Federal Court  Cour fédérale

Date: 20250707

Docket: IMM-11201-24

Citation: 2025 FC 1201

Ottawa, Ontario, July 7, 2025

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ALAA ALHILAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicant was found to be a Convention Refugee in Canada over six years ago and applied for permanent residence. She included her husband and minor child, who are separated from her and each other, in her permanent residence application. During the permanent residence application process the Applicant received a procedural fairness letter. It stated that Immigration,

Refugees and Citizenship Canada ("IRCC") had concerns that she was inadmissible to Canada under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for being a member of an organization that there are reasonable grounds to believe engaged in subversion by force of a government.

[2] Prior to a decision being made by IRCC on her inadmissibility, the Applicant brought an application for leave and judicial review asking this Court to find paragraph 34(1)(f) of *IRPA* is unconstitutional and to prohibit the Minister of Public Safety or the Minister of Citizenship and Immigration from relying on it to find her inadmissible, to detain her or to deport her.

[3] The Applicant's application for leave and judicial review was functionally terminated prior to it being sent to a judge to determine leave. An Associate Judge relied on Rule 74 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] to remove from the Court file the Applicant's originating document for commencing an application for leave and judicial review ("Rule 74 Order"). This meant that the application for leave and judicial review matter was now closed.

[4] The Associate Judge characterized the application for leave and judicial review as an "independent constitutional challenge" that did not challenge a specific decision. The Associate Judge found that neither section 18 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] nor section 72 of *IRPA* permit the filing of an "independent constitutional challenge" where there is no specific decision at issue. It was on this basis that the Associate Judge applied Rule 74

– finding the originating document "was not filed in accordance with … an Act of Parliament", namely *IRPA* or the *Federal Courts Act*.

[5] The Applicant appealed the Associate Judge's Rule 74 Order under Rule 51 of the *Federal Courts Rules*. I am deciding the appeal.

[6] A key issue on appeal is whether an associate judge removing the originating document in an application for leave and judicial review is inconsistent with the requirement that only judges can determine applications for leave and judicial review (*IRPA*, para 72(2)(d)). The Applicant argues that removing the originating document effectively amounts to "dispos[ing] of the application [for leave and judicial review]". The Minister argues that the Associate Judge did not dispose of the leave application because the decision concerned a "procedural defect" that did not go to the merits of the application for leave and judicial review, allowing the Applicant to pursue the same relief by way of an action without prejudice.

[7] I find the removal of the originating document in these circumstances amounts to the termination of the Applicant's ability to seek relief by way of judicial review and therefore disposes of the application for leave and judicial review. Accordingly, as I explain below, the Associate Judge's use of Rule 74 in these circumstances is inconsistent with the requirement that only judges decide the application for leave and judicial review as set out in paragraph 72(2)(d) of *IRPA*.

[8] Even if I am wrong about the Associate Judge exceeding his authority by disposing of leave, I find the order has to be overturned because of its analysis of section 72(1) of *IRPA* and section 18 of the *Federal Courts Act* on what matters can be judicially reviewed. I also find that it was a palpable and overriding error to characterize the Applicant's application as an "independent constitutional challenge" that did not relate to the actions of a "federal board, commission or tribunal."

[9] After I heard oral arguments, I received notice from the Minister that the Applicant's application for permanent residence was likely to be approved because her security screening had now been passed. The Minister then brought a motion for summary judgment that asked that the Rule 51 appeal and the application for leave and judicial review be dismissed because of mootness.

[10] I am dismissing the Minister's motion for summary judgment. The Applicant opposes the Minister's motion and argues that her challenge was framed as relating to a broader set of circumstances than the delay in processing and the rejection of her permanent residence application. In my view, the Minister's motion for summary judgment is premature. At this stage, leave is yet to be determined because the Rule 74 Order effectively terminated the proceeding. The Minister will have the opportunity to raise their concern about mootness if leave is granted and, at that time, the Court would have the benefit of deciding the issue based on a full record.

[11] The appeal is allowed and the Minister's motion for summary judgment is dismissed.

II. Procedural History and Background

[12] The Applicant was found to be a Convention Refugee by the Immigration and Refugee Board ("IRB") in 2019. Approximately three months later, she applied for permanent residence. She included her husband and minor son, who are overseas, as dependents in her application. The Applicant's husband and minor son are also separated from each other, with her husband in Saudi Arabia and her minor son in Syria. There is still no final decision on this application.

[13] Approximately five years later, in March 2024, the Applicant received a procedural fairness letter from IRCC advising her of their concerns that she may be inadmissible under paragraph 34(1)(f) of *IRPA* for being a member of an organization that there are reasonable grounds to believe engaged in subversion by force of a government. In particular, the IRCC claimed their inadmissibility concern arose from her work with the Foreign Relations Office of the Syrian Negotiation Commission which the IRCC claimed was a component of the "National Coalition of Syrian Revolutionary and Opposition Forces" and may have included member organizations that engaged in subversion by force of the Assad regime in Syria.

[14] On June 26, 2024, the Applicant filed the application for leave and judicial review that is the subject of the Rule 74 Order. As noted by the Associate Judge in his decision, this was the second filing by this Applicant challenging the constitutionality of paragraph 34(1)(f) of *IRPA*. A few weeks prior, on June 4, 2024, the Applicant filed an application for leave and judicial review, where Canadian Council for Refugees ("CCR") was named as a co-Applicant, also challenging the constitutionality of paragraph 34(1)(f) of *IRPA*.

[15] The June 4, 2024 application was not accepted for filing by the same Associate Judge whose decision is the subject of this appeal. The Associate Judge issued a direction on June 10, 2024 stating that the application for leave and judicial review ought not to be accepted for filing because the applicants “are not contesting a decision” but are instead seeking a declaration. The Associate Judge found that the “relief requested must be pursued by way of action.”

[16] The Applicant refiled the challenge with Ms. Alhilal as the sole Applicant. In the new filing, that is the subject of this appeal, the Applicant pleaded that she was seeking relief concerning the ongoing and potential 34(1)(f) inadmissibility proceedings against her in addition to seeking a declaration of constitutional invalidity of the underlying provisions. The Applicant referenced the impact of the delays in processing her application for permanent residence and that she did not want to be subjected to an unconstitutional provision now or in her future interactions with the Respondents.

[17] On July 10, 2024, the Associate Judge, on his own initiative, issued a direction where he requested further submissions from both parties as to why the application for leave and judicial review should not be removed from the Court file under Rule 74 of the *Federal Courts Rules*. Both parties filed submissions.

[18] In the meantime, the Applicant filed her Application Record on July 27, 2024, the Respondent filed their responding materials on August 26, 2024, and the Applicant filed her reply on September 3, 2024.

[19] On September 10, 2024, the Associate Judge ordered that the application for leave and judicial review be removed from the Court file. He determined that the originating document was inconsistent with an Act of Parliament – both subsection 72(1) of *IRPA* and section 18 of the *Federal Courts Act* - finding that neither permitted the judicial review of an "independent constitutional challenge" where a decision was not being reviewed. The Rule 74 Order was made without prejudice to the Applicant pursuing the same relief by way of action.

[20] The Applicant filed an appeal of the Rule 74 Order. After oral submissions were heard, the Minister advised that the Applicant's admissibility assessment was completed and approved by IRCC, and that the application for permanent residence would be approved. The Minister then brought a motion for summary judgment with respect to both the Applicant's appeal of the Rule 74 Order and the underlying application for leave and judicial review on the basis of mootness.

III. Analysis

A. *Preliminary Issues: Authority to Consider Appeal*

[21] Both parties agree that I have the authority to consider this appeal under Rule 51 of the *Federal Courts Rules*. Both agree, for somewhat different reasons, that paragraph 72(2)(e) of *IRPA*, which generally bars appealing final or interlocutory decisions at the leave stage, does not apply. Their arguments about my authority to consider the appeal align with their arguments about the merits of the appeal itself.

[22] The Applicant says the bar does not apply because leave was not determined by a "judge" of this Court as is required in paragraph 72(2)(d) of *IRPA*, the paragraph preceding the appeal bar. The Minister says that because the Associate Judge found that the application for leave and judicial review did not properly fall within section 72 of *IRPA*, he therefore did not dispose of leave under section 72 of *IRPA*, but rather made a determination open to him to make under Rule 74(1)(a) of the *Federal Courts Rules*.

[23] Without getting into the substance of the appeal itself, I am satisfied that I can hear this appeal. The bars to appeal under paragraph 72(2)(e) of *IRPA* do not apply where the appeal raises a question about the authority of the Court to issue the order that is under appeal. As stated by the Federal Court of Appeal, "a narrow exception exists" to the appeal bars where the Court "refuses to exercise its jurisdiction or commits a jurisdictional error" (*Canada (Citizenship and Immigration) v Goodman*, 2016 FCA 126 at para 3). This appeal, at its core, raises a question about a jurisdictional error: whether, in removing the originating document of an application for leave and judicial review, the Associate Judge exceeded his authority as an associate judge by disposing of the leave application.

[24] I am satisfied that paragraph 72(2)(e) of *IRPA* does not apply to the circumstances before me. I accordingly have the authority to consider the appeal of the Rule 74 Order under Rule 51 of the *Federal Courts Rules*.

[25] On a Rule 51 appeal, I must review the decision of the Associate Judge on a standard of palpable and overriding error for questions of fact and questions of mixed fact and law, except

where there is an extricable legal principle at issue and then, like on any question of law, the standard is correctness (*Housen v Nikolaisen*, 2002 SCC 33 at paras 17-31; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] at paras 64, 66).

B. *Preliminary Issue: Mootness of the Appeal and Underlying Application*

[26] The Minister argues that because the Applicant has now passed the security screening stage in her application for permanent residence, the underlying judicial review challenging the constitutionality of security admissibility provisions is moot. The Minister further argues that because the underlying application for leave and judicial review is moot, this appeal of the decision to deny the Applicant the ability to begin the leave application is moot as well.

[27] The Minister is not conceding that the Rule 74 Order should not have been made. The Minister is instead saying that, because the underlying application for leave and judicial review is now, in their view, moot, there is no practical utility in evaluating the appeal of the Rule 74 Order.

[28] The test for determining whether a matter is moot is well known and set out in the Supreme Court of Canada's decision in *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC) 1 SCR 342 [*Borowski*]. The first step is to determine whether a live controversy remains that affects or may affect the rights of the parties (*Borowski* at 353). If there is no live controversy, the Court then considers whether it should hear the moot case nonetheless.

[29] The Minister's mootness arguments on the appeal are focused on why the underlying application for leave and judicial review is moot. I will therefore address this first.

[30] The Applicant disputes that the matter is moot. She argues her challenge is not solely based on IRCC's evaluation of her permanent residence application. The Applicant explains that the further relief she is seeking in this application for leave and judicial review would remain unaddressed even if the permanent residence application is approved. For example, she argues that neither CBSA nor the IRB are bound by IRCC's determination on her inadmissibility. Therefore, without obtaining relief from this Court declaring the impugned provision unconstitutional, she may be subject again to inadmissibility proceedings in other fora based on the same impugned provision. According to the Applicant, in order to not place her status in Canada at risk, this would also result in having to refrain from openly supporting or joining any organization in the future that had, at any time in the past, engaged in subversion by force against the Assad regime.

[31] The Minister contends that the Applicant's arguments are speculative and that the Federal Court of Appeal has dismissed similar arguments, finding a constitutional challenge in the refugee context to be moot where the applicant already had obtained permanent residence through a non-refugee pathway by the time of the appeal hearing (*Hakizimana v Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 33 at paras 8-26; *NO v Canada (Citizenship and Immigration*), 2016 FCA 214).

[32] The Applicant also argued the Court should hear the application for leave and judicial review even if the Court finds it moot, raising in particular the evasiveness of reviewing the constitutionality of the impugned provision because of the lengthy delays in processing ministerial relief applications.

[33] In my view, it is premature at this stage of the proceeding, where leave has not been granted, to find the application moot. The question of mootness is not straightforward here. The Applicant is arguing the relief that she is seeking does not match the remedy she would receive if the application for permanent residence is approved (*RA v Canada (Citizenship and Immigration*), 2024 FC 935 at paras 11-12). The Applicant is also asking the Court to exercise its discretion to hear the matter because of the evasiveness of reviewing the constitutionality of this inadmissibility provision. In these circumstances, it is preferable for the mootness issue to be considered in the context of the full record and not at this preliminary stage (*Krah v Canada (Citizenship and Immigration)*, 2019 FC 361 [*Krah*] at paras 13-14).

[34] Accordingly, at this stage of the proceeding, I refuse the Minister's motion for summary judgment on the application for leave and judicial review. In turn, given that the mootness of the application was the only ground on which the Minister argued the appeal was moot, I find there remains a live controversy with respect to the appeal of the Rule 74 Order that may affect the rights of the parties. The appeal of the Rule 74 Order is not moot.

[35] Even if I had found the appeal to be moot, I nonetheless would have exercised my discretion to consider it (*Canada (Prime Minister) v Hameed*, 2025 FCA 118 at paras 10-13).

Judicial economy is not a strong concern because I had already heard the parties' full arguments on the appeal. There certainly remains an adversarial context between the parties, with neither conceding any point on the appeal. The Court's role as part of the adjudicative branch in our political framework is also not an issue because the decision under review is not of a tribunal but a decision of an Associate Judge of the same Court.

C. *Rule 74 and Disposing of Leave*

[36] As neither party raised before the Associate Judge the concern that removing the originating document would amount to disposing of leave, the interplay between Rule 74 and the requirement that only judges dispose of leave is not considered in the Associate Judge's decision.

[37] There is no dispute between the parties that an associate judge is not permitted to decide or – more precisely, in the language of paragraph 72(2)(d) of *IRPA* – "dispose of the application [for leave and judicial review]". The parties agree that where an Act of Parliament confers jurisdiction on a "judge" to make a particular determination, associate judges are restricted from doing so (*Federal Courts Rules*, ss 1.1, 47, 50(1)(a)). *IRPA* sets out that leave determinations, as well as deciding the judicial review itself if leave is granted, are decisions made by "judges" (*IRPA*, paras 72(2)(d) and 74(c)).

[38] The question before me is whether the effect of the Associate Judge's Rule 74 Order, removing the originating application for leave and judicial review, amounted to disposing of leave.

[39] The Applicant argues the answer is simple because, in removing the originating document for an application for leave and judicial review, there is no longer any basis to make a leave determination – the matter is closed. Indeed, this Court has found that removing the originating document under Rule 74 effectively dismisses the proceeding (*Dona v Canada (Attorney General)*, 2024 FC 92 at para 21; *Wu v Canada (Judicial Council)*, 2025 FC 866 at para 9). In the Applicant's view, closing the matter necessarily means disposing of it.

[40] The Minister argues that the answer is not simple. The Minister argues that, because the Associate Judge found that the application for leave and judicial review did not relate to a "matter" that could be judicially reviewed under subsection 72(1) of *IRPA*, the Associate Judge was therefore not deciding leave under paragraph 72(2)(d) of *IRPA*, but rather making a procedural decision under Rule 74 that did not go to the merits. The Minister relies on the Associate Judge's statements that a decision as to whether there "is a defect in the originating document is one of procedure, not substantive merit" and that removing the originating document is not "the end of the matter" because "leave is granted to re-file the proceeding using the proper procedure", which he found to be by way of an action.

[41] There are a number of problems with the Minister's position. First, at issue is the Associate Judge's determination that the Applicant's challenge, filed as an application for leave and judicial review under subsection 72(1) of *IRPA*, did not fit within subsection 72(1). It is no answer to say it is not a decision concerning subsection 72(1) because the Associate Judge found the matter did not fit there. Deciding the challenge could not fit under subsection 72(1) is making a substantive decision on the proper interpretation of subsection 72(1).

[42] Second, I am not convinced that whether a decision is procedural or merits-based is determinative of whether leave has been decided. I was not provided with any jurisprudence that supports this theory. This Court does not distinguish between procedural or merits-based grounds in deciding leave. The Court can certainly dismiss leave on the basis of a procedural issue. Common examples include where an applicant has not exhausted the available remedies in *IRPA* to challenge a decision prior to coming to this Court or has failed to file an Application Record. In either case, the Court is not dealing with the merits of the challenge, and yet the judge can dispose of leave on this basis.

[43] The Minister relies on decisions of this Court finding that a decision of an Associate Judge denying a motion to extend time to file an application record is an interlocutory decision that does not have the effect of a final decision (*Mendez v Canada (Citizenship and Immigration)*, 2021 FC 1237; *Ntoco v Canada (Citizenship and Immigration)*, 2022 FC 894). I do not find these examples helpful. Unlike the matter before me, after an associate judge denies the motion to extend time, the matter is not closed. Rather, it is put before a judge of this Court to determine leave. While, arguably, the chances that the Court would grant leave are slim without an application record filed, the decision-making on leave still remains with a judge of this Court. This is consistent with the requirement in paragraph 72(2)(d) of *IRPA* that leave be decided by a judge of the Court.

[44] Third, I am also not persuaded that the Rule 74 Order is appropriately characterized as addressing a “procedural defect” in the originating document. In my view, the issues raised in the Rule 74 Order are not straightforward ones where it is plainly obvious the application is

inconsistent with an Act of Parliament or is an abuse of the Court's processes as contemplated by Rule 74.

[45] I leave open the possibility that there may be circumstances where removing a document that had an administrative defect on its face may not amount to disposing of leave. But here, the analysis underlying the Rule 74 Order required a characterization of the application for leave and judicial review to determine its "essential character", and a consideration of the requirements under section 18 of the *Federal Courts Act* and section 72 of *IRPA* in light of the relief being sought by the Applicant.

[46] This is not a circumstance where the Applicant could simply refile and correct a procedural defect. The defect at issue is the main thrust of her application - her application for leave and judicial review was found to be inconsistent with the requirements in section 18 of the *Federal Courts Act* and subsection 72(1) of *IRPA*.

[47] The statement in the decision that the Applicant could seek, without prejudice, the same relief by filing an action, further supports the Applicant's view that the Associate Judge disposed of leave under paragraph 72(2)(d) of *IRPA*. The Applicant could not simply re-file her application for leave and judicial review, correcting a "defect" when the defect at issue was about her ability, in her current circumstances, to seek relief by way of judicial review.

[48] In my view, the matters dealt with in the Rule 74 Order, including the characterization of the pleadings, and an evaluation of whether the application related to a "matter" that could be the

subject of judicial review, are generally ill-suited to be decided at such a preliminary stage (*Krah* at paras 13-14). These are issues that could be determined at the leave stage or if leave is granted, by the judge deciding the judicial review application.

[49] I find that in the circumstances of this case, the removal of the originating document under Rule 74 of the *Federal Courts Rules* amounted to disposing of leave under paragraph 72(2)(d) of *IRPA*. This meant that the Associate Judge exceeded his authority by making a determination that amounted to one that only judges are permitted to make under *IRPA*. This is a sufficient basis on which to allow the appeal.

D. *Interpreting "Matter" Under Subsection 72(1) Of IRPA And Sections 18 and 18.1 of the Federal Courts Act*

[50] Even if I am wrong about the Associate Judge exceeding his authority by using Rule 74 in these circumstances, I also find a basis to grant the appeal because of my concerns with: i) the interpretation of section 72 of *IRPA* and sections 18.1 and 18 of the *Federal Courts Act;* and ii) the characterization of the pleadings as "an independent constitutional challenge" that did not seek relief against a federal board.

[51] The first issue relates to a question of law and therefore I will apply a standard of correctness; the second issue – the characterization of the pleadings, is a question of mixed fact and law, and therefore I will apply the standard of a palpable and overriding error (*Hospira* at paras 64, 66).

[52] The Associate Judge began his analysis of what "matters" could be judicially reviewed under *IRPA* by considering the wording in subsection 72(1) of *IRPA* and specifically the meaning of the words "any matter — a decision, determination or order made, a measure taken or a question raised — under this Act".

[53] With great respect, this approach is inconsistent with the guidance from the Federal Court of Appeal. The Federal Court of Appeal has explained that in immigration matters, the right to make an application for judicial review stems from sections 18 and 18.1 of the *Federal Courts Act* (*Zaghbib v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182 [*Zaghbib*]). The Federal Court of Appeal further clarified that the language of section 72 of *IRPA* does not act as a limit on what matters are subject to judicial review, but instead provides for the additional procedural requirements in cases involving *IRPA*, like the leave requirement.

[54] Justice Pelletier explained that relying on the description of "matter" in subsection 72(1) of *IRPA* to understand what matters can be judicially reviewed is a misunderstanding of the meaning of the provision:

> The focus on whether Mr. Zaghbib's application was a "decision, determination, order, measure or question arising under the IRPA" betrays a misunderstanding of the thrust of section 72 of the Act. That section does not create a right to have a matter arising under the Act judicially reviewed. That right arises from sections 18 and 18.1 of the Federal Courts Act […].
>
> Section 18 grants the Federal Court exclusive jurisdiction over judicial review of federal administrative action. Section 18.1 provides that an application for judicial review may be brought "by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought." A matter includes an order or decision but it is not limited to decisions: see *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at paragraphs 24 and 25. An allegation that a public officer

> has failed to discharge a duty imposed upon her by law is a matter which is amenable to judicial review.
>
> Section 72 simply imposes additional procedural requirements, in the immigration context, on the exercise of the right to seek judicial review. Subsection 72(1) provides that leave is required to commence an application for judicial review. It does not define when judicial review is available. The words "any matter — a decision, determination or order made, a measure taken or a question raised — under this Act" are not intended to limit the access to judicial review granted by section 18.1 but rather to ensure that they are given the broadest scope so as to include any matter, including "any question raised" (*Zaghbib* at paras 29-31).

[55] In other words, section 72 of *IRPA* is not meant to restrict the matters that are subject to judicial review under sections 18 and 18.1 of the *Federal Courts Act*. Instead, as Justice Pelletier found, the language in subsection 72(1) of *IRPA* is meant to ensure access to judicial review by defining "matter" with "the broadest scope so as to include any matter, including any question raised".

[56] The second issue relates to the concern that an "independent constitutional challenge" that is not tied to a decision is not a matter that can be judicially reviewed. I have two concerns. The first is with respect to notion that there must be a decision to challenge in order to seek judicial review. The second is with the characterization of the Applicant's application as an "independent constitutional challenge" that did not seek relief against a federal board.

[57] First, it is well-established that judicial review under section 18 and 18.1 of the *Federal Courts Act* is not limited to only the review of decisions or orders but includes "any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*" (*Krause*

v Canada, 1999 CanLII 9338 (FCA) at para 21). As the Federal Court of Appeal explained in *May v CBC/Radio Canada*, 2011 FCA 130 at paragraph 10:

> While it is true that, normally, judicial review applications before this Court seek a review of decisions of federal bodies, it is well established in the jurisprudence that subsection 18.1(1) permits an application for judicial review "by anyone directly affected by the matter in respect of which relief is sought". The word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought: *Krause v. Canada*, 1999 CanLII 9338 (FCA), [1999] 2 F.C. 476 at 491 (F.C.A.). Ongoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment: *Sweet v. Canada* (1999), 249 N.R. 17.

[58] This general understanding that a matter under sections 18 and 18.1 of the *Federal Courts Act* encompasses more than only reviews of decisions is not altered when a party has raised a challenge to the constitutional validity of a provision and/or seeks declaratory relief. The same principle applies – a decision is not required.

[59] The Associate Judge relied on this Court's recent decision in *Bird v Canoe Lake Cree First Nation*, 2024 FC 1205, where it found that because no administrative decision was being challenged in a judicial review advancing a constitutional challenge, the matter "was not properly framed as a judicial review". After the Associate Judge issued the Rule 74 Order, the Federal Court of Appeal overturned the *Bird* decision, solely on this point, finding this Court had erred in its determination (*Bird v Canada (Attorney General)*, 2025 FCA 70 at para 2).

[60] After finding that the Applicant's case could not be considered a "matter" under subsection 72(1) of *IRPA* because it was essentially an "independent charter challenge" not tied

to a decision affecting the Applicant, the Associate Judge then turned to section 18 of the *Federal Courts Act*. The Associate Judge found that paragraphs 18(1)(a) and (b) of the *Federal Courts Act* do not apply because the "essential relief requested in the [application for leave and judicial review] is not against a federal board, but rather is a challenge to the legislation itself."

[61] This leads me to the last issue. I find that the Associate Judge made a palpable and overriding error in characterizing the essential character of the pleadings as an "independent charter challenge" where the "essential relief requested" was not against a federal board.

[62] The Associate Judge stated at the outset of the decision that the Rule 74 Order did not address the Applicant's standing or the merits of the challenge. The issue raised is not with subsection 18.1(1) of the *Federal Courts Act* and whether the conduct raised "fails to affect legal rights, impose legal obligations, or cause prejudicial effect" (*Air Canada v. Toronto Port Authority*, 2011 FCA 347 at para 29) but whether the relief being sought is against a "federal board, commission or other tribunal" (paragraph 18(1)(b) of *Federal Courts Act*).

[63] Throughout the decision, the application for leave and judicial review is characterized as an "independent charter challenge" or a "stand alone charter challenge" or an attack on the legislation itself. Yet, the Applicant explains in her pleadings that she is seeking relief from the actions that have been and may be taken in the future by IRCC.

[64] In particular, the Applicant describes the delay and separation from her immediate family members pending an investigation into her inadmissibility by the IRCC. IRCC had raised the

impugned provision as a basis for her inadmissibility in their procedural fairness letter to the Applicant. At the time that the Applicant filed her application for leave and judicial review, she was awaiting a decision from IRCC on her admissibility.

[65] The Applicant asks in her application for leave and judicial review that the Court declare the Respondents be prohibited from relying on the impugned provision to find her inadmissible, or to detain or deport her. The pleadings could have been drafted more clearly to explicitly name the federal agencies (IRCC and CBSA) in the context of the relief being sought. But the pleadings do set out the actions the Applicant is seeking to prohibit – namely, an inadmissibility finding, detention and deportation based on the impugned provision. IRCC is certainly named as the federal agency that is investigating her admissibility and, in the Applicant's view, delaying her reunification with her immediate family; and IRCC and CBSA are two federal agencies responsible for determining inadmissibility, and CBSA with detaining and deporting individuals.

[66] The Associate Judge found the essential character of the pleadings to be an attack on the legislation. While the Applicant is asking that this Court declare the impugned inadmissibility provisions to be unconstitutional, it is being raised within a context in which the Applicant is asserting these provisions have been and could potentially continue to be applied to her by federal agencies. It is not an example where no federal administrative action is involved (See, in contrast, *Olumide v. Canada*, 2016 FC 558). In my view, reading the pleadings generously, there is no basis, at this stage, to find that relief was not being sought against a "federal board, commission or tribunal".

E. *Disposition*

[67] The Applicant's appeal is allowed. The Applicant and the Respondent had already perfected their records at the time that the Rule 74 Order was issued. The file is therefore now ready for leave disposition. The Minister's motion for summary judgment is dismissed.

JUDGMENT in IMM-11201-24

THIS COURT'S JUDGMENT is that:

1. The Rule 51 appeal is allowed;
2. The Rule 74 Order, dated September 10, 2024, is quashed;
3. The Respondent's motion for summary judgment is dismissed; and
4. No costs are awarded.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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