Federal Court  Cour fédérale

Date: 20110714

Docket: IMM-5359-10
IMM-5360-10
IMM-5361-10
IMM-5445-10
IMM-5742-10

Citation: 2011 FC 878

Ottawa, Ontario, July 14, 2011

PRESENT: The Honourable Madam Justice Snider

Docket: IMM-5359-10

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B031

Respondent

Docket: IMM-5360-10

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B028

Respondent

Docket: IMM-5361-10

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B024

Respondent

Docket: IMM-5445-10

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B033

Respondent

Docket: IMM-5742-10

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

B017

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In these Reasons for Judgment, I am addressing five applications for judicial review involving five foreign nationals who arrived in Canada on board the “MV Sun Sea” in August 2010 and three decisions releasing the Respondents from detention. These judicial review applications are five of seven lead cases representing 61 applications brought by the Minister of Citizenship and Immigration [the Minister], as Applicant, regarding decisions made by members of the Immigration and Refugee Board, Immigration Division [the ID] in which the foreign nationals were ordered to be released from detention.

[2] As discussed below, the determinative issue for all of these applications is mootness.

[3] The decisions under review are as follows:

- Decision [Decision #1] and Order [Order #1] dated September 14, 2010, wherein a member [Member #1] of the ID ordered the release of the Respondents referred to as B031 (Court File No. IMM-5359-10), B028 (Court File No. IMM-5360-10) and B024 (Court File No. IMM-5361-10);

- Decision [Decision #2] and Order [Order #2] dated September 16, 2010, wherein a member [Member #2] of the ID ordered the release of the Respondent referred to as B033 (Court File No. IMM-5445-10); and

- Decision [Decision #3] and Order [Order #3] dated October 1, 2010, wherein a member [Member #3] of the ID ordered the release of the Respondent referred to as B017 (Court File No. IMM-5742-10).

[4] The other two applications, that were part of the seven lead cases, were heard at the same time. Reasons for Judgment and Judgment, allowing the judicial reviews, have been rendered in respect of Court File No. IMM-5414-10 and Court File No. IMM-5415-10 (see: *Canada (Minister of Citizenship and Immigration) v B046, Canada (Minister of Citizenship and Immigration) v B047*, 2011 FC 877 [referred to as "*B046, B047*"]).

[5] Because of the common elements and disposition for each of these five cases, I have determined that it is most expedient to deal with all of them together in this one set of Reasons.

[6] The "MV Sun Sea" arrived in Canadian waters on August 13, 2010 with 492 migrants on board. The offloading and processing the persons on board was, as described by one member of the ID, "a monumental task".

[7] One cannot ignore the unique context of the Sun Sea migrants. The persons on board were purported to be Tamils from Sri Lanka. There was a serious possibility that some of the migrants had ties to the Liberation Tigers of Tamil Eelam [the LTTE], a group designated as a terrorist organization in Canada; such persons would be inadmissible to Canada. While many of the migrants apparently had no documentation to support their claimed identity, officials who searched the "MV Sun Sea" found many unclaimed identity documents that had been partially destroyed.

Significantly, there were a number of children on board; it was important that the identity of the children and their alleged parents be established to negate the possibility of child smuggling. These and other factors not normally present in the arrivals of refugee claimants by other means created a situation where the Minister placed a high value on establishing identity.

[8] For all of the Respondents in these five cases, the key concern for the Minister was identity. At all of the detention reviews leading to the ID decisions, the Minister sought to continue detention on the basis that identity had not yet been established. In each case, the member of the ID ordered release of the person, subject to terms and conditions. As of the date of the hearing of these applications for judicial review, the Minister is satisfied as to the identity of each of the Respondents in the cases at bar.

[9] The Respondents argue that, because they have been released, the applications for judicial review are now moot and should not be heard. For the reasons that follow, I agree that the applications are now moot, on the basis that identity is no longer at issue between the parties. Further, I will not exercise my discretion to hear them.

[10] The leading case on mootness is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 33 CPC (2d) 105 [*Borowski*]. In that case, the Supreme Court of Canada provided guidance on the application of the doctrine of mootness, particularly in respect to when courts should exercise discretion in departing from the usual practice of not deciding hypothetical or abstract questions. As a general principle, the Supreme Court held that a court should not render a judgment in

circumstances where its decision will have no effect in resolving a controversy that affects (or may affect) the rights of the parties.

[11] In determining whether an issue is moot, at paragraph 16 of its reasons in *Borowski*, above, the Supreme Court of Canada outlined out a two step analysis. The first step is for the court to determine whether there remains a live controversy. If the controversy no longer exists, the issue will be considered moot. Second, if the issue is moot, the court must then decide whether it should exercise its discretion and hear the case in any event. The following three factors are to be considered in the exercise of discretion: (1) the existence of an adversarial relationship between the parties; (2) the concern for judicial economy; and (3) the need for the court not to intrude into the legislative sphere.

[12] The Minister acknowledges that, because the identity of the Respondents is no longer a live issue, the factual dispute between the parties no longer exists. However, the Minister urges this Court to exercise its discretion to hear the cases.

[13] I agree that the issue that formed the basis of the request by the Minister for these judicial reviews no longer exists. The Minister was seeking to detain the Respondents for the express purpose of establishing their identities; those identities have now been established. There is no live controversy.

[14] I turn now to consider the factors outlined in *Borowski*, above, to determine whether I should exercise my discretion to hear these cases in any event.

[15] With respect to the first rationale, I agree that there is still an adversarial relationship between the parties. The underlying issue is the interpretation of s. 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*] in cases where there are grounds for continued detention under s. 58(1)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*]. Section 248 sets out a number of factors that are to be considered where it has been determined that there are grounds for detention. The Minister takes a very restrictive view of how s. 248 of the *Regulations* should be interpreted where the Minister is of the opinion that the identity of a foreign national has not been, but may be, established (see *IRPA*, s. 58(1)(d)). On the other hand, the Respondents take a broader view. I expect that the respondents in the remaining 54 cases will take the same position as the Respondents in this case, leaving the adversarial relationship in tact.

[16] The second rationale is described as "judicial economy". This consideration was described by the Supreme Court, in *Borowski*, above, at paragraph 36:

> [A]n expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly … The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[17] The Minister points out that these applications are the lead cases of a group of 61 specially-managed proceedings all of which raise similar issues. In particular, one common issue raised is the interpretation and application of s. 248 of the *Regulations* in cases where there are

grounds for continued detention under s. 58(1)(d) of *IRPA*, in the context of a mass arrival of refugees to Canada. The Minister asserts that this issue has not previously been considered by the Federal Court on judicial review.

[18] I agree that, absent anything further, this is a strong argument for exercising my discretion. However, there are other factors that must be considered. First, it appears that the Minister has resolved the identity for many of these migrants. In the event that the Minister's continuing investigations reveal new reasons for re-arrest or continued detention (such as inadmissibility for security, suspected human rights abuses or other reasons), the Minister may seek detention on those grounds. Any decision on my part with respect to the meaning of s. 248 of the *Regulations* would not be helpful, in any of the remaining 61 cases where identity is no longer at issue between the parties.

[19] Secondly, in *B046, B047,* above, one of the issues raised by the Minister was whether the ID member, in his common decision for the two Respondents, misconstrued s. 248 of the *Regulations*. In *B046, B047,* above, identity remained a live issue and, in spite of arguments made to the contrary by the Respondents, I concluded that the matter was not moot. In those cases, I found errors in the common decision of the ID member, although not with respect to the member's construction of s. 248 of the *Regulations*. However, in reaching a conclusion on the issue before me, I provided an analysis of s. 248 of the *Regulations*. Having reviewed the records before me in these five cases, I cannot believe that the result, if the matters were dealt with, would give any different guidance or interpretation of s. 248 of the *Regulations*. Because the question of statutory interpretation was not determinative, I declined to certify a question in *B046, B047*, above.

[20] I appreciate that the parties would prefer to have the views of the Federal Court of Appeal on this issue; so would I. The only way to accomplish that objective would be to certify a question. However, given the disappearance of the factual basis for these cases, the Court of Appeal's decision in *XXXX v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 27, 18 Admin LR (5th) 68 leads me to conclude that it is unlikely that they would consent to hear the appeal.

[21] In sum, hearing these judicial reviews would not provide the guidance sought for the 54 cases that remain to be considered.

[22] The third consideration is whether a pronouncement by this Court, in the absence of a dispute affecting the rights of the parties, would be viewed as intruding into the role of the legislative branch of the government. In this case, I do not think that it would. In the circumstances, however, this is not a particularly relevant or important consideration.

[23] Considering all of the relevant factors, I conclude that there is no strong argument for exercising my discretion and I will decline to do so. The applications for judicial review will be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the applications for judicial review in each of the following are dismissed:

   (a) Canada (Minister of Citizenship and Immigration) v. B031 (Court File No. IMM-5359-10);

   (b) Canada (Minister of Citizenship and Immigration) v. B028 (Court File No. IMM-5360-10);

   (c) Canada (Minister of Citizenship and Immigration) v. B024 (Court File No. IMM-5361-10);

   (d) Canada (Minister of Citizenship and Immigration) v. B033 (Court File No. IMM-5445-10); and

   (e) Canada (Minister of Citizenship and Immigration) v. B017 (Court File No. IMM-5742-10).

2. No question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5359-10; IMM-5360-10; IMM-5361-10; IMM-5445-10; IMM-5742-10
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DATED:	JULY 14, 2011

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