

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161122

Docket: A-108-16

Citation: 2016 FCA 296

**CORAM: STRATAS J.A.
WEBB J.A.
WOODS J.A.**

BETWEEN:

DANILO MAALA ALMACÉN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 22, 2016.
Judgment delivered from the Bench at Toronto, Ontario, on November 22, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

WEBB J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on November 22, 2016).

WEBB J.A.

[1] The Appellant's Amended Statement of Claim dated September 23, 2014 was struck by an Order of the Prothonotary dated August 10, 2015 (2015 FC 957) without leave to amend. The Appellant then brought a motion before the Federal Court to set aside this Order. This motion was dismissed by Order and reasons of Russell J. dated March 9, 2016 (2016 FC 300). This appeal is from this Order of Russell J.

[2] The Appellant commenced the action in the Federal Court following the denial of the Appellant's application to remain in Canada on Humanitarian and Compassionate grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the H&C Decision). The claim alleged various causes of action including misfeasance in public office, negligence, and breaches of the *Canadian Charter of Rights and Freedoms*. The Appellant also filed an application for leave and judicial review of the H&C Decision. This application for leave was denied by Shore J. and a subsequent motion for reconsideration of this decision was dismissed. The test before Shore J. was whether there were fairly arguable issues in relation to the H&C Decision. Since leave was denied and the motion for reconsideration dismissed, the conclusion is that there were no fairly arguable issues.

[3] The Prothonotary struck the Appellant's Amended Statement of Claim on the basis that, based on the facts as pled, this Statement of Claim did not disclose a reasonable cause of action. The Prothonotary also stated that, in the alternative, he would have struck this Statement of Claim as an abuse of process since, in his view, this was an attempt to re-litigate the decision of Shore J. to dismiss the application for leave in relation to the H&C Decision.

[4] Russell J. reviewed the decision of the Prothonotary on a *de novo* basis and dismissed the Appellant's motion to set aside the Order of the Prothonotary on the basis that it was an abuse of process as it "is simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court has already dealt with the reasonableness of that decision" (paragraph 46 of his reasons). Russell J. also found that he would dismiss the motion on the basis that, based on the facts as alleged in this Statement of Claim, no reasonable cause of action was disclosed.

[5] In this Court, the Appellant submitted that, at the time of the issuance of the Statement of Claim, the application for leave had not been decided. This changes nothing: once the leave application was decided, none of the issues against the validity of the decision were fairly arguable. In these circumstances an action based on the validity of the decision cannot succeed and, in our view, the foundation of his claim is the unreasonableness of the H&C Decision.

[6] The Appellant submits that the Supreme Court holdings in *Attorney General of Canada v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (*TeleZone*) and five related cases support his position in this appeal. We disagree. None of the six cases involved a prior related proceeding that was determined by a court to be not fairly arguable. In the *TeleZone* cases the Supreme Court did not repeal the doctrine against re-litigation – that doctrine applies here.

[7] In this appeal, we have not been persuaded that Russell J. committed any reviewable error in dismissing the Appellant's motion and therefore, the appeal will be dismissed, with costs.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-108-16

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE RUSSELL OF THE FEDERAL COURT DATED MARCH 9, 2016, DOCKET NO. T-1508-14.

STYLE OF CAUSE:

DANILO MAALA ALMACÉN v.
HER MAJESTY THE QUEEN

PLACE OF HEARING:

Toronto, Ontario

DATE OF HEARING:

NOVEMBER 22, 2016

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.
WEBB J.A.
WOODS J.A.

DELIVERED FROM THE BENCH BY:

WEBB J.A.

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