Date: 20091126

Docket: A-393-09

Citation: 2009 FCA 346

Present: **NADON J.A.**

BETWEEN:

TIMOTHY ROSHAUN FOX

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard by teleconference at Ottawa, Ontario, on November 25, 2009.

Order delivered at Ottawa, Ontario, on November 26, 2009.

REASONS FOR ORDER BY: NADON J.A.

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REASONS FOR ORDER

NADON J.A.

[1] Before me is a motion by the appellant, Timothy Roshaun Fox, for an order staying the resumption of his admissibility hearing before the Immigration Division of the Immigration and Refugee Board of Canada (the "Immigration Division"), now scheduled to resume today, November 26, 2009, at 1:00PM Vancouver time.

[2] In his Memorandum of Fact and Law, the appellant seeks the following remedy:

an interim order, pursuant to s. 18.1 of the *Federal Courts Act*, in the nature of a stay of the removal order until such time as the main application in this matter has been determined. Although the appellant does not say so expressly, I have assumed (and so has the respondent) that what he is

seeking is a stay of execution of the judgment rendered on October 5, 2009, by de Montigny J. of the Federal Court.

[3] A brief summary of the facts will place this motion in proper context.

[4] The appellant, a citizen of the United States of America, became a permanent resident of this country on January 14, 2002.

[5] On September 4, 2007, the appellant was convicted of having imported 90 kilos of cocaine into Canada, contrary to ss. 6(1) of the *Controlled Drug and Substance Act*. As a result, he was sentenced to seven years and 10 months of imprisonment.

[6] I should point out here that on October 17, 2008, pursuant to s. 125 and s. 126.1 of the *Corrections and Conditional Release Act* (the "CCRA"), the National Parole Board directed that the appellant, a first-time non-violent offender, be released on day parole on December 23, 2008. I should also point out that the appellant will become eligible for full parole on April 14, 2010.

[7] On July 10, 2008, a report pursuant to ss. 44(1) of the *Immigration and Refugee Protection Act* (the "Act") was prepared by an enforcement officer employed by the Canada Border Services Agency (the "CBSA"). In the report, the enforcement officer stated his opinion that the appellant was inadmissible to Canada pursuant to ss. 36*(a)* of the Act on the ground of serious criminality for conviction and imprisonment in Canada. The report was sent to a Minister's delegate.

[8] The report was reviewed by the Minister's delegate on November 7, 2008, who, pursuant to ss. 44(2) of the Act, referred the report to the Immigration Division for an admissibility hearing to determine whether the appellant was a person described in ss. 36*(a)* of the Act.

[9] On December 15, 2008, while the appellant was still an inmate at Matsqui Institution in British Columbia, his admissibility hearing commenced before the Immigration Division. The appellant sought an adjournment of the hearing in order to obtain legal representation and, as a result, the hearing was adjourned to February 3, 2009.

[10] On December 23, 2008, the appellant was released from Matsqui Institution by reason of the National Parole Board's direction of October 7, 2008. At that time, he was delivered to the custody of a CBSA officer by reason of a warrant issued by the CBSA for his arrest, in accordance with ss. 55(1) and s. 59 of the Act, which directed the warden of Matsqui Institution to deliver the appellant to a CBSA officer at the end of his period of detention.

[11] The appellant's admissibility hearing resumed on February 3, 2009, at which time he again sought an adjournment to obtain legal representation. The hearing was adjourned to March 17, 2009.

[12] Upon resumption of the hearing on March 17, 2009, the appellant indicated to the Immigration Division that he would be represented by his wife, Sharon Fox. Mrs. Fox indicated to

the Immigration Division that she was ready to proceed, but then immediately sought an adjournment of the hearing to April 14, 2010, that date being the appellant's full parole eligibility date. The obvious purpose of Mrs. Fox's request was to prevent her husband's re-incarceration should he be found inadmissible and thus subject to a removal order. In order to consider the merits of Mrs. Fox's request for an adjournment, the Immigration Division adjourned the hearing to March 26, 2009.

[13] The true purpose of Mrs. Fox's request for an adjournment to April 14, 2010, was to avoid the application of ss. 128(5) of the CBSA, which provides that if a removal order is made against a person who has received day parole prior to that person's full parole eligibility date, the day parole becomes inoperative on the day the removal order is made and, as a result, the offender will be re-incarcerated until his full parole eligibility date. The provision reads as follows:

128. (5) If, before the full parole eligibility date, a removal order is made under the *Immigration and Refugee Protection Act* against an offender who has received day parole or an unescorted temporary absence, on the day that the removal order is made, the day parole or unescorted temporary absence becomes inoperative and the offender shall be reincarcerated.	**128.** (5) La libération conditionnelle du délinquant en semi-liberté ou en absence temporaire sans escorte devient ineffective s'il est visé, avant l'admissibilité à la libération conditionnelle totale, par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés*; il doit alors être réincarcéré.

[14] Thus, should the Immigration Division find the appellant to be inadmissible, which finding will result in the issuance of a removal order, the appellant will be re-incarcerated until April 14,

2010, i.e. until his full parole eligibility date, at which time the removal order will become enforceable by reason of paragraph 50*(b)* of the Act, which provides:

50. A removal order is stayed *(b)* in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;	**50.** Il y a sursis de la mesure de renvoi dans les cas suivants : *b)* tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;

[15] On March 26, 2009, member Tessler of the Immigration Division allowed the appellant's request for an adjournment and adjourned the admissibility hearing to April 1, 2010.

[16] As a result of this decision, the Minister commenced judicial review proceedings in the Federal Court. On October 5, 2009, de Montigny J. allowed the respondent's application. In the learned judge's view, the Immigration Division acted without jurisdiction or beyond its jurisdiction in granting the adjournment to April 1, 2010.

[17] In further Reasons for Judgment and Judgment issued on October 22, 2009, de Montigny J. certified the following question of general importance:

> Does a member of the Immigration Division ("ID") presiding over an admissibility hearing concerning an allegation of serious criminality for an offence committed in Canada have the jurisdiction to adjourn the hearing for the purpose of providing the person concerned humanitarian and compassionate relief from the effects of re-incarceration that would ensue pursuant to section 128(5) of the *Corrections and Conditional Release Act ("CCRA")*?

[18] On November 9, 2009, the appellant filed a Notice of Appeal in this Court seeking to set aside the Federal Court's decision. As to the motion before me, it was filed on November 20, 2009.

[19] I now turn to the test which the appellant must meet in order to succeed on his motion. The test was enunciated by this Court in *Toth v. Canada (M.C.I.)* (1988), 86 N.R. 302, and is as follows:

1. Does the appeal raise a serious issue?
2. Would the appellant suffer irreparable should his motion not be granted?
3. The balance of convenience, i.e. which party will suffer the greatest harm from the granting or refusal of the stay?

[20] In *RJR Macdonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, albeit in the context of constitutional issues, the Supreme Court of Canada indicated that there were exceptions to the general rule that a judge hearing a stay application should not "engage in an extensive review of the merits". The first exception to the rule is in the case of an interlocutory motion which finally determines the underlying application, be it an action or an appeal (see p. 338).

[21] This Court has taken a similar approach with respect to the granting of stays of removal in the immigration context. In *Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, at paragraph 66, I approved, for a unanimous Court on this point, the comments of Pelletier J. (as he then was) made in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682,

> [66] …
> These comments take me back to Pelletier J.A.'s Reasons in *Wang, supra*, where he dismissed the motion before him for a stay of removal because the applicant had not satisfied him that the underlying application raised a

> serious issue. This conclusion was the result of his view that on such a motion, in determining the "serious issue" prong of the tripartite test enunciated in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 (and adopted by this Court for the purposes of determining applications for a stay of removal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.), [1988] F.C.J. No. 587), the Judge ought to "go further and closely examine the merits of the underlying application" (paragraph 10 of his Reasons). In other words, the Judge should take a hard look at the issue raised in the underlying application.

[22] In the present matter, a determination of the stay application will likely determine the appeal in that the relief sought by the appellant in this motion is the relief which he is seeking to obtain in his appeal. In effect, unless the appeal is heard before April 1, 2010, allowing the appellant's motion for a stay will conclusively decide the appeal in his favour, in that the appellant will not be re-incarcerated prior to his full parole eligibility date. In the same way, should the appellant's motion be dismissed, he will be re-incarcerated and, unless the appeal is heard before April 1, 2010, the appeal will become moot.

[23] Thus, it is open to me in this application to take "a hard look" at the issue raised by the appellant's appeal.

[24] I must state at the outset that, in my respectful view, the fact that the motions judge certified a question of general importance does not prevent me from determining whether there is a serious issue raised by the appeal now before this Court. In my view, there is clearly no serious issue raised by this appeal. Like the motions judge, I am of the view that the Immigration Division presiding over an admissibility hearing concerning an allegation of serious criminality for an offence committed in Canada does not have the jurisdiction to adjourn the hearing for the purpose of

providing the person concerned humanitarian and compassionate relief from the effect of re-incarceration that would ensue pursuant to ss. 128(5) of the CCRA. Not only am I of that view, but I am also of the view that there is no arguable case to the contrary.

[25] First of all, I shall reproduce the relevant provisions of the Act:

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions: (a) recognize the right to enter Canada of a Canadian citizen within the meaning of the Citizenship Act, a person registered as an Indian under the Indian Act or a permanent resident; (b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act; (c) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or (d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	**45.** Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes : a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la Loi sur la citoyenneté, à la personne inscrite comme Indien au sens de la Loi sur les Indiens et au résident permanent; b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi; c) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire; d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.
…	…
173. The Immigration Division, in any proceeding before it, *(a)* must, where practicable, hold a hearing; *(b)* must give notice of the proceeding to	**173.** Dans toute affaire dont elle est saisie, la Section de l'immigration : *a)* dispose de celle-ci, dans la mesure du possible, par la tenue d'une audience; *b)* convoque la personne en cause et le ministre à une audience et la tient dans les meilleurs délais; *c)* n'est pas liée par les règles légales ou

the Minister and to the person who is the subject of the proceeding and hear the matter without delay; *(c)* is not bound by any legal or technical rules of evidence; and *(d)* may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	techniques de présentation de la preuve; *d)* peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.
[Emphasis added]	[Non souligné dans l'original]

[26] It is clear from these provisions that one of the purposes of an admissibility hearing is to allow the Immigration Division to make a removal order against a permanent resident where the Immigration Division "is satisfied that the foreign national or the permanent resident is inadmissible". It is also clear from these provisions that the Immigration Division must, where practicable, hold a hearing and "hear the matter without delay".

[27] Thus, in the present matter, the Immigration Division was bound by law to hear the appellant's matter without delay so as to determine whether the making of a removal order was justified in the circumstances. However, what was not before the Immigration Division were the consequences arising from a declaration of inadmissibility and the making of a removal order. In other words, the issue raised by the appellant with regard to ss. 128(5) of the CCRA was clearly not a matter over which the Immigration Division had jurisdiction in the context of an admissibility hearing.

[28] There is nothing in the Act, nor in the *Immigration Division Rules*, which could possibly allow the Immigration Division to consider the consequences of an order made pursuant to paragraph 45(2)*(d)* of the Act as a factor relevant to the determination of whether a hearing before it should be adjourned to a future date. Before de Montigny J. and now in this motion, the appellant relied on Rule 43(2) and, more particularly, on paragraph 43(2)*(i)* of the *Immigration Division Rules*, which read as follows:

43. (1) A party may make an application to the Division to change the date or time of a hearing.	**43.** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une audience.
(2) In deciding the application, the Division must consider any relevant factors, including *(a)* in the case of a date and time that was fixed after the Division consulted or tried to consult the party, the existence of exceptional circumstances for allowing the application; *(b)* when the party made the application; (c) the time the party has had to prepare for the hearing; *(d)* the efforts made by the party to be ready to start or continue the hearing; *(e)* the nature and complexity of the matter to be heard; *(f)* whether the party has counsel; *(g)* any previous delays and the reasons for them; *(h)* whether the time and date fixed for the hearing was peremptory; and *(i)* whether allowing the application would unreasonably delay the proceedings or likely cause an injustice.	(2) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment : *a)* dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement; *b)* le moment auquel la demande a été faite; c) le temps dont la partie a disposé pour se préparer; *d)* les efforts qu'elle a faits pour être prête à commencer ou à poursuivre l'audience; *e)* la nature et la complexité de l'affaire; *f)* si la partie est représentée; *g)* tout report antérieur et sa justification; *h)* si la date et l'heure qui avaient été fixées étaient péremptoires; *i)* si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice.
(3) Unless a party receives a decision from the Division allowing the application, the party must appear for the hearing at the	3) Sauf si elle reçoit une décision accueillant sa demande, la partie doit se présenter à la date et à l'heure qui avaient

date and time fixed and be ready to start or continue the hearing.	été fixées et être prête à commencer ou à poursuivre l'audience.

[29] The judge dealt with this at paragraphs 43 and 44 of his Reasons, concluding that "[T]he injustice to which ss. 43(2)(i) relates cannot extend to the effect of the substantive decision made at the conclusion of a hearing (i.e. the issuance of a removal order)". This how the judge put it at paragraphs 43 and 44:

> 43. Now, the applicant is right to point out that s. 43(2)(i) of the Immigration Division Rules allows the Tribunal to consider whether allowing the application for an adjournment would "likely cause an injustice". The applicant states that on that basis, the Tribunal was justified to consider the exceptional circumstances that were brought to its attention, including the fact that the respondent was already at liberty, had been found not to be a danger to the public and not unlikely to appear for immigration proceedings, and that he was married to a Canadian citizen and had a nine-year-old child with attention deficit hyperactive disorder.
>
> 44. This subsection, however, cannot be read in a vacuum and must be interpreted in context. All the subparagraphs of paragraph 43(2) of the *Immigration Division Rules*, as well as paragraph 162(2) of the IRPA relate to the procedural requirements to ensure that the hearing itself is conducted fairly. The "injustice" to which subparagraph 43(2)(i) relates cannot extend to the effect of the consequences of the final substantive decision made at the conclusion of a hearing (i.e. the issuance of a removal order).

[30] I entirely agree with de Montigny J. I would only add that paragraph 43(2)(i) cannot possibly be read in the way proposed by the appellant. In other words, the paragraph simply sets out a number of factors which the Immigration Division must consider in determining whether it will allow an application to change the date or time of a hearing. It is clearly not designed or intended to allow the Immigration Division to consider whether the rendering of an order, which it is statutorily bound to make if the circumstances so require, will create an injustice for the person subject to that

order. It is not up to the Immigration Division, nor to judges of the Federal Court or of this Court, to second-guess Parliament on the wisdom of ss. 128(5) of the CCRA.

[31] Before de Montigny J., the appellant did not raise any constitutional or Charter issues. Although no such issues were raised in the Notice of Appeal, the appellant relies on s. 7 of the *Charter of Rights of Freedoms* to argue that ss. 128(5) of the CCRA is constitutionally invalid unless the Immigration Division is allowed to consider whether the appellant's re-incarceration would be unjust in the circumstances. Should the Immigration Division not be entitled to consider that issue, the appellant submits that his re-incarceration pursuant to ss. 128(5) will constitute arbitrary detention, deprivation of liberty, will be contrary to the rules of fundamental justice, will constitute the imposition of cruel and unusual punishment and discrimination against non-citizens contrary to sections 7, 9, 12 and 13 of the Charter.

[32] The respondent takes the position that it is improper for the appellant to now allege a breach of Charter in the context of this motion.

[33] For the reasons which I have already stated, I need not address this issue in determining the merits of this motion. As I have indicated, it is not possible to argue, in my view, that the Immigration Division can adjourn the appellant's admissibility hearing on the ground that a finding of inadmissibility on its part, which would lead to the issuance of a removal order, would cause injustice to the appellant. In his decision, member Tessler of the Immigration Division opined that the adjournment to April 1, 2010, was justified because the appellant's liberty interest outweighed

the public interest. As I have attempted to make clear, there is no statutory basis to support the Immigration Division's decision to adjourn the hearing to April 1, 2010.

[34] As the appellant has not convinced me that his appeal raises a serious issue, I therefore need no address the two other prongs of the test, irreparable harm and the balance of convenience.

[35] For these reasons, the appellant's motion for a stay will be dismissed.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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