Federal Court  Cour fédérale

Date: 20190905

Docket: IMM-1421-18

Citation: 2019 FC 1139

Toronto, Ontario, September 5, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

PIOTR MAREK KACZOR
CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

ORDER AND REASONS

[1] This motion, brought by the Minister, seeks an Order dismissing this application for mootness due to his May 17, 2019 removal of all countries that appeared on the Designated Country of Origin list. For the reasons explained below, the Minister's motion will not be granted. Instead, the matter will be stayed for a period of six months, whereupon a case management judge will seek input from the parties as to the status of the file and next steps

required. A brief background to provide the context underlying this litigation precedes the analysis of the arguments raised in this motion.

I. Background

[2] Mr. Kaczor is a citizen of Poland who arrived in Canada on New Year's Day, 2018, and ultimately succeeded in his refugee claim on the basis of sexual orientation. However, because Poland, at the time, was a Designated Country of Origin [DCO], he could not obtain his work permit for a period of 180 days by operation of subsection 206(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[3] Mr. Kaczor thus brought the underlying application for leave and judicial review, arguing that subsection 206(2) of the Regulations infringed his rights under sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*]. Justice Brown granted leave for judicial review on October 16, 2018.

[4] Mr. Kaczor obtained test case funding from Legal Aid Ontario [LAO]. The file was assigned to be case managed. The Canadian Association of Refugee Lawyers [CARL] brought a motion for public interest standing (rather than as intervener), and was joined as an applicant through Prothonotary Aalto's May 15, 2019 Order. The timelines originally set out in Justice Brown's leave order were vacated when the application was assigned to case management.

[5] On May 17, 2019, the Minister announced the de-designation of all DCOs. That announcement [Announcement] is attached as Appendix A to this Order. The Minister stated in

his Announcement that the de-designation "effectively suspends the DCO policy, introduced in 2012, until it can be repealed through future legislative changes."

[6] The Minister also noted that other aspects of the DCO system had been declared unconstitutional by this Court, noting that the "DCO policy did not fulfil its objective of discouraging misuse of the asylum system and of processing refugee claims from these countries faster. Additionally, several Federal Court decisions struck down certain provisions of the DCO policy, ruling that they did not comply with the *Canadian Charter of Rights and Freedoms*."

[7] As the work permit waiting period continued to affect refugee claimants from DCO countries before May 17, 2019, the public policy [Policy] that accompanied the Minister's Announcement instructed that officers "may" grant exemptions to the work permit waiting period based on Policy considerations.

II. Issues and Arguments Raised

[8] Through this motion, the Minister seeks to have this application dismissed for mootness. The test for mootness comprises a two-step analysis (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]). The first step requires determining whether a live controversy between the parties remains, or rather whether the dispute has disappeared, rendering the issue academic, in which case, the proceedings are moot. If it is determined that the issue is moot during the first step of the *Borowski* analysis, the Court may still exercise its discretion to decide a case. In this second step analysis, the Court is guided by three policy rationales: (i) the presence of an adversarial context; (ii) concern for judicial economy; and (iii) consideration of

whether the Court would be encroaching on the legislative sphere. In addition, the Supreme Court later noted that the overall test for whether a court should hear a moot case is whether it is "in the interest of justice that the appeal be heard" (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 17 [*Doucet-Boudreau*]).

A. *Parties' Positions*

(1) *Borowski – Step 1:* Live Controversy Between the Parties

[9] The Minister contends that Mr. Kaczor's application is moot due to the Announcement and Policy change; since there are no longer DCOs listed, the six-month waiting period no longer applies to any new work permit applicants, and those who were negatively affected can reapply to obtain their work permit. The waiting period, the Respondent argues, therefore no longer infringes on Mr. Kaczor's *Charter* rights, and/or those of other impacted refugee claimants for whom CARL speaks.

[10] Specifically, the Minister argues that as a result of the de-designation of DCOs and the resulting Policy change, no new refugee claimant will have to wait six months before being eligible for a work permit. This ends any live controversy between the parties, as the Applicants have obtained the relief that they sought.

[11] The Minister further argues that the fact that the Applicants may have preferred to obtain this relief by a declaration of constitutional invalidity does not give rise to a concrete dispute between the parties, as "[t]he desired effect has been achieved" (*Doucet-Boudreau*).

[12] The Applicants disagree with the Minister and maintain that the dispute between the parties, and the underlying problem for claimants like Mr. Kaczor, persists due to the offending provision; the Applicants contend that as long as it is possible that such claimants could be subjected to the DCO work permit delay, the constitutional issue remains unresolved and, following *Doucet-Boudreau*, there is a live controversy.

[13] The Applicants further note that CARL was added as a party to this litigation to ensure that that the important constitutional issues raised will receive full and proper consideration by advancing the interests of DCO claimants generally, as found by Prothonotary Aalto in his Order which granted public interest standing to CARL.

(2) *Borowski – Step 2:* Court's Discretion

[14] The Minister contends that re-designation of DCOs is speculative and not a basis upon which this Court should hear a long, protracted and expensive litigation of a moot issue. None of the three factors that allow this Court to exercise its discretion to hear the matter supports continuing this action, in that (i) there is no longer the presence of an adversarial context, given that no individual is currently unable or delayed in getting a work permit; (ii) to do so would undermine judicial economy given the litigation's long and complex trajectory; and (iii) it would encroach on the legislative sphere. The Minister argues that the government has clearly stated its intention to repeal the provision through future legislative amendment; the speculation that some future government will enact policy that may infringe on someone's constitutional rights does not create an adversarial context.

[15] Second, the Minister argues this case does not raise important issues that are evasive of review which may justify the expenditure of resources. If the Applicants' speculative apprehensions were to materialize at some point in the future, it would be open to affected individuals to bring a constitutional challenge at that time, and there is nothing stopping CARL or any other organization from seeking party status in such potential future litigation.

[16] Third, if this Court were to allow this litigation to proceed, and were to strike down subsection 206(2) of the Regulations, that would pre-empt the stated intentions of the Minister, and thus encroach upon the role of Parliament.

[17] The Applicants counter that because section 206 of the Regulations is still on the books, and until it is repealed from the statute, DCOs can be re-designated at any time. Should that occur, parties will not have the ability to recommence the litigation which has evaded review until now.

[18] The Applicants point to evidence in the record that, given recent cuts to LAO announced by the provincial government, it will not fund future test cases going forward, although it will honour certificates that have already been granted. Here, the Test Case Committee determined that Mr. Kaczor's challenge merited funding. The Applicants point out that no other case challenging the six-month work permit delay – whether a test case or otherwise – has ever obtained leave. I note that after this motion was argued, on August 12, 2019, the federal government announced a one-time injection of funds to LAO.

III. Applicants' Request for a Stay

[19] Thus, the Applicants argue that the application should not be dismissed, but temporarily stayed pursuant to section 50 of the *Federal Courts Act*, RSC 1985, c F-7 [*Act*]. They request that the application be placed in abeyance until section 206 has been repealed. They argue that placing this matter in abeyance will avoid any unnecessary expenditure of further resources by the parties and this Court, while ensuring the resources expended to date are not wasted, including said test case funding, so that a constitutional violation does not evade review in the event that the Minister re-designates countries to the DCO list.

[20] The Minister opposes any stay, pointing out that the Supreme Court has never fashioned an alternative remedy of holding a matter in abeyance for a speculative future development. He states that the Applicants provided no evidence that the government will revive the DCO provisions, and in the unlikely event that a future government decides to do so, there would be time to launch a constitutional challenge.

IV. Analysis

[21] I am persuaded in part by both parties. On the first step of the *Borowski* test, I agree with the Minister that the practical issue of DCO nationals being delayed in obtaining a work permit is moot. However, I will nonetheless exercise the discretion that rests with the Court to hear the application. The Applicants agree that if and when the impugned six-month delay is repealed – as the Minister indicates will occur in his Announcement – the *Borowski* factors would no longer warrant hearing the case, because the declaration of unconstitutionality being sought would no

longer be relevant. However, this has not happened to date, and will not before the next general election.

A. *Borowski – Step 1:* Live Controversy Between the Parties

[22] The Minister is correct that for Mr. Kaczor, and indeed any potentially impacted individual from a DCO country, the matter is moot, because according to his Announcement and Policy, new work permit applicants will not be prejudiced by the 180-day application delay. For those DCO nationals who were affected if they applied in the months that preceded the May 17, 2019 Announcement but for which six months have not yet passed, and are thus impacted by the 180-day delay, the Announcement makes it clear that these individuals could immediately apply for a work permit. Any such DCO refugee who decided, for whatever reason, not to take advantage of the Announcement and reapply will be free and clear to obtain their work permit by approximately mid-November.

B. *Borowski – Step 2:* Court's Discretion

[23] This Court still has discretion to decide the case namely taking into account the aspects of (i) adversarial context; (ii) judicial economy; and (iii) legislative encroachment.

(1) Adversarial Context

[24] The presence of an adversarial context clearly continues, given the positions put forward by the two parties and the underlying application. The Applicants have consistently sought the invalidation of the provision. In *Borowski*, the Supreme Court held that an adversarial context

will persist in circumstances where "although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context," and that the presence of interveners who had a stake in the outcome could supply the necessary adversarial context (at pages 359-360). Clearly, the presence of a public interest party – CARL in this case – satisfies this criterion.

(2) Judicial Economy

[25] *Borowski* held that "[t]he concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it" (at p 360) [emphasis added].

[26] As noted above, *Borowski* mentioned "special circumstances," and specified that these include "cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly" (at p 360).

[27] The second *Borowski* factor has often been explained in terms of, and applied to, cases that, because of the short duration of their underlying situation, typically become moot before they can be submitted to a court. Such cases are often said to be "evasive of review." Here, this may be one reason that the six month work permit delay was not previously litigated before this Court.

[28] However, cases deemed "evasive of review" do not exhaust the category of cases in which considerations of judicial economy weigh in favour of hearing a moot case. Here, the resources already invested in this case and the hurdles that another applicant would face in order to initiate a similar case are considerations that weigh strongly in favour of not dismissing the case for mootness.

[29] This Court has acknowledged in the context of another DCO judicial review that refugee claimants are generally economically disadvantaged, and would therefore face difficulty in mounting a constitutional challenge (*Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 345 and 350).

[30] This case has already been identified as a vehicle to facilitate access to justice for a class of claimants who would otherwise lack the necessary resources. Specifically, Prothonotary Aalto stated in his May 15, 2019 Order that granted public interest standing to CARL:

> This application is a vehicle for access to justice for refugee claimants who by virtue of both financial limitations and time limitations will have their day in Court to finally decide the constitutionality of the DCO six-month work permit bar. Therefore, CARL must be granted public interest standing.

[31] In addition, and as stated above, LAO's Test Case funding, which was the vehicle for financing this constitutional litigation, will not be available for a new constitutional challenge if this case is dismissed, based on the evidence presented to the Court from LAO.

[32] I note as an aside that the Chief Justice very recently invoked this factor of judicial economy, when he held that "the public interest in resolving the ongoing uncertainty regarding

those issues also weighs in favour of addressing them" (*Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 at para 53). While the ultimate impact of the remedy sought by the Applicants in this case would not be to have the merits of this judicial review addressed immediately given the request for a temporary stay, the application would at least remain 'alive' within the Court docket.

(3) Political Encroachment

[33] *Borowski* cautioned that in "considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role," by intruding into the legislative sphere (at p 363). Issuing a temporary stay to await the developments resulting from the Announcement and Policy, in the context of the upcoming election, could not be seen to intrude on the legislature. A temporary pause for all sides in no way intrudes on or usurps Parliament's policy and law-making role, the length of which will be discussed next.

V. Stay of Proceedings

[34] Putting this litigation into abeyance for the relatively short period of six months pursuant to paragraph 50(1)(b) of the *Act* is the most prudent course of action to follow, given all the circumstances outlined above. This Court has very broad discretion under paragraph 50(1)(b) to stay proceedings when it is in the interest of justice to do so; each such stay turns on its facts (*Clayton v Canada (Attorney General*), 2018 FCA 1 at para 24). I see no prejudice to the

Minister in ordering this temporary pause, particularly given the case management already underway that will be ordered to resume six months from now.

VI. Conclusion

[35] In sum, given the *Borowski* factors discussed above including the adversarial context, stage of this litigation, investment of resources to date, inclusion of a public interest party, test case funding, current timing, barriers to future re-commencement, lack of political encroachment, and active case management, the interests of justice favour staying this application for a period of six months.

ORDER in IMM-1421-18

THIS COURT ORDERS that:

1. The motion for dismissal is denied.

2. This application will be held in abeyance for a period of six months, at which point a case management conference will be convened.

"Alan S. Diner"
Judge

ANNEX A

Government of Canada / Gouvernement du Canada

Home > Immigration, Refugees and Citizenship Canada > Newsroom

Canada ends the Designated Country of Origin practice

From: Immigration, Refugees and Citizenship Canada

News release

Canada removes all countries from the designated country of origin list

May 17, 2019—Ottawa, ON—The Government of Canada is committed to a well-managed asylum system that's fair, fast and final. Effective today, Canada is removing all countries from the designated country of origin (DCO) list, which effectively suspends the DCO policy, introduced in 2012, until it can be repealed through future legislative changes.

Claimants from the 42 countries on the DCO list were previously subject to a 6-month bar on work permits, a bar on appeals at the Refugee Appeals Division, limited access to the Interim Federal Health Program and a 36-month bar on the Pre-Removal Risk Assessment.

The DCO policy did not fulfil its objective of discouraging misuse of the asylum system and of processing refugee claims from these countries faster. Additionally, several Federal Court decisions struck down certain provisions of the DCO policy, ruling that they did not comply with the Canadian Charter of Rights and Freedoms.

Removing all countries from the DCO list is a Canadian policy change, not a reflection of a change in country conditions in any of the countries previously on the list.

De-designating countries of origin has no impact on the Canada-U.S. Safe Third Country Agreement.

Quotes

> "We are keeping our promise to Canadians and taking another important step towards building an asylum system that's both fair and efficient while helping the most vulnerable people in the world."
>
> – The Honourable Ahmed Hussen, Minister of Immigration, Refugees and Citizenship

Quick facts

- Claimants from former DCOs who are awaiting a decision on their claim need not take any action. The Immigration and Refugee Board will continue to process these claims as efficiently as possible.

- Each asylum claim is unique and is determined in accordance with the law by an independent decision-maker based on the evidence presented, and the individual merits of the case.
- De-designating countries of origin has no impact on:
  - visa policy decisions.
  - the outcomes of decisions at the independent Immigration and Refugee Board of Canada.
- Asylum claims continue to be decided on the basis of an assessment of the merits of the individual's claim.
- From January 1, 2013, to March 31, 2019, 12 percent of asylum claims were from citizens of designated countries of origin.
- Budget 2019 announced $208 million to increase the capacity of the asylum system and shorten wait times at the Immigration and Refugee Board. This is the largest-ever investment into the IRB and builds on funding announced in Budget 2018, as well as a series of measures implemented to improve the efficiency of the asylum system following an independent review.

Associated links

- Designated countries of origin policy - archived
- Backgrounder – Investing in Canada's Asylum System
- The Immigration and Refugee Board Clears its Legacy backlog

- Making a claim for refugee protection? Here's what you should know
- Less Complex Claims: The short-hearing and file-review processes

Contacts

Contacts for media only

Mathieu Genest
Minister's Office
Immigration, Refugees and Citizenship Canada
613-954-1064

Media Relations
Communications Branch
Immigration, Refugees and Citizenship Canada
613-952-1650
IRCC.COMMMediaRelations-RelationsmediasCOMM.IRCC@cic.gc.ca

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Date modified:
2019-05-17

APPENDIX B

Public policy concerning work permit restrictions for Designated Country of Origin Asylum Claimants

Background and Public Policy Considerations

Canada is committed to a well-managed migration system with an asylum system that is fair, provides timely protection to refugees, and helps remove failed claimants quickly. The Government of Canada has removed all countries from the Designated Countries of Origin list. This is another step toward improving the asylum system.

The original policy goal of the Designated Countries of Origin regime was to expedite the processing of claimants from countries generally considered safe, in order to deter misuse of the asylum system. Under the original provisions, claimants from identified countries were subject to shorter regulated hearing timelines, had limited access to post-claim recourses and were required to wait 180 days before applying for work permits. However, two evaluations of the asylum system, and changes to processing at the Immigration and Refugee Board, demonstrated that asylum claims from nationals of designated countries of origin were not being processed faster than other claimants. In addition, key elements of the regime have been struck down by the Federal Court for being contrary to the *Canadian Charter of Rights and Freedoms*.

The Designated Countries of Origin list has been discontinued by Ministerial Order. While those who make a claim after the date of de-designation will no longer be subject to the 180-day bar on applying for a work permit, de-designation cannot apply retroactively for the purpose of the work permit restriction, which is based on whether a country was designated at the time a claim was made. This means that the work permit bar would continue to be in effect for those from countries previously on the list who made a claim in the last six months. To align with this designation change, claimants who are nationals of a Designated Country of Origin on the day on which their claim is made may now be issued a work permit immediately following the referral of their claim, without having to wait 180 days after the referral of their claim.

I hereby establish that there are public policy considerations that justify granting, under section 25.2 of the *Immigration and Refugee Protection Act*, an exemption from the requirements of the Immigration and Refugee Protection Regulations listed below.

Conditions (Eligibility requirements)

Based on public policy considerations, delegated officers may grant an exemption from the criteria and obligations listed below when a foreign national complies with the following conditions (eligibility requirements):

- Claimant is a national of a Designated Country of Origin on the day on which their claim was made

Provisions of the *Immigration and Refugee Protection Regulations* for which a delegated officer may grant an exemption:

- Subsection 206(2) - a work permit must not be issued to a claimant referred to in subsection 111.1(2) of the Act unless at least 180 days have elapsed since their claim was referred to the Refugee Protection Division

Coming into force and expiration

This temporary public policy comes into force on the signature date, and ends once processing of all applications who are eligible for this public policy is complete.

The Honourable Ahmed Hussen.
Minister of Immigration, Refugees and Citizenship

Dated at Ottawa, May 10th, 2019

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ashley Fisch	FOR THE APPLICANT PIOTR MAREK KACZOR
Benjamin Liston	FOR THE APPLICANT CANADIAN ASSOCIATION OF REFUGEE LAWYERS
Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kaminker & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT PIOTR MAREK KACZOR
Refugee Law Office Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT CANADIAN ASSOCIATION OF REFUGEE LAWYERS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT