

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180926

Docket: A-345-17

Citation: 2018 FCA 173

**CORAM: GAUTHIER J.A.
GLEASON J.A.
LASKIN J.A.**

BETWEEN:

SERGIY YURIS

Appellant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

Motion in writing disposed of without the appearance of the parties.

Judgment delivered at Ottawa, Ontario, on September 26, 2018.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

**GAUTHIER J.A.
LASKIN J.A.**

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] We have before us a motion, brought by the respondent, to dismiss this appeal by reason of mootness. The appellant concurs that the appeal has become moot, but urges this Court to nonetheless exercise its discretion to hear the appeal as the bulk of the pre-hearing work has been completed and the issues involved in the appeal may arise again. For the reasons set out below, I

would decline to exercise our discretion in this fashion and would accordingly grant the respondent's motion and dismiss this appeal, without costs.

[2] A bit of background is necessary to frame the issue before us.

[3] The appellant made a refugee claim and also sought to be included as a dependent on his wife and their son's application for permanent resident status on humanitarian and compassionate (H&C) grounds. An immigration officer refused the appellant's request to be included as a dependent by virtue of paragraph 25(1.2)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), which provides that the Minister may not consider an H&C request if the "foreign national" has made a claim for refugee protection that is pending before the Refugee Protection Division (RPD) or the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada. In so ruling, the immigration officer interpreted the term "foreign national" as including not only the principal applicant for H&C status, but also any named dependents.

[4] In a decision reported at 2017 FC 981, the Federal Court (*per* Manson J.) upheld the immigration officer's decision and certified the following question under paragraph 74(d) of the IRPA: "Does the term 'foreign national' in [paragraph] 25(1.2)(b) of the IRPA pertain only to the [subsection] 25(1) request of a principal applicant, or does it also preclude the Minister from examining [subsection] 25(1) requests from all foreign nationals in Canada included in the application for permanent resident status, who have a claim for refugee protection pending before the RPD or the RAD?"

[5] After the appellant launched this appeal, he was granted refugee status by the RPD. Accordingly, he is now eligible to apply for permanent resident status. His wife's H&C application has also been recently granted, and she and their son are likewise now permanent residents.

[6] The parties agree that the issue of whether the appellant was entitled to be included on his wife's H&C application has become academic because the appellant is entitled to apply for permanent resident status by reason of the refugee determination and is thus in the same position he would have been in had he been included on his wife's H&C application.

[7] The controlling authority on mootness is the decision of the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 92 N.R. 110. At page 353 of *Borowski*, the Supreme Court set out the following two-step test for determining whether a court should decline to hear a case due to mootness: first, the court must determine whether the issues have become academic and, second, if that question is answered in the affirmative, the court must decide whether to nonetheless exercise its discretion to hear the case in the interests of justice. Relevant considerations under the latter inquiry include the presence of an adversarial context, interests of judicial economy and the need for the court to be sensitive to its role as the adjudicative branch under Canada's political framework.

[8] Here, I agree with the appellant that there likely remains an adversarial context as it appears that the Minister would not decline to participate further in the appeal if this motion were

dismissed and the Minister has already filed his memorandum of fact and law. This factor therefore weighs in the appellant's favour.

[9] The other two factors, however, point strongly in the opposite direction. Interests of judicial economy favour dismissing this appeal principally because the outcome of the appeal would have no practical consequences for the appellant. Likewise, the final factor favours dismissal because the Minister has taken the position that public funds should not be further expended in defending this appeal and the issues involved in the appeal are not such that they need to now be addressed by this Court.

[10] In this regard, the fact pattern in the appellant's case is unusual. He and his wife claimed to be homosexuals and to have married each other in an attempt to conceal their sexual orientation. They first lived separately and later together while in Canada and added the appellant to the H&C application only after his refugee claim had been sent for re-determination. It is unlikely that this fact pattern will occur again and, indeed, the issue posed by the certified question would appear likely to arise infrequently. To the extent that the issue addressed by the certified question could again arise, it seems to me to be preferable that it be addressed in the context in which it arises as opposed to on the unusual and now academic facts of this case.

[11] I would accordingly grant the respondent's motion and dismiss this appeal. There is no basis for a costs award under section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

“Mary J.L. Gleason”

J.A.

“I agree.
Johanne Gauthier J.A.”

“I agree.
J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-345-17

STYLE OF CAUSE: SERGIY YURIS v. THE
MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP

MOTION MADE IN WRITING WITHOUT THE APPEARANCE OF THE PARTIES

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: GAUTHIER J.A.
LASKIN J.A.

DATED: SEPTEMBER 26, 2018

WRITTEN REPRESENTATIONS BY:

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