Federal Court of Appeal  Cour d'appel fédérale

Date: 20160527

Docket: A-443-15

Citation: 2016 FCA 159

CORAM: **DAWSON J.A.**
STRATAS J.A.
GLEASON J.A.

BETWEEN:

SEAN ALLISTAIR O'BRIEN

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on May 19, 2016.

Judgment delivered at Ottawa, Ontario, on May 27, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant, a citizen of Surinam and Guyana, is married to a Canadian citizen who sponsored the appellant's application for permanent residence in Canada. In his application the appellant failed to disclose a criminal conviction that renders him inadmissible to Canada.

[2] When the appellant attempted to be landed in Canada, a check of his fingerprints led the port of entry officer to learn of the appellant's prior criminal conviction. While the appellant was

admitted into Canada, he was not landed. Subsequently, the appellant was found to be inadmissible to Canada and a removal order was issued against him.

[3] The appellant appealed his removal order to the Immigration Appeal Division of the Immigration and Refugee Board pursuant to subsection 63(2) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) ("Act"). On his appeal the appellant did not challenge the legality or validity of the removal order. Instead, he asked the Appeal Division to exercise its humanitarian and compassionate jurisdiction either to grant permanent resident status to him or to compel an immigration officer to confer permanent resident status on him.

[4] On an appeal under subsection 63(2) of the Act, the Appeal Division may only consider humanitarian and compassionate considerations if it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the applicable regulations (section 65 of the Act).

[5] The Appeal Division made three key findings:

i. The appellant was not a member of the family class because he and his sponsor had separated.

ii. The appellant had not shown that his wife's sponsorship remained in effect.

iii. The Appeal Division lacked jurisdiction to grant permanent resident status to the appellant or to compel an immigration officer to confer permanent resident status on the appellant.

[6] In the result, the Appeal Division dismissed the appellant's appeal. For reasons cited as 2015 FC 1047, a Judge of the Federal Court dismissed an application for judicial review of the decision of the Appeal Division. The Judge certified a serious question of general importance and stated the question to be:

> In an appeal pursuant to s. 63(2) of the *Immigration and Refugee Protection Act*, in relation to what period in time should an assessment of membership in the family class under s. 65 be conducted by the Immigration Appeal Division?

[7] This is an appeal from the decision of the Federal Court.

[8] In order for a question to be properly certified the question must be dispositive of the appeal (*Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, 318 N.R. 365, at paragraph 11; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129, at paragraph 28). In the absence of a properly certified question, the condition precedent to a right of appeal to this Court is not met and the appeal must be dismissed (*Varela*, at paragraph 43).

[9] I am of the view that the question certified by the Federal Court is not dispositive of the appeal. Irrespective of whether the Appeal Division erred by considering the existence of a spousal relationship at the time of the hearing before it, the Appeal Division could not confer permanent resident status on the appellant or compel an immigration officer to land the

appellant. It follows that the certified question is purely academic in nature; the answer to the question will not affect the legal rights of the parties to this appeal.

[10] In oral argument the appellant submitted that the certified question was dispositive because the Appeal Division could have granted him a meaningful remedy: the Appeal Division could have stayed the removal order pursuant to subsection 68(1) of the Act.

[11] However, this relief was not sought in the Appeal Division.

[12] A certified question does not arise in a vacuum. A properly certified question is based upon the facts in evidence and the points in issue before the Federal Court. Because the appellant did not put in issue in the Appeal Division a request for an order staying the removal order, he was precluded in these circumstances from raising in the Federal Court any issue relating to the Appeal Division's failure to issue a stay of removal. This is because the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue and an argument not put to it (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 23 – 25).

[13] As the ability of the Appeal Division to issue a stay could not give rise to a serious issue in the Federal Court, this issue cannot give rise to a certified question that is dispositive of this appeal.

[14] For these reasons I would dismiss the appeal. I see no special reasons to warrant an award of costs.

"Eleanor R. Dawson"

J.A.

“I agree.
David Stratas J.A.”

“I agree.
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-443-15
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE SOUTHCOTT DATED SEPEMBER 9, 2015, DOCKET NO. IMM-8141-14	
STYLE OF CAUSE:	SEAN ALLISTAIR O'BRIEN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	MAY 19, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRING REASONS BY:	STRATAS J.A. GLEASON J.A.
DATED:	May 27, 2016

APPEARANCES:

Prasanna Balasundaram Asiya Hirji	FOR THE APPELLANT
Prathima Prashad Bradley Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Toronto, Ontario	FOR THE APPELLANT
Mamann, Sandaluk & Kingwell LLP Toronto, Ontario	
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT