Federal Court Cour fédérale

Date: 20150304

Docket: T-1734-14

Citation: 2015 FC 276

Ottawa, Ontario, March 4, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ALEXANDR SIN

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Overview

[1] The plaintiff, Mr Alexandr Sin, a citizen of Russia, applied for permanent residence in Canada as an investor. Before his application had been processed, the Government of Canada introduced legislation terminating pending investor applications (*Economic Action Plan Act No 1*, amending the *Immigration and Refugee Protection Act*, SC 2001, c 27, s 87.5; provisions cited

are set out in an Annex). The legislation provides that applicants have no legal recourse against the Government of Canada in respect of their terminated applications.

[2] Nevertheless, Mr Sin commenced an action claiming compensation for his out-of-pocket expenses and damages for loss of opportunity. He relies heavily on bilateral treaties that protect the rights of investors. He maintains that these treaties continue to protect his interests, notwithstanding the legislation that appears to bar his claim. In his suit, Mr Sin seeks to represent a class of similarly situated investors.

[3] The defendant has presented a motion to strike Mr Sin's claim on the basis that it is plain and obvious that it cannot succeed. Mr Sin asks me to dismiss the motion and to allow his parallel motion requesting permission to notify prospective members of the proposed class action.

[4] In the circumstances, I must allow the defendant's motion. Mr Sin's claim cannot succeed; it follows that his request for pre-certification notice cannot be granted.

II. Background

[5] In 2014, the Government of Canada terminated all applications for permanent residence from foreign investors that had not been approved prior to February 11, 2014 (s 87.5(1)). Mr Sin's application was caught by that provision.

[6] The legislation specifically provides that applicants whose applications were terminated will be refunded their application fees and any monies that had been invested (ss 87.5(3), (4)). Further, it stipulated that applicants had no recourse or indemnity for the termination of their applications (s 87.5(7)).

III. Is it plain and obvious that Mr Sin's claim cannot succeed?

[7] Mr Sin argues that his claim is viable primarily because the legislation cited above must be read alongside international agreements protecting the rights of investors, particularly the Canada-Russia Foreign Investment Promotion and Protection Agreement. That agreement, and others like it, provides that investments cannot be expropriated directly or indirectly without compensation. Further, they permit aggrieved investors to seek redress in the domestic courts of the states in which investments were made.

[8] According to Mr Sin, his investment in Canada was indirectly expropriated without compensation given that, through the termination of his application for permanent residence, he lost one of the benefits of his investment, namely his chance at achieving permanent resident status in Canada. Returning his application fees and his investment will not compensate for that loss so, he submits, he should be allowed to seek a remedy in this Court.

[9] Mr Sin maintains that the legislation conflicts with international agreements. Accordingly, he argues that the legislation should be interpreted in a manner that respects Canada's obligations under international law, including international investment treaties. Since Parliament did not expressly state that it was overriding international treaties, s 87.5(7) should be

read down so as to protect the rights of investors under those instruments. Mr Sin submits that Parliament could not have silently and obliquely nullified dozens of international agreements protecting the rights of investors. He contends that Parliament could only have done so through unambiguous language.

[10] In my view, however, the legislation terminating investors' opportunities to obtain permanent resident status through investment does not conflict with the international agreements cited by Mr Sin. As such, Parliament did not need to state expressly that it was vitiating Canada's international responsibilities.

[11] First, the agreements do not protect the rights Mr Sin seeks to assert here. Mr Sin points to the broad definition of "indirect expropriation" set out in many agreements and maintain that the legislation subjects investors and entrepreneurs to "a measure or series of measures . . . that have an effect equivalent to direct expropriation".

[12] However, in my view, Mr Sin and other investors were not subjected to any measures equivalent to expropriation. They lost the opportunity to attempt to achieve permanent resident status in Canada as members of the prescribed class of investors, but they certainly did not suffer expropriation of their investments, or any equivalent loss. Mr Sin was unable to identify any provision in the agreements that would suggest that the termination of an application for permanent residence by an investor, who received compensation in respect of his application and investment, amounts to uncompensated expropriation, either directly or indirectly. Accordingly, in my view, the provisions enacted by Parliament that terminate investors' permanent residence

applications and limit the extent to which they can seek compensation for the termination of their applications simply do not conflict with those agreements. There is no need, therefore, to read down the legislation to accommodate Canada's obligations under international law (as was required in *Reference as to Powers to Levy Rates on Foreign Legations* [1943] SCR 208).

[13] Second, the international agreements cited by Mr Sin have not been incorporated into Canadian domestic law. Mr Sin argues that international agreements that do not conflict with domestic law are self-implementing – they do not need to be brought into force through Canadian legislation. He also notes that when the agreements were brought into force they did not conflict with, and therefore should be considered part of, Canadian domestic law.

[14] I would first note that the agreements might well have been in force as between the contracting parties. However, that is not enough to make them part of Canadian law. That would require implementation by statute (*Janssen Inc v Teva Canada Limited*, 2015 FCA 36, at para 14).

[15] In addition, even if the agreements were interpreted in the manner Mr Sin urges, they would directly conflict with the legislation described above, which expressly denies Mr Sin and similarly situated investors any remedy beyond compensation for their investment and ancillary fees. Therefore, in light of s 87.5(7), the agreements cannot be regarded as being part of Canadian domestic law. Further, while courts will generally strive to avoid interpreting domestic law in a manner that would violate Canada's international obligations, they must do so where, as

here, "the wording of the statute clearly compels that result . . ." (*R v Hape*, [2007] 2 SCR 292, at para 53).

[16] As a result, I must conclude that Mr Sin's statement of claim does not disclose a cause of action. In the event that I were to grant the defendant's motion, Mr Sin requested permission to amend his statement of claim. However, he did not offer to amend any substantive aspects of his claim; he merely sought permission to identify the specific subsections of the international agreements on which he was relying. No such amendment would serve to overcome the obstacles to Mr Sin's action identified above. Therefore, I would not provide Mr Sin an opportunity to amend his statement of claim.

[17] It follows that I must also dismiss Mr Sin's request to issue a pre-certification notice to potential class members.

IV. Conclusion and Disposition

[18] For the reasons set out above, I find that it is plain and obvious that Mr Sin's claim cannot succeed. Therefore, I must grant the defendant's motion to strike and dismiss the plaintiff's motion for pre-certification notice, with costs to the defendant in respect of both motions.

ORDER

THIS COURT ORDERS that:

1. The defendant's motion is allowed, with costs.
2. The plaintiff's motion is dismissed, with costs.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Pending applications	Demandes pendantes
87.5 (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of investors or of entrepreneurs is terminated if, before February 11, 2014, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to the class in question.	**87.5** (1) Il est mis fin à toute demande de visa de résident permanent faite au titre de la catégorie réglementaire des investisseurs ou de celle des entrepreneurs si, au 11 février 2014, un agent n'a pas statué, conformément aux règlements, quant à la conformité de la demande aux critères de sélection et autres exigences applicables à la catégorie en cause.
…	[…]
Effect	Effet
(3) The fact that an application is terminated under subsection (1) does not constitute a decision not to issue a permanent resident visa.	(3) Le fait qu'il a été mis fin à une demande de visa de résident permanent par application du paragraphe (1) ne constitue pas un refus de délivrer le visa.
Fees returned	Remboursement de frais
(4) Any fees paid to the Minister in respect of the application referred to in subsection (1) — including for the acquisition of permanent resident status — must be returned, without interest, to the person who paid them. The amounts payable may be paid out of the Consolidated Revenue Fund.	(4) Les frais versés au ministre à l'égard de la demande visée au paragraphe (1), notamment pour l'acquisition du statut de résident permanent, sont remboursés, sans intérêts, à la personne qui les a acquittés; ils peuvent être payés sur le Trésor.
…	[…]
No recourse or indemnity	Absence de recours ou d'indemnité
(7) No right of recourse or indemnity lies against Her Majesty in right of Canada in connection with an application that is terminated under subsection (1), including in respect of any contract or other arrangement relating to any aspect of the application.	(7) Nul n'a de recours contre Sa Majesté du chef du Canada ni droit à une indemnité de sa part relativement à une demande à laquelle il est mis fin par application du paragraphe (1), notamment à l'égard de tout contrat ou autre forme d'entente qui a trait à la demande.

FEDERAL COURT

SOLICITORS OF RECORD

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