Federal Court of Appeal | Cour d'appel fédérale

Date: 20210427

Docket: A-295-20

Citation: 2021 FCA 85

CORAM: **STRATAS J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

MOHAMED HARKAT

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION and MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 27, 2021.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20210427

Docket: A-295-20

Citation: 2021 FCA 85

CORAM: **STRATAS J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

MOHAMED HARKAT

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION and MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] The Supreme Court has upheld a security certificate against Mr. Harkat: *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33.

[2] When the security certificate was issued, Mr. Harkat was arrested and detained in a correctional facility. He was later released under strict conditions. Since then, the Federal Court has conducted many reviews of Mr. Harkat's conditions. On occasion, it has relaxed them.

[3] Recently, the Federal Court conducted a new review: *Re Harkat*, 2020 FC 715. The Federal Court relaxed some of the conditions. Mr. Harkat wishes to appeal to this Court.

[4] Standing in Mr. Harkat's way is section 82.3 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Under that section, he can appeal only if the Federal Court certifies a serious question of general importance for this Court's consideration.

[5] Mr. Harkat asked the Federal Court to certify a question. The Federal Court refused to do so: *Re Harkat*, 2020 FC 818. Despite this, Mr. Harkat filed a notice of appeal in this Court.

[6] In response, the Minister brings this motion. The Minister moves under Rule 74 for an order removing the notice of appeal from the Court file on the ground that this Court does not have the jurisdiction to hear the appeal. The Minister relies on section 82.3 of the Act and the Federal Court's refusal to certify a question.

[7] Mr. Harkat opposes the Minister's motion on two bases. First, he submits that section 82.3 is constitutionally invalid because it violates the principles of fundamental justice under section 7 of the Charter and is not saved by section 1 of the Charter. In the alternative, he submits his case falls within certain judge-made exceptions to section 82.3 and so he can appeal.

A. Analysis

(1) The argument invoking the Charter

[8] Mr. Harkat's Charter argument against section 82.3 is doomed to fail. This Court has rejected it on multiple occasions: *Huynh v. The Queen*, [1996] 2 F.C. 976, 134 D.L.R. (4th) 612 (C.A.); *Huntley v. Canada (Citizenship and Immigration)*, 2011 FCA 273, [2012] 3 F.C.R. 118. As well, there is no constitutional right to an appeal as of right or to an unrestricted appeal: *Huynh* at paras. 12-18, citing *R. v. Meltzer*, [1989] 1 S.C.R. 1764, 49 C.C.C. (3d) 453 at 1773-1774 S.C.R. and *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456 at 69-70 S.C.R.; see also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 136 and *Sachs v. Air Canada*, 2007 FCA 279, 68 Admin. L.R. (4th) 233 at para. 11. Section 82.3 is constitutionally valid.

(2) The argument invoking certain judge-made exceptions to section 82.3

[9] Actual or apparent bias is an exception to the certified question requirement: *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, [2005] 3 F.C.R. 255 at para. 15; *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 at para. 28. Mr. Harkat alleges that the Federal Court was biased.

[10] The notice of appeal and Mr. Harkat's written representations identify a handful of instances of alleged bias by the Federal Court. First, Mr. Harkat draws the Court's attention to

the Federal Court's statement that it was broadening Mr. Harkat's access to technology so he could get an opportunity to have "gainful employment" and "fully embrace the values of his adopted country". He also impugns the Federal Court's criticism of Mr. Harkat for not abiding by the spirit of its detention order and release conditions. Finally, he criticizes the Federal Court for failing "to recognize or take responsibility for the [role] its orders have played in the mental health issues faced by Mr. Harkat".

[11] None of these are instances of actual or apparent bias. Even on a generous reading, they come nowhere close to satisfying the test for actual or apparent bias in *Committee for Justice and Liberty et al. v. National Energy Board et al*., [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 at 394 S.C.R. Mr. Harkat's appeal does not fit within the judge-made exception for actual or apparent bias. Making allegations that call "into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice" is "a serious step that should not be undertaken lightly": *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 at para. 113. In immigration matters, this can result in a costs award, sometimes even against counsel personally.

[12] Mr. Harkat also alleges that the Federal Court exceeded its jurisdiction. This is another judge-made exception to the certified question requirement. But it is not as broad as Mr. Harkat suggests.

[13] The threshold to satisfy this exception is high: *Tennant* at para. 18. In *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 ("*Tennant (2018)*"), a single judge suggested that it is restricted to two rarely occurring circumstances:

(1) Where the Federal Court failed to exercise its jurisdiction in circumstances where it must exercise it, *e.g.*, the Federal Court had to decide an issue but did not and the case turns on that issue: *Tennant (2018)* at para. 14. See, *e.g.*, *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, [2005] 3 F.C.R. 255.

(2) Where it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case—examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and the flaw raises serious concerns about the Federal Court's compliance with the rule of law: *Tennant (2018)* at para. 17.

[14] In *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144 at paras. 19-21, a panel of this Court confirmed that to avail oneself of this exception, one must identify "very fundamental matters" or "truly exceptional matters" that "strike right at the rule of law". Only some significant flaw that strikes at the root of the fundamental fairness of the Federal Court's decision can qualify. Recently, this Court declined to revisit the nature and scope of this exception: *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, [2020] 1 F.C.R. 231 ("*Tennant (2019)*").

[15] Over and over again, this Court has confirmed that this exception does not include "ordinary errors" or "mere errors of law": *Mahjoub* at para. 21; *Tennant (2019)* at para. 51;

Huntley at para. 8; *Katriuk v. Canada (Minister of Citizenship and Immigration) (1999)*, 177 F.T.R. 318, 71 C.R.R. (2d) 113 (Fed. A.D.) at para. 8; *Canada (Citizenship and Immigration) v. Goodman*, 2016 FCA 126, 42 Imm. L.R. (4th) 1 at paras. 3-9. If it did, section 82.3 would be reduced to naught. This Court must apply Parliament's prohibition in section 82.3 against appeals where a question has not been certified. Only something fundamental that implicates the constitutional principle of the rule of law will prompt this Court to accept an appeal: *Tennant (2018)* at paras. 12-14.

[16] Mr. Harkat takes issue with the Federal Court's decision to leave certain conditions in place. This is an ordinary question of mixed fact and law, not a fundamental matter that strikes right at the rule of law.

[17] Mr. Harkat tries to make more of this. He submits that the Federal Court's decision to leave certain conditions in place causes "cruel and unusual treatment". Even if this is meant to invoke section 12 of the Charter—and Mr. Harkat does not do so explicitly—constitutional concerns, alone, do not qualify: *Wong v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 229, 487 N.R. 294 at paras. 18-19; *Mahjoub* at paras. 23-24.

[18] In any event, the conditions left in place by the Federal Court do not meet the high threshold for a finding of cruel and unusual treatment: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72 at para. 147. Finally, as this constitutional issue was not raised in the Federal Court, it is a new issue in this Court and should not be entertained:

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19, [2002] 1 S.C.R. 678.

B. Conclusion and proposed disposition

[19] Section 82.3 applies to bar this appeal. Therefore, I would order that the notice of appeal be removed from the court file and the court file closed. Though wholly unfounded allegations of bias were made against the Federal Court, the Ministers do not seek costs and so none should be awarded.

"David Stratas"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-295-20
STYLE OF CAUSE:	MOHAMED HARKAT v. MINISTER OF CITIZENSHIP AND IMMIGRATION *et al.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	APRIL 27, 2021

WRITTEN REPRESENTATIONS BY:

Barbara Jackman	FOR THE APPELLANT
Bernard Assan	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jackman & Associates Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS