Federal Court of Appeal | Cour d'appel fédérale

Date: 20180704

Docket: A-104-18

Citation: 2018 FCA 132

Present: **STRATAS J.A.**

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

ANDREW JAMES FISHER-TENNANT BY HIS GUARDIAN AT LAW, JONATHAN TENNANT

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 4, 2018.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The Minister appeals from the judgment dated February 13, 2018 of the Federal Court (*per* Ahmed J.): 2018 FC 151. The Federal Court declared the respondent to be a citizen of Canada.

[2] The Federal Court did not certify a question under subsection 22.2(*d*) of the *Citizenship Act*, R.S.C., 1985, c. C-29. This subsection provides that this Court cannot hear an appeal from the Federal Court unless the Federal Court has certified a question for its consideration.

[3] The respondent has brought a motion under Rule 74 of the *Federal Courts Rules*, SOR/98-106, asking for the notice of appeal to be removed from the court file and the court file to be closed because this Court lacks jurisdiction.

A. Has this Court already decided the matter?

[4] Upon the filing of the notice of appeal in March, 2018, the Registry forwarded it to this Court for direction. In a single-sentence direction, this Court allowed the notice of appeal to be filed. In making this direction, has this Court already decided the issue under Rule 74?

[5] The Minister answers that question in the affirmative. The respondent obviously thinks not: he has brought a motion under Rule 74.

[6] The transmittal sheet from the Registry that prompted the Court's direction suggested that at that time Rule 72 was the concern. Thus, it may be that this Court's earlier direction that the notice of appeal may be accepted for filing was only a ruling on Rule 72, not Rule 74.

[7] Rule 72 and Rule 74 fulfil different purposes. Rule 72 concerns formal defects in a document presented for filing or the failure to satisfy conditions precedent for the filing of a

document; Rule 74 deals with whether a document should be removed because it suffers from a fatal substantive defect, such as jurisdiction. See *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144 at paras. 20-29.

[8] The certified question requirement can be a matter of form to be addressed under Rule 72. A notice of appeal must be in Form IR-4 under Rule 20 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 and the Form requires the appellant to set out the certified question. In this case, it is possible that the Court noticed the absence of a question on the notice of appeal, thought that one had been stated, regarded the absence as a mere oversight of form, and allowed the notice of appeal to be filed. Left only with a single sentence directing the Registry to file the notice of appeal, I cannot be certain that this Court considered the substantive issue. Therefore, I shall entertain the substantive issue raised in the respondent's motion under Rule 74: whether this Court has jurisdiction to consider this appeal despite the absence of a certified question.

B. The applicable law

[9] The certified question requirement serves only a "gatekeeping" function: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909. Once appellants get past the requirement, they can raise any issues that affect the validity of the appeal. This Court explained this as follows:

> Once an appeal has been brought to this Court by way of certified question, this Court must deal with the certified question and all other issues that might affect

> the validity of the judgment under appeal: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 12; *Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122, [2012] 3 F.C.R. 635 at para. 6. The certification of a question "is the trigger by which an appeal is justified" and, once triggered, the appeal concerns "the judgment itself, not merely the certified question": *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 at para. 25. Simply put, "once a case is to be considered by the Federal Court of Appeal, that Court is not restricted only to deciding the question certified"; instead, the Court may "consider all aspects of the appeal before it": *Ramoutar v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 32, [1993] 3 F.C.R. 370 at pp. 379-380.

(*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 50.)

[10] Subsection 22.2(*d*) of the *Citizenship Act* and subsection 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 both impose a statutory bar against appeals: appeals shall not be brought to this Court unless the Federal Court has certified a question. In particular, both provide that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the [Federal Court] certifies that a serious question of general importance is involved and states the question." From all appearances, these are absolute bars.

[11] Nevertheless this Court has recognized certain "well-defined" and "narrow" categories of exception and has allowed appeals falling within the categories to be brought: see, *e.g.*, the summary in *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 at para. 28.

[12] The judicial implication of exceptions into seemingly absolute bars may strike some as strange. After all, judges, like everyone else, are subject to the laws passed by Parliament. Only

Parliament can legislate, not judges. Judges have no business amending Parliament's laws. This is nothing more than the "hierarchy of law" described in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 82: a constitutional provision or principle takes precedence over statutory and subordinate legislative provisions, and they take precedence over judge-made common law. Put another way, only a constitutional principle can trump or modify legislation: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781.

[13] Thus, the only plausible basis for the judge-made exceptions to the statutory bars is a constitutional principle. Here, that constitutional principle is the rule of law, recognized in the preamble to the *Constitution Act, 1982* and in the unwritten principles of the Constitution. On occasion, the case law under subsection 74(*d*) explicitly acknowledges this: see *e.g. Huntley v. Canada (Citizenship and Immigration)*, 2011 FCA 273, [2012] 3 F.C.R. 118 at para. 7.

[14] The recognized exceptions to the statutory bars—all of which exemplify rule of law concerns—include the Federal Court's failure to exercise jurisdiction in circumstances where it must exercise it (*Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, [2005] 3 F.C.R. 255), and a lack of jurisdiction owing to some fundamental flaw in the proceedings going to the root of the Federal Court's ability to decide the case (*Narvey v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R. 305 (F.C.A.); *Sellathurai v. Canada (Public Safety and Emergency Preparedness*), 2011 FCA 1 at para. 6 and *Canada (Citizenship and Immigration) v. Goodman*, 2016 FCA 126 at para. 3), such as a reasonable apprehension of bias (*Re Zundel*, 2004 FCA 394, 331 N.R. 180).

[15] An alleged error of law—even one where "an appeal would certainly succeed if it were entertained"—is not an exception to the statutory bars: *Mahjoub v. Canada*, 2011 FCA 294, 426 N.R. 49 at para. 12; *Huntley* at para. 8; *Goodman* at para. 9.

[16] The case law has not defined particularly well the exception for loss of jurisdiction for some fundamental flaw in the proceeding going to the root of the Federal Court's ability to decide the case. This motion provides this Court with an opportunity to offer a better explanation for it. The explanation I offer does not change the threshold for the exception. It remains an exceedingly difficult one to meet. Indeed, most of the cases in para. 14, above that assert the existence of this exception deny it on the particular circumstances of the case.

[17] This exception covers cases where:

- it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case—examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and

- the flaw raises serious concerns about the Federal Court's compliance with the rule of law.

This exception does not include contentious debates over issues of statutory interpretation, errors of law, exercises of judicial discretion, and the weight that should be accorded to evidence and its assessment.

[18] The threshold is high—one must show a flaw that is "fundamental," strikes at "the very root" of the judgment or "the very ability" of the Court to hear the case, in some circumstances has "substantial particularity," and raises "serious concerns" regarding the rule of law. This high threshold allows Parliament's preference for an absolute bar to prevail in all cases except for those most rare cases where concerns based on the constitutional principle of the rule of law are the most pronounced.

[19] This explanation of the exception does not use the word "jurisdiction." "Jurisdiction" is an unhelpful word that too often is thrown around with abandon. When people speak of a body regulated by legislation, such as the Federal Court, going "beyond its jurisdiction," they usually mean that the body has gone beyond the powers given to it by the statute, properly interpreted. Seen in this way, issues of so-called "jurisdiction" are just issues of legislative interpretation: *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 at paras. 57-59; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paras. 15-16; *City of Arlington v. F.C.C.*, 133 S. Ct. 1863 (2013). And errors in legislative interpretation are at best just errors of law, matters caught by the statutory bar: *Mahjoub* (2011), *Huntley* and *Goodman*, above.

[20] Seen in this way, “jurisdiction” is not some sort of a magic password that opens the door to access to this Court. Rather, it is nothing more than a rhetorical label people sometimes use to try to boost a garden-variety issue of statutory interpretation into something more significant. In my view, in describing this very rare exception to the statutory bars it would be best if this word were avoided altogether. Rather, the exception is for fundamental flaws in well-defined, extraordinary circumstances.

[21] Further underscoring the very rare nature of this exception is the meaning of the “rule of law.” The “rule of law” does not mean whatever counsel can decry as egregious or unfair: *Galati v. Harper*, 2016 FCA 39 at para. 43 (concurring but not disputed by the majority) and cases cited therein. Rather, it is a limited concept illustrated by the very rare cases that have successfully applied it in this context.

[22] In this context, the rule of law takes its flavour from the ills sought to be prevented by this exception. If this exception did not exist, a judge of the Federal Court could always blatantly disregard binding law and do whatever he or she wants in a case based on her or his own ideology, whim or personal idiosyncratic feelings, and then decline to certify a question. The effect? Immunization from any accountability or review.

[23] “L’etat, c’est moi” and “trust us, we got it right” have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec*, [1998] 2

S.C.R. 217, 161 D.L.R. (4th) 385; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.

[24] Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power—no matter how lofty, no matter how important—must be subject to meaningful and fully independent review and accountability.

C. Application of the applicable law to this case

[25] In this case, the judgment of the Federal Court granted the respondent citizenship. But the clear language of the *Citizenship Act* gives this power only to the Minister. The judgment on its face, if upheld, would be a clear exceedance of authority not requiring a contentious debate over statutory interpretation—a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case in the way it did. The clear, apparent exceedance of authority implicates the rule of law in a serious way.

[26] It follows, then, that this Court has jurisdiction over the notice of appeal; put another way, this Court should not remove the notice of appeal from the court file and close the file. To the extent that, contrary to what I have held, this Court has already pronounced on this substantive matter in its earlier direction, my ruling here effectively confirms it.

[27] In reaching this conclusion, this Court is not in any way deciding the appeal against the respondent. Nor are serious aspersions being cast upon the Federal Court in this case. All that is being said is that the type of ground alleged—not yet proven—is of the qualitative kind that triggers an exception to the statutory bar, nothing more. And even if this ground is borne out, it may just be a technical error: although the Federal Court cannot grant citizenship, the same practical result should follow in this case because a mandatory order against the Minister forcing him to grant citizenship passes muster under the standard of review. (Note that the appellate standard of review applies, not the administrative law standard of review, to the Federal Court's choice of remedy: *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at paras. 88-89.)

[28] I note that the reasons of the Federal Court speak of something called a "directed verdict"—a remedy not listed under section 18.1 of the *Federal Courts Act*. Perhaps what was meant was *mandamus*, which is a listed remedy: *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93 at para. 13; *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251 at para. 8. But *mandamus*—the requiring of an administrative decision-maker to take positive action—is granted only where certain relatively rarely occurring prerequisites are met: *LeBon* at para. 14 and authorities cited therein; see also *D'Errico v.*

Canada (Attorney General), 2014 FCA 95, 459 N.R. 167 at para. 16. And under *mandamus*, it is the Minister that performs the required administrative action, not the Court.

[29] These issues and all other issues said to affect the validity of the Federal Court's judgment will be for the hearing panel to decide.

D. Disposition

[30] The respondent's motion to remove the notice of appeal from the court file and close the court file will be dismissed. Costs will be in the cause.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-104-18
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. ANDREW JAMES FISHER-TENNANT BY HIS, GUARDIAN AT LAW, JONATHAN TENNANT

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	JULY 4, 2018

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