Federal Court of Appeal | Cour d'appel fédérale

Date: 20160212

Dockets: A-545-14
A-546-14

Citation: 2016 FCA 51

CORAM: **DAWSON J.A.**
WEBB J.A.
RENNIE J.A.

Docket: A-545-14

BETWEEN:

EMELIAN PETER

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: A-546-14

AND BETWEEN:

SURESHKUMAR SAVUNTHARARASA

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on January 18, 2016.

Judgment delivered at Ottawa, Ontario, on February 12, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Subject to certain exemptions and exceptions not relevant to these appeals, paragraph 112(2)(*b.1*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) prohibits a person from applying for a pre-removal risk assessment (PRRA) if a specified period of time has not elapsed since the person's claim for refugee protection was last rejected. The specified period of time is 12 months, unless the person is a national of a designated country of origin. For nationals of designated countries of origin, 36 months must elapse from the last rejection of their refugee claim before an application for a PRRA may be made.

I. Background Facts

[2] The appellants are Tamils from Sri Lanka whose claims to refugee protection were denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada on the basis that, as a result of changes in country conditions in Sri Lanka, each failed to demonstrate that if returned to Sri Lanka he would face a serious possibility of persecution. Additionally, the Refugee Protection Division found that Mr. Peter failed to provide sufficient credible and trustworthy evidence in support of his claim, and that Mr. Savunthararasa's testimony was not "generally credible".

[3] Following their failed refugee claims, each appellant was scheduled to be removed from Canada. Each appellant sought to have his removal deferred, submitting that new evidence of risk was available that had not been put in evidence before the Refugee Protection Division.

Thus, in his request for deferral, each appellant requested that his removal be deferred pending an assessment of the risks he faced in light of the new evidence of risk. Each request for deferral was supported by extensive documentation about conditions in Sri Lanka.

[4] Each request for deferral was denied by an enforcement officer of the Canada Border Services Agency.

[5] Subsequently, each appellant commenced an application for judicial review of the decision refusing to defer his removal. Each sought and obtained an order staying his removal pending determination of his application for judicial review. Thereafter, each appellant obtained an order granting leave to judicially review the decision of the enforcement officer refusing to defer his removal from Canada.

[6] The appellants' applications for judicial review were heard together by the Federal Court. On their applications, the appellants argued that both paragraph 112(2)(*b.1*) of the Act and the "removals process" violated rights they possessed that were protected by section 7 of the *Canadian Charter of Rights and Freedoms*. Of particular concern was the limited discretion to defer removal reposed in enforcement officers.

[7] It is common ground that, based upon jurisprudence of this Court, when evidence of some new risk is put forward, an enforcement officer may defer removal when the failure to defer will expose the person seeking deferral to a risk of serious personal harm. More specifically, an enforcement officer may defer removal where an applicant establishes a risk of

death, extreme sanction or inhumane treatment that has arisen since the last assessment of risk (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness*), 2009 FCA 81, [2010] 2 F.C.R. 311, at paragraph 51; *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133, at paragraphs 41-43). Enforcement officers are not to conduct a full assessment of the alleged risks, nor come to a conclusion as to whether the person is at risk. Rather, officers are to consider and assess the risk-related evidence in order to decide whether deferring removal is warranted in order to allow a full assessment of risk.

[8] In the appellants' submission, section 7 of the Charter is engaged when a person claims he will be at "risk of harm" if removed from Canada. Further, the "risk of harm" which engages section 7 is broad enough to encompass the kinds of risks assessed under both section 96 of the Act (a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion) and section 97 of the Act (a risk of torture or a risk to life or a risk of cruel and unusual treatment or punishment). The appellants argue that enforcement officers do not, and are not permitted to, assess this full spectrum of risk.

[9] The appellants framed two issues before the Federal Court. First, does paragraph 112(2)(*b.1*) of the Act infringe section 7 of the Charter? Second, does the removals process violate section 7 of the Charter?

[10] For reasons cited as 2014 FC 1073, a judge of the Federal Court found that both paragraph 112(2)(*b.1*) of the Act and the removals process comply with section 7 of the Charter.

The Judge also found the decision refusing each appellant's request to defer removal was reasonable. The Judge certified two questions of general importance:

1. Does the prohibition contained in section 112(2)(*b.1*) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 12 months have passed since the claim for refugee protection was last rejected infringe section 7 of the Charter?

2. If not, does the present removals process, employed within 12 months of a refugee claim being last rejected, when determining whether to defer removal at the request of an unsuccessful refugee claimant for the purpose of permitting a Pre-Removal Risk Assessment application to be advanced, infringe section 7 of the Charter?

[11] These are the appeals from the judgments of the Federal Court dismissing each application for judicial review. The appeals were heard together, accordingly a copy of these reasons will be placed on each file.

II. The Issue

[12] I would frame the issue raised by the appellants in this appeal to be whether the Federal Court erred in its analysis of whether the removals process infringes section 7 of the Charter?

[13] In framing the issue in this fashion, I note that the Federal Court found paragraph 112(2)(*b.1*) of the Act to be Charter-compliant on the basis that the removals process could be carried out in a manner that was in accordance with the requirements of the Charter (reasons at paragraphs 86, 97-98). The appellants do not take issue with this conclusion (appellants' joint memorandum of fact and law at paragraph 27).

[14] The appellants view the decision of the Federal Court to be so flawed that they do not put in issue the finding of the Federal Court that the enforcement officers' decisions were reasonable.

[15] I agree that the analysis of the Federal Court was flawed. I reach this conclusion on the following basis.

III. Analysis

[16] It is well-settled law that Charter issues must not be decided in a factual vacuum. Illustrative of this principle is Justice Cory's comment in *MacKay v. Manitoba* that to attempt to decide Charter issues without a proper evidentiary record "would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts […] is essential to a proper consideration of *Charter* issues" (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at page 361, 61 D.L.R. (4th) 385).

[17] In the present case, the Judge made the following findings of mixed fact and law:

- The risk of harm asserted by each appellant would fall within the scope of risk that would be assessed by an enforcement officer (reasons at paragraph 203).

- The appellants' allegations of a well-founded fear of persecution upon return to Sri Lanka "would be directly related to detention and physical harm that reaches a threshold which is to be assessed" under the test applied by enforcement officers (reasons at paragraph 213).

- The appellants "describe risks which are in the nature of extreme sanctions or inhumane treatment, both of which are assessed under section 97 of the [*Immigration and Refugee Protection Act*]. One would have thought that in a test case, the facts demonstrating the failure to test for section 96 [*Immigration and Refugee Protection Act*] factors would have been in plain evidence before the Court" (reasons at paragraph 223).

- The appellant, Mr. Peter "is making a novel argument on a test that has been employed for over a decade and is not advancing facts that permit the Court to consider whether any allegedly unassessed risk of persecution would nevertheless fall into the category of 'inhumane treatment'" (reasons at paragraph 235).

[18] The appellants have not demonstrated that these findings are vitiated by any palpable and overriding error of fact or mixed fact and law, or any extricable legal error.

[19] These findings are wholly consistent with the risks identified by each appellant in his submission to the enforcement officer requesting deferral.

[20] Thus, the new risks asserted by Mr. Peter arose from his profile as a former employee of the international aid agency CARE and his profile as a member of a family known to authorities whose members had been investigated by the Terrorist Investigation Division (Peter Appeal Book, Tab 11 at page 234). Based on these profiles, Mr. Peter was said to face a risk of torture, arbitrary arrest and detention, kidnapping, extortion, and murder (Peter Appeal Book, Tab 11 at page 239). Based on the country condition documentation, these risks would fall within the ambit of extreme sanctions or inhumane treatment.

[21] Similarly, Mr. Savunthararasa submitted he faced risks arising from his profile as a "young Tamil male from the north, who has spent time abroad, and who is a refused refugee claimant in Canada" (Savunthararasa Appeal Book, Tab 7 at page 47). He submitted that removal to Sri Lanka would expose him "to risk of death, extreme sanction, or cruel and inhumane treatment" (Savunthararasa Appeal Book, Tab 7 at page 41).

[22] In these circumstances, the Judge ought not to have embarked on his lengthy Charter analysis unsupported by a proper evidentiary record. This error is sufficient to dispose of these appeals. It follows that any comments or analysis beyond the Judge's findings quoted above at paragraph 16 are *obiter dicta* and these reasons should not be read as endorsing the Judge's *obiter* comments. This particularly applies to the Judge's concern about the need for greater

clarity about the nature of the harm that at law constitutes a well-founded fear for the purpose of defining persecution.

[23] This said, I am mindful that these appeals were viewed effectively to be test cases on the validity of paragraph 112(2)(*b.1*) of the Act. In the event this issue is to be re-litigated, I offer the following comments on the nature of the required analysis.

[24] In these proceedings, the evidence of risk of harm was in largest part found in the extensive documentation submitted by the appellants that set out country conditions in Sri Lanka. Such documentation is in part conflicting and deals with a panoply of circumstances including, for example, information concerning restrictions on the cultural life of members of the Tamil community. In this circumstance, it is incumbent on a judge hearing an application for judicial review to make clear findings as to the nature and scope of the risk of harm an applicant would face on return to his country of origin.

[25] Once the nature and scope of the risk faced has been clearly delineated, a judge should consider and make findings about which, if any, risks faced would not be assessed by an enforcement officer considering a request to defer removal.

[26] If an applicant for deferral is found to face a risk of harm that would not be assessed by an enforcement officer, a judge should next consider whether in the circumstances section 7 of the Charter is engaged.

[27] In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, in order to decide whether the appellants had been deprived of the right to life, liberty or security of the person, the Court began by determining which rights the appellants possessed under the applicable immigration legislation. Those rights were found to be the right to a determination on proper principles as to whether a permit should issue allowing the appellants, as persons claiming refugee status, to enter and remain in Canada, the right not to be returned to a country where the appellants' life or freedom would be threatened, and the right to appeal a removal or deportation order made against them.

[28] Once the rights possessed by the appellants as refugee claimants were identified, the inquiry turned to whether the deprivation of those rights constituted a deprivation of the right to life, liberty and security of the person within the meaning of section 7 of the Charter. The Court concluded that security of the person encompassed "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself" (*Singh* at page 207). The Court expressly left open the question of whether a more expansive approach to security of the person should be taken (*Singh* at page 207).

[29] Because the Court left this question open, in the context of a claim asserting a broader concept of security of the person, the Federal Court must be mindful of the need to properly analyze at the first stage of the section 7 analysis whether the removals scheme imposes limits on the security of the person, thus engaging section 7 of the Charter.

[30] If section 7 is found to be engaged, the inquiry moves to the second stage of the section 7 analysis: the determination of whether the deprivation of the claimant's security of the person is in accordance with the principles of fundamental justice.

[31] At this stage, the need for clear findings of fact is reinforced because what is required by the principles of fundamental justice must be determined in the context of the specific fact situation (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paragraph 113). This is because the greater the effect on the life of the individual by impugned legislation or state action, "the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter" (*Suresh* at paragraph 118).

IV. Conclusion

[32] In his judgments, the Judge dismissed each application for judicial review and certified two questions. As the appellants have failed to show the Judge erred in his finding that they presented no evidence of risks they face that would not be assessed by an enforcement officer, I would dismiss these appeals. The certified questions should not be answered because they do not arise on the record.

"Eleanor R. Dawson"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-545-14
STYLE OF CAUSE:	EMELIAN PETER v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	A-546-14
STYLE OF CAUSE:	SURESHKUMAR SAVUNTHARARASA v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
DATED:	FEBRUARY 12, 2016

APPEARANCES:

Barbara Jackman Sarah L. Boyd	FOR THE APPELLANT
Kristina Dragaitis Amy King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates	FOR THE APPELLANT

Barbara Jackman Professional Corporation
Toronto, Ontario

William F. Pentney — FOR THE RESPONDENT
Deputy Attorney General of Canada