

Federal Court



Cour fédérale

Date: 20180412

**Dockets: IMM-2977-17
IMM-2229-17
IMM-775-17**

Citation: 2018 FC 396

Toronto, Ontario, April 12, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

**THE CANADIAN COUNCIL FOR
REFUGEES, AMNESTY INTERNATIONAL,
THE CANADIAN COUNCIL OF CHURCHES,
ABC, DE [BY HER LITIGATION GUARDIAN
ABC], FG [BY HER LITIGATION GUARDIAN
ABC], MOHAMMAD MAJD MAHER HOMSI,
HALA MAHER HOMSI, KARAM MAHER
HOMSI, REDA YASSIN AL NAHASS AND
NEDIRA MUSTEFA**

Applicants

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION AND THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondents

ORDER AND REASONS

I. Introduction

[1] By motion filed July 28, 2017, the Applicant in IMM-2229-17, Nedira Mustefa, seeks an order under Rule 105(a) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] consolidating her application for judicial review with those in IMM-2977-17 and IMM-775-17 [together with IMM-2229-17, the Related Proceedings]. The Related Proceedings, three distinct applications for judicial review, each challenge the constitutionality of the “safe third country” [STC] provisions contained in Canada’s immigration laws.

[2] For the reasons that follow, I have concluded that consolidation would greatly enhance the efficiency of the Related Proceedings without causing prejudice to any party. Therefore, I am granting Ms. Mustefa’s motion.

II. Procedural History

[3] This motion concerns three matters: IMM-775-17, brought by Mohammad Majd Maher Homsî and her three children [*Homsî*]; Ms. Mustefa’s application, IMM-2229-17, within which the present motion for consolidation was brought [*Mustefa*]; and IMM-2977-17, brought by the Canadian Council for Refugees, Amnesty International, the Canadian Council of Churches [together, the Organizations], and an El Salvadorian mother and her two children whose names are protected by a confidentiality order [*CCR*].

[4] The procedural history of these matters is summarized in chart form as Annex A to this Order and Reasons. It is significant for two reasons.

[5] First, the current stage of the Related Proceedings factors into whether they should be consolidated.

[6] Second, Ms. Mustefa's motion is being determined some eight months after it was first pursued, which naturally raises the question as to why. The answer is that it was held in abeyance pending leave determinations in the Related Proceedings (had leave been refused, this request for consolidation would have been moot). Leave has now been granted in all three matters and, accordingly, this motion can be adjudicated.

III. Analysis

[7] In *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 [*Coote*], Justice Stratas stressed that Courts should guard against the wasteful use of judicial resources:

13 Additional principles guide this Court in the exercise of its plenary jurisdiction to manage and regulate proceedings. As long as no party is unfairly prejudiced and it is in the interests of justice — vital considerations always to be kept front of mind — this Court should exercise its discretion against the wasteful use of judicial resources. The public purse and the taxpayers who fund it deserve respect. As well, cases are interconnected: one case sits alongside hundreds of other needy cases. Devoting resources to one case for no good reason deprives the others for no good reason.

[8] Although Justice Stratas' comment was made in the context of deciding whether or not to stay two consolidated appeals (see paras 8-17), in my view, the principles identified also inform

consolidation decisions. This is because the policy objectives animating a consolidation order are the (a) avoidance of a multiplicity of proceedings and (b) promotion of expeditious and inexpensive determination of those proceedings (*Global Restaurant Operations of Ireland Ltd v Boston Pizza Royalties Ltd Partnership*, 2005 FC 317 at para 11).

[9] Where consolidation meets these policy aims and no party is prejudiced, the Court may also consolidate proceedings on its own initiative (*Montana Band v Canada*, [1999] FCJ No 1631 (Federal Court of Canada – Trial Division) [*Montana Band*], aff'd [2000] FCJ No 1824 (Federal Court of Canada – Appeal Division)). In *Coote*, for instance, the Court consolidated proceedings due to the “factual and legal similarity of the two appeals, the lack of prejudice to anyone, and the obvious advantages of efficiency and minimization of costs” (at para 7).

[10] In *Sanofi-Aventis Canada Inc v Novopharm Ltd*, 2009 FC 1285 [*Sanofi*], Justice Snider summarized the jurisprudence on consolidation, holding that it is significant whether (a) there are common parties, (b) there are common legal and factual issues, (c) any of the parties will suffer prejudice or injustice from the consolidation, and (d) consolidation will provide the most efficient resolution of the matters in issue (at para 16).

[11] Here, the Related Proceedings have common parties (the Respondents). Each also raises the common key legal issue of whether the STC provisions in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] violate the personal Applicants’ rights under sections 7 and/or 15 of the *Canadian Charter of Rights and Freedoms* [Charter].

[12] However, the Respondents oppose consolidation on the basis that it will cause inefficiencies and prejudice. Therefore, I will now turn to the specific arguments they raise.

A. *Different Stages of the Related Proceedings*

[13] In their written representations filed August 8, 2017, the Respondents submitted that they would suffer prejudice as a result of consolidation, because the Related Proceedings were then at very different stages. Leave had not been determined in either *CCR* or *Mustefa* and, likewise, the public interest standing of the Organizations in *CCR* was undetermined.

[14] As summarized in the procedural history (Annex A to this Order and Reasons), much has changed since Ms. Mustefa's motion for consolidation was originally pursued. The Organizations have received public interest standing. Furthermore, leave has been granted in all three Related Proceedings. Certified tribunal records have also been delivered in each matter. The parties have agreed on a timetable that would lead to these applications being heard in January 2019.

[15] Therefore, the Respondents' initial concerns that the Related Proceedings were at different procedural stages are no longer pertinent.

B. *Legal and Factual Differences*

[16] The Respondents take the position that the Related Proceedings engage different factual and legal issues, such that consolidation is not warranted. The Respondents note that the

Applicants in *Mustefa* and *CCR* did not seek asylum in the United States [US], and that Ms. Mustefa may now be time-barred from doing so. Further, the Respondents submit that different grounds of discrimination under section 15 of the *Charter* are alleged in the Related Proceedings.

[17] I agree with Ms. Mustefa that, in order to consolidate two or more proceedings, they need not have “completely common” questions of law or fact, only “some commonality” (*Fibreco Pulp Inc v Star Shipping A/S*, [1998] FCJ No 297 (Federal Court of Canada – Trial Division) at para 42).

[18] Here, the material facts and legal issues underlying the Related Proceedings are substantially similar in several ways. First, all refugee claimants amongst the Applicants have been found ineligible to claim protection in Canada. Second, the Related Proceedings — although there are different nuances in their constitutional arguments — all allege that those claimants’ rights under sections 7 and/or 15 of the *Charter* are breached by the STC provisions in IRPA and the Regulations. Third, all Applicants intend to present evidence on US immigration detention, the US asylum determination process, the adjudication of gender claims in the US, and changes in US asylum determination after the January 2017 Executive Orders issued by the US President.

[19] This body of evidence, which the parties have advised the Court will be extensive, should be presented and considered by this Court only once in a coordinated way, rather than thrice in multiple hearings.

[20] Therefore, contrary to the Respondents' submission, the commonality of facts and legal issues weighs significantly in favour of consolidation.

C. *Case Management*

[21] The Respondents submit that consolidation is not required because, through case management (which the Related Proceedings are currently subject to), the Court will be able to tailor processes for the effective resolution of these matters, "as would be the case if the proceedings were consolidated".

[22] I do not agree that consolidation would be duplicative of case management. The effect of consolidation is that two or more proceedings are treated as if they are one for the purposes of the *Rules* (*Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2016 FCA 209 at para 9). In practical terms, where issues are determined on a paper record, this means reducing the amount of paper filed and having the matters heard together (*Janssen Inc v Abbvie Corporation*, 2014 FCA 176 at paras 7-8).

[23] Certainly, a case management judge has broad latitude, and as stipulated under Rule 385(1)(a) may "give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits". Further, the Court may order common case management to promote efficiencies in cases where consolidation is not appropriate (see *Sanofi* at paras 34, 36).

[24] But the Respondents have not explained why, in this case, this Court would or should not achieve such efficiencies through consolidation, as opposed to continued case management. The availability of continued common case management does not in and of itself weigh against consolidation. To the contrary, the related judicial tools of case management and consolidation complement each other in helping promote the aims of Rule 3 — the just, most expeditious, and least expensive determination of the Related Proceedings on their merits.

D. *Future Matters*

[25] The Respondents submit that, should the Related Proceedings be consolidated, it will be more procedurally complex for this Court to deal with future applications raising similar legal and factual issues.

[26] In my view, the fact that future matters may come before the Court raising similar facts and legal issues is irrelevant. Indeed, I recently ordered that IMM-4549-17 and IMM-558-17 (two recent applications also challenging the constitutionality of the STC provisions) be held in abeyance pending the final determination of the Related Proceedings, while declining to include those two files in the common case management of the Related Proceedings, absent a formal motion. If a motion for consolidation or co-hearing were indeed to be brought in these or other future cases, such a motion could be efficiently determined whether or not the Related Proceedings are consolidated.

E. *Remedial Flexibility*

[27] The Respondents argue that if Ms. Mustefa’s motion is granted, this Court will lose the remedial flexibility it would have if the Related Proceedings were to be heard as separate applications.

[28] First, I observe that all three of the Related Proceedings seek that the STC provisions be declared of no force and effect under section 52 of the *Constitution Act, 1982*. In other words, no Applicant seeks an individual remedy under section 24(1) of the *Charter*. Therefore, as I understand it, the basis for the Respondents’ concern over “remedial flexibility” is that there are some differences in the grounds and other specifics of the *Charter* breaches alleged in the Related Proceedings.

[29] I acknowledge that there are nuances in certain legal arguments made by the Applicants, but am unpersuaded that this Court’s remedial powers are constrained following consolidation. While it is generally true that where different remedies are sought, this may weigh against consolidation (see *Association des crabiers acadiens Inc v Canada (Attorney General)*, 2009 FCA 357 at para 65). However, this Court is not bound to only make findings or order remedies that apply to every applicant in a consolidated proceeding. In *Monemi v Canada (Solicitor General)*, 2004 FC 1648, for instance, Justice Gauthier commented on the consequences of consolidation as follows:

40 ...Pursuant to [Rule 105], distinct actions seeking different remedies will be heard together or one after the other if they involve the same or similar factual and evidentiary issues. After a consolidated hearing, the Court will assess the evidence presented

including the credibility of the witness, and weigh the documentary evidence only once before determining the distinct rights arising from its factual findings.

[30] And despite differences in the relief sought by different plaintiffs, Justice MacKay consolidated two actions in *Montana Band*:

35 In my opinion, the circumstances here warrant an order that the actions be consolidated. That will avoid a multiplicity of proceedings and promote the more expeditious and less expensive process than separate actions for determination of the matters at issue between the parties. In the two actions as now framed the parties are common, the legal and factual issues upon which the plaintiffs' claims are based are substantially common, much of the evidence in the two actions will be common or similar, and the differences in relief claimed concern specific causes flowing from one basic set of circumstances.

[31] Further, *Montana Band* noted at paragraph 32 that the *Rules* provide sufficient flexibility to address potentially prejudicial complications that might arise from consolidation, including Rules 106 and 107, under which the Court may order the separate determination of claims and issues.

[32] Recent case law from the Federal Court of Appeal also confirms the Court's ability to order different remedies in different matters after consolidation. In April 2016, Justice Stratas consolidated A-186-15 and A-178-15, two judicial reviews under the *Special Import Measures Act*, RSC 1985, c S-15. Consolidation was ordered notwithstanding that two parties to those proceedings were applicants in one judicial review and respondents in the other.

[33] Justice Stratas ordered this consolidation because the matters (a) concerned the same administrative proceeding, (b) raised some issues in common, (c) would therefore avoid duplication, and (d) because it was important for a single panel to consider the legality of the administrative proceeding all at once. The differences in parties and arguments only meant that the Federal Court of Appeal ultimately issued separate reasons for each application (see *Prudential Steel ULC v Borusan Mannesmann Boru Sanayi ve Ticaret AS*, 2017 FCA 173 at para 3; *SeAH Steel Corporation v Evraz Inc NA Canada*, 2017 FCA 172 at para 3).

[34] I conclude that this Court would not be constrained, remedially or otherwise, if consolidation were ordered, and that as a result differences in the grounds of discrimination alleged do not weigh against consolidation.

F. *Prejudice*

[35] In *Sanofi*, this Court held that the issue of potential prejudice is the most significant factor in a consolidation motion, and that the moving party must prove that (a) continuing the actions separately would prejudice them or be an abuse of process, and (b) consolidation would not prejudice the responding party (at paras 11, 25). The Respondents submit that Ms. Mustefa has not met this burden.

[36] As set out above, however, I have not been persuaded that consolidation would prejudice the Respondents. Moreover, I agree with Ms. Mustefa's submission that, although it is her onus to demonstrate that no prejudice will arise from consolidation, in practical terms this does not

mean that she must divine and address any potential forms of prejudice not identified by the Respondents.

[37] Further, as was the case in *Montana Band*, I am satisfied that it would be a potential abuse of process if this Court — in light of the volume of evidence already filed and the amount the parties advise will follow — were to deal with the Related Proceedings as separate applications. As in *Montana Band*, if these cases move forward separately, then “the same evidentiary base [...] involving a very substantial collection of documents would be required to be established” in each matter (at para 30). Here, that would mean establishing and presenting the evidence and legal arguments thrice over.

[38] I observe that several of the Respondents’ objections to consolidation stem from the argument that continued common case management would be more efficient. During the hearing of this motion, however, counsel for Ms. Mustafa urged this Court to approach the Respondents’ concern for efficiency with skepticism, suggesting that the Respondents have opposed the Applicants on matters where concessions may have been made.

[39] In my view, the efficiencies to be achieved by consolidation are obvious. The Applicants will be able to communicate more effectively with one another, rely on a common record, and adopt one another’s submissions. Duplication of evidence and arguments will thus be avoided. There will, as a result, be a shorter hearing, a simplified record, and only one set of memoranda. This achieves the policy goals of consolidation discussed above, as well as the fundamental objectives set out in Rule 3 that promote the effective administration of, and access to, justice.

[40] Finally, it should escape no one that the common issues raised in these three proceedings are of national importance and transcend the immediate interests of the individual applicants (*Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 at para 74). Therefore, it is important that they be considered by a single judge of this Court all at once, which will best achieve the fundamental objectives of the administration of justice.

IV. **Conclusion**

[41] In summary, I have concluded that the Related Proceedings should be consolidated. The parties have agreed on a timetable for subsequent steps leading to a hearing date in January 2019. It is my earnest hope that the parties will now focus on having the important issues raised in these matters determined on their merits, in the spirit of Rule 3, which animates this Order and Reasons.

ORDER in IMM-2977-17, IMM-2229-17, IMM-775-17

THIS COURT ORDERS that

1. The applications in files IMM-2977-17, IMM-2229-17, and IMM-775-17 will be consolidated;
2. The application in file IMM-2977-17 will be considered the lead application;
3. This Order and Reasons will have the style of cause of this consolidated matter;
4. All further filings in this consolidated matter shall (a) have the consolidated style of cause set out in this Order and Reasons; and (b) be made in IMM-2977-17 alone; and
5. The whole without costs.

"Alan S. Diner"

Judge

Annex A: Procedural History

February 20, 2017	<i>Homs</i>	Application for leave and judicial review filed
February 28, 2017	<i>Homs</i>	Notice of appearance filed in application for leave and judicial review
May 1, 2017	<i>Homs</i>	Application record filed in application for leave and judicial review
May 17, 2017	<i>Mustefa</i>	Application for leave and judicial review filed
May 19, 2017	<i>Mustefa</i>	Notice of appearance filed in application for leave and judicial review
May 31, 2017	<i>Homs</i>	Respondents' memorandum filed in application for leave and judicial review
June 12, 2017	<i>Homs</i>	Applicants' reply memorandum filed in application for leave and judicial review
July 5, 2017	<i>CCR</i>	Application for leave and judicial review filed
July 5, 2017	<i>CCR</i>	Applicants' motion for stay of removal filed
July 6, 2017	<i>CCR</i>	Respondents' materials in opposition to motion for stay of removal filed
July 6, 2017	<i>CCR</i>	Hearing of Applicants' stay motion
July 6, 2017	<i>CCR</i>	Order issued granting a stay of removal and protecting the identity of the personal Applicants
July 6, 2017	<i>CCR</i>	Notice of appearance filed in application for leave and judicial review
July 25, 2017	<i>Homs</i>	Order granting leave with hearing scheduled for October 23, 2017
July 26, 2017	<i>Mustefa</i>	Consolidation motion materials submitted to the Registry, with a letter requesting that they be filed under seal as a result of the confidentiality order in <i>CCR</i>

July 27, 2017	<i>Mustefa</i>	Direction that Ms. Mustefa's confidentiality request be made by formal motion
July 28, 2017	<i>Mustefa</i>	Confidentiality motion filed appending consolidation motion materials
July 28, 2017	<i>Homs</i>	Letter filed in support of <i>Mustefa</i> consolidation motion
July 31, 2017	<i>CCR</i>	Letter filed in support of <i>Mustefa</i> consolidation motion
August 8, 2017	<i>Mustefa</i>	Respondents' materials filed in opposition to consolidation
August 8, 2017	<i>CCR</i>	Respondents' letter filed in opposition to Applicants' letter supporting consolidation
August 9, 2017	<i>Homs</i>	Certified tribunal record received
August 14, 2017	<i>Mustefa</i>	Applicant's reply memorandum to Respondents' record in consolidation motion filed
August 14, 2017	<i>Mustefa</i>	Applicant's letter filed explaining that Ms. Mustefa intends to seek an extension of time to perfect her application for leave and judicial review after the determination of her consolidation motion
August 14, 2017	<i>CCR</i>	Applicants' letter filed adopting reply submissions in <i>Mustefa</i> consolidation motion
August 17, 2017	<i>Mustefa</i>	Non-confidential version of consolidation motion filed
August 18, 2017	<i>Mustefa</i>	Order issued granting Ms. Mustefa's confidentiality motion and allowing her to file her consolidation motion <i>nunc pro tunc</i>
August 18, 2017	<i>Mustefa</i>	Order issued determining that Ms. Mustefa's consolidation motion was premature, as <i>Mustefa</i> and <i>CCR</i> not yet perfected, and thus held in abeyance pending the determination of leave in those files
September 5, 2017	<i>CCR</i>	Motion filed by the Respondents for an order striking the Organizations as parties
September 11, 2017	<i>CCR</i>	Applicants' materials filed in opposition to Respondents' strike motion

September 11, 2017	<i>CCR</i>	Applicants' letter requesting extension of time to file application record in application for leave and judicial review pending the disposition of the Respondents' strike motion
September 15, 2017	<i>CCR</i>	Respondents' reply memorandum filed in strike motion
September 15, 2017	<i>Mustefa</i>	Motion filed by Applicant for an extension of time to file application record in application for leave and judicial review
September 25, 2017	<i>Mustefa</i>	Respondents' materials filed in opposition to Ms. Mustefa's motion for an extension of time
September 29, 2017	<i>Mustefa</i>	Applicants' reply memorandum filed in motion for extension of time
October 5, 2017	<i>Mustefa</i>	Order issued granting extension of time and allowing Applicant to file application record <i>nunc pro tunc</i> to September 15, 2017
October 19, 2017	Related Proceedings	Orders issued assigning Case Management Judge
October 20, 2017	<i>Homsi</i>	Direction issued adjourning hearing of application for judicial review <i>sine die</i>
October 30, 2017	Related Proceedings	Case management conference held
November 1, 2017	<i>CCR</i>	Order issued scheduling Respondents' strike motion for November 16, 2017 and allowing Applicants' request for extension of time
November 1, 2017	<i>Homsi</i>	Order issued holding <i>Homsi</i> in abeyance pending leave determinations in <i>CCR</i> and <i>Mustefa</i>
November 6, 2017	<i>Mustefa</i>	Respondents' record filed in application for leave and judicial review
November 10, 2017	<i>CCR</i>	Directions issued in respect of the Court's jurisdiction to grant relief requested in Respondents' strike motion

November 14, 2017	<i>CCR</i>	Supplementary submissions of the Respondents filed in strike motion
November 15, 2017	<i>CCR</i>	Supplementary submissions of the Applicants filed in strike motion
November 16, 2017	<i>Mustefa</i>	Applicants' reply memorandum filed in application for leave and judicial review
November 16, 2017	<i>CCR</i>	Hearing of Respondents' strike motion
December 11, 2017	<i>CCR</i>	Order issued dismissing Respondents' strike motion and granting the Organizations public interest standing
December 11, 2017	<i>Mustefa</i>	Order issued granting leave in application for leave and judicial review and deferring scheduling
December 11, 2017	Related Proceedings	Case management conference held
December 13, 2017	<i>CCR</i>	Applicants' request for leave to file a memorandum in excess of 30 pages in application for leave and judicial review
December 14, 2017	<i>Mustefa</i>	Order issued requiring certified tribunal record to be delivered by January 22, 2018
December 14, 2017	Related Proceedings	Order issued scheduling further case management conference on March 5, 2018, at which time the parties could make oral submissions on the matter of consolidation (the parties were also given an opportunity to file further submissions; none did)
January 2, 2018	<i>CCR</i>	Respondents' letter taking no position on Applicants' request for extended memorandum in application for leave and judicial review
January 2, 2018	<i>CCR</i>	Order issued granting Applicants' request for leave to file a memorandum not exceeding 40 pages in application for leave and judicial review
January 8, 2018	<i>CCR</i>	Application record filed in application for leave and judicial review
January 18, 2018	<i>Mustefa</i>	Certified tribunal record received

February 7, 2018	<i>CCR</i>	Respondents' memorandum of argument filed in application for leave and judicial review
February 19, 2018	<i>CCR</i>	Applicants' reply memorandum filed in application for leave and judicial review
February 28, 2018	<i>CCR</i>	Order issued granting leave in application for leave and judicial review and deferring scheduling
March 5, 2018	Related Proceedings	Case management conference held where the Court heard, on consent of the parties, further submissions on the matter of consolidation
March 5, 2018	Related Proceedings	Draft consent timetable provided by the parties
March 21, 2018	<i>CCR</i>	Certified tribunal record received
April 12, 2018	<i>Mustefa</i>	Order issued granting consolidation motion

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: IMM-775-17, IMM-2229-17, IMM-2977-17

STYLE OF CAUSE: THE CANADIAN COUNCIL FOR REFUGEES ET AL v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION ET AL

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 5, 2018

ORDER AND REASONS: DINER J.

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