Federal Court  Cour fédérale

**Date: 20240910**

**Docket: IMM-11201-24**

**Citation: 2024 FC 1420**

**St. John's, Newfoundland and Labrador, September 10, 2024**

**PRESENT: Associate Judge Trent Horne**

**BETWEEN:**

**ALAA ALHILAL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MNIISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondents**

# ORDER AND REASONS

## I. Overview

[1] The issue before the Court is whether an independent constitutional challenge to a subsection of the *Immigration and Refugee Protection Act*, SC 2001, c 27, *ie* not as part of a challenge to an administrative decision, can be commenced by way of an application for leave and for judicial review.

[2] I conclude that it cannot. An independent constitutional challenge must proceed by way of action. The application for leave and for judicial review shall be removed from the Court file, without prejudice to seeking the same relief by way of action.

## II. Background

[3] Alaa Alhilal and the Canadian Council for Refugees presented an application for leave and for judicial review ("ALJR") for filing on about June 4, 2024. The ALJR did not seek judicial review of a decision, rather a declaration that subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") is unconstitutional. The ALJR was referred to me by the Registry for directions as to whether it could be received for filing (Rule 72 of the *Federal Courts Rules*, SOR/98-106 ("Rules")).

[4] I issued a direction on June 17, 2024 stating that the ALJR may not be received for filing, concluding that the relief requested must be pursued by way of action. A copy of the direction is attached as annex A.

[5] The ALJR in this proceeding was issued on June 26, 2024. The Canadian Council for Refugees is not a party. Otherwise, the ALJR raises an essentially identical constitutional challenge to subsection 34(1)(f) of IRPA (all references to sections in these reasons are to sections of IRPA, unless otherwise indicated). The ALJR expressly states that no decision is being contested.

[6] I issued a direction on July 10, 2024. The direction stated that the ALJR appears to raise an almost identical constitutional challenge, and expressly states that no decision is being contested. Since it appeared that the relief requested must be pursued by way of action, I directed the applicant to serve and file written submissions as to why the ALJR should not be removed from the Court file pursuant to Rule 74.

[7] In response to the July 10, 2024 direction, the applicant filed submissions on July 22, 2024; the respondent filed submissions on August 2, 2024; the applicant filed submissions in reply on August 6, 2024.

## III. Analysis

[8] The only issue before the Court is the appropriate procedure that must be followed for the applicant's constitutional challenge, and whether the proceeding may be commenced by making an application for leave to the Court. More specifically, the issue is whether the ALJR should be removed from the Court file because it "was not filed in accordance with these Rules, an order of the Court or an Act of Parliament." Whether there is a defect in the originating document is one of procedure, not substantive merit. The applicant's standing, and the merits of the proceeding, are not issues to be decided now.

[9] The applicant submits that the present ALJR is different than the first one that was not accepted for filing because, in addition to a declaration that subsection 34(1)(f) is unconstitutional, it seeks declaratory relief, specifically a declaration that the respondent cannot rely on this subsection as a basis for denying or further delaying the applicant's application for

permanent residence, or to detain, impose conditions of release or seek a deportation order against the applicant.

[10] When reviewing a pleading, it must be read with a view to understanding its real essence, and gaining a realistic appreciation of the essential character of the proceeding. The Court of Appeal has warned that the Court must not fall for skilful pleaders who are "armed with sophisticated wordsmithing tools and cunning minds." Rather, pleadings must be read "holistically and practically without fastening onto matters of form" (*Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 at paras 14-16).

[11] Reading the ALJR as a whole, the declaratory relief requested as against the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness is contingent upon the initial grant of the main relief requested – a declaration that subsection 34(1)(f) is unconstitutional. The secondary declarations can only be considered if the primary declaration of unconstitutionality is granted. It may be self-evident that the Ministers cannot rely on legislation that has been determined to be unconstitutional. In any event, the essential character of this proceeding is a request for a declaration that subsection 34(1)(f) is unconstitutional.

[12] It is not certain that the secondary declarations sought by the applicant can be granted at all. Declarations are supposed to be declarations of rights held by those seeking them (*Canada v Boloh 1(a)*, 2023 FCA 120 ("*Boloh*") at para 60). In *Boloh*, the Court of Appeal overturned an order where the declarations sought and granted were really disguised mandatory orders or

disguised *mandamus* remedies against the Government of Canada. That is the case here. What the applicant is practically seeking by way of the secondary declarations is a mandatory order or injunction preventing the Ministers from doing certain things.

[13] The Court has jurisdiction to consider constitutional challenges within the context of proceedings commenced by making an application for leave that challenge a specific decision, although consideration will be given to whether the constitutional arguments were before the administrative decision-maker, or whether they are being advanced for the first time on judicial review (see, for example, *Tan v Canada (Citizenship and Immigration)*, 2024 FC 600 at paras 29-55). That is not the case here; no decision is being challenged.

[14] In assessing whether the applicant's present constitutional challenge to subsection 34(1)(f) may be brought by way of commencing an application for leave, and not in association with a challenge to a specific decision, I begin with section 72:

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| DIVISION 8 | SECTION 8 |
| Judicial Review | Contrôle judiciaire |
| Application for judicial review | Demande d'autorisation |
| 72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court. | 72 (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation. |

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| Application | Application |
| (2) The following provisions govern an application under subsection (1): | (2) Les dispositions suivantes s’appliquent à la demande d’autorisation : |
| (a) the application may not be made until any right of appeal that may be provided by this Act is exhausted; | a) elle ne peut être présentée tant que les voies d’appel ne sont pas épuisées; |
| (b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court (“the Court”) within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter; | b) elle doit être signifiée à l’autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l’alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance; |
| (c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice; | c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour; |
| (d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and | d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d’un juge de la Cour, sans comparution en personne; |
| (e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment. | e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d’appel. |

[15] Statutory interpretation requires consideration of the ordinary meaning of the words used and their statutory context. This was explained by the Supreme Court in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, at para 10, and reiterated in *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 21. In the latter case, the Supreme Court quoted from and commented on *Canada Trustco* as follows:

> […]
>
> > It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [Paragraph 10.]
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> The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.

[16] Beginning with the text of section 72, it does not speak broadly to "litigation" or "proceedings", rather the specific procedure of judicial review. Fundamentally, judicial review is a process by which courts review decisions of administrative bodies to ensure that their decisions are fair, reasonable, and lawful (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28). The legislature is not an administrative body.

[17] Where a proceeding is a direct attack against the legislation, the federal Crown cannot be brought before the Court by means of an application for judicial review, (*Confédération des syndicats nationaux v Canada*, [1998] FCJ No 144 at para 17). The use of "judicial review" in section 72 supports a conclusion that this section was not intended to include stand-alone constitutional challenges brought by way of making an application for leave, and then judicial review in the event leave is granted.

[18] Section 72 states that judicial review is available for "any matter […] under this Act […]."

[19] The words between "matter" and "under" ("a decision, determination or order made, a measure taken or a question raised") are illustrative of the words "matter under" rather than definitional (*Wong v Canada (Citizenship and Immigration)*, 2007 FC 949 at para 13 ("*Wong*")).

[20] In *Wong*, the Court was satisfied that a decision of the Registrar of the Immigration and Refugee Board ("IRB"), in rejecting the applicant's request for access to certain files, was a "matter under" IRPA because the IRB derived its authority to make that decision from IRPA, notwithstanding that the authority may be proscribed by the *Access to Information Act*, RSC 1985 c A-1.

[21] The Oxford Dictionary of English (third edition) defines "under" as controlled, managed, or governed by. A stand-alone constitutional challenge (*ie* one that is not associated with a specific decision that affects an applicant) is not a matter *under* IRPA. The challenge is to the

legislation itself, an act of the legislature. The legislature derives no authority from IRPA to create or amend that legislation, and is not managed or governed by IRPA. Using the plain meaning of the text of section 72, a constitutional challenge that is not tethered to a specific decision is not a “matter under” IRPA, and therefore cannot be advanced by way of proceedings commenced by an ALJR.

[22] An analysis of the French version of section 72 leads to the same conclusion. The phrase *prise dans le cadre de la présente loi* means taken within the context, or framework, of this law. The French version also supports a conclusion that an ALJR may be used as an originating document to challenge decisions made where authority is derived from IRPA, but not used to challenge constitutional validity alone.

[23] As for context, subsection 72(2)(e) states that no appeal lies from the decision of the Court with respect to the application. Given the potential importance of a determination of constitutional validity to litigants generally, it is difficult to accept that the legislature contemplated section 72 to include a process for stand-alone constitutional challenges that would be presumptively insulated from appellate review.

[24] I reach the same conclusion in respect of purpose. Division 8 of IRPA provides a summary means to judicially review administrative immigration decisions. I cannot conclude that the purpose of Division 8, or IRPA as a whole, is to provide a summary means to independently adjudicate constitutional validity.

[25] The applicant relies on subsection 18(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 ("FC Act"), which reads as follows:

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| Extraordinary remedies, federal tribunals | Recours extraordinaires : offices fédéraux |
| 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction | 18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour : |
| (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ *of quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and | a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral; |
| (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. | b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral. |

[26] I do not find this argument persuasive. Subsections 18(1)(a) and (b) of the FC Act address the Court's jurisdiction to issue orders and determine proceedings "against a federal board, commission or other tribunal." The essential relief requested in the ALJR is not against a federal board, rather is a challenge to the legislation itself.

[27] There is no dispute that the Federal Court has jurisdiction to adjudicate constitutional challenges, and is a "court of competent jurisdiction" as that term is used in section 24 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). The issue is what procedure must be used to advance the applicant's constitutional challenge. Neither section 18 of the FC Act nor section 72 permit or require such a challenge to be advanced by issuing an ALJR.

[28] I therefore conclude that the ALJR was not filed in accordance with an Act of Parliament, and must be removed from the Court file.

[29] Removing the ALJR from the Court file is not the end of the matter. Leave is granted to re-file the proceeding using the proper procedure.

[30] So what is the proper procedure – an application or an action?

[31] Rule 300 of the *Federal Courts Rules*, SOR/98-106 sets out a closed list of the kinds of matters that may be adjudicated by way of application. Rule 300 does not state that a request for a declaration of unconstitutionality may be brought as a stand-alone application, separate and apart from a challenge to a specific decision or administrative action. The ALJR does not seek judicial review of past administrative actions or decisions, rather the essential character of the proceeding is a challenge to actions of the legislature. The declaratory relief sought in the ALJR does not fall within the scope of Rule 300.

[32] I note the recent decision of Justice Blackhawk in *Bird v Canoe Lake Cree First Nation*, 2024 FC 1205 where an application for judicial review advancing a constitutional challenge to *The Canoe Lake Cree First Nation Citizenship Law* was dismissed because no administrative decision was being challenged, and therefore the matter was not properly framed as a judicial review (paras 5-8).

[33] As discussed above, IRPA does not require or permit stand-alone constitutional challenges to be commenced by making an application for leave to the Court. The *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 do not apply. IRPA does not require or permit such challenges to be brought by application under the Rules.

[34] By way of comparison, the kinds of proceedings that may be commenced by notice of application in the Ontario Superior Court of Justice are set out in Rule 14.05 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194 ("Ontario Rules"). Subrule 14.05(3)(g.1) of the Ontario Rules provides that an application can be brought "for a remedy under the *Canadian Charter of Rights and Freedoms*." The kinds of proceeding that may be brought by way of application in Ontario is not a closed list. Subrule 14.05(3)(h) of the Ontario Rules permits the use of the application procedure "in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial." That is not the case here.

[35] The Rules set out the procedure for actions (Part 4), applications (Part 5), and appeals (Part 6). Since the essential character of the applicant's claim cannot be pursued by way of

application, and this is not an appeal, the applicant's constitutional challenge must proceed by way of action.

[36] I acknowledge that pursuing a declaration that subsection 34(1)(f) is unconstitutional by way of action will be more time consuming and more expensive than pursuing the same relief by way of application. But to conclude that the matter should remain on the Court file and move forward on the procedural path selected by the applicant would be the equivalent of picking up the legislator's pen and re-writing Division 8 of IRPA. The legislation has a clear meaning, a meaning that only Parliament can modify (see *Felipa v Canada (Citizenship and Immigration)*, 2011 FCA 272 at para 109). I cannot rely on the general principles in Rule 3 (that the Rules be interpreted and applied so as to secure the just, most expeditious and least expensive outcome of every proceeding) to supersede the specific requirements of section 72.

**ORDER in IMM-11201-24**

**THIS COURT ORDERS that**:

1. The application for leave and for judicial review shall be removed from the Court file.

2. This order is without prejudice to the applicant pursuing the same relief by way of action.

"Trent Horne"

Associate Judge

**ANNEX A**
**June 10, 2024 Direction of the Court**

Alaa Alhilal and the Canadian Council for Refugees have submitted a notice of application for leave and for judicial review ("ALJR") for filing. The Registry referred the document to me for directions as to whether it may be received for filing.

The ALJR expressly states that the applicants are not contesting a decision. Rather, the applicants seek a declaration that subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, as it operates in combination with the other provisions relevant to the security inadmissibility regime under the IRPA, including but not limited to s. 42.1, 6(3), 21(2), 24, 25, 25.1, 25.2, 44, 56(3), 58(5), 101(1)(f), 112(3)(a), 113, 114, and any and all related regulations including but not limited to ss. 24.1-24.5, 65(b), 230, and 250.1 of the *Immigration and Refugee Protection Regulations*, is of no force or effect pursuant to section 52 of the *Constitution Act*, 1982 because it violates section 7 and/or section 12 and/or section 15 of the *Canadian Charter of Rights and Freedoms*, and is not saved by section 1.

The ALJR may not be received for filing. The relief requested must be pursued by way of action.

Rule 300 of the *Federal Courts Rules*, SOR/98-106 sets out a closed list of the kinds of matters that may be adjudicated by way of application. Rule 300 does not state that a request for a declaration of unconstitutionality may be brought as a stand-alone application, separate and apart from a challenge to a specific decision or administrative action. The ALJR does not seek judicial review of past administrative actions or decisions, rather seeks stand-alone declaratory relief related to actions of the legislature. The declaratory relief sought in the ALJR does not fall within the scope of Rule 300. Further, the *Immigration and Refugee Protection Act* does not require or permit stand-alone constitutional challenges to be brought by way of application. Section 72 of that Act contemplates judicial review "with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act." The declaratory relief requested in the ALJR is not a matter "under" the Act, rather relates to the content of the Act itself.

I note that the kinds of proceedings that may be commenced by notice of application in the Ontario Superior Court of Justice are set out in Rule 14.05 of the Ontario *Rules of Civil Procedure*, RRO

1990, Reg 194 ("Ontario Rules"). Subrule 14.05(3)(g.1) of the Ontario Rules provides that an application can be brought "for a remedy under the *Canadian Charter of Rights and Freedoms*." The kinds of proceeding that may be brought by way of application in Ontario is not a closed list. Subrule 14.05(3)(h) of the Ontario Rules permits the use of the application procedure "in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial." That is not the case here.

The *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 do not assist the applicants. Those Rules (Rule 3) state that they apply to applications and appeals under the *Citizenship Act* and the *Immigration and Refugee Protection Act*. Here, the ALJR does not arise from a decision under either of those Acts, rather challenges the constitutionality of certain provisions.

Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 does not assist the applicants. The ALJR does not challenge a decision of a federal board, commission or tribunal, or any form of administrative decision-making. It proposes to challenge legislative action. Even if the Court has jurisdiction to grant the relief in the ALJR, the procedure to pursue that relief is in Part 4 of the *Federal Courts Rules*.

The applicants also submitted correspondence asking for the Court's direction as to whether the Canadian Council for Refugees can rely on a certain line of authority in respect of standing, or whether there is a new expectation by the Court that public interest parties may only participate in litigation after seeking and obtaining leave to do so by way of preliminary motion. Since the ALJR will not be received for filing, there is no Court file or adversarial context within which to issue any direction in this respect. In any event, a party should use a request for directions (Rule 54) as a last resort. The Court does not offer legal advice to parties, and must remain completely impartial and neutral. Parties must ascertain their own legal positions and bring a motion in the event of dispute (*Olumide v Canada*, 2016 FCA 287 at paras 14-17). Any dispute as to the standing of the Canadian Council for Refugees in any action for the relief set out in the ALJR can be specifically adjudicated in the context of that action.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-11201-24 |
| **STYLE OF CAUSE:** | ALAA ALHILAL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MNIISTER OF, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |

**MATTER CONSIDERED IN WRITING WITHOUT THE PERSONAL APPEARANCE OF THE PARTIES**

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| **ORDER AND REASONS:** | HORNE A.J. |
| **DATED:** | SEPTEMBER 10, 2024 |

**WRITTEN REPRESENTATIONS BY:**

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|---|---|
| Jared Will | FOR THE APPLICANT |
| James Todd | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

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| Jared Will & Associates<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENTS |