Date: 20090226

Docket: A-244-08

Citation: 2009 FCA 59

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

QIANHUI DENG,
ADMINISTRATOR ON BEHALF OF THE
ESTATE OF SHIMING DENG (DECEASED)

Appellant

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

Heard at Vancouver, British Columbia, on February 24, 2009.

Judgment delivered at Vancouver, British Columbia, on February 26, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DESJARDINS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal from a decision of Pinard J. of the Federal Court rendered in immigration matters. By that decision, he refused to grant an extension of time for bringing an application for judicial review and he dismissed the pending application for judicial review.

[2] The fundamental issue is whether this Court has jurisdiction to entertain the appeal in view of paragraphs 72(2)(*e*) and 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[3] Paragraph 72(2)(*e*) prohibits appeals from the decision of the court with respect to an application for judicial review and with respect to an interlocutory judgment.

[4] Under paragraph 74(*d*), a judgment disposing of a judicial review application may not be appealed unless the judge, when rendering the judgment, certifies that a serious question of general importance is involved and states the question. In the case at bar, Pinard J. refused to certify a question.

Facts and Proceedings

[5] On October 26, 2005, an immigration officer prepared a report under section 44 of the IRPA. In that report, he expressed the opinion that Mr. Shiming Deng was inadmissible to Canada for serious criminality as a result of a conviction for assault. He confiscated the Chinese passport of Mr. Deng pursuant to section 140 of the IRPA.

[6] A senior immigration officer reviewed the report. He then referred Mr. Deng, under subsection 44(2) of the IRPA, to the Immigration Division for an admissibility hearing.

[7] On November 22, 2005, Mr. Deng died in tragic circumstances. Nearly two years later, on October 12, 2007, the appellant, who is the father of Mr. Deng and the administrator of his estate, brought an application for leave to commence judicial review proceedings and sought an order granting an extension of time for filing and serving the application. The object of the challenge was the referral to the admissibility hearing and the confiscation of his dead son's passport more than two years earlier.

[8] On January 31, 2008, a judge of the Federal Court sitting as a motions judge granted the appellant leave to commence judicial review proceedings and set out a time-frame for completing the proceedings. At the hearing of the application for judicial review before Pinard J., the respondents raised as a preliminary issue the fact that no decision had been rendered granting an extension of time to commence the judicial review proceedings.

[9] Pinard J. dealt with this preliminary issue raised by the respondents. He agreed with their submissions that the question of the extension of time had not been determined. He then considered the appellant's request for an extension of time. He denied it and dismissed the application for judicial review.

Whether this Court has jurisdiction to hear the appeal

[10] On May 21, 2008, Pinard J. rendered two decisions: one dismissing the motion for an extension of time, and the other dismissing the application for judicial review.

[11] The decision dismissing the motion and refusing the extension of time is an interlocutory decision. Clearly, under paragraph 72(2)(*e*), that interlocutory decision cannot be appealed.

[12] Counsel for the appellant relies upon the decision of this Court in *Subhaschandran v. Canada*, [2005] 3 F.C.R. 255 where Sexton J.A. found that the adjournment of a stay motion to a time when the stay matter would be moot amounted to a constructive refusal to exercise jurisdiction which called for a remedy in the nature of *mandamus*. He submits that Pinard J., in the present instance, refused to exercise his jurisdiction.

[13] I disagree with this submission. Pinard J. did exercise a jurisdiction when he dealt with the motion for an extension of time and denied it. He also exercised his jurisdiction when he dismissed the application for judicial review.

[14] In the alternative, counsel for the appellant contended that Pinard J. had no jurisdiction to review the decision of the motions judge and deny the leave application that the motions judge had granted. According to counsel, Pinard J. had no power to review the merits of the decision rendered by another judge of coordinate jurisdiction. Counsel refers us to the decision of our Court in *Bubla v. Solicitor General*, [1995] 2 F.C. 680, at page 692.

[15] With respect, I do not think that this is what Pinard J. did in the present instance. The order of the motions judge was silent on the issue of the extension of time. The order contained no

conclusion either granting or denying an extension. Pinard J. made a finding of fact that the matter had been overlooked by the motions judge. That finding is not unreasonable in the circumstances. The memorandum of fact and law of the appellant and that of the respondent, while dealing in their arguments with the extension of time, contained in the part relating to the Order sought no demand regarding an extension of time. That may explain the oversight: for another example of an omission to consider the request for an extension of time, see *Nayyar v. Canada (Minister of Citizenship and Immigration)* (2007), 62 Imm. L.R. (3d) 78.

[16] The appellant submits that it should be inferred from the granting of the leave, by the motions judge, to commence the application for judicial review that the motions judge also granted an extension of time. A similar situation occurred in *Canada (Minister of Human Resources Development) v. Eason* (2005), 286 F.T.R. 14 (F.C.) where Tremblay-Lamer J. refused to draw that kind of inference. I agree with the following assertion that she makes at paragraph 20 of her reasons for judgment:

> [20] However, as stated above, the member was silent on the issue of extension of time. The respondent suggests that as leave to appeal cannot be granted unless an extension of time is also granted, it can be inferred from the member's decision to grant leave that she also granted an extension of time. I disagree. While Mr. Eason did apply for the extension of time and for leave, it cannot automatically be inferred that the member turned her mind to the issue of extension of time simply because she granted leave. The granting of an extension of time must be explicitly considered by the decision maker.

[17] Since the motion for an extension of time had not been dealt with by the motions judge, Pinard J. had jurisdiction to decide the issue.

[18] In dismissing the motion for an extension of time, Pinard J. disposed, by the same occasion, of the application for judicial review because that application had no valid legal existence unless duly authorized by a judge to be commenced after the expiry of the limitation period. To put it differently, the dismissal of the application for judicial review was a necessary corollary and consequence of the refusal to extend the time limit.

[19] As Pinard J. refused to certify a question when he rendered his judgment on the application for judicial review, paragraph 74(*d*) of the IRPA prohibits an appeal.

[20] For these reasons, I would dismiss, without costs, this appeal for lack of jurisdiction.

"Gilles Létourneau"

J.A.

"I concur
Alice Desjardins J.A."

"I concur
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-244-08
STYLE OF CAUSE:	Qianhui Deng, Administrator on behalf of the Estate of Shiming Deng (deceased) v. MPSEP
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 24, 2009
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DESJARDINS J.A. TRUDEL J.A.
DATED:	February 26, 2009

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