Federal Court  Cour fédérale

Date: 20140930

Docket: IMM-5397-13

Citation: 2014 FC 926

Ottawa, Ontario, September 30, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

GETTI FARHADI

Applicant

and

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

Respondents

JUDGMENT AND REASONS

Introduction

[1] This case presents itself in a rather awkward context. It stems from refugee protection claims, made by the Applicant in the context of the US-Canada Safe Third Country Agreement (the Agreement), found ineligible for referral to the Refugee Protection Division of the

Immigration and Refugee Board of Canada (the Board) by the Canada Border Services Agency (the Agency). Those findings were not judicially challenged by the Applicant. Instead, the Applicant sought to have those findings reconsidered which request for reconsideration was apparently never received by the Agency.

[2] This led, more than a year later, to the filing of the present judicial review application seeking to compel the Agency to reconsider its ineligibility decisions and to refer the Applicant's case to the Board (the *Mandamus* Proceeding). The Agency claims that it only became aware of the Applicant's request for reconsideration through the *Mandamus* Proceeding and that in becoming so aware, it decided to proceed to reconsider. However, the reconsideration decision was communicated to the Applicant only five weeks prior to the hearing of the *Mandamus* Proceeding scheduled for September 4, 2014. At that point, the Applicant asked that her *Mandamus* Proceeding be amended to include the judicial review of the reconsideration decision.

[3] Both the *Mandamus* Proceeding and the motion to amend were heard on September 4, 2014. For the reasons that follow, both are dismissed.

I. Background

[4] The Applicant (or Ms. Farhadi) is a female citizen of Afghanistan. In July 2007, following the death of her father, she left Afghanistan to study in the United States. On May 24, 2011, while still residing in the United States, she entered Canada at the Fort Erie border post and made a refugee claim on the basis that she feared her uncles who had assumed charge of her

and her family as a result of her father's death and who blamed her and her mother for her western education.

[5] As her refugee claim was covered by the Agreement, which is intended to ensure that a refugee claimant makes his or her claim in the first country of arrival, Ms. Farhadi invoked the Agreement's "family" exemption in order for her claim to be eligible for referral to the Board. In order to meet that exemption she had to establish that she had an "anchor relative" living in Canada. She failed to do so.

[6] As a result, her claim was found ineligible for referral to the Board pursuant to section 101(1)(e) of the *Immigration and Refugee Protection Act*, (SC 2001, c 27) (the Act) which provides that a refugee claim is ineligible for such referral in cases where "the claimant came directly or indirectly to Canada from a country designated by the regulations". The United States, through the operation of the Agreement, has been so designated.

[7] Ms. Farhadi, on the same day she entered Canada (May 24, 2011), departed for the United States. In December 2011 she returned to the Fort Erie border post in order to renew her refugee claim. This time she was able to establish that she had an "anchor relative" in Canada within the meaning of the Agreement. However, considering the prior ineligibility decision, her renewed claim was found ineligible for referral this time under section 101(1)(c) of the Act which provides that a refugee claim is ineligible to be referred to the Board if a prior claim from the same claimant was determined to be ineligible for such referral. As a result, a removal order

was issued against her although it is not enforceable at this time given the *moratorium* on removals to Afghanistan currently in place.

[8] Ms. Farhadi did not judicially challenge either of these two ineligibility decisions.

[9] However, about four months after the second ineligibility decision, that is on March 28, 2012, Ms. Farhadi's lawyer sent a letter to the Agency requesting that it reconsider the ineligibility determination made on May 24, 2011.

[10] This is where the case took an awkward spin.

[11] The Agency claims that it never received a request for reconsideration and that it only became aware of such a request on or about August 15, 2013 when Ms. Farhadi filed the *Mandamus* Proceeding. The Agency points out in this regard that Ms. Farhadi made no enquiries between March 2012 and August 2013 as to the status of her request for reconsideration.

[12] Through her *Mandamus* Proceeding Ms. Farhadi sought to compel the Agency to; (a) reconsider her eligibility for the referral of her refugee claim to the Board, (b) determine her claim eligible for such referral, and (c) refer it to the Board for a hearing to take place within 90 days of the Court's order. In the alternative, she sought a declaration that section 101(1)(c) of the Act is either inoperative to her or of no force and effect on the ground that it violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[13] The Agency responded to the *Mandamus* Proceeding by informing Ms. Farhadi that it would consider her request for reconsideration and that it would accept any additional evidence that she may wish to file in support of that request. The Agency also expressed the view that, as a result of having accepted to reconsider the initial ineligibility decision, the *Mandamus* Proceeding had become moot and should therefore be discontinued. Ms. Farhadi declined to discontinue the *Mandamus* Proceeding on the ground that she was also seeking an order compelling the Agency to determine her claim eligible for referral and proceed to its referral to the Board.

[14] Upon reconsideration, the Agency held, with written reasons in support, that Ms. Farhadi's refugee claim was ineligible for referral to the Board. The Agency claims that this decision was made on November 22, 2013 but that, through inadvertence, it was only communicated to Ms. Farhadi's lawyer on July 30, 2014.

[15] By that time, leave to pursue the *Mandamus* Proceeding had been granted by this Court and the hearing was five weeks away. Ms. Farhadi opted to pursue her *Mandamus* Proceeding but sought to amend it in order to include the judicial review of the Agency's reconsideration decision.

II. Issue

[16] It is against that rather peculiar background that I must decide whether:

i. Ms. Farhadi's motion to amend her *Mandamus* Proceeding should be granted;

ii. The *Mandamus* Proceeding, given the Agency's decision to consider Ms. Farhadi's request for reconsideration, should nevertheless be granted.

[17] The answer to both questions is no.

III. Analysis

A. *The Amendment Request*

[18] As I indicated at the hearing, section 72(1) of the Act constitutes, in my view, a complete bar to Ms. Farhadi's amendment request. This provision dictates that this Court has no jurisdiction to judicially review any decision, determination or order made, or any measure taken or question raised, under the Act, absent leave to seek judicial review being first sought and then granted. In other words, in the context of any matters raised under the Act, there is no right to judicial review unless leave is first granted (*Varela v Canada (Minister of Citizenship and Immigration*), 2009 FCA 145, [2010]1 FCR 129, at para 24).

[19] Section 72(1) serves as a "gatekeeper" provision (*Varela*, above at para 27) with the result that judicial review proceedings brought under the Act without leave having first been sought and granted, are improperly constituted and cannot stand (*Wong v The Minister of Citizenship and Immigration*, 2007 FC 949 at para 15).

[20] In such context, Ms. Farhadi's reliance on Rules 3 (Interpretation Rule) and 75 (Amendments With Leave Rule) of the *Federal Courts Rules*, SOR/98-106, as the basis for her

amendment request, is of no assistance to her as it is well settled that the Rules cannot operate so as to authorize the Court to dispense with compliance with a statutory provision enacted by Parliament (*Westclox Canada Ltd. v Pyrotronics of Canada Ltd* [1981] 2 FC 68 (FCA), at para 3; *Dawe v Minister of National Revenue (Customs and Excise)* 86 FTR 240 (1994), [1994] FCJ No. 1327 (QL) (FCA)).

[21] Ms. Farhadi claims that it is in the interest of justice to allow her amendment request as the facts underlying the reconsideration decision are the same as those in the *Mandamus* Proceeding. Such is the case for refugee claimants having to face a decision, a determination, an order, a measure or a question at various stages of the processing of their case under the Act: the underlying facts are generally the same, whether the matter raised is in connection with the claim's eligibility for referral to the Board, the Board's findings as to the well-foundness of the claim, the pre-removal risk assessment of an eventual removal order or a decision on a in-land application for permanent residency based on humanitarian and compassionate grounds.

[22] I know of no decision of this Court allowing a judicial review application to proceed without leave first being sought and granted on the basis that the underlying factual matrix is similar to a previous judicial review application brought by the same applicant. In fact, the cases relied upon by Ms Farhadi deal with modifications or amendments of claims. However, none relate to amendments aiming at adding to an existing proceeding a matter that cannot be judicially challenged unless prior judicial authorization is given, be it in the context of the Act or any other context.

[23] In any event, there are significant differences between the *Mandamus* Proceeding and the judicial review of the reconsideration decision. The *Mandamus* Proceeding seeks to compel the Agency to act, and to act in a certain way. No decision *per se* is being challenged. The reconsideration decision is the Agency's direct response to the *Mandamus* Proceeding. This decision marks a new stage, prompted by the *Mandamus* Proceeding, in the processing of Ms. Farhadi's refugee claim. It has its own set of reasons, crafted in the specific context of the request for reconsideration. Its challenge would be in the nature of a *certiorari* and would therefore involves a different approach to the judicial review analysis than is the *Mandamus* Proceeding. Additionally, it could possibly require some modifications to the record before the Court.

[24] For these reasons, Ms. Farhadi is not permitted to amend her *Mandamus* Proceeding in order to include the judicial review of the Agency's reconsideration decision. My conclusion on this issue shall not be interpreted as an impediment for seeking leave to judicially challenge that decision in accordance with section 72(1) of the Act.

B. *The Mandamus Proceeding*

[25] Ms. Farhadi claims that the Agency has a legal duty to reconsider her eligibility for referral of her refugee claim to the Board, to determine her claim eligible for such referral and to refer it to the Board for a hearing.

[26] Assuming it had a legal duty to do so, which is far from being certain from a strictly legal standpoint, the Agency, as the record shows, has opted to reconsider its prior decisions as to the

eligibility of Mr. Farhadi's refugee claim for referral to the Board. To that extent, the *Mandamus* Proceeding is moot as there is no longer a live controversy or concrete dispute between the parties is this regard (*Borowski v Canada (Attorney General),* [1989] 1 SCR 342, at p. 353).

[27] The issue then is whether *mandamus* is available to compel the Agency to act in a certain way, that is to determine Ms. Farhadi's claim eligible for referral to the Board and to proceed to referral.

[28] *Mandamus* is an extraordinary, discretionary remedy and it is trite law that while it will be issued to compel the performance of a legal duty, it cannot dictate the result to be reached (*Singh v The Minister of Citizenship and immigration and Canada Border Services Agency*, 2010 FC 757, 372 FTR 40 at para 52; *Orr v Peerless Trout First Nation*, 2012 FC 590, 411 FTR 224 at para 25-26; *Kahlon v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 386, [1986] FCJ No. 930 (QL) at para 3 (FCA)).

[29] The only exception to the rule that *mandamus* cannot dictate the outcome of the exercise of a legal duty is when the only lawful exercise of that duty is the granting of the remedy sought. In other words, although the issuance of specific directions may sometimes be warranted on a *mandamus* application, this power will only be exercised "in very limited and exceptional circumstances", that is where there is only one possible result (*Singh*, above at para 52; *Lebon v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55, at para 14).

[30] To the extent she seeks an order compelling the Agency to determine her claim eligible for referral to the Board, the one result sought by Ms. Farhadi amounts to a collateral attack on the May and December 2011 ineligibility decisions which, for reasons unknown, Ms. Farhadi opted not to challenge. The problem with that approach is that courts have traditionally been reluctant to issue orders or directions that would essentially overturn unchallenged, valid, administrative decisions (*Chamchuk v Canada* (Attorney General), 2011 FCA 93, at para 6).

[31] In *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62, [2010] 3 SCR 585 [*TeleZone*], the Supreme Court of Canada indicated that a collateral attack is one that occurs in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment (*TeleZone* at para 60; *Wilson v The Queen*, [1983] 2 SCR 594, at p. 599). This jurisprudential doctrine is based on general considerations related to the administration of justice (*TeleZone*, at para 61). The doctrine of collateral attack is intended to prevent a party from circumventing the effect of a decision rendered against it (*Garland v Consumers' Gas Co*., 2004 SCC 25, [2004] 1 SCR 629, at para 72).

[32] I see no reason to depart from these principles in this case. The *Mandamus* Proceeding is either moot or ill-conceived as a collateral attack on the May and December 2001 decisions. In such circumstances the only possible result, in my view, is to dismissed the *Mandamus* Proceeding and to dismiss it in its entirety. This includes the alternate conclusions sought by Ms. Farhadi as to the constitutional operability or validity of section101 (1)(c) of the Act since these conclusions amount to a subsidiary form of collateral attack on these two decisions.

[33] In any event, this is a case where judicial restraint is warranted. Courts have indeed been generally reluctant to address constitutional issues that are not necessary to the resolution of a case, specially in circumstances where the foundation upon which the proceedings were initiated has ceased to exist (*Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, at para. 9; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I,* [1997] 3 SCR 3, at para 301; *Attorney General of Quebec v Cumming*, [1978] 2 SCR 605; *The Queen in Right of Manitoba v Air Canada*, [1980] 2 SCR 303; Winner v S.M.T. (Eastern) Ltd., [1951] SCR 887; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357).

[34] Here, the context underlying the *Mandamus* Proceeding has evolved. A new decision, the reconsideration decision, with its own set of reasons, has been issued on Ms. Farhadi's eligibility for referral of her refugee claim to the Board. This decision has ultimately been rendered at the very request of Ms. Farhadi. This is the new foundation upon which this case rests at this point in time and it is against that background that the issue of the constitutional validity of section 101(1)(c) of the Act, if it becomes necessary to do so, ought to be considered.

[35] At the hearing, Ms. Farhadi's counsel urged the Court to consider the "human factor". Ms. Farhadi claims to be under severe stress from the fact her refugee claim might not be determined in any foreseeable future, either by the Board or, as she is not "removal-ready" due to the Afghanistan's removal *moratorium*, through a pre-removal risk assessment under section 112 of the Act.

[36] However, Ms. Farhadi still has the option of challenging the reconsideration decision, provided she does it the proper way. In the meantime, the removal order issued against her is not enforceable because of the Afghanistan's removal *moratorium*. In other words, she cannot be returned to the country where her fears as a refugee claimant lie. Also, the record shows that she was entitled, and did receive, a work permit which put her in a position to gain livelihood in Canada.

[37] Moreover, Ms. Farhadi has led no evidence of her failed attempts to receive health care nor has she shown that she has been refused treatment at an emergency medical care center. As an Ontario resident, it appears also she might be eligible to apply for Ontario's Health Insurance Plan.

[38] Although one can sympathize with Ms. Farhadi, her situation is not one that is, in my view, intolerable or hopeless both from a "human" and legal perspective.

[39] Neither party has proposed a question of general importance. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion to amend the judicial review application is dismissed.

2. The judicial review application is dismissed.

3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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