Federal Court  Cour fédérale

Date: 20180621

Docket: IMM-5239-17

Citation: 2018 FC 650

Ottawa, Ontario, June 21, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

SEEVARATNAM MURUGAMOORTHY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Seevaratnam Murugamoorthy, seeks judicial review of a decision (Decision) of a Senior Decision-Maker in Immigration, Refugees and Citizenship Canada (Minister's Delegate). On the basis of a series of criminal convictions in Canada over a 20 year period, the Minister's Delegate determined that the Applicant was a danger to the Canadian public and could be removed from Canada pursuant to paragraph 115(2)(a) of the *Immigration*

and Refugee Protection Act, SC 2001, c 27 (IRPA). This application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] At the hearing of this matter in Toronto on June 13, 2018, counsel for each of the Applicant and Respondent presented their arguments on the issue of whether the application for judicial review of the Decision is moot due to the removal of the Applicant to Sri Lanka in March 2018. I reserved my decision in that regard and the matter was adjourned prior to submissions from counsel on the merits of the application.

[3] For the reasons that follow, I find that this application for judicial review of the Decision is moot as the Applicant has been removed from Canada. The application is dismissed.

I. Overview

[4] The Applicant arrived in Canada from Sri Lanka in 1990 and made a claim for refugee protection. The Applicant's claim as a Convention refugee was accepted in 1991. A long series of criminal convictions in Canada dating from 1993 prevented him from obtaining permanent residence. The bulk of the Applicant's crimes involved financial criminality. Between 2005 and 2013, Canada Border Services Agency (CBSA) prepared three reports alleging that the Applicant was inadmissible due to serious criminality. A deportation order was issued against the Applicant in February 2007 but was not pursued by CBSA. In 2014, CBSA notified the Applicant that it was seeking the opinion of the Minister of Citizenship and Immigration that the Applicant posed a danger to the Canadian public and could be refouled in accordance with paragraph 115(2)(a) of the IRPA.

[5] The Applicant made a number of submissions contesting his removal from Canada, filing his final submissions on June 22, 2017. He included with his submissions extensive country condition documentation. The Applicant's submissions detail his current profile as a Tamil man who has lived in Canada for many years within the Sri Lankan Tamil diaspora. He argues that his current profile would subject him to significant and unacceptable risk of persecution upon any return to Sri Lanka. The Applicant also raises humanitarian and compassionate (H&C) arguments in support of his remaining in Canada.

[6] The Decision is dated October 16, 2017. The Minister's Delegate concluded that the Applicant could be removed from Canada pursuant to paragraph 115(2)(a) of the IRPA. The Minister's Delegate first detailed the Applicant's criminal conviction history in Canada. His finding of serious criminality within the meaning of paragraph 36(1)(a) of the IRPA is not in dispute in light of the Applicant's criminal history in Canada spanning 20 years. The Minister's Delegate then reviewed the risks the Applicant might face in a return to Sri Lanka and the H&C factors raised by the Applicant against the need to protect Canadian society. The Minister's Delegate determined that the need to protect members of the Canadian public weighed in favour of the Applicant's removal and that removal would not violate the Applicant's rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (Charter).

[7] The Applicant's written submissions on the merits of this application centre on the risk assessment conducted by the Minister's Delegate against the Applicant's current profile. He argues that the Minister's Delegate conducted a highly selective and flawed review of the

country condition documentation regarding Sri Lanka. The Applicant also contests the assessment by the Minister's Delegate of the Applicant's H&C factors, particular the Applicant's strong and loving relationships with his wife and three children in Canada and his establishment in Canada.

[8] An order for the removal of the Applicant to Sri Lanka was issued by CBSA in February 2018. The Applicant's request for a stay of the execution of his removal order was dismissed by this Court on March 14, 2018. The Applicant was removed from Canada to Sri Lanka on March 18, 2018.

[9] On April 3, 2018, the Court granted the Applicant leave to commence this application for judicial review of the Decision.

II. Legislative Background

[10] Subsections 115(1) and (2) of the IRPA provides as follows:

Principle of Non-refoulement	**Principe du non-refoulement**
Protection	**Principe**
115(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or	115(1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est

political opinion or at risk of torture or cruel and unusual treatment or punishment.	statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
Exceptions	**Exclusion**
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

III. Analysis

[11] The determination of mootness of an application before the Court involves a two-step process (*Borowski v Canada (Attorney-General)*, [1989] 1 SCR 342 (*Borowski*)). The first step is the obvious starting point: the consideration of whether a live controversy which affects the rights of the parties continues to exist at the time the Court is called on to make a decision in the case. If not, the Court will generally decline to hear the case as it is moot. However, the Court retains discretion to hear the case and must consider the exercise of its discretion before finally

determining whether or not to proceed. The Supreme Court of Canada described the process as follows:

> [16] The approach in recent cases involves a two-step analysis. 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. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[12] The Supreme Court identified three factors a court should consider in assessing whether to exercise its discretion to hear a case on its merits even though it is moot: the adversarial system, the concern for judicial economy and the court's proper law-making role (*Borowski*, paras 31 to 42). The review of the factors is not to be mechanical and the Supreme Court acknowledged that the factors may weigh differently in any particular case.

[13] The issue of mootness in the specific context of judicial review of a decision made pursuant to paragraph 115(2)(a) of the IRPA has been considered by the Federal Court of Appeal and by this Court (*Mohamed v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 303 (*Mohamed*); *Es-Sayyid v Canada (Minister of Public Safety and Preparedness)*, 2013 FC 309 (*Es-Sayyid*)). In *Mohamed*, the Federal Court of Appeal stated:

> [5] We are all agreed that the appeal is moot, the appellant having already been removed to Somalia after his unsuccessful attempt to stay the removal order. In our view, there is no longer a live controversy existing between the parties. While it is true that we have discretion to hear the appeal, notwithstanding its mootness (see: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342

> ("*Borowski*")), we do not believe that we should so exercise our discretion in the circumstances of this case.

[14] The Court reviewed the *Borowski* factors and concluded that no adversarial context remained "considering that the question raised under section 115 of the [IRPA] was whether or not the appellant should be removed from Canada" (*Mohamed* at para 6).

[15] In *Es-Sayyid*, this Court cited the decision in *Mohamed* and concluded that the matter before it was moot. The applicant in question had been removed to Egypt following a paragraph 115(2)(a) decision. He had lived in Canada since childhood and was contesting credibility and H&C findings made by the minister's delegate in the decision under review. The Court referred to the three factors from *Borowski* in declining to hear the merits of the case as there were no special circumstances in the case that warranted the exercise of the Court's discretion. Justice Rennie, as he then was in this Court, stated:

> [16] […] Judicial review cannot grant a practical benefit to the applicant in this case because he has already been removed. The *lis* between the parties, namely whether the applicant can be removed from Canada notwithstanding his status, has evaporated.

[16] The Applicant argues that the issue of whether his application is moot should be assessed in light of jurisprudence of this Court involving refugee claims pursuant to section 96 of the IRPA. The Court has held in those cases that an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board is not moot following removal from Canada of the applicant (*Rosa v Canada (Citizenship and Immigration)*, 2014 FC 1234 (*Rosa*); *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750; *Mrda v Canada (Citizenship and Immigration)*, 2016 FC 49). In *Rosa*, the Chief Justice found that the application

before him was not moot notwithstanding the applicant had been removed from Canada. He distinguished prior cases in which the decision underlying the judicial review application was a Pre-Removal Risk Assessment (PRRA) decision. The Chief Justice stated:

> [34] In my view, an important factor in the decisions of both the FCA and Justice Martineau at first instance (*Solis Perez v Canada (Citizenship and Immigration)*, 2008 FC 663) was that section 112 specifies that a person applying for protection is a "person in Canada". The same was true in *Sogi Canada (Minister of Citizenship and Immigration)*, 2007 FC 108, at para 31, where Justice Noel stated: "… [I]f a PRRA applicant is removed from Canada before a determination is made on the risks to which that person would be subject to in his or her country of origin, the intended objective of the PRRA system can no longer be met. This is why section 112 of the IRPA specifies that a person applying for protection is a 'person in Canada'." Those cases, as well as the cases cited at paragraph 32 above, were all judicial reviews of decisions made by a PRRA officer, pursuant to sections 97 and 112 of the IRPA.
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> [35] In a judicial review of a negative PRRA decision, there would be little point in sending the matter back for redetermination by a different PRRA officer, because the applicant would no longer be "in Canada", as required by those provisions. In that context, it is readily apparent that the judicial review would be without object (*Solis Perez*, above).
>
> [36] The same cannot be said with respect to a judicial review of a negative decision by the RPD under section 96. There is no specific requirement in section 96 that the refugee claimant still be in Canada at the time of the redetermination. In the absence of clear wording in the IRPA to the contrary, I reject the Respondent's position that the RPD does not have the jurisdiction to reconsider an application under section 96 once the applicant has properly been removed from Canada, even if this Court determines that the RPD committed a reviewable error in denying the application. Indeed, there is jurisprudence of this Court to the contrary (*Freitas v Canada (Minister of Citizenship and Immigration*), [1999], 2 FC 432 at para 29; *Magusic v Canada (Minister of Citizenship and Immigration)* (IMM-7124-13), July 22, 2014 (Unreported), at paras 10-11 [Magusic]; see also *Thamotharampillai, v Canada (Solicitor General)*, 2005 FC 756, at para 16).

[17] In my opinion, *Rosa* and the cases that consider mootness of applications for judicial review of section 96 decisions are distinguishable from those involving PRRA and paragraph 115(2)(a) decisions. This point is made by the Chief Justice in *Rosa* in his analysis of the leading PRRA cases. The same analysis applies to paragraph 115(2)(a) cases. The focus of both PRRA and paragraph 115(2)(a) decisions is the removal of the individual from Canada. The process engaged in a paragraph 115(2)(a) danger opinion and the circumstances of the individual in question differ substantively from the section 96 process and the circumstances of a refugee claimant.

[18] In this case, the Applicant's status as a Convention refugee is not at issue. This determination was made in 1993. However, a long pattern of criminal behaviour in Canada placed him within the ambit of paragraph 115(2)(a) of the IRPA. Paragraph 115(2)(a) embodies an exception to the principle of non-refoulement and permits Canada to consider the removal of a person previously determined to be a Convention refugee. Although the paragraph itself contains no requirement that the risks to which an individual may be subject upon removal be assessed, such an assessment must be undertaken to ensure that any removal does not violate the individual's rights pursuant to section 7 of the Charter. The purpose of the paragraph 115(2)(a) risk assessment is analogous to that carried out in a PRRA and is to be carried out prior to removal. The removal of the individual from Canada has the same impact on a pending judicial review of both a paragraph 115(2)(a) decision and a PRRA decision. Once the individual has been removed, the purpose of the proceeding is moot as the very issue, whether the individual could properly be removed from Canada, has disappeared.

[19] In *Lai v Canada (Minister of Citizenship and Immigration)*, 2015 FC 646, a case that post-dates the decision in *Rosa*, Justice Strickland considered the issue of mootness in the context of a judicial review of a PRRA determination. The applicant had been removed from Canada. Justice Strickland referred to the leading case of *Solis Perez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 663, also a PRRA case, and concluded that the case before her was moot. She declined to exercise her discretion based on the *Borowski* factors, quoting from *Mekuria v Canada (Citizenship and Immigration)*, 2010 FC 304 (*Mekuria*). In *Mekuria*, the continued existence of an adversarial context did not outweigh the principle of judicial economy and the fact that the Court could not grant a practical remedy as the purpose of a PRRA was to conduct a risk assessment prior to removal.

[20] The decisions in *Mohamed* and *Es-Sayyid* remain determinative in considering the first step in the *Borowski* analysis. The 2003 case cited by the Applicant, *Singh v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 795, while on point, has been superseded by the more recent cases. I find that this application is moot and now turn to the second step in determining whether to hear the application on its merits.

[21] The Applicant argues that the Court should exercise its discretion to hear and determine the merits of this application. In considering whether to exercise my discretion, I have reviewed the PRRA and paragraph 115(2)(a) cases noted in this judgment in which the courts have determined the cases to be moot notwithstanding the particular applicant may question the risk assessment conducted in their case. I have read the decision of the Minister’s Delegate carefully and find nothing exceptional in the decision that would warrant the exercise of discretion. There

is no suggestion in the record and none has been made by the Applicant that the steps taken by the Respondent through the removal process were taken other than in the proper discharge of the Minister's obligations under the IRPA.

[22] The Applicant referred to this Court's refusal to stay the removal of the Applicant and the fact that the same judge of this Court then granted leave to commence this application. The Applicant argues that the Court, in so doing, found a serious issue with the Decision which justifies the exercise of the Court's discretion. I do not agree. The wording of the Order refusing to stay the Applicant's removal states specifically that, for the purposes of the stay motion, the "Court will assume without deciding that a serious issue exists".

[23] The Applicant also referred the Court to Operations Manual ENF 28 (ENF 28) published by Immigration, Refugees and Citizenship Canada. He argues that section 7.16 of ENF 28 suggests that a request for reconsideration of a paragraph 115(2)(a) danger opinion will continue notwithstanding the removal of the individual in question. In my view, the wording of the section does not provide clear support for the Applicant's position.

[24] I understand the Applicant's concern. He was granted leave to have the Decision reviewed by this Court. In the interim, the Minister, acting in accordance with his statutory obligations under the IRPA, has effected the removal of the Applicant to Sri Lanka, the very issue between the parties. However, I find that the circumstances of this case do not warrant the exercise of the Court's discretion. There remains no adversarial context. The issue between the parties, namely the removal of the Applicant from Canada, has disappeared. The case does not

raise any legal issues of general importance which would overcome the principle of judicial economy. Finally, the Court cannot grant a practical remedy (reconsideration of the risk assessment) because the Applicant has been removed. In my opinion, there are no circumstances that distinguish this case from the paragraph 115(2)(a) cases in which this Court and the Federal Court of Appeal have declined to consider the merits of the case before them due to mootness.

IV. Conclusion

[25] I find that this application for judicial review is moot. In addition, there are no circumstances which warrant the exercise of my discretion to hear the merits of the application. Therefore, the application is dismissed.

[26] No question for certification was proposed and no issue of general importance arises on the record.

JUDGMENT in IMM-5239-17

THIS COURT'S JUDGMENT is that the Applicant's application for judicial review is moot and the application is dismissed. No question is certified for appeal.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Robert Isreal Blanshay	FOR THE APPLICANT
David Knapp	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Blanshay Law Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT