Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110621

Docket: A-501-09

Citation: 2011 FCA 208

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

BEN NDUNGU

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 21, 2011.

REASONS FOR ORDER BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] The appellant Ben Ndungu successfully appealed a judgment of the Federal Court dismissing his application for judicial review of a decision of the Minister under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*"). The notice of appeal included a claim for solicitor and client costs in this Court and in the Federal Court.

[2] The memorandum of fact and law filed for Mr. Ndungu included a request for all relief sought in the notice of appeal, but no submissions on costs appear in the memorandum of fact and law, and no submissions on costs were made at the hearing. The judgment on appeal and the reasons for judgment, which were issued on April 29, 2011, are silent on costs (2011 FCA 146). On May 6, 2011, Mr. Ndungu moved for an order granting costs on a solicitor and client basis, or alternatively, costs on a "public-interest basis" at a specified hourly rate. The respondent, the Minister of Citizenship and Immigration, opposes the motion.

[3] For the reasons that follow, I have concluded that the motion should be dismissed.

[4] The motion is in substance a motion under Rule 397(1)(b) of the *Federal Courts Rules*, SOR/98-106, for reconsideration of a judgment on the basis that a matter that should have been dealt with was overlooked. As the motion was filed within 10 days after judgment, it is properly before this panel of the Court. The judgment will be reconsidered to deal with the matter of costs.

[5] The appeal was from a judgment dismissing Mr. Ndungu's application for judicial review of a decision under the *IRPA*. Therefore, the motion for costs is subject to Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, which precludes an award of costs in the absence of "special reasons".

[6] There is no statutory definition of the phrase "special reasons" as used in Rule 22, and no definition has been developed in the jurisprudence. Perhaps no such definition is possible, given the

variety of circumstances that can give rise to an application for judicial review in the immigration context, or an appeal upon a certified question.

[7] However, the cases involving the application of Rule 22 provide some examples of the circumstances that have been held to comprise "special reasons", as well as circumstances that have been held to fall short of that standard. I summarize as follows the conclusions reached in some of the cases, based on a non-comprehensive survey:

The nature of the case

1) An appeal based on a certified question generally will be presumed to have been appropriately brought (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C.R. 537, 2002 FCA 89).

2) "Special reasons" justifying costs on a solicitor and client basis may be found where the Minister has applied for judicial review of an immigration decision which then takes on the nature of a test case as to the interpretation of a fundamental provision of the statute (for example, where the issues are whether "Trinidadian women subject to spousal abuse" comprise a particular social group and whether fear of that abuse, given the indifference of authorities, amounts to persecution: *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C.R. 154 (C.A.)).

3) After an unsuccessful judicial review application by refugee claimants challenging the establishment of a "lead case" format for determining refugee claims, the Federal Court found "special reasons" justifying an award of costs to the

applicants on the basis of "the novel and recognized contentious nature of the lead case at the time it was brought" (*Geza v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 3, 2004 FC 1039). That costs award was upheld on appeal. The applicant's appeal on the merits was allowed, and costs were granted on the appeal for the reasons given by the Federal Court judge, and also because of the extra-record material obtained by counsel for the applicant establishing that the process culminating in the decisions in the lead cases was flawed (*Kozak v. Canada (Minister of Citizenship and Immigration)*, [2006] 4 F.C.R. 377, 2006 FCA 124).

Behaviour of the applicant

4) "Special reasons" justifying an award of costs against an applicant may be found where the applicant has unreasonably opposed the Minister's motion to allow the application for judicial review, thereby prolonging the proceedings (*Chan v. Canada (Minister of Employment and Immigration)* (1994), 83 F.TR. 158 (T.D.); *D'Almeida v. Canada (Minister of Citizenship and Immigration)* (1999), 1 Imm. L.R. (3d) 309 (F.C.T.D.)).

Behaviour of the Minister or an immigration official

5) An award of costs against the Minister for "special reasons" cannot be justified merely because:

i) an immigration official has made an erroneous decision (*Sapru v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35);

ii) the Minister seeks summary dismissal of an immigration appeal for mootness after the appellant has expended resources to perfect the appeal, rather than applying at the earliest opportunity (*Jones v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 279); or

iii) the Minister discontinues an appeal on the eve of the hearing as a result of new legislation undermining the basis of the appeal (*Harkat v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 179).

6) "Special reasons" justifying costs against the Minister may be found where:

i) the Minister causes an applicant to suffer a significant waste of time and resources by taking inconsistent positions in the Federal Court and the Federal Court of Appeal (*Geza v. Canada (Minister of Citizenship and Immigration)* (2001), 266 N.R. 158 (F.C.A.));

ii) an immigration official circumvents an order of the Court (*Bageerathan v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 513);

iii) an immigration official engages in conduct that is misleading or abusive (*Sandhu v. Canada (Minister of Citizenship and Immigration*), 2006 FC 941); *Said v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 663 (FCA));

iv) an immigration official issues a decision only after an unreasonable and unjustified delay (*Nalbandian v. Canada (Minister of Citizenship and Immmigration*), 2006 FC 1128; *Doe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 535; *Jaballah v. Canada (Minister of Citzenship and Immigration)*, 2003 FC 1182);

v) the Minister unreasonably opposes an obviously meritorious application for judicial review (*Ayala-Barriere v. Canada (Minister of Citizenship and Immigration)* (1995), 101 F.T.R. 310 (T.D.); *Ndererehe v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 880; *Dhoot v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1295).

Behaviour of counsel

7) "Special reasons" justifying an award of costs personally against counsel may be found where counsel has repeatedly failed to appear at scheduled hearings (*Ferguson v. Canada (Minister of Employment and Immigration)*, [1986] F.C.J. No. 172 (F.C.A.)).

[8] This appeal was heard together with *Toussaint v. MCI* (A-408-09) from identical judgments of the Federal Court that the Minister is not compelled by subsection 25(1) or any constitutional principle to consider a request to waive the fee stipulated for an application for relief from the requirement to submit a permanent residence application from outside Canada. We agreed with the Federal Court judge on the constitutional issues, but we interpreted subsection 25(1) of the *IRPA* to

require the Minister to consider the request for a fee waiver, and on that basis alone reversed the Federal Court judgment.

[9] It is argued for Mr. Ndungu that "special costs" are justified in this case because:

1) Mr. Ndungu was eligible for and sought legal aid for this appeal but was refused because legal aid had funded the other appeals raising the same issue (including *Toussaint*) as a test case and it would not be reasonable to fund a further, independent appeal;

2) this case raises serious and systematic issues of public importance, as evidenced by the certification of questions of general importance and the fact that it was joined with *Toussaint* involving similar issues; and

3) the Minister unreasonably refused to consent to Mr. Ndungu's application for leave and for judicial review so that it could be joined to other cases then pending on the same issue, (including *Toussaint*), thereby requiring Mr. Ndungu to shoulder the entire burden of his case independently.

[10] In my view, in determining whether there are "special reasons" for awarding costs, it is not relevant that Mr. Ndungu was unable to obtain legal aid funding.

[11] Nor am I persuaded that “special reasons” can be based on the importance of the issue raised in the appeal, because a certified question of general importance is required in all appeals in immigration matters.

[12] Given the particular circumstances, I find no fault with the decision of the Minister not to consent to the joining of the *Ndungu* judicial review application to the *Toussaint* judicial review application. The *Toussaint* application was filed in the Federal Court on January 26, 2009. The *Ndungu* application was filed on March 3, 2009. By March 5, 2009, the *Toussaint* application had advanced to the point where leave was granted and a date was set for the Federal Court hearing (originally September 2, 2009). On March 23, 2009, the date for the *Toussaint* hearing was changed to June 23, 2009 at the request of Ms. Toussaint’s counsel (and it was actually heard on that date). By that date, not much had happened in the *Ndungu* file, perhaps because of the delay while the Minister’s consent was sought. The applicant’s record in *Ndungu* was filed on June 15, 2009, only 8 days before the *Toussaint* hearing. Without the *Ndungu* application record, it would have been difficult, if not impossible, for the Minister or counsel for the Minister to determine whether the facts were sufficiently similar to justify joining it with the *Toussaint* application in the Federal Court. Therefore, in my view it was reasonable for the Minister not to consent at that stage.

[13] The two files were joined in the Federal Court of Appeal, but by that time counsel for Mr. Ndungu had done all the work for a separate Federal Court hearing and had separately perfected the *Ndungu* appeal. This seems to be a neutral factor, given that I assign no weight to the Minister’s decision not to consent to the granting of leave for the *Ndungu* application for judicial review.

[14] I have considered the fact that although both parties argued both issues on appeal, counsel for Mr. Ndungu pressed the statutory interpretation point more strongly and with more particularity, and that was the basis upon which the appeal succeeded. Counsel for Ms. Toussaint argued the statutory interpretation point, but placed more emphasis on the constitutional issues in the hope that a favourable result on that basis would be more likely to apply despite a statutory amendment that came into force too late to be applied in these cases. Given that both appellants argued the point of statutory interpretation that ultimately succeeded, it is difficult to find a "special reason" in the fact that arguments were presented differently.

[15] Taking all of the relevant circumstances into account, I am unable to conclude that there are "special reasons" in this case justifying an award of costs in favour of Mr. Ndungu. The motion will be dismissed.

"K. Sharlow"

J.A.

"I agree
Eleanor R. Dawson J.A."

I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-501-09
STYLE OF CAUSE:	Ben Ndungu v. The Minister of Citizenship and Immigration

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	SHARLOW J.A.
CONCURRED IN BY:	DAWSON J.A. LAYDEN-STEVENSON J.A.
DATED:	June 21, 2011

WRITTEN REPRESENTATIONS BY:

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