Federal Court Cour fédérale

Date: 20230322

Docket: T-24-19

Citation: 2023 FC 402

Ottawa, Ontario, March 22, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

TANZIRUL ALAM

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Tanzirul Alam, brings a motion in writing for the conversion of his ongoing application for judicial review into an action, pursuant to subsection 18.4(2) of the *Federal Courts Act*, RSC 1985, c F-7 (the "Act").

[2] The Applicant submits that the application for judicial review does not provide him with adequate procedural safeguards given that he seeks declaratory relief. The Applicant also submits that he intends to seek financial damages against the Respondent, that the necessary facts cannot be established by affidavits, and that conversion would preserve access to justice and avoid unnecessary cost and delay in these proceedings.

[3] For the reasons that follow, I find that the Applicant has failed to justify an order for conversion under subsection 18.4(2) of the Act. This motion is therefore dismissed, with costs.

II. Facts

[4] On June 23, 2017, the Applicant was found guilty of 13 offenses under the *Criminal Code*, RSC 1985, c C-46, including sexual assault, sexual exploitation, and making, possessing, and transmitting child pornography. The Applicant was sentenced to a period of imprisonment of 12 years, reduced to eight years and eight months for pre-trial custody (*R v Alam*, 2020 ABCA 10 at para 2).

[5] The Applicant was initially incarcerated in Bowden Institution in Alberta. On October 17, 2017, he was informed of his transfer to Matsqui Institution in British Columbia. The transfer decision was issued on November 12, 2017. On December 12, 2017, the Applicant appealed this transfer decision through the internal process of the Correctional Service of Canada ("CSC"). A CSC officer upheld the transfer decision.

[6] On January 7, 2019, the Applicant filed an application for judicial review with this Court, challenging both the transfer decision of November 2017 and the CSC officer's decision to uphold the transfer decision. The procedural history of the Applicant's case in this Court can be found at paragraphs 4 to 14 of *Alam v Canada (Attorney General)*, 2022 FC 833 ("*Alam*").

[7] The Applicant's statutory release date is scheduled for April 3, 2023. The Applicant's release would render moot a significant portion of his underlying application for judicial review, given that his primary request for relief is a writ of *mandamus* compelling CSC to transfer him back to Bowden Institution in Alberta.

[8] On December 15, 2022, the Applicant filed this motion in writing pursuant to subsection 18.4(2) of the Act, seeking an order to convert his application for judicial review into an action.

III. Issue and Standard of Review

[9] The sole issue in this case is whether the application for judicial review should be converted into an action pursuant to subsection 18.4(2) of the Act.

[10] A conversion order is a procedural order rather than a substantive one. While the substantive law remains the law of judicial review, the rules related to actions become available upon conversion (*Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228 at para 24 ("*Saddle Lake Cree Nation*"). A conversion order must therefore specify the manner in which the application should be proceeded with as an action, such as providing for the

conducting of discoveries or allowing for amendments to the application to support a claim for public law damages (*Saddle Lake Cree Nation* at para 25).

[11] The non-exhaustive factors that the Court must consider in exercising its discretion under subsection 18.4(2) are set out by the Federal Court of Appeal ("FCA") in *Association des crabiers acadiens Inc. v Canada (Attorney General)*, 2009 FCA 357 ("*Crabiers*"). Conversion is possible where: 1) an application for judicial review does not provide the appropriate procedural safeguards where declaratory relief is sought; 2) the facts cannot be satisfactorily established through mere affidavit evidence; 3) it is desirable to facilitate access to justice and avoid unnecessary cost and delay, and; 4) it is necessary to address remedial inadequacies in an application for judicial review, such as a damages award (*Crabiers* at para 39). The party seeking the conversion bears the onus to justify why the Court should exercise this discretion (*Crabiers* at para 35).

[12] Subsection 18.4(2) should be interpreted broadly to promote the objectives of access to justice and avoiding unnecessary costs and delays for litigants seeking relief (*Meggeson v Canada (Attorney General)*, 2012 FCA 175 at para 38). However, recent jurisprudence in this Court emphasizes the rare and exceptional nature of a conversion order (*Mahoney v Canada*, 2021 FC 399 at para 10, citing *Canada (Attorney General) v Slansky*, 2013 FCA 199 at para 56; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 104).

IV. Analysis

[13] In his written submissions, the Applicant submits that the application for judicial review lacks the appropriate procedural safeguards, given that he seeks declaratory relief. The Applicant submits that the primary relief sought in his application, a writ of *mandamus* for his transfer, will be rendered moot by his release in April 2023, therefore resulting in a lack of procedural safeguards. The Applicant further submits that the necessary facts cannot be satisfactorily established through mere affidavit evidence and that an adequate presentation of his claim requires expert evidence from psychological and mental health experts that cannot adequately be established by affidavits.

[14] The Applicant submits that a conversion order in his case would save unnecessary cost and delay because it has already been four years since the application for judicial review was commenced. He argues that restarting the process as an action would result in an excess of resources and delay. The Applicant also contends that proceeding with the application as an action would facilitate access to justice because if the majority of the application is rendered moot by his release, he will not be able to obtain a meaningful remedy.

[15] Lastly, the Applicant submits that he wishes to seek an award of damages against the Respondent for alleged wrongdoing and a consideration of the remedial inadequacies of judicial review therefore weighs in favour of a conversion order.

[16] The Respondent submits that the Applicant's case is not a rare and exceptional circumstance warranting a conversion order under subsection 18.4(2) of the Act. Considering each of the *Crabiers* factors, the Respondent first submits that the Applicant must specify what procedural safeguards are precluded by the application and that a particular remedy is not a procedural safeguard. The Respondent submits that the Applicant failed to demonstrate how the evidence could not be handled through affidavits and has only provided vague and unsubstantiated submissions on the factor of access to justice and inordinate costs and delays. The Respondent further submits that conversion is not justified on the sole basis that the Applicant is now newly seeking damages against the Respondent.

[17] The Respondent submits that, contrary to the Applicant's submissions, the potential mootness of his application upon his release is due to a material change in his circumstances, resulting in *better* relief than what he sought through an application for judicial review. The Respondent further notes that this mootness is due to the lack of progress in the application for judicial review, which is in turn due to the Applicant's own negligence in meeting deadlines. The Respondent submits that this is "not a situation where an inadvertent procedural mistake may doom a potentially valid claim."

[18] Finally, the Respondent submits that the Applicant's written submissions misinterpret the scope of a conversion order pursuant to subsection 18.4(2), which is "purely procedural" (*Saddle Lake Cree Nation* at para 24). The Respondent submits that the Applicant's submissions amount to a request that he starts a new action altogether, given that the initial notice of application

contains a fraction of the allegations contained in his material filed in support of this motion, with only some overlap in facts and remedies sought.

[19] I agree with the Respondent. The Applicant bears the onus to justify the Court's exercise of discretion under subsection 18.4(2) and he has failed to do so. A majority of the Applicant's written submissions on this motion reiterate the same points and are unsupported by jurisprudence. Nonetheless, I do not find that a cumulative consideration of the factors enumerated in *Crabiers* weighs in favour of an order to treat the application as an action. Rather, the consideration of the Court's resources and time weigh in favour of adhering to the general rule under subsection 18.4(1), to determine the application for judicial review without delay and in a summary way. Additionally, the Applicant has failed to demonstrate which procedural safeguards he lacks, why the evidence cannot be adequately presented by affidavits, and how access to justice is better facilitated by treating the application as an action.

[20] A central argument presented by the Applicant in support of this motion, repeated under multiple factors in his written submissions, is regarding the potential mootness of his application for judicial review and his inability to obtain the remedy sought. Although four years have passed since the Applicant initially filed his notice of application, the application for judicial review has not progressed, largely due to the "general lack of diligence and a persistent pattern of failing to respect applicable deadlines" by the Applicant (*Alam* at para 20). The delay in the application can be attributed to the Applicant himself and now risk the application's eventual mootness. The fact that the Applicant is now arguing that this mootness justifies the conversion of the application into an action is insufficient to exercise this Court's discretion to do so.

[21] I further agree with the Respondent that the substance of the Applicant's motion significantly alters and expands the allegations and relief sought in the initial notice of application filed in 2019. A conversion order under subsection 18.4(2) does not stay or replace a notice of application, but may allow for amendments to the grounds for review (*Saddle Lake Cree Nation* at paras 24-25). However, the Applicant's submissions appear to significantly and substantively amend the notice of application and the relief sought, which strips the Respondent of the ability to understand the case to be met and this Court to properly adjudicate the claim. This is beyond the scope of an order under subsection 18.4(2) of the Act.

V. Conclusion

[22] For these reasons, I do not find that an order to convert the application for judicial review into an action is justified in light of the relevant considerations and the circumstances of the case. The Applicant's motion pursuant to subsection 18.4(2) of the Act is dismissed, with costs.

ORDER in T-24-19

THIS COURT ORDERS that the subsection 18.4(2) motion to convert the application for judicial review into an action is dismissed, with costs.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-24-19
STYLE OF CAUSE:	TANZIRUL ALAM v THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING PURSUANT TO SUBSECTION 18.4(2) OF THE *FEDERAL COURTS ACT*

ORDER AND REASONS:	AHMED J.
DATED:	MARCH 22, 2023

APPEARANCES:

Tanzirul Alam (on his own behalf)	FOR THE APPLICANT
Benjamin Bertram	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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