Cour fédérale Federal Court

Date: 20180704

Dockets: IMM-2806-17
IMM-2664-17
IMM-2727-17

Citation: 2018 FC 681

Ottawa, Ontario, July 4, 2018

PRESENT: Mr. Justice Grammond

Docket: IMM-2806-17

BETWEEN:

CLARISSE BUYU LUEMBA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

Docket: IMM-2664-17

AND BETWEEN:

RAFIQUE JOSEPH
REHANA JOSEPH
SHERISH JOSEPH
SHUN JOSEPH
SHARAL KINZA JOSEPH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-2727-17

AND BETWEEN:

BELIZAIRE JOINIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The applicants are claiming refugee status. Their claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]. Since they entered Canada under an exception to the Safe Third Country Agreement, paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], denies them the right to appeal to the Refugee Appeal Division [RAD] of the IRB.

[2] Paragraph 110(2)(d) was the subject of a constitutional challenge. In *Kreishan v Canada (Citizenship and Immigration)*, 2018 FC 481 [*Kreishan*], this Court dismissed that challenge and declared that paragraph 110(2)(d) is compliant with the *Canadian Charter of Rights and Freedoms* [Charter]. The Court did, however, certify a question pursuant to paragraph 74(d) of IRPA, which allowed the parties to bring an appeal before the Federal Court of Appeal. That appeal will be heard on an expedited basis. The hearing will take place either during the week of September 17, 2018, or during the week of October 1, 2018.

[3] In *Luemba* (IMM-2608-17), an order was made to keep the application for leave and for judicial review in abeyance until the thirtieth day following the decision of this Court in *Kreishan*. A similar order, but without the 30-day delay, was made in *Joseph* (IMM-2664-17) and *Joinis* (IMM-2727-17).

[4] The applicants are now seeking an order staying the cases at hand until the Court of Appeal has rendered judgment in *Kreishan*. The Minister objects to this.

[5] According to the information available to me, there are dozens of other cases presenting a similar situation.

I. Analytical framework

[6] Paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7, allows this Court to stay a proceeding "where . . . it is in the interest of justice". In *Mylan Pharmaceuticals ULC v Astrazeneca Canada, Inc*, 2011 FCA 312, Justice Stratas of the Federal Court of Appeal stated

that the test normally applied to stays, as set out in *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*], was not directly relevant. It is entirely within the Court's discretion to rule on the application. Nevertheless, some of the *RJR* criteria constitute useful guidelines for the exercise of this discretion. Accordingly, where the applicant can show that he or she would suffer irreparable harm if proceedings were not stayed, this would weigh heavily in favour of a stay of proceedings. Similarly, balancing the inconvenience suffered by each party is a helpful factor in deciding whether a stay is in the interest of justice.

[7] In contrast, I do not think it is appropriate for me, at this stage, to assess the chances of success of the appeal in *Kreishan*. I need only note that this Court has certified a question in accordance with paragraph 74(d) of IRPA. I therefore cannot agree with the premise of the Minister's argument, namely, that this Court's decision in *Kreishan* represents the state of the law and that it must be applied immediately to the cases at bar.

II. Irreparable Harm

[8] The applicants would suffer irreparable harm if their cases were not stayed. Indeed, if the Federal Court of Appeal reverses the judgment of this Court in *Kreishan*, this means that the applicants are entitled to appeal their cases to the RAD. However, if their cases are not stayed, the Minister will no doubt submit, as he is doing in these motions, that *Kreishan* represents the state of the law and must be applied. He will therefore ask that the applicants' applications for leave and for judicial review be dismissed. If this is what happens, the applicants will have been deprived of their right of appeal to the RAD.

[9] This Court has already considered the effects of being deprived of the right of appeal to the RAD where the RPD is of the opinion that a case presents no credible basis for a claim (subsection 107(2) of IRPA). It noted that such a finding "has some significant consequences since it deprives those concerned of an appeal to the Refugee Appeal Division with the benefits of a statutory stay. This is why the threshold for such a finding is a high one": *Shukriya v Canada (Citizenship and Immigration),* 2016 FC 1375 at paragraph 24. Indeed, when reviewing decisions of the RPD, the RAD defers to the RPD only with regard to specific categories of issues: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93. It is therefore clear that appeals to the RAD permit the correction of several types of errors that would not give rise to judicial review by this Court.

[10] Since they concern the very jurisdiction of an appellate administrative tribunal, the cases at hand can be distinguished from certain decisions cited by the Minister in support of his position. In those cases, it appears that the issue before the Court of Appeal or the Supreme Court was not exactly the same as those that had to be decided in the cases for which a stay was being sought. There was a well-established line of authority on those issues, which the case on appeal could have changed or not. Moreover, none of those cases dealt with the denial of a right of appeal.

[11] On the other hand, a parallel can be drawn with *Monla v Canada (Citizenship and Immigration),* 2016 FC 1280, in which a significant number of applications made to this Court were held in abeyance pending a decision in certain lead cases. But for that stay of proceedings,

the applicants would have been denied the right to challenge the revocation of their citizenship before this Court.

III. Balance of convenience

[12] The interests of justice usually require that the matters submitted to this Court be dealt with as expeditiously as possible. This is especially true in immigration cases: refugee protection claimants should be told as quickly as possible whether they will be granted refugee status or ordered to leave Canada. It is in no one's interest for refugee protection claimants to remain in Canada for an extended period while awaiting a final decision.

[13] Nevertheless, refugee protection claims must be decided in fair manner, in compliance with the Charter. As I noted above, this means that the proceedings must be stayed pending the Federal Court of Appeal's judgment.

[14] Moreover, this stay will cause the Minister no significant inconvenience. We now know that the Federal Court of Appeal will hear this case expeditiously. Of course, it will be several weeks or months before a final decision is rendered with regard to the applicants. However, this delay is necessary to ensure that their Charter rights are respected.

[15] In any event, if the stay were not granted, the applicants and individuals in a similar situation would have to perfect their applications for leave and for judicial review. The Minister would have to respond to each of them. The Court would then have to consider and rule on all these cases. The time and resources that this would require will in all likelihood be wasted.

Moreover, this is the same conclusion my colleague Prothonotary Mandy Aylen reached in a similar case: *Mukhammad v Canada (Citizenship and Immigration)*, IMM-1405-18, order dated June 11, 2018. I trust that these steps will become unnecessary once the Court of Appeal has rendered its judgment, whatever the outcome.

[16] I am therefore of the opinion that it is in the interest of justice that these applications be stayed until the Court of Appeal has rendered judgment in *Kreishan*.

ORDER in IMM-2806-17 & IMM-2664-17 & IMM-2727-17

THE COURT ORDERS that:

1. These files be kept in abeyance pending the judgment of the Federal Court of Appeal in *Kreishan v Canada (Citizenship and Immigration)*, A-153-18;

2. The applicants will serve and file their record within thirty days after the judgment of the Federal Court of Appeal.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2806-17
STYLE OF CAUSE:	CLARISSE BUYU LUEMBA v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 28, 2018

MOTION HELD VIA TELECONFERENCE ON JULY 3, 2018 IN OTTAWA, ONTARIO

DOCKET :	IMM-2664-17
STYLE OF CAUSE:	RAFIQUE JOSEPH, REHANA JOSEPH, SHERISH JOSEPH, SHUN JOSEPH, SHARAL KINZA JOSEPH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-2727-17
STYLE OF CAUSE:	BELIZAIRE JOINIS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
ORDER AND REASONS:	GRAMMOND J.
DATED:	JULY 4, 2018

APPEARANCES:

Jacqueline Bonisteel	FOR THE APPLICANT (CLARISSE BUYU LUEMBA)
Gabrielle White	FOR THE RESPONDENT

ORAL AND WRITTEN REPRESENTATIONS BY:

Stéphanie Valois	FOR THE APPLICANTS (RAFIQUE JOSEPH, REHANA JOSEPH, SHERISH JOSEPH, SHUN JOSEPH, SHARAL KINZA JOSEPH)
Michel Pépin	FOR THE RESPONDENT
Myriam Harbec	FOR THE APPLICANT (BELIZAIRE JOINIS)
Michel Pépin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Corporate Immigration Law Firm Ottawa, Ontario	FOR THE APPLICANT (CLARISSE BUYU LUEMBA)
Attorney General of Canada	FOR THE RESPONDENT
Stéphanie Valois Montréal (Québec)	FOR THE APPLICANTS (RAFIQUE JOSEPH, REHANA JOSEPH,SHERISH JOSEPH, SHUN JOSEPH, SHARAL KINZA JOSEPH)
Attorney General of Canada	FOR THE RESPONDENT
Myriam Harbec Montréal (Québec)	FOR THE APPLICANT (BELIZAIRE JOINIS)
Attorney General of Canada	FOR THE RESPONDENT