intends to object to the admissibility of this evidence. Even so, the applicant's argument based on issue estoppel cannot establish an ongoing tangible and concrete dispute. Issue estoppel may not even apply in the new proceeding because, for example, the parties are not the same. Even if issue estoppel could apply, the party opposite may not seek to rely on it in defending the admissibility of the evidence. Finally, even if issue estoppel were invoked, the tribunal has the discretion not to apply it if to do so would not advance the interests of justice. As Justice Binnie stated for the Supreme Court of Canada in

Danyluk v Ainsworth Technologies Inc., [2001] 2 SCR 460, 2001 SCC 44, the "rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case" (at para 33). This requires considering the fairness of the original proceeding and, even where the prior proceeding was conducted fairly and properly having regard to its purpose, whether it may nonetheless be unfair to use the results of that process to preclude the subsequent claim (*Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 39). The factors a future tribunal would no doubt consider when determining whether the applicant is estopped from challenging the admissibility of his statement to the CBSA officer include the nature and purpose of the original proceeding, the manner in which detention review hearings are conducted and whether it is reasonable to expect the applicant to have litigated the issue fully in that proceeding (something I return to below). Without in any way deciding the matter, these factors arguably support the exercise of discretion not to allow issue estoppel to preclude another objection to the admissibility of the evidence. The fact that the applicant attempted to challenge the original ruling directly in this proceeding would also doubtless be considered a point in his favour.

[24] In these circumstances, it is far from a foregone conclusion that issue estoppel would be an impediment to any subsequent attempt the applicant might make to exclude the contents of the CBSA interview. The law is clear that "speculative possibilities are insufficient to avoid a finding of mootness" (*Yahaan v Canada*, 2018 FCA 41 at para 26). That a constellation of contingencies would align in such a way as to adversely affect the applicant's rights in some future proceeding is simply too speculative to save this application from mootness.

2) *Should the Court nonetheless decide the application on its merits?*

[25] In *Borowski*, the Court formulated guidelines for determining whether to address issues raised in a moot case. Three factors were identified: (1) whether there is an adversarial context; (2) the concern for judicial economy; and (3) whether deciding the case on its merits would be consistent with the court's adjudicative role relative to that of the legislative branch of government (at 358-63). The Court emphasized that this is not an exhaustive list: "more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases" (at 358). This discretion is "to be judicially exercised with due regard for established principles" (*ibid.*). Further, the application of these factors is not a "mechanical process" (at 363). The factors may not all support the same conclusion in a given case, and the presence of one or two may be overborne by the absence of a third, and vice versa (*ibid.*).

[26] In my view, only the first of these factors favours deciding this case on its merits. There is no question that an adversarial context is present here. The applicant remains engaged personally and both sides have ably advanced their positions on the merits of the judicial review application. However, as I will explain, the other two factors weigh heavily against deciding this application on its merits.

[27] The applicant attempts to cast the issue he seeks to pursue as one that is evasive of review. It is certainly the case that judicial economy can favour addressing a recurring issue of short duration or which is otherwise evasive of review when it finally manages to reach a court.

However, I do not agree with the applicant that the issue of what obligations, if any, section 10(b) of the *Charter* places on a CBSA officer who conducts an initial interview with someone already detained by the police is so evasive of review that I should deal with it in this case.

[28] This application arises from a detention review hearing. It is true that rulings in detention review proceedings will often be overtaken by subsequent decisions that are made before the original determination can reach this Court, as this case itself demonstrates. In this respect, they are like bail decisions under the *Criminal Code* (as in *Oland* and *R v Hall*, [2002] 3 SCR 309, 2002 SCC 64 at para 10) or orders of provincial review boards (as in *Winko* and *Mazzei*). However, unlike those cases, the legal issue on which the applicant seeks a determination from this Court does not arise only in proceedings with a short lifespan. One can easily imagine the admissibility of a statement made to a CBSA officer being at issue in an admissibility hearing under section 44(2) of the *IRPA*, for example. Indeed, it is only fair to recall that, as part of his issue estoppel argument, the applicant submitted that he could be confronted with his statement to the CBSA officer in some future proceeding and, in fact, presented evidence that this could well happen in his refugee hearing. It is difficult to see how he can rely on this and at the same time maintain that the admissibility of this kind of evidence is an issue that is evasive of review. There is nothing distinctive about the issue having arisen in this case in the context of a detention review hearing. In short, the issue the applicant asks this Court to address despite its mootness is not so evasive of review "as to warrant the further expenditure of judicial resources when its determination would amount to the giving of a legal opinion with no practical effect" (*Democracy Watch* at para 18).

[29] In addition, the inadequacy of the record entails that this is not an appropriate case in which to decide the issue raised by the applicant. It is inconsistent with the court's adjudicative role to decide an important legal question in what is essentially a factual vacuum. This is especially so in a case raising a constitutional issue.

[30] The Supreme Court of Canada has stressed the importance of an adequate evidentiary record when deciding constitutional issues. As Justice Cory put it in an oft-quoted passage from *MacKay v Manitoba*, [1989] 2 SCR 357,

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[31] This principle is often applied in the context of constitutional challenges to legislation but I consider it to be equally applicable when the constitutional issue concerns the obligations the *Charter* itself imposes on state agents, as is the case here.

[32] At the detention review hearing, the only evidence the applicant relied on to support his application to exclude the notes of his interview with the CBSA officer was the notes themselves. Significantly, those notes say nothing about what the CBSA officer said (or did not say) to the applicant about his rights under section 10(b) of the *Charter*. No other evidence was presented. The applicant did not testify.

[33] The applicant filed an affidavit on this application for judicial review in which he purports to describe the circumstances under which he was questioned by the CBSA officer. The general rule is that the evidentiary record on an application for judicial review of an administrative decision is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Canada (Citizenship and Immigration) v Sohail*, 2017 FC 995 at para 17). While this general rule admits of exceptions, none apply here. Indeed, counsel for the applicant properly conceded that the affidavit is inadmissible with respect to the merits of the application for judicial review.

[34] As a result of how the detention review hearing was conducted, there is no evidence touching on a number of critical matters, including the following:

- What exactly the police told the applicant when they informed him of his rights under section 10(b) of the *Charter*. (There does not appear to have been any issue that the police would have cautioned the applicant under section 10(b) in some fashion.)

- What the applicant understood his rights to be as explained to him by the police.

- Whether the applicant was informed of his rights again by anyone in authority before he was interviewed by the CBSA officer.

- Whether the applicant consulted with counsel at any time before he was interviewed by the CBSA officer.

- If the applicant did consult with counsel before being interviewed by the CBSA officer, whether he sought or received any advice about his immigration situation. (I appreciate that this is a delicate matter since it engages solicitor/client privilege but counsel for the applicant puts the adequacy of the advice the applicant received in issue by asserting, in the absence of any evidence, that criminal duty counsel would not have provided advice on immigration-related matters.)

- On the Notice of Arrest form completed by the CBSA officer, a box labeled "Charter Rights – Charte des Droits" has been checked. There is no evidence of what this means. Assuming it means that the applicant was told something about his rights under the *Charter*, there is still no evidence of what he was told, when, by whom, what he understood from what he was told, or what he said or did in response.

- During submissions on the application to exclude the evidence, counsel for the Minister apparently presented a document he said was signed by the applicant and which stated that the applicant "was given an opportunity to retain and instruct counsel without delay and to be informed of that right." No evidence regarding this document was called at the detention review hearing. The document itself was not marked as an exhibit at the detention review hearing and, as a result, it is not part of the record on this application for judicial review.

[35] This is a completely unsatisfactory state of affairs in which to adjudicate any legal question, let alone an important constitutional issue with potentially wide-ranging ramifications. I am sensitive to the exigencies of detention review hearings. Quite understandably, the

detainee's focus is on securing release as quickly as possible. By their very nature, detention review hearings will rarely be conducive to the full-scale litigation of the admissibility of a piece of evidence. But even making allowance for this, the record here is woefully inadequate.

[36] Drawing the latter two *Borowksi* factors together, it is possible that judicial economy could have been promoted by dealing with this case on its merits if the record did not suffer from the deficiencies set out above. That, however, is not the case that has been presented to this Court. Even if concerns about judicial economy could justify overlooking some deficiencies in the record, to accede to the applicant's position in the circumstances of this case would require doing much more than this.

V. CONCLUSION

[37] The applicant raises an important legal issue but its importance entails that this Court should consider it only on the basis of a proper record. There is no reason to think such a case will not come along at some point. Taking all the *Borowski* factors into consideration, I decline to consider the merits of the *Charter* issue the applicant has raised. There being no other issues before the Court, the application for judicial review is dismissed.

[38] The parties agreed that no question of general importance would arise if the case were decided on the ground of mootness. I concur.

JUDGMENT IN IMM-5019-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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