Federal Court  Cour fédérale

Date: 20190322

Docket: IMM-2121-18

Citation: 2019 FC 361

Ottawa, Ontario, March 22, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

YONNA SAYBAH KRAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] Applications for judicial review in the Federal Court are to be "heard and determined without delay and in a summary way" (s. 18.4(1), *Federal Courts Act*, RSC 1985, c F-7).

[2] To facilitate this, the *Federal Courts Act* and the *Federal Courts Rules*, SOR/98-106 [the *FC Rules*] provide a simple and clear set of guidelines. In regard to matters involving citizenship,

immigration or refugee determinations, there are similar procedures, but with the additional requirement to apply for leave prior to launching an application for judicial review (s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]). It is specified, however, that immigration and refugee matters are also to proceed against tight time limits, and the Court is to "dispose of the application without delay and in a summary way" (s. 72(2)(d) of *IRPA*). There is also a specific set of rules governing such proceedings, which lay out in clear terms the steps and timelines to follow in order to get the matter to a determination without delay (see *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [the *Rules*].

[3] This case has not followed the usual, summary, and expeditious path laid out in these provisions. This Order deals with the Respondent's preliminary motion seeking to strike out the Applicant's application for leave and judicial review, and/or to strike out the Applicant's record and supporting material.

II. Background

[4] The Applicant filed her application for leave and judicial review in order to overturn a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD), which upheld the denial of her husband's application for a permanent resident visa as part of the family class. The key issue was her husband's failure to satisfy immigration authorities of his identity, as required pursuant to s. 11(1) of *IRPA*.

[5] In support of her application for leave and judicial review, the Applicant, through her lawyer, filed an Application Record containing the decision of the IAD, as well as an affidavit of an articling student employed at the counsel's law firm. This affidavit included a number of

exhibits, including documentation relating to the application for permanent residence, affidavits sworn by the Applicant's husband, as well as an affidavit sworn by Maître Gjergji Hasa, who was the Applicant's counsel at the IAD hearing.

[6] The Respondent's preliminary motion to strike argues that the affidavit evidence in support of the Applicant's application for leave and judicial review are irregular and improper, and for this reason the entire application should be struck, or in the alternative the material filed in support of the application should be struck. The Respondent submits that this Court has jurisdiction to strike an application at a preliminary stage (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (FCA) [*David Bull Laboratories*]; *Leahy v Canada (Citizenship and Immigration)*, 2009 FC 509, paras 10-12 [*Leahy*]).

[7] The Respondent argues that the affidavits are irregular and improper because:

- The Applicant has not filed an affidavit herself, as required by s. 10(2) of the *Rules* and the jurisprudence (*Dhillon v Canada (Citizenship and Immigration)*, 2009 FC 614, para 7; *Fatima v Canada (Citizenship and Immigration)*, 2017 FC 1086);
- The application is supported by an affidavit sworn by the very counsel who is the solicitor of record in this matter, contrary to s. 82(1) of the *FC Rules* and the jurisprudence (*Seymour Stephens v Canada (Citizenship and Immigration)*, 2013 FC 609, para 28);
- The rule against solicitors filing affidavits in matters where they appear as counsel extends to affidavits filed by members of the same law firm (*Samuel v Canada (Citizenship and Immigration)*, 2010 FC 223);

- The affidavit of M[e] Hasa is filed as an exhibit to the articling student's affidavit, and therefore it should be given very little weight. This problem is compounded because M[e] Hasa commissioned the affidavit of the law student;
- Furthermore, the affidavit of M[e] Hasa is replete with argumentative commentary, and is not limited to a neutral statement of the facts, as required by the *FC Rules* (s. 81(1)) and the jurisprudence (*Gravel v Telus Communications Inc*, 2010 FC 151, paras 5-7; aff'd 2011 FCA 14).

[8] The Applicant argues that these concerns are misplaced. In her reply to the motion, the Applicant filed a further affidavit from M[e] Hasa, as well as written submissions (written and submitted by new counsel from the same firm). In his further affidavit, M[e] Hasa explains that he was counsel for the Applicant and her husband at the IAD. Upon receipt of the negative decision – and in order to preserve their rights – his law firm was given the mandate to draft, file, and serve a Notice of Application for leave and judicial review. A short time later, his law firm received the mandate to pursue this matter.

[9] M[e] Hasa states that he quickly realized that he would be swearing an affidavit to attest to what happened at the IAD hearing, since there was not sufficient time to obtain a written transcript of the hearing. Upon realizing this, M[e] Hasa obtained his clients' permission to transfer the file to a colleague in the law firm, Maître Ashley Walling. The Applicant asserts that M[e] Walling therefore became solicitor of record in this matter, upon her signing and filing the Application Record, which included the original affidavit of M[e] Hasa.

[10] The Applicant's position is that it is not contrary to the law or jurisprudence for M[e] Hasa to swear an affidavit as to his personal knowledge, in a matter in which he is no longer appearing

as counsel. This is in conformity with the *FC Rules* (s. 81(2)) and the jurisprudence (*Pluri Vox Media Corp v Canada*, 2012 FCA 18 [*Pluri Vox*]). It is also in conformity with the Québec *Code of Professional Conduct of Lawyers*, CQLR c B-1, R 3.1, article 76.

[11] The Applicant contends that the case-law cited by the Respondent does not establish a total bar and is distinguishable on the facts. It is not a requirement in all cases that an Applicant swear an affidavit and it is not inappropriate in specific circumstances for a lawyer to swear an affidavit in a matter in which he or she will not be appearing as counsel.

III. Issue

[12] The only issue is whether the Respondent's preliminary motion to strike should be granted.

IV. Analysis

[13] Applications for leave and judicial review in immigration and refugee matters, like all other applications for judicial review in this Court, are meant to be summary and expeditious proceedings. The focus is on hearing the matter on the merits without delay rather than contesting procedural questions through preliminary motions and hearings, which normally, and preferably, could all be dealt with at the merits hearing.

[14] While it is true that the Court has jurisdiction to dismiss an application for judicial review in a summary manner at the preliminary stage, it is a limited power which should be exercised only in the exceptional circumstance where the notice of motion is so clearly improper as to be

bereft of any possibility of success (*David Bull Laboratories*; *Leahy*; *Mubenga v Canada (Citizenship and Immigration)*, 2015 FC 111). On a motion to strike an application for judicial review, the facts alleged in the application must be taken as true, unless it is clear that they simply cannot be proven (*Turp v Canada (Foreign Affairs)*, 2018 FC 12).

[15] I am not persuaded that this is the type of exceptional case in which this extraordinary power to strike an application for judicial review at a preliminary stage should be exercised. The Respondent is correct to assert that some of the evidence filed in support of the application is replete with problems, but the matter is not so wholly bereft of merit that there is no possibility of success. I agree with certain of the Respondent's submissions, but I find overall that the application is supported by some evidence which is properly before the Court, and some of the arguments are not supported by a careful reading of the jurisprudence.

[16] It is not an absolute requirement that an application for leave and judicial review be supported by an affidavit of the applicant, although that is generally the best way of putting the essential facts before the Court. It is critical that the affidavit be sworn by someone who has personal knowledge of the decision-making process (*Ismail v Canada (Citizenship and Immigration)*, 2016 FC 446). If the application rests on a question of law, or the essential facts necessary for its determination are contained in the Certified Tribunal Record, the lack of an affidavit of the applicant is not fatal (*Koky v Canada (Citizenship and Immigration)*, 2011 FC 1407; *Singh v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 455; *Conka v Canada (Citizenship and Immigration)*, 2018 FC 532). I therefore reject the Respondent's argument that the Applicant's failure to file an affidavit is a basis to strike the application. In view of the particular circumstances of this case, I do not find the absence of an affidavit from

the Applicant to be fatal to the claim. It is a matter which is best addressed in submissions at the hearing on the merits.

[17] In regard of the affidavits filed by M^{e} Hasa, I find that there are a number of difficulties.. First, the affidavit in the application record is an exhibit to the articling student's affidavit. The jurisprudence of this Court is clear that it will be given little weight (*594872 Ontario Inc v Canada* (1992), 55 FTR 215, [1992] FCJ No 253 (QL) (TD), para 14; *Zaman v Canada (Citizenship and Immigration)* (1997), 131 FTR 54, 1997 CanLII 16394 (TD)).

[18] Second, the affidavits go beyond a neutral presentation of the evidence, and include inappropriate commentary and conclusory statements. For example, M^{e} Hasa states at several points that he was "surprised" by certain rulings of the IAD; that the husband had "explained perfectly" his life history with his immediate family; that his testimony was "straight forward" and "plausible" and "very cogent" such that M^{e} Hasa was "extremely surprised and dismayed" about how the IAD treated some of the evidence. I need not go on to make the point that this type of language is not what is appropriate for an affidavit in this Court, especially in an affidavit sworn by a member of the legal profession. As stated by Madam Justice Johanne Trudel in *Canada (Attorney General) v Quadrini*, 2010 FCA 47, at paragraph 18:

> [18] The question of the respondent's affidavit remains. As a general rule, the affidavit must contain relevant information which would be of assistance to the Court in determining the application. As stated by our Court in *Dwyvenbode v. Canada (Attorney General)*, 2009 FCA 120, the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion

> (*McConnell v. Canadian Human Rights Commission*, 2004 FC 817, affirmed 2005 FCA 389).
>
> [Emphasis in original.]

[19] However, the fact that an affidavit contains some objectionable language is not, in and of itself, a reason to strike it entirely, particularly in the context of an application for judicial review, where the judge hearing the merits can decide whether to rely on any such passages (see for example *Deyab v Canada (Citizenship and Immigration)*, 2013 FC 881, paras 19-23).

[20] Third, while it is technically true that M[e] Hasa no longer intends to appear as solicitor of record, the affidavit in question was sworn by an articling student working in his law firm and he commissioned the articling student's affidavit. This is far from a best practice, insofar as the affidavit of M[e] Hasa goes well beyond presenting documentation that was before the IAD, or a simple summary of procedural steps by way of context.

[21] The jurisprudence indicates that this is not a best practice, guided by the various Codes of Professional Conduct for lawyers across the country, and inspired by the Federation of Law Societies' *Model Code of Professional Conduct*. As the Federal Court of Appeal makes clear in *Pluri Vox* at paragraphs 3-4, Rule 82 reflects these generally accepted rules of professional conduct, and it is appropriate to refer to the professional conduct rules for the province in which the lawyer practices.

[22] In this case, M[e] Hasa, and M[e] Walling are members of the Québec Bar. Article 76 of the Québec *Code de déontologie des avocats*, c B-1, R 3.1, indicates that a "lawyer must not personally act in a dispute he knows or should know that he will be called upon as a witness." I would observe that this has been interpreted to extend to affidavits from other members of the

same firm (*Rafale Sélection Contact inc c Stragégietchno.com inc*, 2016 QCCQ 8943, paras 24-27, 52-57; *Barreau du Québec (syndic ad hoc) c Brouillette*, 2018 QCCDBQ 109, paras 393-96), although it is clear that this depends on the circumstances and is not an absolute bar (*Dion c Simard*, 2015 QCCA 1946, para 7; *Dubo Électrique ltée c Votre Docteur Électrique inc*, 2017 QCCQ 14531, para 8; *Société immeubles Majewski #1 c Groupe Géni-E-Tude inc*, 2016 QCCS 31, paras 14-17).

[23] I mention these points not to make any final determination on this issue, but rather to indicate that I do accept certain of the Respondent's arguments regarding aspects of the Applicant's affidavits. I do not, however, find that these difficulties are so great as to warrant the exercise of the exceptional power to strike the application for leave and judicial review at this preliminary stage.

V. Conclusion

[24] For these reasons, while I find that the affidavits present certain difficulties and challenges, I am not persuaded that I should strike the entire application for leave and judicial review, nor that I should, at this preliminary stage, strike all or portions of the affidavits filed by the Applicant. The judge deciding the application for leave, and if that is granted, the judge hearing the application itself can determine what weight, if any, to give to this evidence. It is also possible that the Applicant may bring an application to supplement their record, and perhaps to obtain the material that was before the IAD through an application pursuant to Rule 317.

[25] The Respondent sought further time to serve and file its Record, and accordingly I am granting the Respondent 20 days from the issuance of this Order to serve and file its Record in response to the Applicant's Record.

ORDER in IMM-2121-18

THIS COURT ORDERS that:

1. The motion to strike is dismissed.

2. The Respondent may serve and file its Record in response to the Applicant's Record within 20 days of the issuance of this Order.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2121-18
STYLE OF CAUSE:	YONNA SAYBAH KRAH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	PENTNEY J.
DATED:	MARCH 22, 2019

APPEARANCES:

M[e] Ashley Walling	FOR THE APPLICANT
M[e] Mario Blanchard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ferdoussi Hasa Attorneys Barristers and Solicitors Montréal, Québec	FOR THE APPLICANT
Attorney General of Canada Montréal, Québec	FOR THE RESPONDENT