Federal Court  Cour fédérale

Date: 20100601

Docket: IMM-1724-09

Citation: 2010 FC 593

Ottawa, Ontario, June 1, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

Deisy Julieth DUITAMA GOMEZ, Edison Giovanni AMORTEGUI, Daniel Alejandro AMORTEGUI DUITAMA, and Laura Sofia AMORTEGUI

Applicants

and

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

Respondents

REASONS FOR JUDGMENT

[1] The applicants filed an Application for Leave and for Judicial Review on April 7, 2009 stating therein that they sought review of "the decision rendered by the Minister of Citizenship and Immigration … in respect to a request for an exemption under s. 25 of [the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27 (Act)]." They state that they were notified of that decision on April 7, 2009.

[2] The applicants, through the steps set out, tried to engineer a decision upon which to base this application for judicial review. The applicants wrote to the Minister of Citizenship and Immigration and to the Pre-Removal Risk Assessment (PRRA) Unit in Toronto on April 7, 2009, seeking an exemption from the provisions of subsection 101(1)(c) of the Act which, because of the facts set out below, prevented them from making a refugee claim. They closed their correspondence with this statement which was bolded in the original:

> Please be advised that if there is no response to this request by 3:00 pm today, it will be interpreted as a deemed refusal and an Application for Judicial Review will be initiated.

[3] There was no response from the Minister within the short time period unilaterally set by the applicants and they immediately filed this application for leave and for judicial review.

[4] Notwithstanding the applicants' characterization of the Minister's non-decision as a "deemed decision", it is not such in law. A deemed decision may form the basis of an application or action; however, to be properly described as such, there must be a legislative provision that specifically prescribes a time for making a decision, after which it expressly provides that silence will be deemed to be a decision. An example of such a deeming provision may be found in subsection 10(3) of the *Access to Information Act*, R.S.C. 1985, c. A-1 which provides as follows:

10. (3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the	10. (3) Le défaut de communication totale ou partielle d'un document dans les délais prévus par la présente loi vaut décision de refus de communication.

> head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

Justice Dubé, in *X v. Canada (Minister of National Defence)* (1990), 41 F.T.R. 16 (T.D.) expressed the view that deeming provisions such as that found in subsection 10(3) of the *Access to Information Act*, signal Parliament's intent that that Act not be "frustrated by bureaucratic procrastination: foot-dragging equates refusal."

[5] There is no deeming provision in the Act relating to requests made pursuant to section 25. An applicant cannot create a reviewable decision simply by dictating to the Minister that a failure to respond within a unilaterally imposed time frame will be deemed a refusal sufficient to ground an application for judicial review.

[6] The respondents did not oppose this application on the basis that there was no reviewable decision made; rather they took the position that this application was moot. Their submissions with respect to the character of the "decision" under review were tied to their argument that "reviewing a non-decision in a factual vacuum" would involve the Court in a speculative exercise that ought to be avoided, particularly when *Charter* issues are raised.

[7] During the hearing of this application and through a Direction issued subsequently, the Court requested the parties' submissions as to whether what the applicants characterized as the

Minister's deemed decision was subject to judicial review under section 18.1 of the *Federal Courts Act*. The applicants submitted that it was; the respondents submitted that it was not.

[8] For the reasons that follow, I am of the view that the non-decision of the Minister in these circumstances is not a matter falling within section 18.1 of the *Federal Courts Act* and thus this application may be dismissed on that basis. In my view, the circumstances of this case do not warrant the exercise of the Court's overriding authority to amend the applicants' notice of application in order to bring them within the scope of s. 18.1 of the *Federal Courts Act.* I am further of the view that even if the matter was justiciable under section 18.1, or the notice of application was amended to bring the matter under section 18.1, the application is moot and does not meet the requirements necessary to warrant a hearing on the merits despite its mootness.

Background

[9] Deisy Julieth Duitama Gomez, her husband, Edison Giovanni Amortegui, and their children, Daniel Alejandro Amortegui Duitama and Laura Sofia Amortegui Duitama, are citizens of Columbia. They state that they fear persecution at the hands of the Revolutionary Armed Forces of Colombia (FARC).

[10] It is not necessary for the matters under consideration in these Reasons to outline the applicants' allegations regarding the mistreatment they say they experienced in their country of origin. I am prepared to assume, without deciding, that if the allegations of the family are true, Mrs.

Duitama Gomez has a *prima facie* claim for protected person status under either section 96 or section 97 of the Act.

[11] The applicants fled Colombia in October 2008. The family entered the United States of America (U.S.) and joined Mrs. Duitama Gomez's mother in New York where she was living after having fled there from Colombia at an earlier date.

[12] Rather than make a claim for asylum in the U.S., the applicants waited three months and then, on January 21, 2009, proceeded to the Canada-U.S. border, entered Canada, and attempted to file a claim for refugee status.

[13] Under the *Canada-U.S. Safe Third Country Agreement* (STCA), persons seeking refugee protection must make a claim in the first country into which they arrive (U.S. or Canada). Refugee claimants arriving from the U.S. at the Canada-U.S. land border are only allowed to pursue refugee claims in Canada if they fall within an exception in the STCA. No exception applied to the applicants. Accordingly, pursuant to section 101(1)(e) of the Act and the STCA the applicants were found ineligible to make a refugee claim and an exclusion order was issued against them on January 26, 2009. As a consequence, the applicants were returned to the U.S. on that date and the U.S., under the STCA, accepted their return. Mr. Amortegui Duitama was detained upon return to the U.S.. The remaining applicants sought the assistance of an immigration legal aid clinic.

[14] What happened next is a matter of debate between the parties. The applicants state that "no [U.S.] Application for Asylum and for Withholding of Removal (Form I-589) was ever prepared or filed" on behalf of the family. The applicants state that they were given a hearing date of April 30, 2009 as part of deportation proceedings. The respondents take the position that the family filed a claim for asylum and that they were given an April 30, 2009 hearing date as part of that application process. For the present purposes, it is unnecessary to resolve this dispute.

[15] Once Mr. Amortegui Duitama was released from detention in the U.S., the applicants entered Canada illegally at an unknown point, and proceeded to the Citizenship and Immigration office in Hamilton, Ontario, where on February 16, 2009 they again attempted to make an inland refugee claim.

[16] Pursuant to section 101(1)(c) of the Act, the applicants were ineligible to make a claim for refugee status because their prior claim had been determined to be ineligible because of the STCA, and it was therefore not referred to the Refugee Protection Division. The applicants were arrested and placed in immigration detention. The applicants were given a PRRA application on March 2, 2009 which they submitted on April 1, 2009.

[17] On April 3, 2009, during an immigration detention review hearing, the applicants were informed that their PRRA application had been suspended. They were advised that that the PRRA had been initiated in error and that pursuant to section 112(2)(d) of the Act they were ineligible to apply for protection under the PRRA process because their PRRA application was brought within

six months of leaving Canada after their initial refugee claim had been determined ineligible.

Subsection 112(2)(d) of the Act provides as follows:

112. (2) Despite subsection (1), a person may not apply for protection if … (d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.	112. (2) (2) Elle n'est pas admise à demander la protection dans les cas suivants: … (d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de désistement ou de retrait de sa demande d'asile.

No judicial review application was brought with respect to the April 3, 2009 decision to suspend the PRRA that was given to the applicants.

[18] On April 6, 2009, the applicants were given notice that they would be removed to Bogota, Colombia, on April 9, 2009. This resulted in the letter of April 7, 2009 from counsel for the applicants to the Minister requesting a section 25 exemption from subsections 101(1)(c), 101(1)(e) and 112(2)(d) of the Act.

[19] The applicants submitted that their removal to Colombia, without an assessment of the risk they faced, would violate the principle of *non-refoulement*. As noted earlier, they stated that if they did not receive a response by 3 p.m. that same day they would consider the Minister's silence "a deemed refusal" and would initiate an application for judicial review immediately. The applicants

did not receive a response and so they immediately commenced this application for judicial review. They also brought a motion to stay the scheduled removal to Colombia based on the pending judicial review application of this alleged decision. This stay motion was adjourned when the respondents agreed to cancel the scheduled removal.

[20] On July 27, 2009, six months after the applicants had first been removed from Canada, the respondents notified the applicants that they could initiate a PRRA application. Presumably this action was taken because the bar to a PRRA application in subsection 112(2)(d) of the Act had expired through the passage of time. The applicants filed their PRRA application and made submissions before the due date of August 26, 2009, in which they provided notice that further evidence was to follow.

[21] On October 7, 2009 a negative PRRA decision was rendered before the applicants had filed their additional evidence. This evidence included a letter from Amnesty International and a psychological assessment of Mrs. Duitama Gomez. The negative decision was provided to the applicants on November 3, 2009. The applicants sought leave to judicially review this decision (Court File No. IMM-5799-09). The Court records indicate that Justice Mactavish granted leave on April 14, 2010 and that the application is scheduled to be heard on July 13, 2010.

[22] The applicants state that they have learned that subsequent to their February 16, 2009 entry into Canada, the government of the U.S. was contacted by the Canadian government with a request to accept the return of the applicants to the U.S. Apparently, the U.S. took the position that neither

the STCA or the Reciprocal Arrangement applied and it refused this request. The U.S. government then took steps to terminate the applicants' immigration proceedings in the U.S. The consequence of these steps is not clear to the Court but it appears that the applicants cannot be returned to the U.S. and, if removed from Canada, they can only be returned to Colombia.

Issues

[23] The parties have raised a number of issues in their memoranda and further memoranda. In my view, the real issues in dispute are the following:

1. Whether the non-decision of the Minister is justiciable pursuant to section 18.1 of the *Federal Courts Act*;
2. Whether the Court should exercise its inherent jurisdiction to permit the amendment of the notice of application so as to properly bring it within the scope of s. 18.1 of the *Federal Courts Act*;
3. Whether the application for judicial review is moot regardless of the answer to issues 1 and 2;
4. If the application is moot, should the Court nevertheless exercise its discretion to hear the case on its merits; and
5. If the Court exercises its discretion to hear the application, is subsection 101(1)(c) of the Act, in the applicants' circumstances, of no force or effect because it would permit the *refoulement* of the applicants to their country of origin without a risk assessment and therefore be inconsistent with section 115 of the Act, Canada's

international human rights obligations, and section 7 of the *Charter of Rights and Freedoms.*

[24] When this application came on for hearing the parties were informed that the Court would address the last issue at a later date and then only if it was determined that the application was not moot or, if moot, the Court determined that it would exercise its discretion to hear the application on its merits. As previously noted, subsequent to the hearing the parties were canvassed and provided submissions on the first issue.

Analysis

1. Is this application justiciable?

[25] The jurisdiction of the Federal Court on a judicial review application is circumscribed by section 18.1 of the *Federal Courts Act* which is reproduced in Annex A to these Reasons.

[26] The applicants submit that the application as constituted falls within this Court's jurisdiction for the following six reasons which are taken from their Further Submissions:

(i) "[T]his court has taken jurisdiction in numerous cases of requests to defer removal whereby a deadline is set, not met and a deemed refusal has taken place and that deemed refusal is the subject matter of the judicial review." The applicants cite *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 and *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219 in support of this submission.

(ii) "[T]he fact that CBSA cancelled the Applicants' removal indicates that there is a proper decision under review."

(iii) "[T]he wording of s. 72(1) [of the Act] is very broad and contemplates the issues raised."

(iv) The deemed refusal of the Minister is a "decision, order, act or proceeding" within the meaning of section 18.1 of the *Federal Courts Act*. The applicants rely on this Court's decision in *Markevich v. Canada*, [1999] 3 F.C. 28 (T.D.).

(v) "The administrative action undertaken by the Minister is reviewable as it affects the rights and interests of the Applicants. Furthermore, as the Applicants' only recourse in the face of the deemed refusal is judicial review, and given the issues at stake it is submitted that, as in *Markevich*, it would be a serious gap in this Court's supervisory jurisdiction if it did not entertain this judicial review."

(vi) In the alternative, …[section 18.1(5)(b) of the *Federal Courts Ac*t gives the Court] the authority and jurisdiction to repair any perceived defect in the decision by declaring the Respondent's alleged "non-decision" as a decision, bringing it within the ambit of a deemed refusal." The applicants cite and rely upon this Court's decision in *Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1331 and *Tathgur v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1293.

[27] I find none of these submissions to be persuasive.

[28] With respect to the applicants' first submission, neither *Wang* nor *Simoes* involved a deemed refusal as the basis of the judicial review application. The decisions under review in *Wang* and *Simoes* were decisions of immigration officers denying requests to defer removal from Canada: See *Wang* at para. 2 and 3 and *Simoes* at para 5 and 6. Those applications were not founded on a deemed refusal – in each case there was an actual refusal and in each case that refusal constituted the decision under review. Further, and I question the accuracy of their assertion, even if "this court has taken jurisdiction in numerous cases of requests to defer removal whereby a deadline is set, not met and a deemed refusal has taken place" a previous decision made without jurisdiction cannot constitute a legal basis for continuing that error.

[29] With respect to the applicants' second submission, it is true that the respondents cancelled the applicants' removal but all that proves is that there was a decision made to remove them; the cancellation had nothing to do with the Minister's deemed refusal of their request for a risk assessment.

[30] With respect to the applicants' third submission, although subsection 72(1) of the Act provides that "judicial review by the Federal Court with respect to any matter – a decision, determination or order made, a measure taken or a question raised – under the Act is commenced by making an application for leave to the Court" that provision does not give the Court jurisdiction; it merely provides that an applicant must first obtain leave from this Court if the matter falls under subsection 72(1) if the Act. Further, the Minister's non-decision is not a "decision, determination or order made, [or] a measure taken." It may be that the applicants have raised a question under the

Act, but all that this subsection provides is that they must first obtain leave; it does not independently establish that this Court has jurisdiction over the subject matter of the leave or that the application for leave is properly framed.

[31] With respect to the applicants' fourth submission, the decision in *Markevich* does not assist the applicants in the application as they have framed it. In *Markevich* Justice Evans, as he then was, held that section 18.1(3) of the *Federal Courts Act* gives this Court jurisdiction to review a "decision, order, act or proceeding of a federal board, commission or other tribunal" and that this jurisdiction did not require that there be a decision or order to effect review, an act or proceeding was sufficient.

[32] The applicant in *Markevich* had been sent a letter by Revenue Canada advising him that he owed an amount in unpaid taxes that had previously been written off by Revenue Canada as uncollectible. Justice Evans held that although the letter was not written in the exercise of a statutory power, it nevertheless signified that an official of Revenue Canada had determined to try to collect the outstanding sums. Accordingly, he found that the letter constituted an administrative action by a person having statutory powers and it therefore constituted an "act or proceeding" and was reviewable.

[33] In this case, the Minister was taking steps to proceed with the applicants' removal despite their request for an exemption. That action might suggest that a decision was made with respect to the exemption request but only if the action to remove followed the exemption request; it did not.

[34] It could be said that taking steps to proceed with the applicants' removal constitutes either an act or a proceeding which could ground an application under section 18.1 of the *Federal Courts Act*. However, the application as framed does not directly challenge their removal; rather, it challenges the Minister's "decision" not to accede to the applicants' request for an exemption from the provisions of the Act. At best, this may be a relevant consideration if the Court were to exercise its discretion to amend the application, but it does not make the application, as currently drafted, justiciable.

[35] With respect to the applicants' fifth submission, while I agree with the applicants that there must be some avenue they can take to get their issue before the Court, I do not agree with them that the avenue they have selected is the only one or even that it is the preferred one. I share the view of the respondents that the applicants "could have properly brought an application for *mandamus*." The applicants could also have sought judicial review of the decision to rescind their PRRA when they were informed of this decision on April 3, 2009. Either would have been a proper avenue to get this matter before the Court. Once filed, the applicants could also have sought a stay of removal pending the final determination of that application.

[36] Normally a *mandamus* application is launched because the delay has been significant: See for example the decision of this Court in *Shahid v. Canada (Minister of Immigration)*, 2010 FC 405 in which the applicants' permanent resident application had not yet been processed after nearly nine years. As set out by the Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1

F.C. 742 (C.A.) one of the tests for the granting of *mandamus* is that there has been a prior demand for performance of the duty and a "reasonable time to comply" has passed, unless there has been a direct refusal to act. However, a short delay in performing the duty may be sufficient to ground *mandamus* in circumstances where requiring a longer time for reply would be inappropriate as it would effectively remove from the applicant the right he is seeking. Such a circumstance, in my view, would be the situation faced by the applicants.

[37] With respect to the applicants' sixth submission, section 18.1(5)(b) of the *Federal Courts Act* does not give the Court the authority or jurisdiction to declare the Minister's non-decision to be a decision in order to regularize this proceeding. The purpose of this provision is to allow the Court to save an application that is technically irregular: See, as examples, *Bastanfar v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 29 (F.C.T.D.) and *Canadian Cable Television Association v. American College Sports Collective of Canada Inc.*, [1991] 3 F.C. 626 (C.A.). The defect here goes far beyond a mere technicality.

2. Whether the Court should permit the amendment of the application?

[38] Even if I have the jurisdiction to reframe this application into an application for *mandamus* or otherwise bring it within the scope of section 18.1 of the *Federal Courts Act*, I would not do so because it would serve no purpose for these applicants. For the reasons that follow I am of the view that this application is moot. Even if the Minister was ordered at this time to consider the applicants' request for an exemption, the reality is that they have already had the benefit of a PRRA,

which was effectively what was sought by them in the letter that was directed to the Minister on April 7, 2009.

3. Is this application moot?

[39] The applicants submit that their application is not moot because a live controversy still exists between the parties. They submit that the PRRA decision that was rendered is fundamentally flawed, was interfered with by the Department of Justice, and was made by a biased decision-maker.

[40] The respondents submit that this application is moot because the applicants have been given the very remedy that they sought on this judicial review – a PRRA assessment.

[41] An assessment of whether an underlying application is moot involves a two-step analysis as outlined by the Supreme Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353:

> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[42] The first part of the test has been coined the "live controversy" step: *Borowski*, *supra* at 354. The Court of Appeal in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras. 26-38 explained that when looking at the first step of the test it is necessary

to properly characterize the issue in dispute. Proper characterization requires that one ask what the parties were seeking in their initial request to the Minister.

[43] The applicants' initial request was for a humanitarian and compassionate exemption from the provisions of the Act that deemed them ineligible to claim refugee status or to make a PRRA application. The essence of their request was access to a risk assessment, either before the RPD or a PRRA Officer, prior to being removed to Columbia.

[44] The applicants have now submitted their PRRA application and a decision has been rendered on that application. Leave to judicially review that decision has been granted and a date set for the hearing on the merits (Court File No. IMM-5799-09). I agree with the respondents that this fully settles the live controversy between the parties, thereby rendering the application moot.

[45] In *Baron, supra* at para. 37, the Court of Appeal explained that it is not necessarily the passing of an event that renders an application moot; it is whether the passing of the event has nullified the practical effect of any potentially positive judicial review decision. In this case, the applicants sought an order requiring the Minister to re-determine his "decision" which, if it was positive, would permit the applicants to make a PRRA application. In the words of the respondents, "the applicants have obtained the very relief they have been seeking throughout the present litigation." When the respondents offered the applicants the opportunity to file a PRRA application and a decision was rendered on that application, the live controversy ceased to exist. This application for judicial review is therefore moot.

4. Should the Court exercise its discretion to hear the application on its merits?

[46] The applicants submit that this Court should exercise its discretion to hear the moot application because the factors for exercising that discretion have been met. They claim that an adversarial relationship still exists because they still dispute the reasonableness of the deemed refusal to re-instate their first PRRA application. The applicants contend that the expenditure of judicial resources is warranted because the situation faced by the applicants continues to occur and has thus far evaded review by this Court. The applicants submit that a decision on the merits would not overstep the Court's proper adjudicative role and would be of assistance to immigration officials and persons in circumstances similar to the applicants.

[47] The respondents submit that there is no continuing adversarial relationship between the parties, that this case does not raise issues of public importance that are evasive of judicial review, and that there is no social cost to not hearing the application on its merits. They further submit that the presence of the *Charter* argument militates against hearing this case on its merits, given that it is moot.

[48] As a preliminary matter, the respondents object to the applicants' further affidavit evidence. This objection would have been dealt with in a more fulsome manner if the application had been heard on its merits. They submit that these affidavits contain opinion and belief statements, rather than statements based on personal knowledge, legal argument, hearsay statements, and lack relevance.

[49] In *Rex v. Nat Bell Liquors Limited*, [1922] 2 A.C. 128 (P.C.), which was discussed by the Court of Appeal in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 (C.A.), the Privy Council held that new evidence was permissible on judicial review where it went to the jurisdiction of the decision-maker to make the decision and not to the merits of the decision itself.

[50] In this case, the further affidavits do not go to the merits of the decision, they go to the question of mootness and more particularly to the question of whether this Court should exercise its discretion to hear an otherwise moot matter on its merits. Accordingly, they may be considered for that limited purpose. Nonetheless, I agree with the respondents that aspects of these further affidavits violate the rules of evidence. To the extent that these affidavits are hearsay, or statements of opinion and belief, and not statements based on personal knowledge, they are not proper.

[51] In *Borowski* the Supreme Court laid out three factors that this Court is to consider when determining whether to exercise its discretion to hear an application that is moot: (1) the existence of an adversarial context, (2) the concern for judicial economy, and (3) the proper role of the court in relation to the legislative sphere. The Supreme Court instructed that these are factors to consider but not an airtight legal test. Accordingly, judges ought to exercise their discretion judicially and "with due regard for established principles" that underscore the outlined factors.

[52] Despite the submissions of the applicants, I am not convinced that an adversarial relationship continues to exist between the parties. The applicants no longer have a stake in the

outcome of this application. The order that they sought was the re-instatement of their PRRA; this has occurred and a decision has been rendered. There are no collateral consequences to this application that will affect the applicants in a manner that is not academic. The persons most interested in the hearing of this application on its merits are potential claimants who face the same ineligibility scenario as the applicants faced in this case; that is not sufficient to sustain the adversarial context. The lack of an ongoing adversarial context militates against hearing this application on its merits.

[53] In *Borowski* at 361, the Supreme Court stated that in considering the second factor, "the economics of judicial involvement are weighed against the social cost of continued uncertainty in the law." The applicants assert that the social cost is the potential violation of the principle of *non-refoulement*, and the impact this violation has on the people unlawfully returned to their place of origin as well as on Canada's requirement of meeting its international human rights obligations. While correct, the Court must engage in the balancing exercise dictated by the Supreme Court.

[54] One might argue, with some merit, that the return of even one person contrary to the principle of *non-refoulement* and the potential risk to that person is sufficient to warrant the Court's intervention. In situations where a person cannot be returned to a safe third country, "removal from Canada to the home country without the benefit of a risk assessment … opens the door to the possibility of Canada indirectly running afoul of its international obligations": *Canada (Citizenship & Immigration) v. Zeng*, 2010 FCA 118 at para. 21. However, in my view, the Court must consider both the circumstances in which that possibility arises and the frequency of occurrence.

[55] The circumstances before the Court arise because of an extremely unusual fact situation. All of the following must occur:

1. The claimant must have traveled from his country of origin to a safe third country. A safe third country is a country that has been deemed to be safe pursuant to the Regulations on the basis that individuals can seek and receive appropriate refugee protection in that country. Subsection 102(2) of the Act sets out the criteria for Canada designating a country as a safe third country. The U.S. has been so designated.

2. The claimant, having failed to make a refugee claim in the U.S., must cross over the border into Canada and attempt to make a refugee claim in Canada.

3. Pursuant to the STCA and the Reciprocal Agreement between Canada and the U.S., the claim is ineligible to be referred to the Refugee Protection Division and the claimant is returned to the U.S. where, if he has not already done so, he may make a refugee claim.

4. The claimant must once again cross the border into Canada and seek to make an application for a PRRA within a period that is less than six months since the date he was first removed from Canada to the U.S.[1]

5. The U.S. authorities must then refuse the claimant re-entry to the U.S.

[1] In their Further Memorandum of Argument, the Respondents write: "On July 27, 2009, six months after they were determined ineligible to make a refugee claim under section 101(1)(e) of the IRPA, the Applicants were notified that they could apply for a PRRA." Thus, any impediment to a claimant such as one of the applicants to having a risk determination is the mere passage of time.

[56] It is only if all of those circumstances have been met that it is possible that the claimant may be removed from Canada to his country of origin without an assessment of risk having been performed.

[57] It is reasonable to expect that the vast majority of persons needing protection will make an application at their earliest opportunity and in the first country they enter. In this case, the applicants had family in the U.S.. Ms. Duitama Gomez' mother and uncle left Colombia and travelled to the U.S. on a visa in 1997. Since then her mother has lived in New York continuously except for having travelled occasionally to Colombia to see her children. The applicants fled Colombia in October 2008 and travelled to New York to the home of Ms. Duitama Gomez' mother. They did not enter Canada until more than three months had passed. In an affidavit filed in Court File No. IMM-5799-09 Ms. Duitama Gomez says that during this period the applicants received medical treatment and rested.

[58] The explanation offered as to why the applicants did not choose to remain in the U.S. is best set out in Ms. Duitama Gomez' affidavit filed in support of the judicial review application in Court File No. IMM-5799-09 wherein she states that "we came to the Canadian border to make a refugee claim as my husband's godfather lived here and he encouraged us to seek protection here." In this application she swore an affidavit in which she says that "although my mother was in the U.S., I wanted to put as much distance between us and Colombia."

[59] The explanation as to why these applicants failed to seek protection in the U.S. after their return, but rather again travelled to Canada, is poorly explained in the record. Ms. Duitama Gomez in her affidavit filed in this application says that after Canada turned them away in January and they were returned to the U.S., her husband was arrested and detained and "now we were really terrified that we would be deported to Colombia [and] we felt there could only be safety for us in Canada."

[60] The U.S. has a refugee protection system comparable to that in Canada and it is therefore reasonable to expect that the majority of claimants who fear persecution in their country of origin who are returned to the U.S. under the provisions of the STCA are likely to make their claim for protection there and not to return again to Canada.

[61] This expectation is supported by the fact that the record reveals only two other cases in the previous four years where claimants have re-entered Canada after being removed under the STCA. They are set out in an affidavit of Gloria Nafziger, Refugee Coordinator of Amnesty International Canada.

[62] The first involved Mr. JZG and his family. They fled Colombia and arrived in the U.S. on June 1, 2006. Shortly after their arrival they approached the Canadian embassy in New York City seeking travel visas to enter Canada; they were refused. Nonetheless, they sought refugee protection at the Canadian border. Like these applicants they were found ineligible due to the STCA and subsection 101(1)(e) of the Act. They were issued removal orders and returned to the U.S. They entered Canada clandestinely around July 26, 2006 and made a refugee claim at a CIC

office on August 3, 2006. On August 17, 2006 they were informed that they were not eligible to make a refugee claim or to make a PRRA application. They requested an opportunity to file a PRRA application. They subsequently filed submissions in support of a PRRA and in June 2009 received a positive PRRA.

[63] The second involved the Torres family from Colombia. They travelled to New York City on September 14, 2009 and on September 19, 2009 attempted to enter Canada and make a refugee claim. They were ineligible to do so and were returned to the U.S. the next day. They illegally re-entered Canada on October 16, 2009 and on October 20, 2009 attempted to make a refugee claim at London, Ontario. They were found to be ineligible and a deportation order issued which was to be carried out on November 21, 2009. A motion for a stay their removal was filed (Court File No. IMM-5356-09). Prior to the motion being heard, the removal order was cancelled. The Minister, pursuant to section 25 of the Act, permitted the claimants to file a PRRA application.

[64] Accordingly, including the present matter, there is evidence before the Court of three situations where, as a result of the conduct of the applicants in re-entering Canada after removal rather than seeking protection in the U.S., the applicants have been exposed to the possibility of *refoulement*. There is no evidence before the Court that any person who requested a risk assessment has ever been removed from Canada without having a risk assessment.

[65] The conduct of an individual can provide no justification or support for a nation breaching the *non-refoulement* principle; however, it must be noted that the situation that creates the

possibility of *refoulement* is one where the applicants have twice entered Canada within a six month period rather than seek protection in the U.S.

[66] It is relevant when considering whether to hear this application on its merits to consider that there is no evidence that any person has been *refouled* in the circumstances applicable to these applicants.

[67] There is a judicial cost to hearing this case on its merits. There is also arguably such a cost to not hearing the application on its merits; not in relation to this matter but in relation to possible similar situations in the future. There has been and may continue to be judicial resources occupied by the Court on the adjudication of stay motions and deferral of removal requests that arise from situations having the unique circumstances at hand. It is submitted that continuing that uncertainty may mean this particular issue will continue to occur, and will continue to require judicial resources.

[68] It is also submitted that these issues will continue to evade judicial review. It is suggested by the applicants that once foreign nationals in similar circumstances obtain counsel and raise the spectre of judicial review on this issue, the immigration authorities become forthcoming with the availability of a PRRA application. It is submitted that this alleged evasion, whether deliberate or not, supports the use of scarce judicial resources in hearing the application on its merits.

[69] On balance, I find that concerns for judicial economy tip the balance in favour of not hearing this application on its merits as the number of similar cases is so few. Accordingly, the

future resources required of the Court if no direction is provided as has been sought is not likely to be great.

[70] The third factor to consider is concerned with how "pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed" by the public, particularly if such pronouncements are "viewed as intruding into the role of the legislative branch:" *Borowski*, at 362.

[71] The respondents submit that the discretionary nature of the "decision" favours not hearing the case on the merits, and further point out that there was no "decision *per se* but only a deemed refusal." The respondents say that if the Court were to hear this application it "would be reviewing a non-decision in a factual vacuum." They rely on *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 for the proposition that courts should not decide legal issues, especially constitutional issues, if they are not necessary for the resolution of a case.

[72] The respondents' first submission is without merit. This Court hears judicial review applications of discretionary decisions, including highly discretionary decisions of senior members of government, on a regular basis.

[73] The underlying issue in this case is whether the application of the impugned provisions, in the circumstances of this case, violates the principle of *non-refoulement*. As important as that question is, I share the respondents' concern about the appropriateness of determining *Charter*

arguments in this case. There are sound policy reasons for exercising prudence in determining *Charter* issues in applications where doing so is unnecessary. Despite the able submissions of counsel for the applicants, I am not convinced that the current situation is one where the *Charter* question should be addressed in the absence of a live and continuing dispute between these parties.

[74] When the three factors are considered together, I am of the opinion that they weigh in favour of this Court not exercising its discretion to hear this application on its merits.

5. Conclusion

[75] This application is dismissed. A formal judgment shall issue once the parties have been canvassed, as provided for in Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules*, as to whether they wish to request that a serious question of general importance should be certified. Accordingly, I direct that within seven days of the issuance of these Reasons, the parties may serve and file any proposed question for certification, together with any representations thereon. Following receipt, the Court shall consider these submissions and then issue formal judgment.

"Russel W. Zinn"

Judge

Docket: IMM-1724-09

ANNEX A

Federal Courts Act

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside	b) déclarer nul ou illégal, ou

and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1724-09
STYLE OF CAUSE:	DEISY JULIETH DUITAMA GOMEZ ET AL v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	February 24, 2010
REASONS FOR JUDGMENT:	ZINN J.
DATED:	June 1, 2010

APPEARANCES:

Lina Anani Pamila Bhardwaj	FOR THE APPLICANTS
Gregory George Alex Kam	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

LINA ANANI Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
MYLES KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS