Federal Court of Appeal

Cour d'appel fédérale

Date: 20141031

Docket: A-407-14

Citation: 2014 FCA 252

Present: **WEBB J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

and

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI and JUSTICE FOR CHILDREN AND YOUTH

Respondents

Heard at Toronto, Ontario, on October 30, 2014.

Order delivered at Ottawa, Ontario, on October 31, 2014.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] The appellants have brought a motion for an Order staying the Judgment of Mactavish J. issued on July 4, 2014 (2014 FC 651) until the earlier of July 4, 2015 and the date that the appeal from this Judgment is determined by this Court.

[2] In her Judgment, the Federal Court Judge::

(a) declared that “Orders in Council P.C. 2012-433 and P.C. 2012-945 are inconsistent with sections 12 and 15 of the *Canadian Charter of Rights and Freedoms* and are of no force or effect”;

(b) deferred the effect of the declaratory order for a period of four months; and

(c) ordered “that commencing four months from the date of this decision, the respondents are to provide Hanif Ayubi with health insurance coverage that is equivalent to that to which he was entitled under the provisions of the pre-2012 IFHP”.

[3] The Orders in Council referred to above (which will be referred to herein as the 2012 OICs) implemented certain changes to the Interim Federal Health Program (IFHP) that was provided by the Federal Government to refugee claimants and others who arrived in Canada seeking protection. Prior to the 2012 OICs being adopted, the program operated under the authority granted by an Order in Council that had been adopted in 1957. There were a number of changes made to the program over the years prior to 2012 but none of those changes were the subject of the decision under appeal. In *Toussaint v. Canada (Attorney General),* 2010 FC 810, [2011] 4 F.C.R. 367 [*Toussaint* FC], aff'd 2011 FCA 213, [2013] 1 F.C.R. 374, leave to appeal to SCC refused, [2011] S.C.C.A. No. 412, the Federal Court noted that the program in place in 2010 operated mainly on internal policies that had been developed by Citizenship and

Immigration Canada (CIC) and "bore little resemblance to the terms of the 1957 OIC" (paragraph 52 of the reasons of Mactavish J.). In September 2010, CIC commenced a complete review of the program which resulted in the changes made by the 2012 OICs.

[4] For ease of reference the program as it operated prior to 2012 will be referred to herein as the 1957 Program and the program as modified by the 2012 OICs will be referred to herein as the 2012 Program. The effects of the changes made by the 2012 OICs are summarized by Mactavish J. in paragraph 1 of the Introduction to her reasons. She noted that the 2012 OICs "significantly reduced the level of health care coverage available to many such individuals, and all but eliminated it for others pursuing risk-based claims".

[5] The appellants acknowledge that the 2012 OICs do reduce health care coverage, and Mactavish J. in paragraph 301 of her reasons noted that, "[t]he respondents [now the appellants] concede that people have probably been harmed by the 2012 changes to the IFHP". The appellants submit, however, that the government had the right to make the hard choice to implement the changes and that the affected individuals would have other health care options. However, the issue in this motion is whether an order staying the Judgment that is under appeal should be granted, not whether the government had the right to make the hard choices to implement the changes. The other health care options will be considered as part of the analysis below.

[6] The Supreme Court of Canada in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311; [1994] S.C.J. No. 17 set out a three part test to determine whether a stay of a judgment should be granted:

> 43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits….

Serious Question

[7] The first part of the test is whether there is a serious question to be tried. As the respondents in this motion have conceded that there is a serious question to be tried, this part of the test is satisfied.

Irreparable Harm to the Appellants

[8] The second stage of the test only focuses on irreparable harm to the appellants if the stay is not granted and the appellants are ultimately successful on appeal. Any harm to the respondents is not considered as part of this analysis but rather as part of the third segment of the test.

[9] The appellants submit in their memorandum of fact and law, in addressing the issue of irreparable harm, that:

> 35 If the [2012 OIC] is suspended, tens of thousands of individuals will not receive federally funded health insurance benefits. The suspension of the [2012 OIC] will not provide a public benefit.
>
> …
>
> 36. The decision of Mactavish J. strikes out the [2012 OIC] and the policy vehicle to deliver the entire IFHP, a program that was created in the public interest. On its own, this is sufficient to constitute irreparable harm to the public interest should a stay be denied.

[10] It does not seem to me that this would be the result of denying the stay. The Judgment provides that the 2012 OICs "are of no force or effect". This would mean that if the stay is not granted, everyone would be in the same position as if the 2012 OICs had not been adopted. Therefore, whatever changes the 2012 OICs made to the 1957 Program would not be made. There would be no policy vacuum. The 1957 Program would simply not be affected as there would not be any Order in Council to modify it. Since the 1957 Program operated for over 50 years (with some modifications), it is not at all clear while it could not continue awhile longer. I do not accept the appellants' argument that not granting the stay would cause the harm as submitted by the appellants.

[11] In any event, the Supreme Court of Canada noted in *RJR-MacDonald* that consideration of the public interest should be completed as part of the third part of the analysis, not as part of the second step.

[12] With respect to the question of whether any additional costs would be incurred in providing health care coverage under the 1957 program, Mactavish J. found in paragraph 944 of her reasons that "it has not be *[sic]* demonstrated that the 2012 changes to the IFHP will in fact result in any real savings to Canadian taxpayers" and in paragraph 1012, "[t]here is, thus, no reliable evidence before this Court of the extent to which the 2012 changes to the IFHP will, on their own, result in cost savings at the federal level". As a result, there is no basis to conclude that additional costs would be incurred by the appellants in providing health care under the 1957 Program.

[13] The appellants also submit that the affidavit of Craig Shankar, included as part of their motion record, establishes the harm to the appellants that would be incurred if the stay is not granted. However, in paragraph 3 of this affidavit he states that he is providing his affidavit "to assist the Court by providing information outlining the various steps involved should CIC modify the IFHP or implement a new program in response to the Federal's *[sic]* Court Judgment". However, he does not address what steps would be required if CIC were to revert to the 1957 Program.

[14] The appellants also argue that there will be harm if the program is changed multiple times. However, there was no explanation of why this harm could not be mitigated by simply reverting to the 1957 Program (which was in place for over 50 years, with some modifications) until the appeal of the judgment is finally determined by this Court.

[15] The Supreme Court of Canada in *RJR-MacDonald* noted that:

> 60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

[16] In this case cabinet is charged with promoting and protecting the public interest and the 2012 OICs were adopted pursuant to that responsibility. As a result, I will assume that the appellants will be irreparably harmed if the stay is not granted.

Balance of Inconvenience

[17] As part of the third step in the analysis, the relative harm that would be suffered if the stay is granted or not granted is weighed. The Supreme Court of Canada in *RJR-MacDonald* stated in paragraph 63 that “[t]he factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case”. They also noted that in constitutional cases, the public interest will need to be addressed and that:

> 66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

[18] As support for its position that the pubic interest consideration would support a stay when a particular provision has been struck as being contrary to the *Charter*, the appellants refer to the decision of Rosenberg J.A. of the Ontario Court of Appeal in *Bedford v. Canada*, 2010 ONCA 814; [2010] O.J. No. 5155, and in particular to paragraph 13 of his decision:

> 13 Therefore, unlike the application judge, I must determine whether a stay should be granted in a context where (1) there is a *prima facie* right of the government to a full review of the first-level decision; (2) the government has a presumption of irreparable harm if the judgment is not stayed pending that review; and (3) the responding parties must demonstrate that suspension of the legislation would provide a public benefit to tip the public interest component of the balance of convenience in their favour.

[19] In *Frank v. Canada,* 2014 ONCA 485; [2014] O.J. No. 2981, Sharpe, J.A. of the Ontario Court of Appeal, after quoting the above passage from *Bedford*, stated that:

> 16 In my view, that passage must be read in its proper context and when so read, it is apparent that a court will only grant a stay at the suit of the Attorney General where it is satisfied, after careful review of the facts and circumstances of the case, that the public interest and the interests of justice warrant a stay. In that case, the government filed a substantial volume of evidence to demonstrate the very real and tangible harm that would result if the matter of prostitution were left completely unregulated. It is clear from reading the reasons as a whole that Rosenberg J.A. only granted a stay in because, after reviewing and weighing that body of evidence, he was (at para. 72) "satisfied that the moving party ha[d] satisfied irreparable harm test".
>
> 17 It is the case that very often, the public interest in the orderly administration of the law will tilt the balance of convenience in favour of maintaining impugned legislation pending the final determination of its validity on appeal: See, for example *RJR-MacDonald Inc. v. Canada (A.G.),* [1994] 1 S.C.R. 311 at p. 346
>
>> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> 18 However, I cannot agree with the Attorney General that there is a *presumption* approaching an automatic right to a stay in every case where a court of first instance has ruled legislation to be unconstitutional. As Lamer J. also held in *RJR-MacDonald*, at p. 343, that "the government does not have a monopoly on the public interest." See also *Bedford*, at para. 73: "The Attorney General does not have a monopoly on the public

> interest, and it is open to both parties to rely upon the considerations of public interest, including the concerns of identifiable groups."

[20] The appellants submit that the respondents have not demonstrated that granting the stay would result in irreparable harm to the public interest. However, it should be noted that each party has the right to demonstrate harm to the public interest and the "'public interest' includes both the concerns of society generally and the particular interests of identifiable groups".

[21] In this case children who would have been covered under the 1957 Program but who would not be covered under the 2012 Program are identified by Mactavish J. and the respondents as an identifiable group that would be harmed if the stay is granted (and the respondents are successful on appeal). The Federal Court Judge provides the following examples:

> 644 It will be recalled that the recipients of HCC benefits include refugee claimants from non-DCO countries, refugees, successful PRRA applicants, most privately-sponsored refugees, and all refugee claimants whose claims were filed before December 15, 2012, regardless of the claimant's country of origin.
>
> 645 HCC provides health insurance coverage for medical services of an urgent or essential nature. It does not, however, cover the cost of medications, even if they are required for life-threatening conditions, unless they are required to prevent or treat a disease posing a risk to public health or to treat a condition that is a public safety concern.
>
> 646 As a result, a refugee-claimant child with asthma may be able to access emergency room treatment for an acute asthma attack, but could later be left gasping for breath if his impoverished refugee claimant parents could not afford the cost of the child's asthma medication.
>
> 647 A child with difficulties hearing might receive coverage for a hearing assessment, but may be left hearing impaired if his parents could not afford the cost of a hearing aid. This could impact on the child's ability to attend school, and have long-term consequences for the child's development.

648 The situation is far worse for children brought to Canada by their parents from Designated Countries of Origin whose refugee claims were filed after December 15, 2012. It will be recalled that these children are only entitled to Public Health or Public Safety Health Care Coverage. PHPS coverage only insures those health care services and products that are necessary or required to diagnose, prevent or treat a disease posing a risk to public health, or to diagnose or treat a condition of public safety concern.

649 As a consequence, a child screaming in pain because of an ear infection would not be entitled to funding for any medical care whatsoever, because an ear infection is not a condition that poses a risk to public health or safety. While the child's parent's might be able to have the child seen by a doctor through a hospital emergency room, no health insurance coverage would be available to assist with the cost of the antibiotics that would be required to treat the infection.

650 In his affidavit, Dr. Rashid described the case of a young child with a fever and cough who was unable to get a chest x-ray to rule out pneumonia - a potentially life-threatening illness - because the child only had PHPS coverage.

651 Dr. Caulford described the case of an asthmatic 8 year old from Africa who began coughing and wheezing more severely because his mother could no longer afford medical care and asthma medications after his IFHP coverage was reduced to the PHPS level following the rejection of the family's refugee claim: Caulford affidavit at para. 17.

652 Similarly, the young girl from a DCO country who has been traumatized by sexual or gang violence in her country of origin would not be entitled to health insurance coverage for any kind of mental health care if she becomes suicidal, as medical care is not available to the child whose mental health condition only poses a risk to the child herself. Once again, emergency hospital care might be available to deal with a suicide attempt, but no insurance coverage would be available for the ongoing psychiatric treatment and medications that could assist in allowing the traumatized child to recover.

653 Finally, it will be recalled that children who are only entitled to a PRRA are not entitled to any medical care whatsoever, even if they have a health condition that poses a risk to the public health and safety of Canadians.

654 Thus a young child infected at birth with HIV would have no right to insurance coverage for any kind of medical treatment, effectively condemning the child to an early death.

> 655 Not only would a child with active tuberculosis be ineligible for insurance coverage to cover the cost of his or her diagnosis and treatment, the child could also potentially expose family members, friends, teachers and classmates to the disease.

[22] While these findings in relation to the effects of the 2012 OICs may be in dispute in the appeal that has been filed, for the purposes of this motion, I must accept these findings. A motion for a stay is not the proper forum to challenge findings made by the trial judge. Although these findings relate to potential harm to persons who are not parties to the litigation, the Supreme Court of Canada in *RJR-MacDonald*, (paragraph 67) confirmed that harm that would be suffered by persons who are not parties to the litigation can also be considered.

[23] The appellants submit that these findings are speculative. However, in relation to the respondents, the issue is the harm that would be suffered during the period that the stay would be in place (if the respondents are successful on the appeal to this Court). This would require a determination related to future events. The above findings were made by Mactavish J. The onus on the respondents is on a balance of probabilities to demonstrate harm to the public interest. Mactavish J. found that the appellants had conceded that some individuals probably were harmed by the changes made by the 2012 OICs. Therefore, it seems to me that it is more likely than not that there will be, during the period that the stay would be in place (if granted), a child (or another person) with a medical problem who would have been covered under the 1957 Program but not under the 2012 Program. If, however, the stay is not granted and during the period after the judgment is effective and before the appeal of the decision is determined by this Court, there is no one who would be affected by the changes made by the 2012 OICs, there would be no harm to the appellants since there would be no additional health care costs that the appellants would incur. On the other hand, if there is such a child (or other person) before the appeal is determined

by this Court, there could be serious irreparable harm if the child (or other person) does not receive medical treatment. It seems to me that this tips the public interest in favour of the respondents.

[24] The appellants also argue that there are other health care options available to individuals affected by the changes made by the 2012 OICs. In paragraphs 251 to 301 of her reasons Mactavish J. addressed the various other options available and set out her conclusions. She found that “[t]here are, moreover, numerous shortcomings in all of the alternative sources of health care identified by the respondents [now the appellants]”. As noted above, this stay motion is not the forum to challenge this finding. In addition, the respondents submitted additional affidavit evidence as part of their motion record to confirm that not all of the provinces have filled in the gap left by the changes made by the 2012 OICs.

[25] As a result, I find that the respondents have demonstrated that the public interest component of the balance of convenience tests supports the position of the respondents.

[26] It seems to me that the effect of denying the stay (which would mean that the changes to the 1957 Program as implemented by the 2012 OICs would not be made) would be to defer these changes until the final resolution of the appeal, if the appellants are successful. The 1957 Program was in effect for more than 50 years (with some modifications that are not in dispute). The review of this program started in 2010. The harm that would be caused by reverting to the 1957 Program and delaying the implementation of the changes made by the 2012 OICs (if the stay is denied and the appellants are successful in the appeal before this Court) is outweighed, in

this case, by the harm that would be suffered by those who would have reduced health coverage under the 2012 Program (if the stay is granted and the respondents are ultimately successful).

[27] The appellants' motion for an order staying the judgment of Mactavish J. is therefore dismissed. Since the respondents did not seek costs, no costs are awarded.

"Wyman W. Webb"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

David Tyndale Neeta Logsetty Hillary Adams	FOR THE APPELLANTS
Lorne Waldman Maureen Silcoff Emily Chan	FOR THE RESPONDENTS: CANADIAN DOCTORS FOR REFUGEE CARE, DANIEL GARCIA RODRIGUES, HANIF AYUBI

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPELLANTS
Waldman & Associates Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENTS: CANADIAN DOCTORS FOR REFUGEE CARE, DANIEL GARCIA RODRIGUES, HANIF AYUBI