Federal Court  Cour fédérale

Date: 20220512

Docket: IMM-3023-21

Citation: 2022 FC 707

Toronto, Ontario, May 12, 2022

PRESENT: Madam Justice Go

BETWEEN:

NIKOLAI ANOSHIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of Russia who made an inland refugee claim in 2017. The Refugee Protection Division [RPD] held a hearing on December 10, 2020 and accepted his claim on January 10, 2021 under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] On December 9, 2020, the day before his RPD hearing, the Applicant was charged with operating a conveyance with a blood alcohol concentration equal to or exceeding 80 mg of alcohol in 100 ml of blood under s. 320.14(1)(b) of the *Criminal Code of Canada*, RSC 1985, c C-46. This charge is related to events occurring on November 10, 2019. He did not disclose this charge to the RPD during or after his hearing. The Applicant has not been convicted of this or any other crime in Canada and has no other pending charges.

[3] After being notified of the Applicant's charge and the outcome of his claim, the Minister of Public Safety and Emergency Preparedness [Minister] brought an application to reopen the claim on February 26, 2021. The Minister argued that the Applicant's failure to disclose the criminal charge caused a breach of natural justice by preventing the Minister from considering whether to suspend the Applicant's refugee claim pursuant to s.103 of *IRPA* pending the outcome of the charges.

[4] Pursuant to Rule 62 of the *Refugee Protection Division Rules*, SOR/2002-228, on April 1, 2021 the RPD decided to reopen the Applicant's refugee claim on the grounds that a breach of natural justice had occurred as the Minister was denied the opportunity to consider suspending the claim.

[5] On September 23, 2021, the Canada Border Services Agency [CBSA] notified the Applicant and the RPD, pursuant to s. 103(1) of the *IRPA*, that the Applicant's refugee claim was suspended as a result of his criminal charges.

[6] The Federal Court granted the application for leave on January 6, 2022. On February 24, 2022, the Respondent filed a motion to dismiss the application for judicial review, arguing for the first time that the matter was moot and premature.

[7] I grant the Minister's motion to dismiss the application on the ground that the RPD decision to reopen the refugee claim [Decision] is an interlocutory decision that cannot be subject to judicial review.

II. Analysis

A. *Is the RPD decision to reopen the refugee claim an interlocutory decision?*

[8] The Respondent argues that unlike a refusal to reopen a refugee claim, which confirms that the proceeding has concluded (*Shahid v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1607 at para 10), a decision to reopen a claim has the effect of allowing the refugee claim to resume, and is therefore an interlocutory decision rather than a final decision. The Respondent also relies on the following passage from *Weekes v Canada (Citizenship and Immigration)*, 2008 FC 293:

> [23] Based on the reasoning in *Shahid* above, I find that the decision in the present case is a final decision, not an interlocutory one. I am of this opinion because the IAD's decision has the effect of denying the applicant the opportunity to have his substantive rights determined; the decision essentially terminated any further action on the issue. If the decision had been a positive decision, it would have been comparable to the situation in *Reebok Canada v. Canada (Deputy Minister of National Revenue, Customs and Excise)* (1995), 179 N.R. 300, and interlocutory in nature as it would have enabled the appellant to have his substantive rights determined…

[9] The main reason for the Court not to entertain a judicial review of an interlocutory decision, the Respondent submits, is judicial economy, as proceedings are meant to proceed expeditiously, and that the subject matter in question may become academic.

[10] Further, the Respondent cites *Canada (Citizenship and Immigration) v Chung*, 2018 FC 238 at para 14, in which the Court held that the Immigration Appeal Division's refusal to grant the Minister of Citizenship and Immigration a postponement, which had the effect of resuming with the claim, was an interlocutory decision.

[11] The Respondent argues that based on the above cases, the decision to reopen was an interlocutory one, as it did not terminate any further action on the issue of the Applicant's criminal charges or claim for protection, and it did not have the effect of denying either party the opportunity to have their substantive rights determined, but rather it simply allowed the matter to continue.

[12] The Applicant points out that the cases cited by the Respondent are not directly on point. Rather, these cases establish that a decision not to reopen is not interlocutory, but it does not necessarily follow that the converse is true.

[13] I am not persuaded by the Applicant's argument.

[14] Despite able submission by the Applicant's counsel, I find that the decision of the RPD to reopen a claim is not a final, but an interlocutory, decision. The Decision has the effect of

allowing the Applicant's refugee claim to remain suspended until his criminal charge is resolved. It is not to deny the Applicant's refugee claim. A final decision with respect to the Applicant's claim will come, either if a criminal conviction prevents the Applicant from successfully pursuing his claim, or if his claim is accepted or denied on its merits.

[15] In a recent decision, Justice McHaffie dismissed an application for judicial review of a decision of the Immigration Appeal Division [IAD] because the applicants had yet to exhaust their rights of appeal under *IRPA*. As Justice McHaffie explained at para 7 in *Watzke v Canada (Citizenship and Immigration)*, 2022 FC 323 [*Watzke*]:

> [7] In submissions made on the applicants' behalf, Ms. Watzke noted that the applicants could not determine whether the Federal Court or the IAD was in a better position to provide them the remedy they sought, and that they were concerned that abandoning this application for judicial review might prejudice their interests. While I can understand the applicants' wish to ensure that every possible avenue is followed to pursue their sponsorship application, Parliament has established a clear path for the determination of such issues. An appeal to the IAD must be pursued and determined where it is available before leave is sought to judicially review the IAD's decision in this Court. The applicants' concerns about prejudice are answered by the availability of an application to this Court if their appeal to the IAD is unsuccessful.
>
> [emphasis added]

[16] While *Watzke* deals with a sponsorship appeal, the underlying principles are applicable. Here, the Parliament has established a legislative scheme whereby the Applicant's proceedings before the RPD can be suspended under ss. 103(1) of *IRPA* on notice by a CBSA officer pending the outcome of his criminal charge. If the Applicant's criminal charge is resolved in his favour, the Minister may recommend that the RPD proceedings resume and a positive outcome may be made. If, on the other hand, the Applicant is convicted, and is found ineligible or excluded from

making a refugee claim, there will be other options open to him at the time, including an application for judicial review of any decision the RPD may issue.

[17] The Applicant argues that this case engages his substantive rights, and is not merely about procedural issues, because it is about a final decision whether his Convention refugee status should be reconsidered. I reject that argument. I agree with the Respondent that the effect of reopening a refugee claim is not that one's refugee determination is "reconsidered", but rather that the claim resumes. As the Respondent points out, the claim has resumed with the CBSA's suspension, and it is this very resumption that rendered the decision to reopen interlocutory, not final, and by extension not subject to judicial review.

[18] I further note that had the Applicant disclosed his criminal charge at the RPD hearing, he would still have been in the same position as he is today. His claim would still have been suspended until his criminal charge is resolved, one way or another.

[19] In conclusion, the suspension of the RPD proceedings does not signal the end of the Applicant's refugee claim. By putting the Applicant's refugee claim on pause, the Decision is thus an interlocutory decision, and not a final one. Where the Applicant's claim will end up will depend on a number of factors, one of which being the outcome of his criminal charge.

B. *Are there exceptional circumstances warranting review of the Decision?*

[20] The Respondent argues that absent jurisdictional issues, interlocutory rulings should not be challenged until the tribunal's proceedings have been completed (*Zündel v Canada (Human*

Rights Commission), 2000 CanLII 17138 (FCA), [2000] 4 FC 255 at para 10), and that the threshold for establishing exceptional circumstances warranting review of an interlocutory decision are high (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 33).

[21] The Applicant argues that the reasoning in *Szczecka v Canada (Minister of Employment and Immigration)*, 1993 CanLII 9425 (FCA) at para 4, a case cited by the Respondent, shows why the Respondent's motion should be dismissed:

> …unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgment. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses which interfere with the sound administration of justice and ultimately bring it into disrepute…

[22] With respect, I fail to see how the above quoted passage would assist the Applicant. To the contrary, it confirms that there is no basis for judicial review of an interlocutory judgment. I also do not accept that having his claim suspended until the Applicant's criminal matter is resolved amounts to "breaking up cases."

[23] The Applicant further asserts that dismissal of this judicial review will result in unnecessary "delays and expenses", as it will mean that his risk of return to Russia—already determined to exist by the RPD—will have to be re-determined, whether by the RPD or in a pre-removal risk assessment. This will, the Applicant submits, force him to again re-live the trauma of the events leading to his claim. The Applicant further argues that the Respondent can instead

proceed with an application to vacate his refugee status if he is convicted. As such, the Applicant argues that even if the decision under review is considered interlocutory, the facts of this case amount to special circumstances warranting the Court to hear the judicial review on its merits.

[24] While I am somewhat sympathetic to the Applicant's situation, the jurisprudence does not support his argument. The recent case law from the Federal Court of Appeal states that even jurisdictional issues do not warrant judicial review of interlocutory decisions, but rather only decisions whose consequences are so "immediate and radical" that they call into question the rule of law: *Dugré v Canada (Attorney General)*, 2021 FCA 8 at paras 35-36. Further, in *Herbert v Canada (Attorney General)*, 2022 FCA 11 at paras 7-19, the Court found that an exception ought not to be made even in cases where the practical realties of allowing an interlocutory decision to go un-reviewed would cause hardship. I see no "immediate" or "radical" circumstances in this case to warrant an exception.

[25] The precipitating event leading to the delay, in my view, is the Applicant's criminal charge itself. That the Minister has other options than to seek to re-open his claim does not bring this case above the high threshold needed to proceed with the judicial review application.

[26] Having said that, I recognize that the Applicant's life has effectively been put on hold, while his future in Canada is put into question. It may well be years before the Applicant's claim is finally adjudicated, as the Applicant suggests. However, as I have noted above, the uncertainty facing the Applicant would have happened, had the criminal charge come to light at the RPD hearing, and the delay in the RPD proceedings would still have resulted.

[27] I do hope that, in the event that the Applicant's criminal matter is resolved favourably, the Minister will find a way to expedite the proceedings with respect to the Applicant's claim.

III. Conclusion

[28] The motion to dismiss the application is granted. There is no question for certification.

JUDGMENT in IMM-3023-21

THIS COURT'S JUDGMENT is that:

1. The motion to dismiss the application is granted.

2. There is no order as to costs.

3. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3023-21
STYLE OF CAUSE:	NIKOLAI ANOSHIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	MARCH 31, 2022
JUDGMENT AND REASONS:	GO J.
DATED:	MAY 12, 2022

APPEARANCES:

James Lawson	FOR THE APPLICANT
Mahan Keramati	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Arthur Yallen Yallen Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT