Federal Court  Cour fédérale

Date: 20200519

Docket: T-1858-19

Citation: 2020 FC 628

Ottawa, Ontario, May 19, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ROMEO V. LIM

Applicant

and

THE MINISTER OF JUSTICE
AND
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondents

ORDER AND REASONS

I. Overview

[1] This is a Motion in writing pursuant to Rule 369(1) of the *Federal Courts Rules*, SOR/2004-283 [the *Rules*], brought by the Applicant, Romeo V. Lim, who is self-represented. He indicates that he has been assisted in this and other matters by Timothy Leahy whom he has

appointed as his Attorney-in-Fact for the purpose of representing him in all court cases under a Special Power of Attorney sworn October 2, 2018 in Edmonton, Alberta.

[2] Under Rule 51(1) of the *Rules*, the Applicant appeals the decision of a Prothonotary dated February 11, 2020 in which his Notice of Application dated November 8, 2019 for Judicial Review of a failure to finalize his work permit application was struck on the basis that it was an abuse of process and was moot as he had been deported to the Philippines.

II. **The Notice of Application**

[3] The Notice of Application challenged a "decision, made on or about 27 October 2019 without explanation, never to finalize my work permit application (File No: W303877084), received on 1 October 2018" and "to thwart all my efforts to be issued the work permit so that I will not have to remain jailed with men convicted of violent crimes or starve or freeze to death on the outside, thereby willfully (*sic*) breaching my s 7, s. 12 and 15 *Charter* rights."

[4] The relief sought by the Applicant in the application included various orders in relation to the alleged *Charter* violations. These include a compelled apology for having breached his *Charter* rights and promising never again to breach them; a declaration that previous judicial determinations which the Applicant characterizes as "approval of breaches of [his] *Charter* rights" were unconscionable and bring the administration of justice into disrepute; and costs to the Applicant of "no less than $15,000".

[5] The grounds for the application accuse the Respondents of breaching the Applicant's *Charter* rights by refusing to issue a work permit to him. Various named judicial officers of this Court were said to be co-conspirators who aided and abided by that outcome.

[6] Attached as an Appendix to this Order and Reasons are all the Applicant's grounds for the application and the relief he sought.

[7] By Notice of Motion dated January 22, 2019, the Respondents moved in writing pursuant to Rule 369 for an Order to strike the Applicant's Notice of Application on the grounds that it was an abuse of process and was moot.

[8] As already noted, the Prothonotary granted the Respondents' motion.

III. **The Standard of Review on an Appeal of a Prothonotary's decision**

[9] Rule 221 of the *Rules* provides discretion to the Court to strike all or part of a pleading, with or without leave to amend, based on the grounds specified in the rule.

[10] When determining an appeal from a discretionary decision of a Prothonotary, it has been established that this Court may only interfere if the Prothonotary made an error of law or based the order on a palpable and overriding error in regard to the facts: *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraph 64.

[11] A palpable and overriding error is one the effect of which is to vitiate the integrity of the reasons: *Maximova v Canada (Attorney General)*, 2017 FCA 230 at paragraph 5. In other words if the error is obvious and apparent, it will be overriding and palpable.

[12] For the reasons which follow, the Applicant's appeal is dismissed with costs of $500 for this appeal to be paid to the Respondent, the Minister of Citizenship and Immigration. The Prothonotary made no error of law in her analysis nor did she commit any palpable and overriding error in regard to the facts.

IV. **The Prothonotary's decision**

[13] Relying on *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paragraphs 47 and 48, the Prothonotary identified that there was jurisdiction to strike a Notice of Application and that the threshold for doing so was high such as an obvious, fatal flaw striking at the root of the Court's power to entertain the application. That this remains the test has been recently confirmed in *Canada (Attorney General) v Valero Energy Inc*, 2020 FCA 68 at paragraph 26.

[14] The Prothonotary determined that the application for judicial review should be struck for three reasons: (1) it was an abuse of process as it was attempting to re-litigate the refusal to grant the Applicant's application for a work permit which had previously been dismissed by this Court in Court File No. IMM-3974-19; (2) it was also an attempt to circumvent subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] that requires leave to commence an application for judicial review of any matter under the *IRPA*; and, (3) the application was

plainly moot as no concrete legal dispute remained between the parties once the Applicant was deported to the Philippines and had been found inadmissible to Canada on the grounds of serious criminality.

[15] The Prothonotary struck the Notice of Application, without leave to amend and dismissed the application for judicial review, pursuant to Rule 221 of the *Rules*.

[16] The Prothonotary also ordered the Applicant to pay to the Respondent, the Minister of Citizenship and Immigration, his costs of the motion fixed in the amount of $500.00 inclusive of disbursements and taxes.

[17] Although in my view this matter can be determined on the issue of mootness alone, each of the findings made by the Prothonotary will be examined.

A. *The Abuse of Process finding*

[18] The Applicant challenges the finding that the application which was struck was an abuse of process. He begins by re-categorizing the Prothonotary's reasons as finding that he had engaged in a "collateral attack" on the dismissal of his application for leave in file IMM-3974-19. The Applicant states that the Prothonotary "cleverly did not use the term 'collateral attack'". He then claims that was the actual finding of the Prothonotary and, because the elements of a collateral attack were not present, that finding was made in error.

[19] I do not accept the Applicant's re-categorization of the Prothonotary's analysis. After comparing the contents of the Application for Leave and Judicial Review in Court File No IMM-3974-19 with the contents of the Notice of Application in this matter, the Prothonotary found that the Applicant was, in essence, attempting to re-litigate the refusal to issue a work permit to him.

[20] I see no error of any kind in that conclusion by the Prothonotary. In considering a motion to strike, a notice of application is to be read with a view to understanding the real essence of it. The Court is to gain an appreciation of the "essential character" of the application by reading it without fastening onto matters of form: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paragraphs 49 and 50.

[21] In IMM-3974-19 the Applicant sought leave to commence an application for judicial review of:

> the surreptitious decision one or more people made on an unknown date on File No 8932–4655 at CPC-Edmonton [. . .] refusing to process and grant my application for a work permit and for extension (*sic*) my lawful immigration status in Canada.

[22] In the present application, T-1858-19, the Applicant did not seek leave; he filed an application for Judicial Review under subsection 24(1) of the *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1892, c 11 and s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review in respect of:

> the respondents' agents' decision, made on or about 27 October 2019 without explanation, never to finalize my work permit application (File No W303877084), received on 1 October 2018, [. . .] and to thwart all my efforts to be issued the work permit so that I will not have to remain jailed with men convicted of violent

> crimes or starve or freeze to death on the outside, thereby willfully (*sic*) breaching my s. 7, s. 12 and 15 *Charter* rights.

[23] As can be seen, while there is some variation in the way each application frames the reason for seeking judicial review and the decision to be reviewed, there is no variation in the substance of the decision or matter to be reviewed. In each application, the Applicant seeks review of a failure to determine his application for a work permit.

[24] The Applicant put forward several arguments in an attempt to differentiate the substance or essence of the two applications.

[25] For example, the Applicant states that he is not seeking to re-litigate prior decisions made under *IRPA* that have affected him. He baldly asserts, without pointing to any facts in support of his allegations, "that those incidents establish a pattern of IRCC and DoJ (*sic*) personnel and their judicial allies wilfully breaching my s.7, s.12 and s.15 *Charter* rights." He adds that that is why his application was brought under subsection 24(1) of the *Charter* and not under subsection 72(1) of the *IRPA*. The Applicant adds that this application differs from IMM-3974-19 because he seeks declaratory relief based on his allegations of *Charter* violations.

[26] The Prothonotary dismissed this argument on the basis that in IMM-3974-19 the Applicant also sought declarations based on allegations of *Charter* violations.

[27] The Prothonotary made no error in arriving at that finding. Mr. Justice Mosley's dismissal of the application at the leave stage indicates that the Applicant failed to meet the

required test for leave of showing a fairly arguable case on the merits, including the *Charter* arguments.

[28] Finally, in answer to the Applicant's submission to the Prothonotary that his application should not be struck out because it was not an exact duplication of his previous application in IMM-3974-19, the Prothonotary applied the abuse of process test after referring to the decision in *Behn v Moulton Contracting Ltd*, 2013 SCC 26 [*Behn*] which held that the doctrine of abuse of process is flexible and unencumbered by specific requirements.

[29] Specifically at paragraph 40 of *Behn,* the Supreme Court noted that abuse of process engages the inherent power of the court to prevent misuse of its procedure. In doings so, it has been applied where the court has found the litigation in essence was an attempt to re-litigate an issue which the court has already determined.

[30] With reference to *Behn*, the Applicant submits on this appeal that because denial of leave is not a decision on the merits there is no attempt at re-litigation. With respect, the Applicant's interpretation of the effect of the dismissal of his application for leave in IMM-3974-19 is not accurate. Dismissal of an application for leave is a final decision that puts an end to that application for judicial review. By failing to show that there was an arguable case, the Applicant failed to persuade the Court that his application had enough merit to warrant a hearing.

[31] The Applicant also submits that because he filed his application under the *Charter*, not the *IRPA*, he is not re-litigating an issue decided on the merits. This argument in my view is another example of the Applicant preferring to argue form over substance.

B. *Failure to comply with subsection 72(1) of the IRPA*

[32] The Prothonotary made the following finding with respect to an abuse of process regarding subsection 72(1) of the *IRPA*:

> [12] Finally, I agree with the Minister's submission that the application is also an abuse of the Court's process because it seeks to circumvent section 72(1) of *Immigration and Refugee Protection Act* [*IRPA*], which imposes a requirement to obtain leave to commence an application for judicial review in immigration matters under *IRPA*.

[33] The Respondent pointed out in this appeal that the Applicant was well aware of the requirement to obtain leave, given the number of applications for judicial review of several immigration-related decisions he had filed on various grounds. Those grounds ranged from a negative decision for permanent residence on H&C grounds to refusal of an in-Canada Spousal Sponsorship and the subsequent refusal of an application for a Temporary Resident Visa.

[34] The Applicant argues that the Prothonotary has elevated the *IRPA* to be the supreme law of the land by determining that subsection 72(1) of the *IRPA* "vitiates subsection 24(1) of the *Charter*".

[35] I disagree. The Prothonotary is bound to apply subsection 72(1) of the *IRPA* which states that judicial review with respect to any matter under the *IRPA* is commenced by making an

application for leave to the Federal Court. The failure to render a decision with respect to the Applicant's work permit application is a matter under the *IRPA*. As such, by filing an application for judicial review in which he did not seek leave to proceed, the Applicant's application was not properly before the Court as it failed to comply with requirements set out in the legislation.

C. *The Application is Moot*

[36] The Prothonotary identified that an application for judicial review may be struck on a motion, without hearing the application itself, where the application is without any possibility of success because it is moot: *Kardava v Canada (Citizenship and Immigration)*, 2016 FC 159 at paragraph 12.

[37] In determining whether the Applicant's matter was moot the Prothonotary identified and applied the two-stage analysis set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at pages 353-363 [*Borowski*].

[38] The Prothonotary specifically noted that *Borowski* established that if events which affect the relationship of the parties occurred subsequent to the initiation of the proceeding, so that no present live controversy existed which affects the rights of the parties, the case is said to be moot: *Borowski* at page 353.

[39] The Respondent submits that the Prothonotary committed no error in finding that the application for judicial review was moot. On December 9, 2019, the Applicant was deported to

the Philippines and was inadmissible to Canada for serious criminality as a result of his conviction for child luring under paragraph 172.1(1) of the *Criminal Code*, RSC 1985, c C-46.

[40] The Applicant argued that there was still a live issue and the matter was not moot because (1) he had alleged *Charter* breaches and (2) the deportation order was under appeal to the Supreme Court of Canada.

[41] That the Applicant alleged *Charter* breaches has no effect on the issue of whether the application is moot.

[42] After the Prothonotary's decision but before this appeal was determined, the Supreme Court denied leave in both of the matters for which the Applicant had sought leave to appeal, the deportation Order being one of them. That was an event subsequent to the application by the Applicant which affected the rights of the parties, as a result of which any previous live controversy between them ceased to exist.

[43] A requirement of receiving a work permit is that the work take place in Canada. When the Applicant became inadmissible and had exhausted his criminal appeal rights, he lost the ability to benefit from a work permit. At that point, his application to have a work permit issued to him was moot.

[44] The Prothonotary found that the application was plainly moot. Once the Applicant was deported to the Philippines, an order directing the Minister to reconsider Mr. Lim's application for

a work permit would serve no practical purpose. The Prothonotary concluded that she could not identify any basis to exercise her discretion, notwithstanding that the application was moot.

V. **Summary and Conclusion**

[45] There is no discernible error in the Prothonotary's finding that the Notice of Application was an abuse of process because it related to the Applicant's application for a work permit that had already been dealt with in Court File No. IMM-3974-19 and it was an attempt to circumvent the provisions of subsection 72(1) of the *IRPA*.

[46] The Prothonotary identified the appropriate tests for an abuse of process and for mootness. She applied the tests to the facts and used her discretion to make findings supported by and consistent with the facts.

[47] After a review of the materials filed on this motion and on considering the relevant jurisprudence and arguments of the parties, I find that the Applicant has failed to show that the Prothonotary erred in law or committed a palpable and overriding error.

[48] For all the reasons set out above, this appeal is dismissed.

[49] The Respondent seeks costs of $500 on this motion, which I will grant. For clarity, these costs are in addition to those ordered by the Prothonotary whose decision has been upheld.

ORDER in T-1858-19

THIS COURT ORDERS that this appeal is dismissed with costs in the amount of $500 payable forthwith by the Applicant to the Minister of Citizenship and Immigration.

"E. Susan Elliott"
Judge

APPENDIX "A"

Relief Sought in T-1858-19:

1. an order compelling the respondent to cease and desist from violating my s. 7 *Charter* right by refusing to allow me to work under a court order to remain in Canada;

2. an order compelling the respondent to cease and desist from violating my s. 12 *Charter* right by forcing me to choose between being a beggar, homeless and starving to death or of being imprisoned with men convicted of violent crimes;

3. an order requiring the respondent to apologise in writing for having breached my ss. 7, 12 and 15 *Charter* rights and promising never again to breach them;

4. a declaration that judicial approval of breaches of s. 7, s. 12 or s. 15 *Charter* rights in unconscionable and brings the administration of justice into disrepute;

5. an order of costs to the applicant in an amount no less that $15,000 and

6. any additional relief this Honourable Court should consider appropriate and just.

Grounds for the Application in T-1858-19:

1. the respondents' agents, aided and abided by judicial co-conspirators Justices Annis, Mosley and Barnes, have wilfully breached my ss. 7 and 15 *Charter* rights by refusing to issue the work permit, for which $55 was received in 2018, or by maliciously defending or endorsing these *Charter* breaches;

2. the respondents' concealed agents, aided and abided by judicial co-conspirators Justices Annis and Mosley, wilfully breached my s. 12 *Charter* right by forcing me to remain incarcerated with men convicted of violent offences and not to seek release pending appeal (on terms similar to those in place for 10½ months earlier), because, if released and barred from working, I would either starve or freeze to death because they refused to allow me to support myself;

2. the respondents' concealed agents, aided and abided by judicial con-conspirators Justices Annis and Mosley, wilfully breached my s. 15 *Charter* right by refusing to finalize his work permit application or blessing the refusal;

4. Kareitha A. Osborne breached my s. 2, s. 7 and s. 12 rights by using an unlawful deportation order to restrict my liberty by requiring me to comply with excessive and extraneous terms and barring me from working; and

5. such additional arguments as I may advance.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1858-19
STYLE OF CAUSE:	ROMEO V. LIM v THE MINISTER OF JUSTICE, AND, 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:	ELLIOTT J.
DATED:	MAY 19, 2020

WRITTEN REPRESENTATIONS BY:

Romeo V. Lim	FOR THE APPLICANT (ON HIS OWN BEHALF)
Maria Green	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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