Federal Court  Cour fédérale

Date: 20151029

Docket: IMM-1376-14

Citation: 2015 FC 1186

Toronto, Ontario, October 29, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

N.O.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS
(Confidential Judgment and Reasons were issued on October 20, 2015)

[1] Ms. N.O. (the "Applicant") seeks judicial review of a decision made by the Refugee Protection Division (the "RPD") of the Immigration and Refugee Board (the "Board"), refusing to reconsider an application to reopen a refugee claim. The Applicant also submits a Notice of Constitutional Question pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[2] At the hearing of this Application for judicial review, the Applicant asked that she be referred to only by her initials. That request was granted.

[3] The Applicant is a citizen of Haiti. She entered Canada at Fort Erie, on March 19, 2009 and claimed refugee protection on April 1, 2009. Her claim was joined with those of her older brother, N.A. and her older sister E.A. whose claims were filed the previous year.

[4] The claim of the Applicant and her siblings was denied by the Board in a written decision dated October 6, 2010, on the grounds that their evidence was not credible, that they had failed to establish a subjective basis for their claim and that they did not face a personalized risk of torture or to their lives or cruel and unusual punishment if they return to Haiti.

[5] An application for leave for judicial review was granted and the application for judicial review was heard by Justice Snider. In a decision dated May 9, 2011, the application for judicial review was dismissed, on the grounds that the credibility findings of the Board were determinative and that those findings were reasonable. No question was certified.

[6] By an application dated August 16, 2013, the Applicant sought to reopen her refugee claim, pursuant to section 62 of the *Refugee Protection Division Rules*, SOR/2012-256. She alleged that she had been coerced by her brother and sister to make her evidence conform with theirs, as to the grounds upon which she feared to return to Haiti. In a lengthy affidavit filed with her application to reopen, the Applicant deposed that she had been sexually abused as a child and during her teens by her stepfather, and that her mother was aware of the abuse. She deposed that she was discouraged by her siblings from testifying before the Board about this abuse.

[7] The Applicant, in her affidavit dated August 15, 2013, also deposed that she was unaware that her brother and sister had applied for leave and judicial review of the Board's negative decision until Justice Snider delivered her decision in May 2011.

[8] Following the birth of her child in Canada, on February 21, 2013, the Applicant sought therapy for help in dealing with the history of abuse and its impacts on her life. A social worker facilitated contact with a lawyer who advised the Applicant "it might be possible to start again".

[9] The Applicant further deposed that she was motivated to regularize her life in Canada where she is living in a stable relationship. She wishes to raise her child well and wants the opportunity to have her claim for protection, as a Convention refugee or a person in need of protection, decided on the basis of her personal experiences.

[10] The Applicant submitted her application to reopen her Convention refugee claim on or about August 16, 2013. In a decision dated August 27, 2013, the RPD dismissed that application, on the basis that it lacked jurisdiction to reopen the claim, pursuant to section 170.2 of the Act.

[11] Upon receipt of the decision of August 27, 2013, the Applicant presented an application for reconsideration under cover of a letter dated September 10, 2013. At this time, the Applicant raised a constitutional question, pursuant to section 66 of the *Refugee Protection Division Rules* as to the constitutionality of section 170.2, referring to section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter").

[12] The RPD delivered its decision on the application for reconsideration, by written reasons dated February 7, 2014.

[13] In that decision, the RPD reviewed the facts and the arguments of both the Applicant and of the Minister of Citizenship and Immigration (the "Respondent"). It first found that it had jurisdiction to consider the constitutional question, pursuant to subsection 162(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and the decision in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 and *R. v. Conway*, [2010] 1 S.C.R. 765.

[14] The RPD also referred to the decision in *Stables v. Canada (Minister of Citizenship and Immigration*) (2011), 400 F.T.R. 135 and concluded that on the basis of these three decisions it did not have jurisdiction to reopen the claim, in light of the clear language of section 170.2 of the Act. The RPD said the following at paragraph 25 of its decision:

> I find that based on the *Conway*, *Martin* and *Stables* decisions that the RPD does not have jurisdiction to consider the re-opening of the case at bar as stated in section 170.2 because the section is clear: "the RPD does not have jurisdiction to re-open on any ground – including a failure to observe a principle of natural justice – a claim for refugee protection, in respect of which the RAD or the Federal Court has made a final determination".

[15] The RPD observed that section 170.2 of the Act came into effect after the decisions in *Conway* and *Stables*. It concluded that Parliament intended to remove from the RPD the jurisdiction to consider the constitutionality of section 170.2 in the circumstances described in that provision. It found that the Federal Court had made a "final decision" on May 9, 2011.

[16] In the within application for judicial review, the Applicant seeks the following relief:

> 1. A declaration that the RPD has the jurisdiction to consider the August 12, 2013 Application to Reopen and that the matter be remitted to the RPD for determination with a direction to that effect.
>
> 2. In the alternative, a declaration that the operation of s. 107.2 of the *Immigration and Refugee Protection Act (IRPA* [sic] barring the Applicant's Application to Reopen violates the Applicant's right to life, liberty and security of the person as guaranteed by s.7 of the *Charter of Rights and Freedoms (Charter)*. Pursuant to s. 52 of the *Constitution Act*, s. 170.2 is of no force and effect to the extent that it contravenes the Applicant's rights.

[17] The Applicant now argues that the RPD erred in law in its conclusion that it lacked jurisdiction to reopen her claim and that this Court should grant the relief sought, either by finding section 170.2 to be unconstitutional in light of section 7 of the Charter, or "read in" the requirement that section 170.2 be interpreted in a manner that it would only operate to remove jurisdiction on an issue or issues that have already been determined by the Federal Court or the Refugee Appeal Division, in accordance with the decision in *Schacter v. Canada*, [1992] 2 S.C.R. 679.

[18] Finally, the last remedy proposed by the Applicant is that the Court grant a constitutional exemption in her favour so that her claim could be reopened. The Applicant here relies on the decision in *Kaur v. Canada (Minister of Employment and Immigration)(C.A.)*, [1990] 2 F.C. 209.

[19] The Respondent submits that this application should be dismissed. He argues that the RPD was principally engaged in a factual determination, whether a "final decision" had been made by the Federal Court. He argues that the RPD had no jurisdiction to consider reopening the

Applicant's claim and consequently, no jurisdiction to consider the constitutionality of section 170.2 and an inquiry into a breach of section 7.

[20] As well, the Respondent submits that fundamental justice does not require that the claim be reopened and in any event, that the Applicant has not established a factual foundation to justify reopening her refugee claim. Any risks to her can be assessed in a Pre-Removal Risk Assessment ("PRRA") application.

[21] The principal issue raised in this application is a question of statutory interpretation. That issue involves a question of law and is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Kandola* (2014), 372 D.L.R. (4th) 342 (F.C.A.).

[22] The Applicant made her initial request for reopening pursuant to section 62 of the *Refugee Protection Division Rules*, SOR/2012-256. Section 62 provides as follows:

62. (1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.	62. (1) À tout moment avant que la Section d'appel des réfugiés ou la Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.

[23] The Board dismissed the original request on the basis of its interpretation of section 170.2 which provides as follows:

170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — a claim for refugee protection, an application for protection or an application for cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination.	170.2 La Section de la protection des réfugiés n'a pas compétence pour rouvrir, pour quelque motif que ce soit, y compris le manquement à un principe de justice naturelle, les demandes d'asile ou de protection ou les demandes d'annulation ou de constat de perte de l'asile à l'égard desquelles la Section d'appel des réfugiés ou la Cour fédérale, selon le cas, a rendu une décision en dernier ressort.

[24] The first issue arising in this application for judicial review is the meaning of section 170.2. According to the decision in *Rizzo & Rizzo Shoes Ltd. (Bankrupt) Re*, [1998] 1 S.C.R. 27 at paragraph 21 the approach to statutory interpretation requires a purposive approach,

> Although much has been written about the interpretation of legislation…Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, 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.

[25] Applying this principle of statutory interpretation, I interpret section 170.2 to mean that the RPD has no authority to reopen a claim, as identified in that provision, once a "final

determination" has been made by the Refugee Appeal Division or the Federal Court, as the case may be.

[26] The language of section 170.2 is clear and specific. The words "on any ground" are broad but it is noteworthy that Parliament added the words "including a failure to observe a principle of natural justice". In my opinion, the inclusion of these words serves to emphasize Parliament's intention to preclude and foreclose any reopening of a claim for refugee protection or a claim for protection, pursuant to section 96 and subsection 97(1), respectively, of the Act, when a "final determination" has been made by either the Refugee Appeal Division or the Federal Court.

[27] On the basis of the evidence before the RPD upon the reconsideration request, there had been a "final determination" of the Applicant's claims to be recognized as a Convention refugee or as a person in need of protection.

[28] I refer to the decision in *Blackmore v. British Columbia (Attorney General)* (2009), 1 Admin. L.R. (5th) 134, where the Court said the following at paragraph 50:

> The grammatical and ordinary meaning of the word "final" is "ultimate … not to be undone, altered or revoked …. [and] conclusive": Simpson and Weiner, *The Oxford English Dictionary*, 2nd ed., Volume V (Oxford: Clarendon Press, 1989) at pp. 191 to 192.

[29] Following this approach, I have no hesitation in finding that a "final determination" has been made of the Applicant's refugee claim and claim for protection pursuant to subsection 97(1) of the Act, when the judicial review application was dismissed on May 9, 2011, because no question was certified.

[30] Pursuant to subsection 74(d) of the Act, an appeal from a disposition of an immigration judicial review proceeding is only available when a serious question of general importance has been certified. Subsection 74(d) provides as follows:

74. Judicial review is subject to the following provisions:	74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
(d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.	d) sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[31] The next question arising from this application for judicial review is whether the RPD is authorized to consider a challenge to legislation on constitutional grounds. The foundation of the constitutional challenge in this case is section 7 of the Charter which provides as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[32] The RPD possesses jurisdiction to decide questions of law pursuant to subsection 162(1) of the Act which provides as follows:

162. (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of	162. (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont

law and fact, including questions of jurisdiction.	elle est saisie.

[33] According to the decision in *Stables*, *supra*, the RPD, like other administrative tribunals, has the authority to decide constitutional questions, unless the relevant legislation indicates otherwise; see *Stables*, *supra* at paragraph 28 as follows:

> As a result of the *Cuddy Chicks* trilogy (the two other cases of that trilogy being *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 and *Tetreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22) and further jurisprudential evolution (extensively summed up in *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765), there is no doubt that administrative tribunals with the powers to decide questions of law have the authority to resolve constitutional questions that are inextricably linked to matters properly before them, unless such questions have been explicitly withdrawn from their jurisdiction.

[34] Section 170.2, in my opinion, meets the test set out above. The language of this provision removes the jurisdiction to reopen on any ground, when a "final decision" has been made. In my opinion, this means that the RPD did not have the jurisdiction to consider any issue of law, including issues of constitutionality.

[35] As noted above, I have found that a "final determination" had been made when the judicial review of the Board's decision, rejecting the Applicant's claim, was dismissed in May 2011.

[36] The Applicant argues that her Charter right to fundamental justice has been breached as a consequence of the refusal of the RPD to reopen her claim. In *Carter v. Canada (Attorney*

General), [2015] 1 S.C.R. 331, the Court described the elements of fundamental justice as follows:

> [54] Section 7 of the Charter states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
>
> [55] In order to demonstrate a violation of s. 7, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.
>
> …
>
> [72] Section 7 does not catalogue the principles of fundamental justice to which it refers. Over the course of 32 years of Charter adjudication, this Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet (Bedford, at para. 94). While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.

[37] The facts set out by the Applicant, in her affidavit submitted to the RPD upon her reconsideration request, provide that she did not testify about the extent of sexual abuse that she suffered from her stepfather, because she felt persuaded by her siblings not to do so.

[38] I agree with the Respondent that the PRRA process will provide an adequate opportunity for the Applicant to submit her evidence about risk if she is subject to removal from Canada.

[39] The facts set out by the Applicant in her affidavit filed in support of this application for judicial review show that both her mother and step-father are now dead.

[40] Furthermore, I agree with the Respondent that the Applicant has not provided a factual foundation for the determination of a constitutional question. I refer to the decision in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 where the Supreme Court of Canada said the following at pages 1099-1100:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter* … .
>
> … this Court heard and decided *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, a case concerning an action for a declaration that certain provisions of *The Elections Finances Act*, S.M. 1982-83-84, c. 45, violated the guarantee of freedom of expression contained in s. 2(b) of the *Charter*. Cory, J., speaking for a unanimous Court, stated at pp. 361-62:
>
> > *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather it is essential to a proper consideration of *Charter* issues. … *Charter* decisions cannot be based on the unsupported hypotheses of enthusiastic counsel.

[41] I am not persuaded that the RPD committed a reviewable error in its decision, refusing to reconsider its earlier decision not to reopen the Applicant's claim. In my opinion, the language of section 170.2 of the Act is clear. The fact is that a "final decision" had been made upon the Applicant's claim for protection when the Federal Court dismissed the application for leave and

judicial review, without certifying a question pursuant to paragraph 74(d) of the Act. The absence of a certified question means that no appeal was available to the Applicant.

[42] In the result, this application for judicial review is dismissed.

[43] Both parties proposed questions for certification. The Applicant proposes the following questions:

> 1. Does the *Immigration and Refugee Protection Act* provide jurisdiction to the Refugee Protection Division of the Immigration and Refugee Board to determine the constitutionality of s. 170.2?
>
> 2. Does the operation of s. 170.2 of the *Immigration and Refugee Protection Act* to bar an application to reopen at the Refugee Protection Division violate the Applicant's section 7 rights when that application is based on grounds not before Federal Court and thus was not subject to a final determination?

[44] The Respondent proposed slightly different questions as follows:

> (1) Does section 170.2 of the *Immigration and Refugee Protection Act*, where it states, "The Refugee Protection Division does not have jurisdiction to reopen on any ground – including a failure to observe a principle of natural justice – a claim for refugee protection … in respect of which the Refugee Appeal Division or the Federal Court … has made a final determination", withdraw jurisdiction from the Refugee Protection Division to decision questions of law and, by implication, constitutionality, arising under that provision?
>
> (2) In spite of the availability of other possible applications under the *Immigration and Refugee Protection Act*, does section 170.2 of the *Immigration and Refugee Protection Act* unjustifiably breach a claimant's rights under section 7 of the *Charter of Rights and Freedoms* such that the provision must be found unconstitutional and declared to be of no force and effect?

[45] I am satisfied that the Respondent's questions meet the test for certification as set out in the decision *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365 (F.C.A.), that is "a serious question of general importance which would be dispositive of an appeal".

[46] Accordingly, the following questions will be certified:

> (1) Does section 170.2 of the Immigration and Refugee Protection Act, where it states, "The Refugee Protection Division does not have jurisdiction to reopen on any ground – including a failure to observe a principle of natural justice – a claim for refugee protection … in respect of which the Refugee Appeal Division or the Federal Court … has made a final determination", withdraw jurisdiction from the Refugee Protection Division to decide questions of law and, by implication, constitutionality, arising under that provision?
>
> (2) In spite of the availability of other possible applications under the Immigration and Refugee Protection Act, does section 170.2 of the Immigration and Refugee Protection Act unjustifiably breach a claimant's rights under section 7 of the Charter of Rights and Freedoms such that the provision must be found unconstitutional and declared to be of no force and effect?

[47] Otherwise, the Application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed and the following questions are certified:

> (1) Does section 170.2 of the Immigration and Refugee Protection Act, where it states, "The Refugee Protection Division does not have jurisdiction to reopen on any ground – including a failure to observe a principle of natural justice – a claim for refugee protection … in respect of which the Refugee Appeal Division or the Federal Court … has made a final determination", withdraw jurisdiction from the Refugee Protection Division to decide questions of law and, by implication, constitutionality, arising under that provision?
>
> (2) In spite of the availability of other possible applications under the *Immigration and Refugee Protection Act*, does section 170.2 of the *Immigration and Refugee Protection Act* unjustifiably breach a claimant's rights under section 7 of the *Charter of Rights and Freedoms* such that the provision must be found unconstitutional and declared to be of no force and effect?

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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