Federal Court of Appeal | Cour d'appel fédérale

Date: 20160509

Docket: A-322-15

Citation: 2016 FCA 144

CORAM: **DAWSON J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

YASMEN AL ATAWNAH
DIANA ELATAWNA
KARAM ELATAWNA
RETAL AISHA ELATAWNA

Appellants

and

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

Respondents

Heard at Toronto, Ontario, on April 11, 2016.

Judgment delivered at Toronto, Ontario, on May 9, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Yasmen Al Atawnah and three of her children, her daughters Diana, Karam and Retal Aisha, are citizens of Israel who sought refugee protection in Canada. Their refugee claims were never decided on their merits because the Refugee Protection Division of the Immigration and Refugee Board declared their claims to be abandoned.

[2] As a result of this declaration, the appellants were unable to obtain a pre-removal risk assessment (PRRA); paragraph 112(2)(b.1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (Act) precludes access to the PRRA process by individuals from designated countries of origin who have abandoned their refugee claim until 36 months pass from the date the refugee claim is declared to be abandoned.

[3] The appellants moved in the Federal Court for declaratory relief, arguing that both their removal from Canada without a full risk assessment being conducted by a competent decision-maker in accordance with the principles of fundamental justice and paragraph 112(2)(b.1) of the Act violate rights guaranteed to them by section 7 of the *Canadian Charter of Rights and Freedoms*.

[4] In thorough and thoughtful reasons cited as 2015 FC 774, a judge of the Federal Court dismissed the application. In dismissing the application the Judge rejected the appellants' argument that paragraph 112(2)(b.1) is arbitrary and overbroad. The Judge also rejected the argument that the provision was grossly disproportionate. The Judge certified and stated the following serious question of general importance:

> Does the prohibition contained in section 112(2)(b.1) of the Immigration and Refugee Protection Act against bringing a Pre-Removal Risk Assessment application until 36 months have passed since the claim for refugee protection was abandoned, violate section 7 of the Charter?

[5] This is an appeal from the judgment of the Federal Court.

[6] On this appeal the appellants' argue that the Judge erred in rejecting their submissions that paragraph 112(2)(b.1) is arbitrary, overbroad and grossly disproportionate.

[7] To the extent the appellants reargue points made to, and rejected by, the Federal Court I reject their submissions. In my view, the Judge selected the correct standard of review, correctness, and applied it correctly. I detect no error on the part of the Judge. I reach this conclusion substantially for the reasons given by the Judge.

[8] Before us, the appellants placed great reliance upon *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754 and the Chief Justice's statement at paragraph 74 to the effect that the requirement in subsection 117(4) of the Act that the Attorney General authorize prosecutions for human smuggling under subsection 117(1) of the Act did not cure the overbreadth problem created by subsection 117(1) of the Act. This was because so long as subsection 117(1):

> … is on the books, and so long as it is not impossible that the Attorney General could consent to prosecute, a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of imprisonment. If the Attorney General were to authorize prosecution of such an individual, despite s. 117's limited purpose, nothing remains in the provision to prevent conviction and imprisonment. This possibility alone engages s. 7 of the *Charter*.
>
> [Emphasis added]

[9] The appellants argue that the possibility that an enforcement officer will fail to properly consider evidence of risk and fail to defer removal similarly engages section 7.

[10] I respectfully disagree on the basis that this submission fails to take into account the Chief Justice's explanation at paragraph 75 of the reasons that:

> Implicit in the Court of Appeal's position is that the problem of humanitarian workers or family members prosecuted under s. 117 of the *IRPA* is a problem of administrative law, and that if a constitutional attack is to be made, it should be made against improper exercise of the Attorney General's duty under s. 117(4) not to prosecute such persons. I cannot agree. As noted, although the purpose of s. 117 of the *IRPA* was not to capture such persons, nothing in the provision actually enacted disallows it. As a result, an individual charged with an offence under s. 117 would have difficulty challenging the decision. Further, judicial review of such discretion is not currently available, and there are good reasons why it may not be desirable. As the Court observed in *Anderson*, judicial oversight of Crown decisions whether to prosecute puts at risk the discrete roles of different actors in our adversarial system: [quotation omitted]
>
> [Emphasis added]

[11] As can be seen from this passage, a decision of the Attorney General to authorise prosecution, like an enforcement officer's decision not to defer removal, can be made in error. The significant distinction between the two situations is that, while a mechanism does not exist to challenge an improper exercise of prosecutorial discretion, as explained below, a mechanism does exist to challenge an unreasonable decision of an enforcement officer.

[12] As this Court recognized in *Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646, 257 N.R. 158, at paragraph 3, "a risk assessment and determination conducted in accordance with the principles of fundamental justice is a condition precedent to a valid determination to remove an individual" from Canada.

[13] In the specific context of an enforcement officer's discretion to defer removal, in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311, at paragraph 51, this Court stated that "deferral should be reserved for those

applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment".

[14] Thereafter, in *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133, at paragraphs 41 and 42, Justice Evans, writing for the Court, observed that if Mr. Shpati had produced some new (post PRRA) evidence of risk, the enforcement officer would have been required to consider whether the evidence warranted deferral and to exercise his discretion accordingly.

[15] As the Federal Court noted in *Etienne v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 415, [2015] F.C.J. No. 408, at paragraph 48, after this Court's decision in *Shpati*, the Canada Border Services Agency issued Operational Bulletin: PRG-2014-22 entitled "Procedures relating to an officer's consideration of new allegations of risk at the deferral of removal stage". This bulletin gives enforcement officer's broader discretion to defer removal than the discretion described in *Shpati*:

> In the case of Shpati, the FCA confirmed that deferral should be reserved for those applications where:
>
> - failure to defer removal will expose the applicant to the risk of death, extreme sanction or inhumane treatment;
> - any risk relied upon must have arisen since the last Pre-Removal Risk Assessment (PRRA) (or since the last risk assessment); and,
> - the alleged risk is of serious personal harm.

> Note that while this case law provides important guidance, officers nevertheless retain discretion to defer removal in cases where these three elements are not strictly met. For example, new evidence may substantiate an allegation of risk that was previously considered. Similarly, evidence that pre-dates the last risk assessment may arise for which there are reasons it was not presented before the last risk assessment.
>
> [Emphasis added]

[16] Enforcement officers are instructed to "consider/assess the evidence submitted, when there are allegations of risk to the applicant upon execution of their removal order". When an officer concludes that deferral of removal is warranted, the allegations of risk are to be forwarded to Citizenship and Immigration Canada, now Immigration, Refugees and Citizenship Canada, for consideration under section 25.1 of the Act. Among other things, section 25.1 allows the Minister, on his own initiative, to exempt a foreign national from the application of the PRRA bar contained in paragraph 112(2)(b.1) of the Act.

[17] As the Judge noted at paragraph 101 of her reasons, the appellants, and all similarly situated persons, may challenge an enforcement officer's refusal to defer by way of an application for leave and judicial review in the Federal Court, and may bring a motion for a stay of removal pending the outcome of their application for judicial review. The Federal Court can often consider a request for a stay of removal in a more comprehensive manner than an enforcement officer can consider a request for deferral (*Shpati*, at paragraph 51).

[18] These rights are not illusory, as demonstrated by the following review of some of the jurisprudence of the Federal Court.

[19] In *Ragupathy v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1370, 303 F.T.R. 178, the applicant submitted considerable evidence of changes in conditions in Sri Lanka that occurred after his risk upon removal was assessed in a danger opinion. The Federal Court found that the risk alleged was both obvious and very serious. While the enforcement officer had correctly determined that at law the applicant was not entitled to a PRRA, the Federal Court found that the enforcement officer possessed discretion to defer the applicants' removal and that the officer's decision not to defer removal was unreasonable. The applicant was not to be removed until the risk he feared of persecution, torture or other inhumane punishment or treatment was reassessed by the Minister's delegate.

[20] In *Toth v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1051, 417 F.T.R. 279, the Federal Court held, at paragraph 23, that if there is evidence either of changed circumstances of an applicant, or of changed conditions within the country the applicant is to be removed to, with the result that the applicant faces a new or increased risk that has not previously been assessed, or the ability of the state to provide protection has been compromised, "the enforcement officer must assess that risk and determine if a deferral of removal is warranted.". [Emphasis added].

[21] To similar effect, in *Kopalakirusnan v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 330 an enforcement officer refused to defer the applicant's removal until he was eligible for a PRRA. The Federal Court stayed the applicant's removal, stating at paragraph 7 of the reasons that, subsequent to an assessment of risk, circumstances may arise that call into question whether an applicant can be removed in a manner that is *Charter*

compliant. An applicant is entitled to adduce evidence of this and "if there is clear and compelling evidence that either the applicant's circumstances have changed or that the conditions in the country to which he is being returned have changed or deteriorated such that the applicant faces a risk of inhumane treatment or death, the applicant is entitled to have his risk assessed in light of that new evidence". Moreover, the evidence in support of the risk need not be conclusive. The mere fact that the evidence involves an element of speculation is not determinative.

[22] Finally, in *Etienne* an enforcement officer again refused a request to defer removal. The Federal Court set aside the officer's decision, stating that when the enforcement officer determined that the applicants would not be removed to the internal flight alternative identified by the Refugee Protection Division of the Immigration and Refugee Board, the officer was required to consider and assess the evidence presented, and if the evidence showed that the applicants might be at risk in the country they were to be removed to, the officer "was <u>required</u> to defer removal in order that the risk could be assessed" [Emphasis added] (reasons, at paragraph 53). The Federal Court went on to note that the risk the enforcement officer was required to consider was not restricted to a "new" risk in the sense that it arose after a refugee determination or other process. Rather, the risks an enforcement officer is required to consider include risks that have never been assessed by a competent decision-maker (reasons, at paragraph 54).

[23] In my view, this jurisprudence demonstrates that the supervisory role of the Federal Court, together with the ability of the Minister to exempt an applicant from the application of

paragraph 112(2)(b.1) of the Act, acts as a "safety valve" such that the PRRA bar under review is not overbroad, arbitrary or grossly disproportionate.

[24] On appeal, the appellants make three additional arguments that were not advanced or not dealt with in the Federal Court. They argue that:

i) It is a principle of fundamental justice that prior to removing an individual from Canada, a decision-maker empowered to assess risk must conduct an assessment of that risk that conforms to the basic principles of fairness, including the ability to convene an oral hearing if credibility is in issue.

ii) The Judge erred by categorizing their criticism of the decision of the enforcement officer not to defer their removal from Canada to be a collateral attack on that decision. The appellants acknowledge the finality of the enforcement officer's decision. The fact the officer arguably made credibility findings in the absence of an oral hearing is said to underscore the constitutional frailties of the current legislative scheme

iii) The Judge erred by relying extensively upon the decision of the Federal Court in *Peter v. Canada (Public Safety and Emergency Preparedness)* 2014 FC 1073, 13 Imm. L.R. (4th) 169 – a decision found to be "flawed" by this Court on appeal (2016 FCA 51, [2016] F.C.J. No. 173, at paragraph 15).

[25] In my view, none of these submissions assist the appellants. I reach this conclusion for the following reasons.

[26] The principle of fundamental justice articulated by the appellants has not, to this point in time, been recognized. It follows that the appellants must establish that it is a legal principle, that there is a significant consensus that the alleged principle "is vital or fundamental to our social

notion of justice" and that the principal is capable of being identified "with precision and applied to situations in a manner that yields predictable results" (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at paragraph 8).

[27] The appellants have failed to demonstrate that the alleged principle is a fundamental principle of justice because, contrary to the appellants' submission, it articulates a process whereby a single decision-maker is required to assess risk (as opposed to a different process such as one where, as now, an enforcement officer assesses the sufficiency of the evidence of risk, and if satisfied the evidence is sufficient, defers removal and refers the risk assessment to another decision-maker). It follows that the asserted principle runs contrary to the jurisprudence of the Supreme Court that section 7 does not require a particular type of process; it requires a fair process having regard to the nature of the proceedings and the interest at stake (see, for example, *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at paragraph 20).

[28] In any event, I am not persuaded that this argument adds anything of substance to the appellants' submission that both their removal from Canada without a full assessment of risk and paragraph 112(2)(b.1) violate section 7 of the *Charter*.

[29] With respect to the second argument advanced by the appellants, I accept that the enforcement officer may well have impermissibly made negative credibility findings on the basis of written submissions when refusing to defer their removal from Canada. The appellants,

however, failed to perfect an application for judicial review of that decision. I also accept that at paragraph 95 of her reasons, the Judge noted that the appellants were essentially trying to mount a collateral attack on the enforcement officer's decision.

[30] However, prior to this, at paragraph 94 of her reasons, the Judge observed that the application before her was not an application for judicial review of the enforcement officer's decision refusing to defer removal. The Judge then stated, in my view correctly, that the "question in this application is not whether the [appellants'] section 7 *Charter* rights were violated by the way that this particular enforcement officer assessed their evidence of risk, but whether the PRRA bar in paragraph 112(2)(b.1) of [the Immigration and Refugee Protection Act] is constitutionally valid". This distinction is consistent with situations where legislation is found to be constitutional, but the manner in which state officials have exercised authority conferred by that legislation is found to be unconstitutional. In my view, this is a complete answer to the appellants' argument that their submission was mischaracterized by the Judge.

[31] Additionally on this point, I reject the notion that, if an enforcement officer were to make negative credibility findings on the basis of written submissions, the Federal Court could nonetheless find the decision to be reasonable. As the Judge noted at paragraph 93 of her reasons, enforcement officers should limit themselves to considering the sufficiency of the evidence before them. Citing *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, [1985] S.C.J. No. 11, at paragraph 59, the Judge stated that the Supreme Court "has held that in light of the important interest at stake in risk-based claims, where a

serious issue of credibility arises, 'fundamental justice requires that credibility be determined on the basis of an oral hearing'".

[32] In view of the decision of the Supreme Court in *Singh*, an enforcement officer cannot reasonably make credibility findings in the absence of an interview.

[33] As counsel for the Minister noted in oral argument, nothing precludes an enforcement officer from interviewing a person who has requested that their removal be deferred, and officers do so from time to time.

[34] The appellants' final argument is to the effect that given the Judge's reliance on the reasoning in *Peter*, and given this Court's determination that the decision was flawed, the present decision ought to be overturned.

[35] There are two answers to this submission.

[36] First, in *Peter* this Court did not find the Federal Court's *Charter* analysis to be incorrect. Rather, it found that the Federal Court ought not to have embarked on its *Charter* analysis at all when it was not supported by a proper evidentiary record (Federal Court of Appeal reasons, at paragraph 22).

[37] Second, the Judge did not base her analysis upon the *Peter* decision. As her reasons amply demonstrate, the Judge conducted her own independent consideration of the scheme of the Act and the relevant jurisprudence.

[38] For these reasons, I would dismiss the appeal. I would answer the certified question as follows:

> Question: Does the prohibition contained in section 112(2)(b.1) of the Immigration and Refugee Protection Act against bringing a Pre-Removal Risk Assessment application until 36 months have passed since the claim for refugee protection was abandoned, violate section 7 of the *Charter*?
>
> Answer: No.

"Eleanor R. Dawson"

J.A.

"I agree
D.G. Near J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED JULY 22, 2015, FILE NO. IMM-343-14)

DOCKET:	A-322-15
STYLE OF CAUSE:	YASMEN AL ATAWNAH, DIANA ELATAWNA, KARAM ELATAWNA, RETAL AISHA ELATAWNA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 11, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NEAR J.A. BOIVIN J.A.
DATED:	MAY 9, 2016

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