Federal Court of Appeal  Cour d'appel fédérale

Date: 20160120

Docket: A-142-15

Citation: 2016 FCA 16

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

BETWEEN:

ALEXANDR SIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 9, 2015.

Judgment delivered at Ottawa, Ontario, on January 20, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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BETWEEN:

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Appellant

and

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the Order of Justice O'Reilly of the Federal Court dated March 4, 2015 (2015 FC 276) striking Alexandr Sin's claim against the Crown on the basis that it was plain and obvious that his claim could not succeed and dismissing Mr. Sin's motion for an order for pre-certification notice for a class proceeding. Mr. Sin had been claiming damages and losses from the Crown as a result of the Government of Canada terminating his application for

permanent residence in Canada as an investor. For the reasons that follow, I would dismiss this appeal.

Background

[2] Mr. Sin applied to immigrate to Canada from Russia in 2009 as an investor under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *IRPA*) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227. Prior to his application being approved, the Government of Canada terminated all of the pending investor applications (including Mr. Sin's) by amending the *IRPA* (*Economic Action Plan Act No 1*, amending the *IRPA*, s. 87.5).

[3] Pursuant to the legislative amendments that terminated the pending applications, the application fee was returned to the individual (subsection 87.5(4) of the *IRPA*) and an amount equal to any investment that had been made by such individual was also paid, without interest, to that person (subsection 87.5(5) of the *IRPA*).

[4] Mr. Sin filed his claim on August 11, 2014. He also brought a motion "for an order that a pre-certification notice of the commencement and nature of the … proposed class proceeding be provided forthwith to the proposed class members by e-mail or website posting or otherwise."

[5] The Crown brought a motion to strike his claim on the basis that it was plain and obvious that it cannot succeed. As noted above, the Federal Court Judge granted the Crown's motion and struck Mr. Sin's claim. Since his claim was struck, his motion for a pre-certification notice was dismissed.

Standards of Review

[6] As a result of the decision of this Court in *Decor Grates Inc. v. Imperial Manufacturing Group Inc.*, 2015 FCA 100, 472 N.R. 109, the standards of review that are applicable when this Court is reviewing a discretionary decision of a lower court are those standards as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Findings of fact (including inferences of fact) will stand unless it is established that the Federal Court Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply. An error is palpable if it is readily apparent and it is overriding if it changes the result.

Issue

[7] The issue in this appeal is whether the Federal Court Judge erred in striking Mr. Sin's claim. If so, should Mr. Sin's motion for an order for pre-certification notice be granted?

Analysis

[8] Subsection 87.5(7) of the *IRPA* provides that:

87.5(7) No right of recourse or indemnity lies against Her Majesty in right of Canada in connection with an application that is terminated under subsection (1), including in respect of any contract or other arrangement relating to any aspect of the application.	87.5(7) Nul n'a de recours contre Sa Majesté du chef du Canada ni droit à une indemnité de sa part relativement à une demande à laquelle il est mis fin par application du paragraphe (1), notamment à l'égard de tout contrat ou autre forme d'entente qui a trait à la demande.

[9] This subsection is clear and unambiguous. Since Mr. Sin's application was terminated under subsection 87.5(1) of the *IRPA*, this subsection would preclude him from recovering any amount from the Crown in relation to the claim that he had filed.

[10] Mr. Sin's argument, however, was that this provision has to be read in light of the Foreign Investment Promotion and Protection Agreement treaties (the FIPA treaties) and Free Trade Agreement treaties that Canada has signed. In particular, Mr. Sin relies on the Canada-Russia FIPA which is dated November 20, 1989.

[11] Mr. Sin acknowledges that none of the FIPAs (including the Canada-Russia FIPA) have been implemented by statute. However, Mr. Sin argues that, notwithstanding the lack of any statute implementing the FIPAs, subsection 87.5(7) of the *IRPA* should be read as only applying to any applicant who was applying from a country other than a country with which Canada has entered into a FIPA. As a result, in Mr. Sin's view, subsection 87.5(7) of the *IRPA* would not apply to any applicant who was applying from a country (including Russia) with which Canada had signed a FIPA. I do not agree.

[12] In *Baker v. Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, the majority of the Justices of the Supreme Court of Canada stated that:

> **69** Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R.

> 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.
>
> (emphasis added)

[13] As noted by the Supreme Court of Canada, "[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute".

[14] This was again recently reiterated in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, where the majority of the Justices of the Supreme Court of Canada stated the following:

> **149** Even if we were to adopt the appellants' interpretation of art. 14 and there was international consensus on this issue, it must be noted that the existence of an article in a treaty ratified by Canada does not automatically transform that article into a principle of fundamental justice. Canada remains a dualist system in respect of treaty and conventional law (Currie, at p. 235). This means that, unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process (Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 69; Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, at pp. 172-73; Currie, Public International Law, at p. 235). The appellants have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation.

[15] Mr. Sin did not argue that the Canada-Russia FIPA reflects customary international law and he acknowledges that it has not been implemented by any statute of Parliament. As a result, this FIPA is not part of the domestic law of Canada and cannot amend an act of Parliament. Therefore, I do not agree that subsection 87.5(7) of the *IRPA* should be read in light of the Canada-Russia FIPA.

[16] Since, as acknowledged by Mr. Sin in his memorandum, this conclusion would end his claim, there is no need to address the question of whether the Canada-Russia FIPA would contemplate the claim that Mr. Sin was making.

[17] As a result, I would dismiss the appeal, with costs.

"Wyman W. Webb"

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

AN APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE O'REILLY DATED MARCH 4, 2015, DOCKET NUMBER T-1734.

DOCKET:	A-142-15
STYLE OF CAUSE:	ALEXANDR SIN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2015
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	JANUARY 20, 2016

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