Federal Court of Appeal | Cour d'appel fédérale

Date: 20100610

Docket: A-432-09

Citation: 2010 FCA 157

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

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

SYED MOHAMMAD ARIF

Respondent

Heard at Montréal, Quebec, on June 7, 2010.

Judgment delivered at Ottawa, Ontario, on June 10, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: TRUDEL J.A.
CONCURRING REASONS BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Lemieux J. of the Federal Court refusing to grant an application for reconsideration of a decision rendered by a Deputy Judge pursuant to subsection 14(5) of the *Citizenship Act*, R.S.C. 1985, c. C-29 (the Act). By that decision, the Deputy Judge set aside the decision of a Citizenship Judge denying Mr. Arif's application for citizenship and returned the matter before a different Citizenship Judge for a new hearing. A subsequent decision issued by

the same Deputy Judge one month later in the same matter (the second decision) came to the opposite conclusion.

[2] The Minister of Citizenship and Immigration (the Minister) brought an application pursuant to Rules 397 and 399(2)(*a)* of the *Federal Courts Rules*, SOR/98-106 (the Rules) seeking to have the first decision reconsidered and replaced by the second decision or, in the alternative, asking that both decisions be set aside and that the appeal be heard again before a different judge of the Federal Court.

[3] A motion for reconsideration pursuant to Rule 397 must be heard by the judge who issued the decision sought to be reconsidered. However, in this case the Deputy Judge was unable to act for medical reasons with the result that another judge had to assume that task.

[4] Lemieux J. denied the motion for reconsideration on the basis that the first decision was not issued in error; that the Deputy Judge was *functus officio* after having issued it, and that the interest of justice would not be served by setting aside the two decisions and ordering a new appeal.

[5] The present appeal ensued. Shortly after the notice of appeal was filed, the respondent brought a motion before this Court seeking to have it struck out on the basis that it was frivolous, vexatious and bereft of any chance of success. The underlying argument was that no appeal lies from a decision of the Federal Court rendered pursuant to an appeal from a decision of a Citizenship

Judge approving or denying an application for citizenship and that accordingly this Court was without jurisdiction to hear the appeal.

[6] In this respect, subsection 14(6) provides:

14. (6) A decision of the [Federal] Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.	**14.** (6) La décision de la Cour [fédérale] rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

[7] Nadon J.A., sitting singly, denied the motion to strike by order dated November 27, 2009. No reasons were given.

[8] In resisting the appeal, the respondent again raises his jurisdictional objection to the hearing of the appeal. The Minister for his part argues that Nadon J.A. finally disposed of this issue when he denied the motion to strike and that the matter is, accordingly, *res judicata*.

[9] There is no basis for this last contention. The issue before Nadon J.A. on the motion to strike was whether it was "plain and obvious" that the appeal filed by the Minister had no chance of success (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). It follows that the fact that Nadon J.A. allowed the appeal to proceed despite the objection raised on behalf of Mr. Arif cannot be construed as a final pronouncement on the issue of jurisdiction. At most, it indicates that he was not convinced at that juncture that the Court was without jurisdiction to hear the appeal.

[10] In any event, if Nadon J.A. had purported to finally decide the issue of jurisdiction (which he did not), his decision would not be binding on the panel hearing the appeal (*Horne v. Canada (Minister of Citizenship and Immigration)* 2010 FCA 55 at para. 5).

[11] The respondent's argument as to jurisdiction is simply that if this Court is precluded from hearing appeals from decisions of the Federal Court pursuant to an appeal under subsection 14(5), it cannot logically have jurisdiction to hear appeals from decisions of the Federal Court reconsidering or refusing to reconsider these very decisions. To hold otherwise would effectively allow parties to a citizenship appeal to circumvent Parliament's clearly expressed intent that decisions rendered by the Federal Court pursuant to an appeal under subsection 14(5) are final and that no appeal lies therefrom.

[12] The Minister resists this argument relying on the decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (*Tobiass*). One of the issues in that case was whether this Court had jurisdiction to hear an appeal from a decision of the Federal Court granting a stay of a citizenship revocation proceeding. Using language similar to that found in subsection 14(6), subsection 18(3) of the Act provides that no appeal lies from a decision of the Federal Court "made under subsection (1)" which deals with whether a person has obtained citizenship by false representation or fraud.

[13] The Supreme Court concluded (*Tobiass*, paras 50 to 53) that the decision to stay the proceeding was not made under subsection 18(1), since the proceedings were stayed for reasons

unrelated to the circumstances surrounding the question whether citizenship was obtained by fraud. Applying this reasoning, the Minister contends that the questions which Lemieux J. was called upon to decide (i.e., whether the first decision was validly issued; whether the Deputy Judge was *functus officio* after having issued it; whether the second judgment can be considered as a new "matter" within the meaning of Rule 399(2)(*a*) and whether it would be in the interest of justice that the two decisions be set aside and a new appeal be ordered) turn on issues which are separate and distinct from the question which underlies the citizenship appeal (i.e., whether the Citizenship Judge properly held that Mr. Arif's citizenship application should be denied).

[14] This Court has recently taken a close look at the interpretation of subsection 14(6) in *Canada (Minister of Citizenship and Immigration) v. Saji*, 2010 FCA 100 (*Saji*). The issue in that case was whether subsection 14(6) prevented an appeal from an interlocutory judgment of the Federal Court refusing to grant the Minister's motion to strike Mr. Saji's appeal from a decision rendered under subsection 14(5) as out of time. After reviewing the case law and in particular *Tobiass*, the Court held that an appeal from the decision of a Federal Court disposing of a motion to strike as being out of time is not barred by subsection 14(6).

[15] The exact reasoning of the Court is set out in the following passage (*Saji*, para. 29):

> …, an appeal from the Federal Court to this Court is only precluded by subsection (6) as a decision made "pursuant to an appeal under subsection (5)" if the decision in question relates to the ultimate question, namely, whether the [C]itizenship [J]udge erred in approving or not approving a citizenship application, or in determining a question related to it. In my view, a decision by a Federal Court Judge disposing of a motion to strike an appeal as being out of time is not related to the ultimate question to be decided on that appeal, regardless of whether the motion is granted or denied. This is because, in the words used in *Tobiass* at

> [paragraph] 58, the decision "will not be made in order to more efficiently determine the ultimate question".
>
> [Emphasis added.]

[16] The proposition so stated is that this Court has jurisdiction if the decision of the Federal Court sought to be appealed does not dispose of, and is not related to, the ultimate question in the citizenship appeal. A decision that is made "to more efficiently determine the ultimate question" is a decision that relates to the ultimate question.

[17] In my view the decision of Lemieux J. clearly comes within this description. Confronted with a difficult and unusual situation he attempted to identify the most efficient way of dealing with the ultimate question. In dealing with the Minister's contention that he should set aside both decisions and order that the appeal be heard *de novo*, Lemieux J. considered the merits of the decision of the Citizenship Judge and concluded that a new appeal would not be a useful step (Order, p. 10):

> …, I consider the Citizenship Judge's decision which gave rise to the appeal at issue to be weak in the sense that her reasons for refusing Mr. Arif's citizenship application are not at all clear nor is her application of the relevant jurisprudence on establishment of residence and once residence established, the impact of the absences on residence or whether Mr. Arif had, in any event, been physically present in Canada for sufficient days to meet the requirements of [paragraph] 5(1)(*c*). In these circumstances, another [appeal] is likely not to be productive.

[18] Lemieux J. also considered that no prejudice would be suffered by either party if, rather than ordering a new appeal, the matter was referred the matter back to a different Citizenship Judge, as had been ordered by the first decision.

[19] These considerations, amongst others, led Lemieux J. to deny the Minister's request that a new appeal be ordered.

[20] Counsel for the Minister was critical of Lemieux J.'s incursion into the merits of the decision of the Citizenship Judge. He suggested that his assessment of the merits was unwarranted since it was not relevant to the issue which he was called upon to decide.

[21] With respect, this contention is baseless. In deciding whether it would be in the interest of justice to order a new appeal, as he was being asked to do by the Minister, Lemieux J. was obviously entitled to consider whether an appeal would be productive. That is the context in which he considered the merits and concluded that referring the matter back to a different Citizenship Judge was the most efficient solution.

[22] It is apparent from the foregoing that not only is the decision of Lemieux J. related to the ultimate question to be decided in the citizenship appeal but that he arguably pronounced on it when he held that a fresh appeal would not be productive.

[23] It follows that applying the test set out in *Saji*, this Court is without jurisdiction to hear this appeal.

[24] I would dismiss the appeal with cots.

"Marc Noël"

J.A.

"I agree.
Johanne Trudel J.A."

LÉTOURNEAU J.A. (Concurring Reasons)

[25] I endorse the conclusion reached by my colleagues. However, I want to address three errors committed by Lemieux J. (the judge) in determining the issue before him.

[26] The first relates to his interpretation of the word "matter" in Rule 399(2)(*a*) of the *Federal Courts Rules*. The judge ruled that the rendering of the second decision by the Federal Court was not a "new matter" (fait nouveau) within the meaning of the Rule because, in his view, the Federal Court was *functus officio* at that time and therefore the second decision is void and does not legally exist. Rule 399(2)(*a*) reads:

Setting aside or variance	**Annulation**
399. (2) On motion, the Court may set aside or vary an order	**399.** (2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(*a*) by reason of a matter that arose or was discovered subsequent to the making of the order;	*a*) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
…	[…]

[27] With respect, Rule 399(2)(*a*) is concerned with the existence of a new matter, a new fact discovered subsequent to the making of the order, not the validity, legitimacy or appropriateness of that new matter. It cannot be denied as a fact or a matter that a second conflicting, irreconcilable decision was rendered by the same judge of the Federal Court on the very same issue. It is a fact or a

matter that is new in relation to the first decision. It is also a new fact or matter that casts doubt on the whole process, on the regularity of the first decision and on how the Federal Court really intended to dispose of the appeal on the merits.

[28] The judge also erred when he concluded that Rule 399(2)(*a*) was not an exception to the *functus officio* principle. There is clear authority from this Court that the Rule is an exception to the principle: see *Apotex Inc. v. Zeneca Pharma Inc.*, 196 D.L.R. (4TH) 299, at page 303. The Rule allows a judge to reconsider and alter his or her decision on account of a new matter which, incidentally, ought not to be confused with new evidence and the new evidence rule which is more limited in its scope of application: see *Saywack v. Canada (M.E.I.)*, [1986] F.C. 189, at pages 202-203.

[29] Thirdly, the judge took a stringent approach to the *functus officio* rule and made an overly strict application of it. However, there are compelling authorities stating that the *functus officio* rule does not apply strictly, and even does not apply, when no further appeal lies from the decision rendered.

[30] In *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pages 222-223 (*Reekie*), the Supreme Court of Canada, under the pen of Sopinka J., wrote in relation to Rule 50 of its own Rules and the common law rule of *functus officio*:

> In my opinion, it would be extraordinary if the Court were powerless to remedy the injustice that is conceded as present in this case. As a general principle, the rules of procedure should

> be the servant of substantive rights and not the master. I believe that this is the underlying rationale of Rule 7 which states:
>
> …
>
> Rule 50 is a reflection of the common law rule of *functus officio*. This rule was developed to achieve a finality of proceedings which were subject to a full appeal: see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Its narrow scope may be appropriate when applied to judgments which can be corrected on appeal, but is inappropriate to decisions of this Court which are not subject to appeal. Any error creating an injustice can only be cured by a reconsideration of the decision by this Court.
>
> [Emphasis added.)

[31] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at page 48, Iacobucci and Arbour JJ., quoting the decision in *Reekie*, reasserted the principle that the *functus officio* rule "exist to allow finality of judgments from courts which are subject to appeal": see also Luc Huppé, *Le régime juridique du pouvoir judiciaire*, Wilson et Lafleur ltée, Montréal, 2000, at pages 151 et 152.

[32] In matter of citizenship, judgments of the Federal court are not subject to a further appeal. In the present instance, the judge erred in his interpretation and application of the *functus officio* rule.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-432-09
(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE LEMIEUX OF THE FEDERAL COURT DATED SEPTEMBER 18, 2009, NO. T-1344-08.)	
STYLE OF CAUSE:	The Minister of Citizenship and Immigration and Syed Mohammad Arif
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 7, 2010
REASONS FOR JUDGMENT BY:	Noël J.A.,
CONCURRED IN BY:	Trudel J.A.
CONCURRING REASONS BY	Létourneau J.A.
DATED:	June 10, 2010

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