Federal Court  Cour fédérale

Date: 20201102

Docket: IMM-4694-19

Citation: 2020 FC 1024

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 2, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

WITHNEY STEPHANIE PIERRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], was initially to be heard on February 25, 2020, then on August 31, and now on November 5. A joint letter from the parties' counsel dated October 26, 2020, asked the Court [TRANSLATION] "to render a decision in this file on the basis of written

submissions" without holding a hearing. The November 5, 2020, hearing is cancelled. This constitutes the Court's decision, rendered without hearing the parties.

[2] On August 31, 2020, the applicant moved that the hearing be adjourned because, according to her, this Court's decision in *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2020 FC 770 [*Canadian Council for Refugees*], had an impact on her situation.

[3] In the order and reasons dated October 9, 2020 (2020 FC 960), disposing of that motion, the Court sets out the circumstances in which it must dismiss the application for a stay of proceedings made at the August 31 hearing. The parties had put forth their points of view in the additional notes filed with the Court in September 2020. The order gives the background details of this matter with its particularities. I will provide only the highlights here.

[4] In the October 9 order, the Court found that the issues raised in *Canadian Council for Refugees*, namely, the constitutionality of paragraph 101(1)(e) of the IRPA and section 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], were quite different since the provisions at issue in that matter are not those at issue in this case (paragraph 112(2)(d) of the IRPA, read together with section 159.5 of the Regulations). These provisions did not prevent the applicant from having her refugee status determined in Canada, whereas in *Canadian Council for Refugees*, the refugee protection claims were ineligible, preventing the determination of refugee status in Canada. Furthermore, the declaration of unconstitutionality was suspended, which means that the provisions at issue stand. I would add

that the Federal Court of Appeal has since allowed a motion for a stay by the Minister, under paragraph 398(1)(b) of the *Federal Courts Rules,* SOR/98-106, until the appeal and cross-appeal have been determined (2020 FCA 181). In sum, there was no reason not to hear this application for judicial review.

[5] Ms. Pierre arrived at the American border and claimed refugee protection in Canada. Although she came from a safe third country, she was not sent back because she had a family member in Canada. Paragraph 101(1)(e) of the IRPA makes a refugee claim ineligible when a person comes from a safe third country (such as the United States), but section 159.5 of the Regulations provides an exception to ineligibility if the claimant has a family member in Canada, who is described in one of the section's paragraphs. Therefore, the applicant was heard by the Refugee Protection Division [RPD]. Her refugee protection claim was rejected.

[6] Her appeal before the Refugee Appeal Division [RAD] was also dismissed because the RAD had no jurisdiction. The reason for this was that, although a refugee protection claim may be made despite arriving from a safe third country in a case like Ms. Pierre's, the IRPA specifically provides that the RPD's decision cannot be appealed to the RAD (paragraph 110(2)(d) of the IRPA).

[7] The applicant's application for leave and for judicial review was two-pronged in that she filed applications for leave for both the RPD and RAD decisions in the same proceeding. This is contrary to Rule 302 of the *Federal Courts Rules*. Nevertheless, on November 27, 2019, this

Court granted leave to file an application for judicial review, but only with respect to the RAD decision. The RPD decision is therefore not before this Court because no leave was granted.

[8] It must be understood that, during this time, there has been debate on the constitutionality of the regime barring appeals to the RAD in cases like Ms. Pierre's. The debate was resolved by the Federal Court of Appeal on August 19, 2019, through its decision in *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 [*Kreishan*], in which the constitutionality of the regime barring appeals to the RAD was affirmed. Hence, the RAD was correct in declining jurisdiction as it did on July 3, 2019, because Parliament had so decided.

[9] However, that was not the end of that matter because of an application for leave to appeal the Federal Court of Appeal decision to the Supreme Court of Canada had been made. That was why the judicial review hearing of the RAD decision, scheduled for February 25, 2020, was postponed on February 24. The Supreme Court was to refuse leave to appeal in *Kreishan* on March 5, 2020. Because of the pandemic, the hearing was eventually postponed until August 31, 2020.

[10] As mentioned, on August 31, 2020, the applicant filed an application for a stay of proceedings, which was dismissed on October 9, 2020.

[11] There is no doubt that only the RAD's decision to decline jurisdiction is before this Court because leave was granted only for that decision. Indeed, the applicant conceded this very fairly in her additional notes dated September 18, 2020. She stated in her notes that the leave granted in

this case pertained only to the RAD decision. That leave would make it possible to know the final result of the legal debate once the Supreme Court's decision was handed down. Because of this leave, the status quo could be maintained (Additional Notes, paras 1 and 9). A ruling that barring appeals was unconstitutional would have meant that the RAD should not have declined jurisdiction. The ruling handed down was to the contrary, however.

[12] Hence, the RAD was correct in declining jurisdiction since the Regulations prohibit appealing to the RAD from the RPD's decision to reject a refugee protection claim. Accordingly, the application for judicial review of the RAD's decision to decline jurisdiction must be dismissed. No serious question of general importance was submitted.

JUDGMENT in IMM-4694-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review of the RAD's decision to decline jurisdiction is dismissed.

2. No serious question of general importance is certified.

"Yvan Roy"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4694-19
STYLE OF CAUSE:	WITHNEY STEPHANIE PIERRE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPLICATION FOR JUDICIAL REVIEW CONSIDERED IN WRITING AT OTTAWA, ONTARIO, IN ACCORDANCE WITH JOINT REQUEST BY PARTIES DATED OCTOBER 26, 2020

JUDGMENT AND REASONS:	ROY J.
DATED:	NOVEMBER 2, 2020

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