Federal Court of Appeal | Cour d'appel fédérale

Date: 20220726

Docket: A-148-22

Citation: 2022 FCA 139

[ENGLISH TRANSLATION]

CORAM: **RIVOALEN J.A.**
LEBLANC J.A.
ROUSSEL J.A.

BETWEEN:

GERMAINE SIEWE

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa on July 26, 2022.

REASONS FOR ORDER: LEBLANC J.A.

CONCURRED IN BY: RIVOALEN J.A.
ROUSSEL J.A.

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REASONS FOR ORDER

LEBLANC J.A.

[1] On June 27, 2022, the appellant submitted for filing a notice of appeal from a judgment rendered by Justice Martine St-Louis of the Federal Court (docket IMM-4514-21). This judgment dismissed the appellant's application for leave to challenge by way of judicial review the decision of a visa officer at the Embassy of Canada in Paris refusing to grant her a study permit.

[2] Justice St-Louis's judgment was rendered under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). Yet, pursuant to paragraph 72(2)(e) of the Act, no appeal lies from this decision. In her notice of appeal, the appellant acknowledges that in light of this provision of the Act, she cannot appeal this judgment, but she pleads that her situation falls within one of the exceptions to this bar that are set out in the case law of this Court, that is, the exception related to cases where the Federal Court has refused to exercise its discretion. Indeed, she argues that because Justice St-Louis did not provide reasons for her decision, it is not possible for her to identify the legal criteria on which Justice St-Louis relied to exercise her discretion. What must be understood from the notice of appeal is that Justice St-Louis would therefore have refused to exercise her discretion to decide the case.

[3] By means of a direction issued on July 7, 2022, the Court accepted the notice of appeal for filing; however, this was providing that, in accordance with rule 74 of the *Federal Courts Rules*, SOR/98-106 (the Rules), the appellant explain in writing how, in these circumstances, the Court should hear her appeal. Pursuant to rule 74, the Court may, at any time, on its own initiative and after having given the parties an opportunity to make representations, order that a document be removed from the Court file if the document was not filed in accordance with these Rules, an order of the Court or an Act of Parliament (see *Wong v. Canada (Citizenship and Immigration)*, 2016 FCA 229, at paras. 5–6 [*Wong*]).

[4] In her response to this direction, the appellant essentially argues that Justice St-Louis's judgment undermines the principle of the rule of law, which warrants granting an exemption from the statutory bar in paragraph 72(2)(e) of the Act. The principle of the rule of law is

supposedly offended in this case because, in her view, the burden to be discharged in order to be granted leave to apply for judicial review of a decision rendered under the Act—the burden of an arguable case involving a serious question to be determined—is not onerous and because a cursory review of the case at bar demonstrates that Justice St-Louis could not reasonably find that this burden was not discharged.

[5] According to the appellant, the principle of the rule of law was also undermined in another way: in the appellant's view, a study published in 2012 by Professor Sean Rehagg (Sean Rehagg, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 *Queen's LJ* 1) tends to demonstrate that Federal Court judges who are female, Francophone and from Montréal, which is the case for Justice St-Louis, are less inclined than their colleagues to grant leave for judicial review under section 72 of the Act.

[6] These arguments have no merit.

[7] First, it should be noted that the right to appeal in matters of judicial review instituted under the Act is provided for in a particular way. Indeed, no appeal lies from decisions allowing or refusing the institution of a judicial review of a decision rendered under the Act or from the interlocutory judgments issued as part of the proceedings. However, pursuant to paragraph 74(d) of the Act, an appeal may be made from decisions rendered on the merits of a judicial review, when a review is granted, only if the Federal Court "certifies that a serious question of general importance is involved and states the question."

[8] It is also useful to point out that Parliament has settled the questions of possible conflicts between the right to appeal immigration matters and the general right under section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which includes the right to appeal from any interlocutory judgment rendered by the Federal Court: in subsection 75(2) of the Act, Parliament provided that "[i]n the event of an inconsistency between this Division and any provision of the Federal Courts Act, this Division prevails to the extent of the inconsistency."

[9] It is true that this Court has recognized a certain number of exceptions to these provisions limiting the right to appeal immigration matters. However, these cases must raise "very fundamental matters—truly exceptional matters that strike right at the rule of law" (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144, at para. 19; *Harkat v. Canada (Attorney General)*, 2021 FCA 209, at para. 24 [*Harkat*]). The refusal of the Federal Court to exercise jurisdiction is one of these exceptions (*Wong* at para. 12; *Subhaschandran v. Canada (Solicitor General)* (F.C.A.), 2005 FCA 27, [2005] 3 F.C. 255 [*Subhaschandran*]).

[10] However, it is obvious that this exception does not apply here. Indeed, Justice St-Louis clearly exercised her jurisdiction under section 72 of the Act because she dismissed the appellant's application for leave (see *Wong* at para. 12).

[11] As I have already mentioned, the appellant is essentially arguing that Justice St-Louis should have granted her leave to undertake a judicial review because she was of the view that her challenge to the visa officer's decision to refuse to grant her a study permit raised an arguable case. This situation is in all respects similar to the situation that was before the Court in *Rahman*

v. Canada (Citizenship and Immigration), 2020 FCA 220, where the Court noted that when deciding on the merits of a case, the Federal Court exercises its jurisdiction:

> [5] Mr. Rahman submits that his appeal should be allowed to continue because the Federal Court, in dismissing his application for leave, refused to exercise its jurisdiction. His basis for this submission is that, in his view, there were more than sufficient grounds for his application for leave to have been granted.
>
> [6] While this Court in *Wong v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 229, acknowledged that the refusal of the Federal Court to exercise jurisdiction is an exception to the paragraph 72(2)(e) bar, it also confirmed that when the Federal Court decides a case on its merits, the Federal Court is exercising its jurisdiction:
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> > 12 A number of well-defined, limited exceptions to the para. 72(2)(e) bar have been recognized in this Court's jurisprudence. One is the refusal of the Federal Court to exercise jurisdiction: see, *e.g.*, *Subhaschandran v. Canada (Solicitor General)*, 2005 FCA 27, [2005] 3 F.C.R. 255. The appellants contend that this exception applies here. It does not: the Federal Court made an order dealing with the merits of the reconsideration motion and thus exercised its jurisdiction.
>
> [7] It is clear that Mr. Rahman does not agree with the decision to dismiss his application for leave to commence a judicial review. However, the disagreement with a decision of the Federal Court does not mean that the Federal Court refused to exercise its jurisdiction. In considering his application for leave and dismissing it, the Federal Court exercised its jurisdiction.

[12] This Court has repeatedly indicated that, in order to justify an exemption from the statutory bars in paragraph 72(2)(e) or paragraph 74(d) of the Act, it is not sufficient to claim that the refusal to grant leave to apply for judicial review results from errors, even if these errors appear very defensible or have a constitutional flavour or involve the role of the Court as part of the judicial review (*Wong* at para. 15; *Harkat* at para. 35; *Canada (Citizenship and Immigration)*

v. Tennant, 2018 FCA 132, at para. 15; *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness*), 2012 FCA 59, at para. 28 [*Es-Sayyid*]; *Huntley v. Canada (Citizenship and Immigration*), 2011 FCA 273, at paras. 7 to 8; *Mahjoub v. Canada (Citizenship and Immigration)*, 2011 FCA 294, at para. 12 [*Mahjoub 2011*]).

[13] Yet this is precisely the basis of the appeal that the appellant wants to undertake. Indeed, she would like this Court to review Justice St-Louis's judgment on its merits. In such circumstances, granting her leave to undertake this appeal would go against Parliament's intention and, as we have seen, run counter to the case law of this Court.

[14] As the respondent rightly points out, none of the judgments relied on by the appellant, where the Court granted exemptions from the statutory bars in paragraph 72(2)(e) and paragraph 74(d) of the Act, are of any help to her. Indeed, *Subhaschandran* was a blatant case of a Federal Court judge refusing to exercise his jurisdiction by adjourning the stay motion before him rather than by ruling on its merits. In *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, the appellant argued that the Federal Court judge had usurped a power that only the Minister responsible for the enforcement of the *Citizenship Act* could exercise. This is a prime example of an alleged case of exceeding jurisdiction.

[15] The fact that Justice St-Louis did not provide reasons for her decision does not further advance the appellant's case because the Federal Court does not give reasons for its decisions to allow or dismiss applications for leave submitted under section 72 of the Act. This is the general practice of the Federal Court (*Hinton v. Canada (Citizenship and Immigration)*, 2008 FC 1007,

[2008] F.C.J. No. 1252 (QL/Lexis), at para. 15). It is important to note that, pursuant to paragraph 72(2)(d) of the Act, the Federal Court shall dispose of applications for leave submitted to it under subsection 72(1) “without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance”.

[16] In *Krishnapillai v. Canada*, 2001 FCA 378, at paragraph 35, which concerned former section 72 of the Act (section 82.1 of the *Immigration Act*, R.S.C. (1985), c. I-2), this Court ruled that nothing which was said in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 with respect to the requirement that henceforth, administrative decision-makers had to provide, in certain circumstances, reasons for their decisions “leads to the import of such a requirement with respect to judicial decisions denying leave to seek judicial review.” In the absence of a requirement to provide reasons set out in the Act, I would add that the choice not to provide reasons for a decision made under section 72 of the Act cannot be considered as a refusal on the part of the Federal Court to exercise its jurisdiction and therefore as a granting of permission to override the limitations on the right to appeal that are set out in paragraph 72(2)(e) and paragraph 74(d) of the Act.

[17] As for the argument based on Justice St-Louis’s [TRANSLATION] “profile”, it has no merit. First, Professor Rehagg’s study focused specifically on the success rate of applications for leave filed under section 72 of the Act in connection with refugee determinations. Here, we are dealing with a completely different category of decisions, those involving applications for study permits. Professor Rehagg’s study is therefore not at all relevant in this case. Second, insofar as the argument based on this study is in fact an indirect attack on Justice St-Louis’s impartiality, one

of the exceptions set out in the case law to the limitations on the right to appeal immigration matters, I note that the notice of appeal filed by the appellant is silent on this point. In other words, the apprehension of bias does not appear in the document that states what the appellant criticizes in Justice St-Louis's judgment.

[18] Even if we were to assume that Professor Rehagg's study is relevant for the purposes of this case, the assertions that the appellant draws from it are riddled with errors and highly questionable shortcuts. Indeed, as the respondent notes, Justice St-Louis was appointed to the Federal Court two years after this study was published. Extending the findings of this study to Justice St-Louis's work seems foolhardy, to say the least. Furthermore, nothing in this study seems to support the appellant's assertions about the work of Federal Court judges who are female, Francophone and from Montréal.

[19] These assertions are extremely serious because they call into question "not simply the personal integrity of the judge, but the integrity of the entire administration of justice" (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 32 and 113 [*R.D.*], cited in *Es-Sayyid* at para. 38). I would note that there is a "strong presumption that judges will carry out their duties properly, and with integrity", and that this presumption "can be rebutted only by a 'serious' and 'substantial' demonstration made by 'convincing evidence'" (*Es-Sayyid* at para. 39, citing *R.D.* at para. 32.)

[20] However, even being generous, and besides the fact that Professor Rehagg's study involved a very specific subset of the applications for leave filed under section 72 of the Act, a subset that does not include applications for study permits, the appellant's assertions do not contain anything conclusive. As the respondent notes, the study specifies that the city from which the applications for leave originated "cannot account for the massive variations in grant rates across judges" (comment at Table 6 of the study, p. 29). The author points out a slight difference between the grant rates of the Court's female judges and the grant rates of the Court's male judges, but he also notes that, on the other hand, female judges are more likely than their male counterparts to grant, on the merits, applications for judicial review of refugee matters.

[21] In short, not only is Professor Rehagg's study utterly irrelevant for the purposes of this case, but the assertions that the appellant drew from it also do not stand up to scrutiny.

[22] As the Court pointed out in *Mahjoub 2011*, most attempts to avoid statutory bars to appeals provided for in the Act "fail" (*Mahjoub 2011*, at para. 11). This is the case with the appellant's attempt in this matter.

[23] For all these reasons, I would order, pursuant to section 74 of the Rules, that the notice of appeal be removed from the file and that the file be closed, all without costs because the respondent is not claiming them.

"René LeBlanc"
J.A.

"I agree.
Marianne Rivoalen J.A."

"I agree.
"Sylvie E. Roussel J.A."

Certified true translation
Melissa Paquette, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-148-22
STYLE OF CAUSE:	GERMAINE SIEWE v. MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER:	LEBLANC J.A.
CONCURRED IN BY:	RIVOALEN J.A. ROUSSEL J.A.
DATED:	JULY 26, 2022

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