Federal Court of Appeal | Cour d'appel fédérale

Date: 20201026

Docket: A-204-20

Citation: 2020 FCA 181

Present: **STRATAS J.A.**

BETWEEN:

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

Appellants

and

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Respondents

Heard at Toronto, Ontario, on October 23, 2020.

Order delivered at Ottawa, Ontario, on October 26, 2020.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. Introduction

[1] Before the Court is an appeal and cross-appeal from a judgment of the Federal Court (*per* McDonald J.): 2020 FC 770. The Ministers now move for an order staying or suspending the Federal Court's judgment until this Court determines the appeal and cross-appeal.

[2] The Federal Court declared that the operation of an agreement between Canada and the United States infringes the rights of certain refugee claimants in Canada under section 7 of the Canadian Charter of Rights and Freedoms.

[3] The agreement is the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, sometimes called the "Safe Third Country Agreement between the United States and Canada". Under this Agreement, Canada refuses to consider the refugee claims of those who first arrived in the United States and who later claim refugee status at points of entry into Canada. Canada requires the refugee claimants to pursue their claims in the United States, not Canada.

[4] According to the Federal Court, this causes refugee claimants to suffer treatment that violates the claimants' rights under section 7 of the Canadian Charter of Rights and Freedoms.

Section 7 guarantees to everyone the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with fundamental justice.

[5] To remedy the violation of section 7 of the Charter, the Federal Court declared two legislative provisions invalid and of no force or effect: paragraph 101(1)(*e*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and section 159.3 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227. These legislative provisions implemented the Safe Third Country Agreement in Canada.

[6] On appeal to this Court, the Ministers contend that the legislative provisions do not violate the Charter. The respondents disagree. And in their cross-appeal, they contend that the *Immigration and Refugee Protection Act* precludes the designation of the United States from being a safe third country under section 159.3 of the *Immigration and Refugee Protection Regulations*. The respondents also contend in their cross-appeal that the Federal Court should have found the legislative provisions invalid because of the right to equality guaranteed by section 15 of the Charter.

[7] The Federal Court suspended its declaration of invalidity for six months "[t]o allow time for Parliament to respond": Federal Court reasons at para. 163. The suspension period ends on January 22, 2021. From that date, the legislative provisions will no longer have force or effect.

[8] Well in advance of that date, on September 3, 2020, the Ministers brought this motion for an order staying the Federal Court's judgment until final determination of the appeal and the cross-appeal.

[9] For the following reasons, the Court will grant the motion. It will order that the Federal Court's judgment is stayed until final determination of the appeal and the cross-appeal. In recognition of the dynamic situation existing at this extraordinary time of pandemic, the Court will provide that its Order can be varied by the panel hearing the appeal and the cross-appeal if there is a significant new development or a marked change of circumstances proven by evidence that can be reasonably expected to change the Court's assessment.

B. Analysis

[10] The parties agree that this Court can stay the Federal Court's judgment on the authority of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, a decision of the Supreme Court. This Court can do so if it is satisfied that a three-fold test is met: an arguable appeal is present, irreparable harm will be suffered if the judgment of the Federal Court is not stayed, and a comparison of the hardships associated with staying the judgment, as opposed to letting it take effect, supports a stay.

[11] At the outset, the respondents object to the jurisdiction of this Court to determine this motion. They say that the Federal Court—after full argument and after full study of the evidence before it—rejected the Ministers' request for a twelve-month suspension and granted only six

months. The respondents say that if the Ministers wanted an extension of the six-month suspension period, they had to go to the Federal Court—not this Court—and ask the Federal Court to vary or change its decision under Rule 399(2)(*a*).

[12] This Court dismisses the jurisdictional objection. This Court has jurisdiction.

[13] At the root of the respondents' jurisdictional submission is a wrong assumption. The respondents assume that the two Courts perform the same task—deciding whether to suspend the declaration of invalidity—and so the Court that first decided the matter, here the Federal Court, should have an opportunity to decide if an extension of time should be given. In fact, the two Courts perform different, independent tasks under different, albeit overlapping, legal tests.

[14] The Federal Court suspended the declaration of invalidity under the remedial authority of section 52 of the *Constitution Act, 1982*: *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1. In exercising this power, the Federal Court considered the "effect of an immediate declaration on the public" such as harms that might be caused: *Schachter* at 715-717 S.C.R. The harms must be significant enough to outweigh the need to immediately vindicate the rights of the Charter complaints. The Court weighs the evidence before it and, if appropriate, sets a period of suspension. As counsel for the respondents fairly conceded in oral argument of this motion, setting the period of suspension is an unscientific, imprecise task.

[15] This Court has an independent power stemming from a different source. It is not changing the Federal Court's remedy under section 52 of the *Constitution Act, 1982*. Rather, it is

exercising a power given to it by Rule 398(1)(*b*): “where a notice of appeal of [a Federal Court judgment] has been issued”, it can “order that [the Federal Court judgment] be stayed” under the *RJR-MacDonald* test.

[16] The appellants are entitled to ask this Court to exercise its power under Rule 398(1)(*b*). They do not have to go first to the Federal Court and ask it to change its remedy by extending the six-month period.

[17] It is true that, as the Federal Court did in setting the six-month suspension period, this Court must perform the unscientific, imprecise task of weighing the evidence under the balance of convenience branch of the *RJR-MacDonald* test. But under the *RJR-MacDonald* test, this Court must do more than the Federal Court did: it must ensure there is an arguable appeal and the presence of irreparable harm.

[18] Now to the merits of the Ministers’ motion. As will be seen, this Court considers that the first two parts of the *RJR-MacDonald* test, arguable case and irreparable harm, are relatively uncontentious. The outcome of the motion turns on the final part of the *RJR-MacDonald* test, the balance of convenience.

[19] The respondents concede that an arguable case is present. This is a fair concession for which they are to be commended. The threshold for showing an arguable case is “low” and “liberal”: *RJR-Macdonald* at 337 S.C.R.; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, 90 C.C.C. (3d) 1 at 358 S.C.R. *per* La Forest J. (dissenting, with

concurrence on this point from the majority). The Ministers need only show that their appeal is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald*, *supra* at 337 S.C.R.; see also *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, 445 N.R. 360 at para. 11 and *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255, 440 N.R. 232 at para. 25.

[20] The second part of the *RJR-MacDonald* test, irreparable harm, is met because of an earlier decision of this Court. In 2008, this Court considered an appeal substantially similar to the one here. The Federal Court had declared invalid provisions substantially similar to those in issue here, basing its decision on the effects caused by the Safe Third Country Agreement: the Federal Court's judgment is at 2008 CanII 91561 and the reasons for judgment are at 2007 FC 1262. The appellant in that case, the federal Crown, asked this Court to stay the Federal Court's judgment under the *RJR-MacDonald* test until the appeal was determined.

[21] This Court granted the stay: *Canada v. Canadian Council for Refugees*, 2008 FCA 40. It found (at paras. 23-30) that the immediate invalidation of the provisions and the termination of the Safe Third Country Agreement would cause irreparable harm. In the present case, the body of evidence in favour of a finding of irreparable harm, if anything, is stronger than that in the 2008 case.

[22] Of note is that the Canadian Council for Refugees was a party in the 2008 case. Thus, it is presumptively barred from relitigating this issue: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Ontario v. O.P.S.E.U.*, 2003 SCC 64, [2003] 3 S.C.R. 149.

[23] The other respondents are not barred. But the Court is bound or at least strongly persuaded by its 2008 finding that irreparable harm would result if this Court did not stay the Federal Court decision invalidating substantially similar legislative provisions. None of the respondents submit the 2008 case should not be followed or is "manifestly wrong" under the authority of *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149.

[24] Putting aside the binding 2008 decision of this Court, the evidence the Ministers have filed in this case proves the existence of irreparable harm. As well, irreparable harm can be found on the basis of the following binding passage from the Supreme Court:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

(*RJR-MacDonald* at 346 S.C.R.)

[25] As mentioned above, this stay motion very much turns on the "balance of convenience" part of the *RJR-MacDonald* test. Several factors raised by the parties need to be considered.

The Federal Court's decision to suspend its judgment for six months does not foreclose this Court from granting a stay of the Federal Court judgment

[26] As mentioned above, the fact that the Federal Court chose six months as the period of suspension does not preclude this Court from staying the Federal Court's judgment for such period as is appropriate. This Court is acting under a different, independent power.

Only a minor stay seems necessary

[27] The appeal and the cross-appeal have been expedited and the parties have been directed to hold the week of February 22, 2021 for a hearing of the appeal. This is one month after the end of the Federal Court's six-month suspension period. The panel hearing the appeal and cross-appeal could terminate any interlocutory stay or suspension this Court has given. In practical terms, all that is in serious issue here is as little as a one-month addition to the suspension given by the Federal Court. It can be expected that the panel will do its best to expedite the release of its decision, especially if it intends to dismiss the appeal, thereby minimizing the duration of the stay.

[28] The role of the appeal panel in the face of an interlocutory stay or suspension previously given requires a little further explanation.

[29] Normally, an interlocutory decision of a motions judge cannot be overturned by a three-judge hearing panel: *Ignace v. Canada (Attorney General)*, 2019 FCA 239; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 259.

[30] But an interlocutory decision can be varied by another motions judge under Rule 399(2)(*a*) or by an appeal panel where there is "a significant new development" or "a marked change in circumstances": *Canada (Prime Minister) v. Khadr*, 2010 FCA 245, 325 D.L.R. (4th) 540 at para. 14, citing *Del Zotto v. Canada (M.N.R.)*, [1996] 2 C.T.C. 22, 195 N.R. 74 at para. 12 (F.C.A.). And an appeal panel can vary an interlocutory order as it sees fit, either as a result of an express or implied invitation extended by the interlocutory order: *Ignace* at para. 29.

[31] Circumstances might change between now and the determination of the appeal and cross-appeal. The Federal Court has made findings concerning the severe impact of the Safe Third Country Agreement on refugee claimants. There may be unexpected delays in this Court's determination of the appeal and cross-appeal. Therefore, this Court will empower the hearing panel to vary or terminate the stay if it considers the *Del Zotto* test to be satisfied.

The Federal Court itself found a six-month suspension to be tolerable

[32] In their cross-appeal, the respondents do not challenge the Federal Court's decision to suspend the declaration of invalidity. Implicitly, they do not disagree with the proposition that the balance of convenience branch of the test lies in favour of the Ministers, at least for six months. The real issue, then, is whether a short extension, perhaps as little as one month, is warranted.

[33] The Federal Court set six months as the period of suspension. It did so by weighing and balancing competing considerations. As the respondents acknowledge, this weighing and

balancing and the setting of six months as the suspension period is neither scientific nor precise. It is a best estimate. A further month imposed by a stay granted by this Court does not run roughshod over what the Federal Court did. In fact, it may be seen as reasonably consistent with it.

The public policy embodied in new legislation suggests this Court should be flexible

[34] In making a discretionary decision such as this, this Court should take into account valid public policy inherent in legislation.

[35] Five days after the Federal Court suspended the declaration for invalidity for six months, the *Time Limits and Other Periods Act (COVID-19)*, enacted by *An Act Respecting Further COVID-19 Measures*, S.C. 2020, c. 11, s. 11, came into force. Under that legislation, time limits established by or under an Act of Parliament are suspended between March 13, 2020 and September 13, 2020.

[36] This legislation does not suspend the running of the six-month period of suspension set by the Federal Court: *Re Section 6 of the Time Limits and Other Periods Act (COVID-19)*, 2020 FCA 137 at paras. 15-21. But inherent in it is a public policy that flexibility should be accorded, where possible, due to the practical exigencies caused by the extraordinary COVID-19 pandemic we are all experiencing.

[37] This Court also sees a very low level of legislative activity by Parliament during 2020 as compared to previous years. This gives rise to an apprehension that the pandemic is affecting the efficiency of the legislative process. The Federal Court's estimate of six months for any necessary legislative action now appears to be unrealistic.

[38] In setting the length of the suspension period, the Federal Court may not have taken into account the practical exigencies caused by the extraordinary COVID-19 pandemic. The Federal Court heard this case in November 2019, well before the start of the pandemic. The Federal Court's reasons do not mention the pandemic.

[39] This Court can and will take judicial notice of the practical exigencies of the pandemic (see, *e.g.*, *R. v. Baidwan*, 2020 ONSC 2349). In considering the length of any stay, it will implement the public policy inherent in the *Time Limits and Other Periods Act* and adopt a flexible approach.

The prorogation of Parliament

[40] The Federal Court set the suspension of its judgment at six months in recognition of the potential harm to the public interest and to permit Parliament to act to pass new legislation.

[41] However, a development arose a month after the judgment of the Federal Court. Parliament was unexpectedly prorogued for slightly over one month, from August 18 until September 23. This is not in evidence before the Court.

[42] The Court can take matters of judicial notice into account and dispense with the need for evidence to prove them: *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458. Typically, only matters notoriously true can be taken on notice; the standard is high.

[43] The lowest standard for judicial notice this Court has seen is in *R v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 at para. 99. There the Supreme Court took judicial notice of the war in Afghanistan and counter-insurgency acts which it found to be "terrorist activity".

[44] In the Court's view, the prorogation of Parliament from August 18 until September 23 is far more notorious than the facts taken on notice in *Khawaja*. Therefore, this Court can take judicial notice of Parliament's unexpected prorogation and can take it into account.

Legislative activity or inactivity—a neutral factor

[45] The respondents submit that the Ministers have done nothing to start the process of legislation to address the Federal Court's judgment.

[46] On the evidence filed before the Court, that is unproven. There is nothing one way or the other suggesting that amendments to the Act and Regulations are under contemplation.

[47] In oral argument, the Court put to the Ministers that it was doing nothing and was, in effect, thumbing its nose at the Federal Court's judgment. The Ministers disagreed. They noted that six months is "an awfully short time".

[48] Overall, on this point, there is no evidence of legislative activity or inactivity for the Court to take into account in assessing the balance of convenience. Nor is this a situation where an adverse inference can be drawn from the failure of the Ministers to adduce evidence: *Lévesque v. Comeau*, [1970] S.C.R. 1010, 16 D.L.R. (3d) 425; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751 at paras. 22-30.

The danger the appeal might become moot

[49] The Ministers submit that any legislative action by Parliament could render their appeal moot. In thinking through possible legislative scenarios, the Court agrees that this is a substantial risk that must be factored into the assessment of the balance of convenience.

[50] The Ministers consider the Federal Court's judgment to be entirely wrong in law. They have responded by appealing that judgment and asking this Court to expedite the appeal. They want to complete their appeal in this Court before any legislation moots their appeal.

[51] This is a significant factor in the assessment of the balance of convenience. It favours staying the Federal Court's judgment until this Court can determine the appeal and cross-appeal.

The public interest consideration

[52] Where, as here, legislative provisions are entirely suspended, the public interest considerations that prompted the legislative provisions weigh heavily in the Court's assessment

of the balance of convenience: *RJR-MacDonald* at 342-347; *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321. In this case, this falls to be weighed against the evidence offered by the respondents.

Assessing the respondents' evidence on the stay motion

[53] The respondents submit that every day the Federal Court's judgment is suspended is another day the harrowing effects of the Safe Third Country Agreement between the United States and Canada continue. They offer voluminous and detailed evidence on this. They say these effects are frequently occurring.

[54] At first glance, this is a powerful submission. But the evidence submitted by the respondents is not as strong as they contend.

[55] The respondents offered much evidence about the harm suffered at large by individuals in refugee detention in the United States. But this evidence must be assessed in its proper context.

[56] Under the balance of convenience branch of the *RJR-MacDonald* test, the harm the Court must consider is not the harm suffered by individuals in refugee detention in the United States generally and at large. Instead, the Court must consider the harm suffered by refugee claimants who are refused entry to Canada from January 22, 2021 (the end of the suspension granted by the Federal Court) to the end of any stay granted by this Court.

[57] On the respondents' own evidence, refugee claims in Canada have dropped precipitously since the beginning of the pandemic. The respondents point to COVID-19 Orders in Council that have effectively closed the U.S. Canada border. They note that refugee claimants can enter Canada only if they fall within narrow exemptions in the Orders in Council: Respondents Memorandum of Fact and Law at para. 20. As a result, these days, fewer individuals are turned away under the Safe Third Country Agreement.

[58] This is not to trivialize what is happening. Accepting for the moment that the Federal Court's analysis is correct, there are still Charter violations taking place. A Charter violation is a serious matter. But the reduction in arrivals at Canadian points of entry affects the Court's assessment of the balance of convenience.

Conclusion on the balance of convenience

[59] Overall, considering the evidence led by the Ministers, including the effect on the public interest, and considering the evidence led by the respondents, the balance of convenience lies in favour of staying the Federal Court's judgment until final determination of the appeal and cross-appeal.

[60] The Court thanks counsel for their excellent motion materials, written representations and oral submissions.

C. Conclusion

[61] Therefore, for the foregoing reasons, this Court concludes that the Minister's motion should be granted. The judgment of the Federal Court will be stayed until final determination of the appeal and cross-appeal. The respondents will be at liberty to move to vary this order under Rule 399(2)(*a*) if there is a significant new development or a marked change of circumstances proven by evidence that can be reasonably expected to change the assessment of the balance of convenience made on this motion.

D. Disposition

[62] The motion will be granted. An order will issue in accordance with these reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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