Federal Court of Appeal | Cour d'appel fédérale

Date: 20160112

Docket: A-180-15

Citation: 2016 FCA 5

CORAM: **TRUDEL J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

PAUL ABI-MANSOUR

Appellant

and

THE CHIEF EXECUTIVE OFFICER OF PASSPORT CANADA,
NICOLAS MEZHER,
KAHINA SID IDRIS

Respondents

Heard at Ottawa, Ontario, on December 8, 2015.

Judgment delivered at Ottawa, Ontario, on January 12, 2016.

REASONS FOR JUDGMENT BY: SCOTT J.A.

CONCURRED IN BY: TRUDEL J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] This is an appeal from an Order of LeBlanc J. of the Federal Court (the Judge), 2015 FC 363 dated March 23, 2015 dismissing Mr. Abi Mansour's (the appellant) appeal pursuant to Rule 51 of the *Federal Court Rules*, SOR/98-106 (the Rules) and upholding Prothonotary Tabib's (the Prothonotary) Order dated November 27, 2014.

[2] The Prothonotary allowed in part the appellant's motion for an extension of time to file his affidavit in support of his application for judicial review and dismissed his request to file only one copy of his record or, in the alternative, that he be granted a further five months to file three copies of his record pursuant to Rules 8 and 55 of the Rules.

[3] The underlying facts are straightforward. On August 20, 2014 the appellant filed a Notice of Application seeking judicial review of a decision rendered by the Public Service Staffing Tribunal which dismissed his complaint in relation to a staffing process conducted by Passport Canada.

[4] Pursuant to Rule 306 of the Rules, the appellant was required to file his supporting affidavit and documentary exhibits within thirty days. That deadline was extended to October 6, 2014 by consent of the parties under Rule 7.

[5] On October 14, 2014 the appellant served and filed his affidavit along with a motion for an extension of time within which to serve and file it. He also filed a motion seeking an extension of time to serve and file his record under Rule 8 as well as relief pursuant to Rule 55 allowing him to file a single copy of his record, instead of three copies, as required under Rule 309(1.1)*b*) or, in the alternative granting him a delay of five months to do so in light of the cost of photocopies.

[6] The Prothonotary allowed the appellant's motion in part. She extended the time within which the appellant was to serve and file his affidavit in support of his application to October 14,

2014 and she dismissed the remainder of the appellant's motion. The Prothonotary specified that in the event the appellant failed to serve and file his application record within the deadlines set out in the Rules, the application would be dismissed unless the deadlines were extended by consent of the parties under Rule 7 or by order of the Federal Court on a further motion brought prior to the expiration of the applicable time limit on grounds that might arise after her Order. The Prothonotary also granted costs in favour of the respondent.

[7] The Prothonotary explained that the appellant had failed to show that he was impecunious and thus saw no basis for the relief sought under Rule 55. She also found that the reasons advanced by the appellant for an extension of time did not warrant the extension. She was also not impressed by the appellant's argument that if the extension of time sought to file his record was not granted, he could let the application lapse its way to status review and obtain the extension sought. In her view, this would constitute an undoubted abuse of the Court's process. Consequently, she turned to Rule 168 and provided for dismissal of the underlying application if the appellant failed to comply with the filing deadlines set out in the Rules or if he failed to obtain an order to extend the deadlines.

[8] In a thorough and detailed Order, the Judge dismissed the appellant's appeal. Applying the appropriate standard, namely whether the Prothonotary arrived at her order on a wrong basis or whether she was plainly wrong, the Judge confirmed that the Prothonotary had applied the proper test to extend procedural deadlines, which is set out in *Canada (Attorney General) v. Hennelly*, 244 N.R. 399, [1999] F.C.J. No. 846 (QL) (C.A.) [*Hennelly*]. He also found that based on the evidence before her, the Prothonotary did not err in determining that the appellant had

failed to establish two requirements under the *Hennelly* test: (i) that his judicial review application had some merit, and (ii) that a reasonable explanation for the requested delay existed.

[9] The Judge came to the same conclusion as the Prothonotary regarding the unacceptable nature of the appellant's explanation for the requested extension to file his application record.

[10] The Judge reviewed the Prothonotary's decision with respect to the Rule 55 request and found that she did not err in finding that the appellant had failed to establish that he was impecunious since he had monthly net earnings of $2800.00.

[11] With respect to the portion of the Order providing for the dismissal of the underlying judicial review application, the Judge rejected the appellant's argument that the Prothonotary did not have jurisdiction to make such an order. The Judge pointed to Rule 50 and endorsed the respondent's position that jurisdiction to provide for dismissal of the appellant's application if he failed to comply with the deadlines in the Rules was a necessary corollary measure to both advance the underlying judicial review application and to prevent an abuse of the Court's processes. The Judge added that even if he were to consider the matter *de novo*, he would come to the same conclusion as the Prothonotary on this point.

[12] The Judge also turned to the retaliation argument raised by the appellant who claimed that the Prothonotary was biased because tensions had arisen in another file. The Judge dismissed this argument and reiterated the warning given by this Court to the appellant with

respect to his continued practice of making unsupported allegations of bias against members of the courts.

[13] Finally the Judge dealt with the appellant's arguments with respect to costs and concluded that the appellant had failed to establish that the Prothonotary's Order was based on a wrong principle or upon a misapprehension of facts.

[14] Before turning to the arguments advanced by the appellant, I would note that at the outset of the hearing of this appeal, the appellant questioned whether his appeal would receive a fair hearing because two judges on the panel had heard some of his prior applications in other files before this Court. The presiding judge offered to recess to allow the appellant time to decide whether he wanted to make a motion for recusal or not. The appellant refused the recess and decided to proceed with the hearing on the merits without making a motion for recusal. Had he made such a request, there would have been no basis for recusal as the mere fact that a judge has decided a case against a party does not prevent the judge from fairly deciding a subsequent case involving the same party.

[15] Turning now to the appellant's arguments, it is settled law that this Court will only interfere with the decision of a judge reviewing an order of a Prothonotary if it was arrived at on a wrong basis or was plainly wrong (see *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, and *Merck & Co. Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459). I am of the view that the Judge identified the appropriate standard and applied it correctly in this case.

[16] The appellant first claims that the Prothonotary used the wrong test to assess his request for an extension of time to file his application record. Alternatively, if the *Hennelly* test which the Prothonotary applied is the correct test, then it is the appellant's position that the Prothonotary erred in requiring the he meet the four criteria in the test. He also claims that the Prothonotary unduly applied a high threshold to the two criteria that she found the appellant had failed to meet. The appellant also argues that the Judge failed to address these issues.

[17] The appellant pointed to the decision in *Canada (Attorney General) v. Pentney*, 2008 FC 96, 322 F.T.R. 81, at paragraph 37, in support of his proposition that even if the *Hennelly* test applied, an extension of time could still be granted if one criterion was not met.

[18] The appellant asserts that the test on status review set out in *Baroud v. Canada*, 1998 CanLII 8819 (FC), 160 F.T.R. 91 (T.D.) should have been applied in this instance as there is no reason for higher requirements when the procedural step at issue is the filing of records.

[19] Since his right to judicial review is a constitutional right, it follows according to the appellant that the judiciary should not interfere with the exercise of that right by requiring compliance with the Rules.

[20] On the issue of the relief sought pursuant to Rule 55, the appellant contends that it was an error on the part of the Prothonotary to rely on Rule 168 because there was no underlying order of the Court and since it is an interim Order, the doctrine of abuse of process could not be engaged. He adds that the abuse of process doctrine has to be construed restrictively and applied

only in the clearest cases. The appellant suggests that this doctrine cannot be used to control the timeline of a proceeding.

[21] The appellant also claims that the Judge erred by failing to conduct a proper analysis of the allegation of retaliation that he brought forward against the Prothonotary. Since the Prothonotary knew the appellant was going to be out of the country from December 28, 2014 until January 17, 2015, he maintains that her Order was crafted to maximize the chances that his application would be dismissed.

[22] Finally, the appellant argues that the Judge erred in relying on the decision of this Court in *Abi-Mansour v. Canada (Aboriginal Affairs)*, 2014 FCA 272 to decide on costs since the facts are completely different in the present instance. It is his position that he should have been awarded costs as he was successful in his motion for an extension of delay to file his affidavit.

[23] I am of the view that none of these grounds discloses that the Judge made a reviewable error in declining to disturb the Prothonotary's Order of November 24.

[24] As the *Hennelly* test was the correct test to be applied in this instance, the appellant's first argument must be rejected. Under that test, the Prothonotary was required to assess whether the appellant had a continuing intention to pursue his application, whether the said application had any merit, whether the delay sought would cause prejudice to the other party and finally, whether there existed a reasonable explanation for the delay sought.

[25] I agree with the Judge's assessment of the Prothonotary's decision on this point as it is evident that the appellant failed to address the merits of his judicial application in his motion record. He also failed to provide a sound justification for the extension he sought. Having failed to meet two of the criteria the decision to deny the request was well founded.

[26] I further find no merit in the allegation that an unduly high threshold was applied in considering the criterion of merit. As the appellant did not address the matter, the Judge rightly concluded that the Prothonotary cannot be faulted, especially since the appellant did not file his affidavit in support of his judicial review application. Contrary to the appellant's contention, the Judge addressed those two issues in paragraphs 25 to 28 of his Order.

[27] The appellant's argument with respect to the assessment of his request pursuant to Rule 55 must also be rejected. It was open to the Prothonotary to enforce Rule 168 to prevent a circumvention of the Court's rules. The Judge found that this decision was not made to pre-empt the final decision on the judicial application and I agree.

[28] The reasons brought forward by the appellant to seek an extension of time to file his record and to be relieved from filing three copies are not convincing. With a net income of $2800.00 a month, the appellant is not impecunious, and his argument based on his personal priorities is unreasonable. In these circumstances, the Prothonotary was justified in ensuring that the appellant complied with the Rules.

[29] The appellant's argument that Rule 168 is only applicable if there is an underlying order of the Court is misplaced. Rule 50 specifies that prothonotaries have broad jurisdiction to deal with any motion under the Rules except for motions specifically excluded from their jurisdiction by Rule 50. The reference to the Court in Rule 168 includes prothonotaries as per Rule 2. Consequently, the Prothonotary could rely on Rule 168, and the portions of her Order, refusing the requested extension, constituted an Order of the Court within the meaning of Rule 168.

[30] In addition, the appellant's argument with respect to the doctrine of abuse of process is without merit. Recently, this Court in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, at paragraph 40, reiterated that the abuse of process doctrine is a residual and discretionary doctrine that bars the re-litigation of issues where doing so would undermine the finality of a judgment and bring the administration of justice in disrepute (see *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at paragraph 37). In the present situation, the appellant was explicit about his intention of using status review to obtain the extension of time sought. I believe that the Prothonotary rightfully used the inherent power of the Court to prevent the misuse of the Rules to circumvent the Order to deny the time extension. What the appellant proposed to do to obtain a *de facto* extension, after his request for an extension was denied, would constitute an abuse of process.

[31] I must also point out that the appellant had a month in which to seek an extension of time to file his motion record through a motion or through consent of the respondent pursuant to Rule 7, as provided for in the Prothonotary's Order. He left for the Middle East on December 28, 2014 and the Prothonotary's Order was issued on November 27, 2014. The Appellant chose to let his

application lapse by his inaction and his disregard for the timelines set by the Rules. As explained by the Judge in paragraph 30 of his Order, the Rules have force of law and they must be applied.

[32] I also see no merit to the appellant's contention that the Judge failed to address the issue of retaliation. The Judge, in paragraphs 47 to 50 of his reasons, dealt with the issue and determined that "[t]hose are very serious allegations which the Applicant has failed to establish to any appreciable degree" (Judge's Order at paragraph 48).

[33] Finally, the appellant's argument with respect to costs is unfounded. The Judge correctly applied the principle reaffirmed by this Court with respect to costs in paragraphs 53 and 54 of his Order.

[34] The appellant has therefore failed to show any reviewable error made by the Judge in this case.

[35] Consequently, I would propose that this appeal be dismissed with costs, inclusive of disbursements and taxes, fixed at $2,000.00, payable forthwith.

[36] As a result, the underlying application for judicial review, filed on August 20, 2014, is dismissed by virtue of the Prothonotary's Order. As the issue of costs in respect of the judicial review application has not been addressed, this issue should be remitted to the Federal Court for determination.

[37] Before concluding, I note that the appellant is still making disrespectful and unfounded allegations against members of the Federal Courts despite having been cautioned on several occasions to cease this unacceptable practice (see *Abi-Mansour v. Canada (Aboriginal Affairs)*, 2014 FCA 272; *Abi-Mansour v. Canada (Attorney General)*, 2015 FC 882; *Abi-Mansour v Public Service Commission*, 2013 FCA 116; *Abi-Mansour v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 135). I propose that this Court warn him for the last time to cease and desist from making such abusive and vexatious statements whenever he fails to get his way. Otherwise, Mr. Abi-Mansour's proceedings could be adjourned under instruction to serve and file amended material that does not contain this type of allegations. The appellant could also face significant costs awards and stays if the costs are not paid.

"A.F. Scott"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-180-15
STYLE OF CAUSE:	PAUL ABI-MANSOUR v. THE CHIEF EXECUTIVE OFFICER OF PASSPORT CANADA, NICOLAS MEZHER, KAHINA SID IDRIS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 8, 2015
REASONS FOR JUDGMENT BY:	SCOTT J.A.
CONCURRED IN BY:	TRUDEL J.A. GLEASON J.A.
DATED:	JANUARY 12, 2016

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