Federal Court of Appeal  Cour d'appel fédérale

Date: 20110119

Docket: A-488-10

Citation: 2011 FCA 18

Present: **SHARLOW J.A.**

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

JAVED AZIZ

Respondent

Heard at Toronto, Ontario, on January 18, 2011.

Order delivered at Toronto, Ontario, on January 19, 2011.

REASONS FOR ORDER BY: SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] The respondent Javed Aziz was the subject of a deportation order. He was entitled to appeal to the Immigration Appeal Division ("IAD") and did so, without success. He sought and was granted leave to apply for judicial review of the IAD decision (IMM-2019-10) but was deported before his application for judicial review was heard on December 8, 2010. The hearing of his application for judicial review resulted in an order of the Federal Court dated December 22, 2010 quashing the IAD decision and requiring the deportation appeal to be reconsidered by a differently constituted tribunal. The Minister of Citizenship and Immigration appealed the Federal Court order

and now seeks a stay of the Federal Court order pending the disposition of this appeal. For the following reasons, the motion for a stay will be dismissed.

[2] The Minister alleges that the order under appeal is based on one or more interpretations of provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, that are wrong, and that were determined by the judge without giving the Minister the opportunity to make submissions. Of particular concern to the Minister are the comments of the judge in his endorsement to the order to the effect that the IAD failed to consider whether to stay the deportation order with conditions, and that Mr. Aziz "is to be returned to Canada forthwith". To put those comments in context, I quote the order and endorsement in their entirety (omitting the reproduction in the endorsement of sections 66 and 68 of the *Immigration and Refugee Protection Act*):

ORDER

> [1] This judicial review application is granted, the March 18, 2010 decision of the Immigration Appeal Division (IAD) is set aside and Javed Aziz's appeal from a deportation Order dated February 26, 2009 is to be reconsidered by a differently constituted tribunal. No question of general importance was proposed.

Endorsement

> Javed Aziz, now 21 years old, was born in Guyana and became a permanent resident of Canada in October 1997 after his father sponsored his family. He was 8 years old at the time. His father abandoned his family shortly after they arrived here.
>
> He was ordered deported after a member of the Immigration Division found him inadmissible under paragraph 361(a) of the *Immigration and Refugee Protection Act* (2001, c. 27) (IRPA). He appealed that deportation to the Immigration Appeal Division (IAD).
>
> He conceded the legal validity of the deportation order. The member of the IAD said at paragraph 4 of her reasons that the only issue to be determined is whether there were sufficient humanitarian and compassionate considerations to warrant special relief. After setting out the Ribic factors as mandated by the Supreme Court of Canada's decision in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, she decided to dismiss the appeal principally for the reason that she was not satisfied Mr. Aziz "has demonstrated that he is capable of rehabilitation".

Paragraph 36(1)(a) provides that a permanent resident is inadmissible on grounds of serious criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of at least 10 years or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.

Section 67(1)(c) enables the IAD to allow on appeal from a deportation order taking into account the best interests of a child directly affected by the decision if sufficient humanitarian and compassionate considerations warrant special relief in light of al of the circumstances of the case.

The reason this judicial review must be allowed is because the member of the IAD failed to consider an alternative ground for special relief, namely, if the appeal was not allowed and the removal order quashed his Counsel at the IAD's hearing submitted "in the alternative I would submit that the execution of the removal order should be stayed and obviously, clearly Mr. Aziz will abide by al the conditions imposed by the Board if the order was to be stayed" (see transcript in the Certified Tribunal Record (CTR) at page 189).

Counsel for the Minister opposed the stay alternative (see CTR at page 191).

[…]

Nowhere in the Member's reasons is there any consideration of the stay alternative nor any finding on that alternative.

The importance of the stay alternative was emphasized by my colleague Justice Luc Martineau in *Canada (Minister of Citizenship and Immigration) v Awaleh*, 2009 FC 1154 at paragraphs 20 and 23:

> **20** The IAD is bestowed with a great deal of discretion in conducting appeals of removal orders. Pursuant to subsections 67(1)(c) and 68(1), the IAD may allow an appeal or stay a removal order where they are satisfied, "taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."
>
> **23** Finally, it is important to reiterate that the impugned decision does not determine the respondent's appeal of his removal order. The IAD may review the stay at any time and vary the conditions or reject his appeal (see section 68 of the Act). The rejection of the appeal would affirm the removal order and result in the respondent being evicted from Canada.

I understand Mr. Aziz has been deported to Guyana and is there now. In view of this decision, he is to be returned to Canada forthwith.

In the light of the foregoing, I refrain from commenting on the IAD's decision except to say that to this Court its finding the Applicant is incapable of rehabilitation is unreasonable as the

> Member had no substantive evidence (medical, psychiatric or from his parole officer) on the question.
>
> **THEREFORE, THIS COURT ORDERS that** this judicial review is granted.

[3] The principal concern of the Minister is that the order under appeal could be interpreted as an order requiring the Minister to return Mr. Aziz to Canada forthwith. I do not read the order that way. Counsel for Mr. Aziz conceded, and I agree, that the order does nothing except set aside the decision of the IAD and require a rehearing. Although the judge stated that as a result of his order Mr. Aziz would be returned to Canada, that statement appears only in the endorsement and not in the order. Again I agree with counsel for Mr. Aziz that this is simply the judge's understanding of the meaning of section 52 of the *Immigration and Refugee Protection Act*. The parties disagree on whether section 52 requires Mr. Aziz to be returned to Canada for the new IAD hearing, but that is a point on which I am not required to express an opinion.

[4] In determining whether to stay an order pending appeal, this Court follows *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. According to that case, a stay may be granted if a serious issue is raised on appeal, the appellant will suffer irreparable harm if the stay is not granted, and the balance of convenience favours the appellant.

[5] The order under appeal is governed by section 74 of the *Immigration and Refugee Protection Act*. Generally, such an order cannot be appealed in the absence of a serious question of general importance certified by the judge who made the order. In this case, the judge was not asked to certify a question and he did not do so. I cannot conclude that the Minister has established the

existence of a serious question on appeal unless it is at least arguable that the Minister was entitled to appeal without a certified question.

[6] The Minister argues that in this case no certified question is required. He relies on a number of immigration cases in which this Court has permitted an appeal to proceed despite the absence of a certified question. For example, in *Forde v. Canada (M.C.I.)* (1997), 210 N.R. 194 (F.C.A.), the Court entertained an appeal from a Federal Court order staying a deportation pending the disposition of another immigration case. The Court concluded that no certified question was required because issue was whether the stay order was within the jurisdiction of the Federal Court under paragraph 50(1)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In *Subhaschanddran v. Canada (Solicitor General)*, 2005 FCA 27, [2005] 3 F.C.R. 255, the Court entertained an appeal from a Federal Court order that it construed as a refusal of a judge to grant or dismiss a motion to stay a deportation. This Court has also held that no certified question is required to appeal an order on a motion for recusal based on an allegation of bias, because such an allegation goes to the jurisdiction of a judge to adjudicate the case: see, *Narvey v. M.C.I.*, [1999] F.C.J. 25 (C.A.), *Re Zündel*, 2004 FCA 394.

[7] In my view, none of these cases assist the Minister. In this case, the Federal Court judge had the jurisdiction to make an order disposing of Mr. Aziz' application for judicial review, and he did so. He did not decline to decide the application. He did not purport to make an order on the basis of any statutory authority outside the *Immigration and Refugee Protection Act*. There is no allegation of actual or apprehended bias, and no facts upon which any such allegation could be made.

[8] For the purpose of this motion, I assume without deciding that the judge may have breached a rule of procedural fairness because he did not have the benefit of submissions from the Minister when he interpreted section 52 as he did, or when he concluded as he did that the IAD was obliged to put its mind to the question of whether to stay the deportation with conditions. However, I am not persuaded that such error, if it occurred, would have deprived the judge of his jurisdiction to set aside the decision of the IAD and to order a rehearing. In my view, the Minister does not have a reasonable basis for arguing that this appeal may proceed without a certified question. I conclude that the Minister has not established that a serious question is raised on the appeal.

[9] That said, it seems to me that the failure of the judge to give the Minister an opportunity to make submissions on those two issues (assuming there was such a failure) is a matter that might give the Minister a basis for seeking reconsideration or a variation of the order under appeal, including a reconsideration of the issue of whether this case merits a certified question. Therefore, although I will make an order dismissing the Minister's motion for stay, that will be without prejudice to the right of the Minister to make a motion in the Federal Court for appropriate relief and, depending upon the outcome of that motion, to submit a new motion for a stay in this Court if circumstances warrant.

[10] The respondent has asked for costs. In my view there are no special circumstances warranting such an award.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-488-10
(MOTION FOR ORDER, STAYING THE ORDER OF THE HONOURABLE JUSTICE LEMIEUX DATED DECEMBER 22, 2010, DOCKET NO. IMM-2019-10)	
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. JAVED AZIZ
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 18, 2011
REASONS FOR ORDER BY:	SHARLOW J.A.
DATED:	January 19, 2011

APPEARANCES:

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