Federal Court  Cour fédérale

Date: 20211118

Docket: IMM-1723-20

Citation: 2021 FC 1262

Ottawa, Ontario, November 18, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

FATIMA JAWAD
RUKH-E-ZAINAB RIZVI
SHEHRBANO RIZVI
SYED ALI MEHDI RIZVI
AMINA RIZVI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The applicants seek judicial review of the dismissal of their claim for refugee protection by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[*IRPA*]. While this application was pending, the applicants were advised by the Canadian Border Services Agency (CBSA) that a removal order was in effect and that they would have to leave Canada. They did so on August 27, 2021, returning to Pakistan.

[2] The Minister now moves for dismissal of the application for judicial review, arguing the applicants' return to their country of nationality renders the application moot.

[3] For the following reasons, the Minister's motion is dismissed. The applicants left Canada pursuant to an enforceable removal order. In light of that removal order, subsection 48(2) of the *IRPA* imposed on the applicants a legal obligation to leave Canada immediately. In such circumstances, the applicants' departure cannot be considered voluntary, despite the fact that they made their own flight arrangements and did not seek a stay of their removal. This Court has recognized that the involuntary departure from Canada of a refugee claimant does not render their application for judicial review moot.

II. Factual Background

[4] The applicants are citizens of Pakistan. The applicants consist of a mother, Fatima Jawad, and her four children. While the father of the family is not included in this application for judicial review, his refugee claim was decided together with the rest of the family. The father arrived in Canada directly from Pakistan in May 2018. The applicants left Pakistan the day after the father and travelled to the United States, before coming to Canada a few days later. The RPD rejected the family's refugee claim on February 20, 2020 on grounds that they had an internal flight alternative within Pakistan.

[5] The father appealed the refusal of his refugee claim to the Refugee Appeal Division (RAD). As a result of this appeal, there was no removal order in force against him: *IRPA*, s 49(2)(*c*). The applicants did not have a right of appeal to the RAD since they had arrived from the United States, a party to 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* (the "Safe Third Country Agreement"): *IRPA*, ss 102(2)(*d*), 110(2)(*d*)(i). The applicants filed this application for leave and judicial review of the RPD's decision on March 9, 2020. Unlike applications for judicial review of decisions of the RAD, applications for judicial review of decisions of the RPD do not benefit from an automatic stay of removal: *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], s 231(1).

[6] Leave to commence this application for judicial review was granted on September 7, 2021, a date that was delayed owing to the COVID-19 pandemic. The hearing of the application was initially scheduled for November 16, 2021, which was subsequently adjourned pending the determination of this motion to dismiss the application for mootness.

[7] In the interim, Ms. Jawad was convened for a meeting with the CBSA in January 2021. According to Ms. Jawad's affidavit, the CBSA advised her that the applicants' removal order was in effect following the RPD's rejection of their claim and that they were legally removable from Canada. Both at this meeting and at subsequent meetings in March and April 2021, Ms. Jawad informed the CBSA officer of this application for judicial review and reiterated that

she did not wish to leave Canada. At the meeting in April, the CBSA told Ms. Jawad she had been given enough time and that the applicants would now need to leave Canada.

[8] In light of this indication that Ms. Jawad and the children would need to leave Canada, the family decided the father should return to Pakistan first. He withdrew his appeal to the RAD and flew to Pakistan in April 2021. A few days later, Canada suspended flights with Pakistan for a month due to the pandemic. A further meeting with the CBSA in late May 2021 included advice from an officer that Ms. Jawad could be arrested if she did not leave the country. The applicants ultimately left Canada for Pakistan on August 27, 2021.

III. Analysis

[9] The applicants' claim for refugee protection is made under sections 96 and 97 of the *IRPA*, which read as follows:

Convention refugee	**Définition de *réfugié***
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	**(iii)** la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	**(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[Emphasis added.]	[Je souligne.]

[10] As clearly stated in the *IRPA*, recognition as a Convention refugee under section 96 includes a condition that a person be "outside each of their countries of nationality." It is also a condition of a claim for recognition as a person in need of protection under section 97 that the applicant be "a person in Canada." In a number of decisions over several decades, this Court has considered the case of an applicant whose refugee claim has been rejected and who has left the country before a judicial review of the rejection has been heard.

[11] In *Ramoutar*, Justice Rothstein, then of this Court, heard a judicial review of the refusal of an application on humanitarian and compassionate grounds to process a permanent resident application from within Canada: *Ramoutar v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 370 at pp 372–373. In granting the application, Justice Rothstein concluded the application was not rendered moot by virtue of the applicant's deportation:

> The deportation of an individual from Canada, while having negative consequences to the individual, does not eliminate all rights that may accrue to him under the *Immigration Act*. Those rights should not be adversely affected by a decision made by application of the wrong standard of proof and without affording

> the applicant procedural fairness. I therefore find that this case is not moot.
>
> [Emphasis added; *Ramoutar* at p 378.]

[12] Justice Gibson applied *Ramoutar* to the case of an unsuccessful applicant for refugee protection under the predecessor to section 96 of the *IRPA* in *Freitas v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 432. There, after leave to bring an application for judicial review was granted, the applicant had been deported to Venezuela, where he was a citizen. The Minister argued that since he was no longer "outside the country of [his] nationality," the matter was moot: *Freitas* at para 20. While recognizing contrary *obiter* in some decisions, Justice Gibson found the reasoning in *Ramoutar* persuasive: *Freitas* at paras 24–27. He concluded as follows:

> Against this overarching and clear human rights object and purpose as the background to this matter, I adopt the position of counsel for the applicant. In the absence of express words on the face of the Act requiring me to do so, I am not prepared to read the right conferred on the applicant herein by subsection 82.1(1) of the Act in such a manner that it is rendered nugatory by the performance by the respondent of her duty to execute a removal order as soon as reasonably practicable. Nor am I prepared to have the applicant's right indirectly rendered nugatory by the rendering of a decision of this Court that confers a meaningless right to a redetermination by the CRDD. I determine this application not to be moot in that it continues to present a live controversy. I am satisfied that this conclusion is consistent with the decision of Rothstein J. in *Ramoutar*, *supra*.
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> [Emphasis added; *Freitas* at para 29.]

[13] In his 2015 decision in *Molnar*, Justice Fothergill addressed a motion brought by the Minister seeking dismissal on grounds of mootness because the applicant had returned to their country of nationality: *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 345 at para 2.

In his reasons dismissing the motion, Justice Fothergill thoroughly reviewed the case law subsequent to *Freitas*, including Chief Justice Crampton's decision in *Rosa*: *Molnar v Canada (Citizenship and Immigration)*, 2015 FC 345 at paras 24–43; *Rosa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1234 at paras 37, 42. He concluded that "[w]hile the matter is not free from doubt, the jurisprudence of this Court weighs against dismissal of an application for judicial review solely on the ground that a refugee claimant has returned to his or her country of nationality" and found the matter was not moot: *Molnar* at paras 38, 43. Justice Fothergill certified a question on this issue, but an appeal taken by the Minister was subsequently discontinued, apparently because the decision was interlocutory and the appeal was therefore precluded by paragraph 72(2)(*e*) of the *IRPA*.

[14] *Freitas* and *Molnar* have been subsequently applied by this Court: *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750 at paras 17–22; *Mrda v Canada (Citizenship and Immigration)*, 2016 FC 49 at para 31; see also *Kleib v Canada (Citizenship and Immigration)*, 2016 FC 1238 at paras 3–6. In *Mrda*, Justice Roussel certified the same question that was certified in *Molnar* while the appeal in *Molnar* was pending, but the Minister apparently did not pursue an appeal: *Mrda* at para 65. In other cases before this Court, the Minister has agreed that an application for judicial review of a refugee determination is not moot where the applicant's return was involuntary: *Okolo v Canada (Citizenship and Immigration)*, 2021 FC 1100 at para 22.

[15] It is worth noting that in most of the foregoing cases with the exception of *Rosa*, the Court found that even if the matter had been moot at the first stage of the mootness analysis

outlined in *Borowski*, it would have exercised its discretion to hear the matter at the second stage: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at p 353; *Ramoutar* at p 378; *Freitas* at para 30; *Rosa* at paras 43–44; *Magyar* at para 25; *Mrda* at para 34.

[16] The situation is different, however, when the applicant's departure from Canada is voluntary. In *Mirzaee*, the applicant voluntarily returned to Afghanistan after the RPD's rejection of her refugee claim and before the hearing of the judicial review application: *Mirzaee v Canada (Citizenship and Immigration)*, 2020 FC 972 at paras 1, 8–10. Justice Gascon considered the above-cited cases and found there to be an important difference between involuntary and voluntary departure:

> It is true that, in many other cases, this Court declined to acknowledge mootness and considered that the interests of justice required applications to be heard when a refugee claimant had left Canada involuntarily before his or her application for judicial review could be considered by the Court […]. I must however underline that this line of cases inextricably involved situations where an applicant had been involuntarily removed or deported, against his or her will and under compulsion. In these precedents, the involuntary nature of the removal was central to the Court's decisions. I am aware of no precedent, and Ms. Mirzaee could not cite any, where the issue of mootness was raised in a context where, as here, a refugee claimant has left Canada voluntarily. What is more, Ms. Mirzaee even left Canada for Afghanistan at a time where Canada had measures in place forbidding compulsory removals to that country.
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> [Emphasis in original; citations omitted; *Mirzaee* at para 29.]

[17] The Minister in this case relies on *Mirzaee* and argues the applicants' departure was voluntary. I cannot agree.

[18] After the applicants' refugee claim was dismissed by the RPD, their removal order came into force: *IRPA*, s 49(2)(*c*). There was no statutory or other stay of that in-force removal order, so it was enforceable: *IRPA*, s 48(1). Subsection 48(2) imposes an obligation on a person subject to an enforceable removal order to leave Canada "immediately":

Enforceable removal order	**Mesure de renvoi**
48 (1) A removal order is enforceable if it has come into force and is not stayed.	**48 (1)** La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	**Conséquence**
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	**(2)** L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.
[Emphasis added.]	[Je souligne.]

[19] The applicants were therefore under a legal obligation to leave Canada by operation of the *IRPA*. The *IRPR* contains various provisions setting out how an enforceable removal order may be enforced: *IRPR*, ss 235–243. This may be either by removal by the Minister or the "voluntary compliance of a foreign national with the removal order": *IRPR*, s 237. The removal order is considered to be "enforced" even where there is voluntary compliance: *IRPR*, ss 237, 240(1).

[20] In the present case, it appears that the removal order against the applicants was enforced by their voluntary compliance with the order. In my view, this does not change the fact that they

left Canada involuntarily as a result of the compulsion of the law. I reach this conclusion for two reasons.

[21] First, there is a considerable difference between “voluntary compliance” with a removal order and “voluntary departure.” A person who voluntarily complies with a removal order is simply taking steps to obey the law. The availability of additional enforcement measures that permit the Minister to forcibly remove a foreign national who does not voluntarily comply does not lessen the obligation in subsection 48(2). Analogy may be drawn to the enforcement of orders of this Court. A variety of tools are available to ensure that orders of the Court are effectively enforced: *Federal Courts Rules*, SOR/98-106, Part 12. For example, an order for the payment of money may be enforced by seizure and sale, garnishment, or appointment of a receiver: *Federal Courts Rules*, Rule 425. The availability of these tools does not mean that someone who makes a payment of money that is ordered by the Court does so “voluntarily” in the same sense that they might give a gift. They do so under compulsion of a valid order that has the backing of enforcement measures. Ultimately, they are compelled by the power of the state even if they choose to comply with the order before further enforcement steps are taken.

[22] In this regard, I agree with the applicants that departing Canada after the CBSA advised that they had to leave the country and that they faced warrants for their arrest can hardly be considered a voluntary decision. They departed under legal compulsion by operation of the *IRPA*, backed by the power of the state.

[23] Second, from the point of view of the administration of the *IRPA*, it would be undesirable if voluntary compliance with a removal order resulted in a less favourable status than removal by the Minister. If an applicant who voluntarily complied with a removal order lost the right to have their judicial review application heard, while someone who forced the Minister to take further enforcement steps to remove them did not, foreign nationals would be strongly discouraged from voluntarily complying with removal orders. This is contrary to the general policy of encouraging voluntary compliance with removal orders: see, *e.g.*, *Revich v Canada (Citizenship and Immigration)*, 2005 FC 852 at para 22; *Mccarty v Canada (Citizenship and Immigration)*, 2019 CanLII 74667 (CA IRB) at para 38. Indeed, the contrary outcome might exacerbate the spectre noted by Justice Roussel of "removal orders being enforced with the intent of depriving this Court of the opportunity to exercise its supervisory jurisdiction": *Mrda* at para 31.

[24] It is worth noting that in concluding there was a difference between voluntary and involuntary departure in *Mirzaee*, Justice Gascon did not suggest that voluntary compliance with a removal order amounted to voluntary departure. Rather, the applicant in *Mirzaee* returned to Afghanistan "[d]espite being under no obligation to leave Canada" and after signing a declaration acknowledging she was not required to leave Canada and that leaving could imperil her ability to seek Canada's protection in future: *Mirzaee* at para 9. There was no similar voluntary departure in this case as the applicants *were* under an obligation to leave Canada, imposed by subsection 48(2) of the *IRPA*.

[25] The Minister points to two other aspects of the applicants' case to argue that their departure was voluntary. First, the Minister notes the applicants made no attempt to defer or stay

their removal. With respect to attempts to defer, this submission does not accord with the facts on the record. While there is limited evidence of a formal deferral request, Ms. Jawad told the CBSA officer several times of her pending application for judicial review and that she did not want to leave Canada. At the third meeting, the officer told her she "had been given enough time," suggesting some time had been given but no further deferral was to be granted. In any event, an officer's power to defer is limited, both as to reasons and length, in light of subsection 48(2) of the *IRPA*: *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 43.

[26] As for a stay, the applicants could certainly have requested a stay of removal from this Court. As the Minister notes, the Court is available to hear such stays on short notice and they are "frequently issued" where appropriate: *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 159. However, a stay is a discretionary remedy, and whether one is sought does not affect the compulsive nature of a removal order. In the present case, Ms. Jawad says a stay was not sought because of the cost and the stress on her children of having a last-minute decision as to their future (not, as the Minister rather disingenuously suggests, that having a stay motion granted would be too traumatic). As Justice Roussel noted in *Mrda*, the decision not to seek a stay may be made for a variety of reasons and "should not be determinative of this Court's jurisdiction over the matter": *Mrda* at para 32.

[27] Second, the Minister points to the father's departure and the withdrawal of his appeal to the RAD, claiming it is not adequately explained. I disagree. As Ms. Jawad stated, the appeal to the RAD was withdrawn after it became clear the rest of the family would have to leave Canada.

The family decided it would be better for the children if the family were not separated and safer for Ms. Jawad if her husband were in Pakistan. He went ahead to get things settled for the family in Pakistan. This explanation is not undermined in my view by the fact that the couple are presently living in hiding separately in Pakistan for the safety of the children. The family's decision to have the father return to Pakistan despite his pending appeal was no doubt difficult, but I cannot see how it affects whether the applicants' voluntary compliance with the removal order against them renders their judicial review moot.

[28] Finally, the Minister argues that whether the departure was voluntary or not does not affect the practical result, since they are no longer eligible to claim protection under section 96 or 97 of the *IRPA*. In my view, that asserted concern has long been answered in cases such as *Freitas* at paras 43–44 (leaving aside the order to return), *Kleib* at paragraph 9, and *Okolo* at paragraph 89. This Court's decisions on mootness would be rendered nugatory if after a successful judicial review a refugee claim were to be simply rejected on grounds that the applicant was no longer in Canada owing to their intervening removal.

IV. Conclusion

[29] The Minister's motion to dismiss the application for judicial review for mootness is dismissed. The matter shall be set down for hearing on a date to be set by the Court after consultation with counsel for the parties.

[30] As this is an interlocutory decision, no question can be certified: *IRPA*, s 72(2)(*e*).

ORDER IN IMM-1723-20

THIS COURT ORDERS that

1. The respondent's motion to dismiss the application for judicial review as moot is dismissed.
2. This application for judicial review shall be set down for hearing on a date to be set by the Court after consultation with counsel for the parties.
3. There is no order as to costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1723-20
STYLE OF CAUSE:	FATIMA JAWAD ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCHAFFIE J.
DATED:	NOVEMBER 18, 2021

WRITTEN REPRESENTATIONS BY:

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