Federal Court of Appeal | Cour d'appel fédérale

Date: 20111024

Docket: A-380-11

Citation: 2011 FCA 294

CORAM: **LÉTOURNEAU J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

MOHAMED ZEKI MAHJOUB

Appellant

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP
THE MINISTER OF PUBLIC SAFETY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 24, 2011.

REASONS FOR ORDER BY: SHARLOW J.A.
CONCURRED IN BY: LÉTOURNEAU J.A.
DAWSON J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] This proceeding is an appeal of an interlocutory judgment of the Federal Court dated October 4, 2011, rendered in a proceeding under section 77 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA"). The Crown seeks to quash the appeal for want of jurisdiction. The appellant Mr. Mahjoub opposes the motion on the basis that this Court has the jurisdiction to entertain the appeal. For the reasons that follow, I have concluded that the appeal should be quashed.

Procedural background

[2] The notice of appeal in this matter was filed on October 13, 2011. On October 18, 2011, Mr. Mahjoub submitted a notice of motion, supported by a two volume motion record, seeking a stay of the October 4, 2011 order pending the disposition of this appeal. That motion record has not yet been accepted for filing.

[3] Meanwhile the Crown, presumably after having been served with the notice of appeal, sent a letter dated October 17, 2001 to the Court, submitting that the notice of appeal should not be filed because the Court has no jurisdiction to entertain it. Mr. Mahjoub responded with a letter dated October 17, 2011 submitting that the Court has the jurisdiction to entertain the appeal. By letter dated October 18, 2011, the Crown replied to Mr. Mahjoub's submission.

[4] On October 19, 2011, I directed that a three judge panel of this Court would determine the question of whether the appeal should be quashed, and that the determination would be made without an oral hearing on the basis of the letters referred to above. At the same time, I made an order staying the October 4, 2011 order of the Federal Court pending that determination.

[5] Mr. Mahjoub responded to the direction with a letter objecting to this matter being determined without an oral hearing, and also pointing out that the issue of Mr. Mahjoub's right to appeal is also addressed in the submissions contained in the motion record submitted October 13, 2011. The Crown argues that no oral hearing is necessary.

[6] I remain of the view that no oral hearing is necessary. I will, however, take into account the submissions of Mr. Mahjoub in his motion record that relate to the issue of the Court's jurisdiction to entertain the appeal.

Statutory provisions

[7] Pursuant to paragraphs 27(1)(*a*) and (*c*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, an appeal lies to this Court from any final or interlocutory judgment of the Federal Court.

[8] However, that right of appeal may be barred by other statutes. There are numerous such provisions in the IRPA. In some cases involving the IRPA, an appeal of a final judgment of the Federal Court is barred unless the judge certifies that a serious question of general importance is involved and states the question. For example, a certified question is required by paragraph 74(*d*) to appeal a final judgment on an application for judicial review of a decision, determination or order made under the IRPA, by paragraph 79 to appeal a determination of the Federal Court as to the reasonableness of a certificate issued under section 77, and by section 82.3 to appeal a final judgment in a detention review proceeding under any of sections 82 to 82.2.

[9] Of more importance to this case are the provisions of the IRPA that bar an appeal of an interlocutory judgment. The relevant provision in this case is section 79, which bars an appeal of an interlocutory judgment in relation to proceedings to determine the reasonableness of a certificate issued under section 77.

[10] There have been instances in which this Court has found a statutory bar to be inapplicable to an appeal that is *prima facie* within its scope. For example, in *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, this Court entertained an appeal from an adjournment which, in the particular factual circumstances, was interpreted as a refusal by the Federal Court judge to exercise his jurisdiction and decide the case. This Court has also held that a statutory bar to an appeal does not preclude a party from challenging a decision on the basis of an allegation of a reasonable apprehension of bias on the part of the judge (see, for example, *Re Zündel*, 2004 FCA 394).

[11] However, most attempts to avoid a statutory bar to an appeal fail. The most recent example is *Huntley v. Minister of Citizenship and Immigration*, 2011 FCA 273. Paragraph 7 of the reasons for decision in that case read as follows:

> **7.** We agree that, despite the apparently plain language of paragraph 74(*d*), Parliament cannot have intended to immunize alleged errors from appellate scrutiny which, if not subject to review, would undermine the rule of law and public confidence in the due administration of justice. However, in our view, the errors that the Judge is alleged to have committed in this case do not fall within this narrow category.

[12] A statutory bar to an appeal cannot be avoided merely by an allegation that the decision sought to be appealed is based on one or more errors of law that are sufficiently egregious that an appeal would certainly succeed if it were entertained: see *Lazareva v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 181, and *Canada (Minister of Citizenship and Immigration) v. Edwards*, 2005 FCA 176.

Facts

[13] Mr. Mahjoub is the subject of a certificate issued under section 77 of the IRPA which was referred to the Federal Court. Proceedings to determine the reasonableness of the certificate have been commenced before Justice Blanchard but have not yet been concluded.

[14] In the course of the section 77 proceedings, the Crown came into possession of documents belonging to counsel for Mr. Mahjoub which contain information that Mr. Mahjoub says is subject to solicitor and client privilege and litigation privilege. The documents in issue became commingled with documents belonging to the Crown. Mr. Mahjoub brought a motion before Justice Blanchard for a permanent stay of the proceedings on the basis of sections 7, 8 and 24(1) of the *Canadian Charter of Rights and Freedoms*. The Crown opposed the motion.

[15] Justice Blanchard heard the motion on October 3, 2011 and reserved his decision. It appears that in the course of the hearing, Justice Blanchard concluded that in order to determine the remedy, if any, that would be appropriate in the circumstances, it would be necessary to have the commingled documents separated and returned to the respective parties so that they would be in a position to make specific submissions on the nature and extent of the alleged prejudice. In that context, Justice Blanchard made the order under appeal on October 4, 2011. It reads as follows:

1. The parties are to attend before Prothonotary Aalto at 9:30 a.m., on Wednesday October 5, 2011, at the Federal Court in Toronto, Ontario, for the purpose of developing a protocol for the separation of the co-mingled documents. The protocol shall be established by Prothonotary Aalto, in consultation with the parties. It shall permit the separation of the documents in a manner that will limit prejudice to the

parties.

2. Each party is to designate a person or persons, not a Solicitor of record, who is able to identify the documents belonging to the party for the purpose of dividing the co-mingled documents in the presence and under the supervision of the Prothonotary pursuant to the protocol to be established for that purpose.

3. The person or persons so designated by each party shall thereafter be excluded from the respective litigation teams and shall be prohibited from communicating with anyone about the nature or content of the materials reviewed for the above stated purpose and shall sign an undertaking to that effect with the Court.

4. The separated documents are to be returned to the respective parties.

5. The parties may make further argument on the nature and extent of any alleged prejudice before the designated judge. To that end, Mr. Mahjoub may prepare a description of any of the returned documents relied upon to demonstrate that prejudice, which description shall not disclose any substantive information that would be subject to solicitor-client or litigation privilege.

6. Prothonotary Aalto shall review and approve any description prepared by Mr. Mahjoub against the document prior to the description being filed with the Court.

7. Upon the separation of documents, Prothonotary Aalto shall file a report on the protocol followed to separate the documents. He may, in the exercise of his discretion, also report on any other matter relating to the within order.

8. In the event of a dispute with respect to the interpretation of the within order, the parties are free to return to the Court for direction.

[16] The record does not disclose whether the parties have sought further direction pursuant to section 8 of the order under appeal, and I assume they have not done so.

[17] On October 13, 2011, Mr. Mahjoub filed a notice of appeal of the October 4, 2011 order. He seeks an order setting the order aside, requiring Justice Blanchard to determine the motion for a permanent stay on the basis of the submissions filed, and deferring the process of separating the documents until after Justice Blanchard determines the motion for a permanent stay.

[18] The notice of appeal sets out many grounds of appeal. Some of the grounds of appeal overlap. Some are difficult to follow, undoubtedly because they are intended to be explained in due course by more detailed submissions. Nevertheless I will attempt to summarize them.

[19] The first ground of appeal asserts that the order under appeal is "not valid and rendered without jurisdiction" because, to the extent that it requires persons other than Mr. Mahjoub's solicitors of record to view his privileged documents, his right to communicate in confidence with his legal adviser is breached, contrary to sections 7 and 8 of the *Charter*.

[20] The second and fifth grounds of appeal challenge the practicality, effectiveness, necessity or factual basis of the order under appeal.

[21] The third and sixth grounds of appeal appear to be based on the premise that the order under appeal necessarily requires Mr. Mahjoub to prove that he was prejudiced by the alleged breaches of

privilege. The argument is that Mr. Mahjoub should be entitled to the benefit of a legal presumption of prejudice, so that the Crown as the party in breach has the onus of proving that the breach caused no prejudice.

[22] The fourth ground of appeal alleges a further breach of section 7 of the *Charter*, as well as section 24, on the basis that it is unfair to require an inspection of the documents to assess prejudice when it cannot be determined with precision what the Crown has seen and possibly disseminated.

[23] The seventh ground of appeal alleges that the order under appeal is based on a mistake of law in so far as it ignores the possibility that some of the documents that came into the possession of the Crown may be missing.

[24] At the risk of oversimplifying the position of Mr. Mahjoub, it seems to me that his fundamental complaint is that, through no fault of his own, he has suffered a breach of a fundamental privilege that is his constitutional right, and it is wrong in law to compel him to suffer a further breach of the same privilege in the search for an appropriate remedy.

Positions of the parties

[25] The Crown has moved to quash the appeal on the basis that the appeal is barred by section 79. The Crown's letter dated October 17, 2001 indicates that the Crown is relying on *Re Zündel*, 2004 FCA 145 at paragraphs 23 to 27, *Froom v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 331, and *Zündel v. Canada (Human Rights Commission) (C.A.)*, [2000] 4 F.C. 255, at

paragraphs 10 to 15. The first of these cases deals with unsuccessful attempts to appeal a decision in the face of a statutory bar in the IRPA. The third case deals with the general principal that, barring special circumstances, decisions made in the course of a hearing should not be challenged until the proceedings are concluded.

[26] Mr. Mahjoub, in his letter to the Court dated October 17, 2011, argues that this Court has the jurisdiction to entertain this appeal because the order sought to be appealed is "invalid and rendered without jurisdiction as it violates his fundamental rights such as his right to solicitor client privilege and to have all his communications made in confidentiality with his lawyer respected (sections 7 and 8 of the *Charter*)." He relies on paragraphs 17 and 18 of *Subhaschandran* (cited above), which read as follows:

> **17.** Other decisions which reinforce my view are those in which this Court has held that certain questions, including ones relating to jurisdiction, are appealable, even in the presence of the express removal of a right of appeal or right of judicial review on the main decision. In *Zündel (Re)*, 2004 FCA 394, Létourneau J.A. found an appeal based on reasonable apprehension of bias to be an exception to the privative clause precluding an appeal or judicial review from a determination of the reasonableness of a security certificate. Similarly, in *Narvey v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R. 305 *(*F.C.A.), Noël J.A. allowed an appeal, notwithstanding subsection 18(3) of the *Citizenship Act* [R.S.C., 1985, c. C-29]. He found that a judge's bias, if demonstrated, would result in a lack of jurisdiction to render a decision, and such decision would accordingly not be one "under" section 18 of the *Citizenship Act*.
>
> **18.** I would therefore allow the appeal, set aside the order and send the matter

> back to the motions Judge with a direction that he proceed to expeditiously make a decision on the application for a stay. In the circumstances there will be no order as to costs.

[27] Mr. Mahjoub also cites paragraph 48 of *Charkaoui v. Canada*, 2004 FCA 421, which reads as follows:

> If it is agreed that the designated judge may, in the exercise of the powers conferred by sections 80 and 83 of the IRPA, make some decisions that are subject to appeal, then there should be no further question as to his jurisdiction to make them. It seems obvious to us that a decision on the constitutional validity of the IRPA has to do with the jurisdiction of the Court and not the reasonableness of the certificate, that it constitutes a separate, divisible judicial act, to repeat the words of Lamer C.J. in [*Canada (Minister of Citizenship and Immigration v. Tobiass, Canada*, [1997] 3 S.C.R. 391], and that it is consequently appealable.

[28] The issue of Mr. Mahjoub's right to appeal is discussed more fully in paragraphs 31 to 40 of the submissions included in the motion record submitted in support of his motion for a stay of Justice Blanchard's order pending appeal. Those submissions read as follows:

> 31. The Appellant is filing a notice of appeal under subsection 27(1) of the *Federal Courts Act* from an Order of the Honourable Mr. Justice Blanchard dated October 4, 2011.
>
> 32. The Order under appeal was rendered in the context of the Appellant's motion record for a permanent stay of proceedings as a remedy pursuant to subsection 24(1) of the *Charter* and section 50 of the *Federal Courts Act* for the violation of his sections 7 and 8 rights under the *Charter*.

33. As mentioned in *Charkaoui v. Canada*, 2004 FCA 421, par 43, a designated judge has the power to make certain decisions that are subject to appeal.

34. The Federal Court of Appeal in *Charkaoui* (supra) referred to the Supreme Court of Canada's (herein referred to as "SCC") decision in *Canada v. Tobiass*, [1997] 3 S.C.R. 391 which upheld the existence of the right of appeal.

35. The SCC held that the decision could be appealed because the Federal Court's power to order a stay does not stem from its power under the *Citizenship Act* but is sourced in section 50 of the Federal Court Act. The SCC in *Tobiass* (supra) confirmed the existence of the right of appeal accordingly:

> "A stay of proceedings is entered for reasons which are completely unrelated to the circumstances surrounding the obtaining, retaining, renouncing or resuming of citizenship. Indeed, a decision to order (or not to order) a stay of proceedings is different from the type of determination that the Court is called upon to make under subsection 18(1)." [p. 414-415]

36. Mr. Mahjoub is entering his appeal in a similar context. Justice Blanchard's Order currently appealed was rendered following Mr. Mahjoub's motion for a permanent stay of proceedings under s. 50 of the *Federal Courts Act*, similarly to *Tobiass*, as well as under s. 24 of the *Charter*.

37. Because the Order is entirely unrelated to the circumstances surrounding the reasonableness of the certificate and is the result of an excess of jurisdiction and other jurisdictional errors [referring by footnote to the portion of the submissions entitled "Serious questions to be tried", which reflect the grounds of appeal summarized above], the Order may be subject to appeal as concluded by *Charkaoui v. Canada*, 2004 FCA 421, par. 48 and in *Subhaschandran* 2005 FCA 27. [Omitted: reproduction of paragraph 48 of *Charkaoui* and paragraphs 17-18

of *Subhaschandran*, quoted above.]

38. In the circumstances of the Order under appeal, it is clear that sections 82.3 and 74(d) of the IRPA do not limit the Appellant's right to appeal.

39. Indeed, Justice Blanchard's decision was not further to a judicial review and was not made under sections 82 to 82.2 of the IRPA, but in the context of Mr. Mahjoub's motion pursuant to s. 50 of the *Federal Courts Act* and s. 24(1) of the *Charter*.

40. For these reasons, the Appellant submits that the Order of October 4, 2011 can be appealed to the Federal Court of Appeal.

[29] In the Crown's letter dated October 18, 2011, the Crown makes the following submissions in response to Mr. Mahjoub's letter dated October 17, 2011:

(a) There is no constitutional right to an appeal, even if a breach of the *Charter* is alleged. The right to appeal is purely statutory. It is open to Parliament to bar or limit a right of appeal, as it has done in the IRPA. The present case does not come within the very narrow exception recognized in *Tobiass*.

(b) Mr. Mahjoub cannot circumvent the statutory bar to an appeal of an interlocutory decision merely by raising a constitutional argument and casting the decision as one going to jurisdiction. An error of law, in general, does not deprive a presiding judge of jurisdiction (citing *Canada (Minister of Citizenship and Immigration) v. Aziz*, 2011 FCA 18. Further, the Supreme Court of Canada has repeatedly stated that courts should not "brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (citing *Canadian Union of Public Employees, Local 963*

v. New Brunswick Liquor Corp., [1979] 2 S.C.R 227 at page 233, as cited in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, at paragraph 36).

(c) In any event, the Supreme Court of Canada has cautioned against permitting a proceeding to be fragmented by interlocutory proceedings that take on life of their own (citing *R. v. Mills*, [1985] 1 S.C.R. 863, at paragraph 271). The statutory prohibition on appeals of interlocutory decisions is intended to avoid such fragmentation and the resulting delays.

(d) Finally, there is no factual foundation for Mr. Mahjoub's appeal, because Justice Blanchard has yet to determine whether any breach of solicitor and client privilege has occurred. And it is clearly within his jurisdiction to deal with matters of privilege and to exercise his discretion to craft appropriate remedies to prevent prejudice from the disclosure of allegedly privileged documents.

Discussion

[30] It is clear that the order sought to be appealed is an interlocutory decision rendered in the course of proceedings under section 77 of the IRPA. Generally, appeals from such decisions are barred by section 79.

[31] It is argued for Mr. Mahjoub that the jurisprudence of this Court establishes that the statutory bar should not apply in this case. However, the cases upon which he relies are not in any way analogous to the facts of this case. *Tobiass* and other cases dealing with the *Citizenship Act* involve a statutory bar to appeals that is more narrowly worded than the very broad prohibition in section 79 of the IRPA. It is not the case, as in *Subhaschandran*, that the Federal Court judge refused to make a decision. There is no allegation or evidence of a reasonable apprehension of bias,

as there was in *Re Zündel*, 2004 FCA 394. There is no constitutional challenge to any legislation, as there was in *Charkaoui*. The decision sought to be appealed is not, to paraphrase *Charkaoui*, a judicial act that is separate and divisible from the section 77 proceedings. On the contrary, the decision sought to be appealed was rendered in the course of Justice Blanchard's management of the section 77 proceedings, and cannot be separated from them.

[32] In my view, there is nothing in the circumstances of this case that would justify this Court in failing to respect the statutory bar. In this case, as in *Huntley* (cited above), it cannot be said that the immunization of Justice Blanchard's decision from appellate scrutiny would undermine the rule of law or public confidence in the due administration of justice. On the contrary, to permit this appeal to proceed would result in an unacceptable fragmentation of the Federal Court proceeding to determine the reasonableness of the certificate, and would require this Court to make a decision on the basis of a factual foundation that is, to say the least, incomplete.

Conclusion

[33] For these reasons, I would quash the appeal for want of jurisdiction. Although Mr. Mahjoub's motion for a stay would be rendered moot and should not be determined, his motion

record should be filed because it was referred to in the course of considering whether the appeal should be quashed.

"K. Sharlow"
J.A.

"I agree.
Gilles Létourneau J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-380-11
STYLE OF CAUSE:	Mohamed Zeki Mahjoub v. The Minister of Immigration and Citizenship et al

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	SHARLOW J.A.
CONCURRED IN BY:	LETOURNEAU J.A. DAWSON J.A.
DATED:	October 24, 2011

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