Federal Court of Appeal  Cour d'appel fédérale

Date: 20131203

Docket: A-170-13

Citation: 2013 FCA 281

CORAM: **EVANS J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

LUDLOW ANTHONY FREEMAN

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on December 3, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on December 3, 2013.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on December 3, 2013).

STRATAS J.A.

[1] Mr. Freeman appeals from the order dated April 29, 2013 of the Federal Court (*per* Justice Hughes) in file T-888-12. The Federal Court dismissed Mr. Freeman's motion to reinstate his application for judicial review. Earlier, his application for judicial review had been discontinued as a result of the filing of a notice of discontinuance.

[2] Before the Federal Court was an affidavit sworn by Mr. Freeman. He deposed that his former lawyer had filed the notice of discontinuance without his authorization. In his affidavit, he also included certain hearsay statements of his former counsel.

[3] Also before the Federal Court was a letter from Mr. Freeman's former counsel disagreeing with Mr. Freeman's account of the events, asserting that Mr. Freeman consented to the filing of the notice of discontinuance. The former counsel's letter was part of an exhibit to another affidavit Mr. Freeman placed before the Court and, thus, was also part of the record. Mr. Freeman's written representations before the Federal Court did not place any qualifications on the admissibility of any of this evidence, all of which he filed.

[4] Finally, as the Federal Court noted, a notice of discontinuance filed by counsel is presumed to have been filed under instructions from his or her client.

[5] Based on this factual matrix, the Federal Court held that the discontinuance remained effective and so the application for judicial review could not be reinstated.

[6] The Federal Court's decision, discretionary and fact-based in nature, is entitled to deference. In order to interfere, this Court must find that the Federal Court proceeded on a wrong principle of law or serious misapprehension of the facts amounting to palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[7] In our view, Mr. Freeman has not established grounds for this Court to interfere with the Federal Court's order. He submits that the Federal Court relied upon inadmissible, unsworn evidence but, as has been mentioned above, the evidence was placed under affidavit and no objection or qualification to it was raised in that Court.

[8] Mr. Freeman submits that the Federal Court misapprehended the evidence and wrongly concluded that his physical circumstances "may have changed," when in fact they have changed significantly. We do not view this as an error which would have affected the Federal Court's exercise of discretion. Given that Mr. Freeman might make a new application for citizenship and given that it did not have evidence before it from a medical professional concerning Mr. Freeman's physical circumstances, the Federal Court may have been reluctant to make a definitive ruling on the issue of his physical circumstances, preferring instead to qualify the matter.

[9] Mr. Freeman also submits that the Federal Court wrongly found that he had made no complaint against his former counsel when the evidence is clear that he had. If this was an error, it is not overriding – *i.e.*, it does not vitiate the overall finding that the discontinuance was effective. Whether or not a complaint to the Law Society had been made, the Federal Court was simply not persuaded that the evidence filed before it rebutted the presumption that the notice of discontinuance was filed with the client's instructions. In accordance with *Housen*, it is not for this Court to reweigh the evidence and come to a different conclusion. In any event, what the Federal Court actually stated was that no complaint had been made *and determined* [my emphasis]. Indeed, Mr. Freeman's complaint had not been determined when the Federal Court made its order. Therefore, in this regard, the Federal Court may not have erred at all.

[10] We wish to point out that neither this Court nor the Federal Court has ruled on the issue whether Mr. Freeman's former counsel filed the notice of discontinuance with actual instructions. Based on his view of the matter, Mr. Freeman remains free to pursue whatever recourses are available to him.

[11] Therefore, we shall dismiss the appeal. In the circumstances, we shall order no costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-170-13

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HUGHES OF THE FEDERAL COURT OF CANADA DATED APRIL 29, 2013, DOCKET NO. T-888-13

STYLE OF CAUSE:	LUDLOW ANTHONY FREEMAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2013
REASONS FOR JUDGMENT OF THE COURT BY:	EVANS J.A. STRATAS J.A. WEBB J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

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