Federal Court of Appeal | Cour d'appel fédérale

Date: 20160915

Docket: A-235-16

Citation: 2016 FCA 229

CORAM: **NOËL C.J.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

LAWRENCE WONG (BARRISTER AND SOLICITOR), and KAI ZHAN LIANG

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 15, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NOËL C.J.
DAWSON J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellants appeal from the order dated May 25, 2016 of the Federal Court (*per* Bell J.): 2016 FC 569. In that order, the Federal Court dismissed a reconsideration motion brought under Rule 397(1) of the *Federal Courts Rules*, SOR/98-106 by the appellant, Kai Zhan Liang.

The reconsideration motion sought to reverse the Federal Court's denial of leave to the appellant Liang to start a judicial review of a decision of a member of the Immigration Appeal Division of the Immigration and Refugee Board.

[2] The Federal Court found that the reconsideration motion had no merit. Reconsiderations under Rule 397(1) are limited to circumstances where the order does not accord with the reasons given for it or a matter that should have been dealt with has been overlooked or accidentally omitted. According to the Federal Court, no such circumstances were present in this case.

[3] The other appellant, Lawrence Wong, was counsel in the Federal Court for the appellant Liang. He appeals from the Federal Court's award of costs on the reconsideration motion. During the motion, the respondent Minister submitted that "special reasons" were present warranting a $1,000 award of costs under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 against Mr. Wong personally. The Federal Court accepted the Minister's submission and made the award. In its view, counsel had "attack[ed]…the integrity of the Court…based upon speculation and innuendo" during his conduct of the motion (at para. 7). Further, it found that the motion had been "incurred improperly and without reasonable cause" (at para. 7).

[4] The appellants appealed to this Court. After they filed their notice of appeal, the Registry referred it for direction. The Registry queried whether the notice of appeal should be removed from the Court file and the file closed because of a statutory bar against appeals in matters such as this: para. 72(2)(*e*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. In para.

72(2)(*e*), Parliament has barred appeals from decisions of the Federal Court refusing leave to commence an application for judicial review.

[5] After reviewing the notice of appeal, this Court formed the view that submissions should be received on whether the bar applies and, if so, whether the notice of appeal should be removed from the Court file and the file closed. In doing this, this Court was exercising a power given to it under Rule 74 of the *Federal Courts Rules*. In a direction to the parties, this Court set out certain questions related to the Court's jurisdiction to entertain the appeal. It invited submissions on them.

[6] The parties have had a full opportunity to address the Court's questions. The respondent Minister filed submissions to the effect that the notice of appeal should be removed from the Court file and the file closed. The appellants responded, submitting that their appeal should continue. The Minister filed a brief reply.

[7] In my view, the statutory bar against appeals applies. Thus, I would order that the notice of appeal be removed from the Court file and the Court file be closed.

[8] The appellants begin their submissions by suggesting that Rule 74 cannot be used to remove a notice of appeal from the Court file. I disagree. Rule 74 provides that "the Court may, at any time, order that a document that is not filed in accordance with…an Act of Parliament be removed from the Court file." The *Immigration and Refugee Protection Act* is an Act of

Parliament. Para. 72(2)(*e*) of that Act bars appeals to this Court. Thus, the filing of the notice of appeal is not in accordance with the Act.

[9] Further, there is clear authority explaining this Court's powers under Rule 74 and confirming that a notice of appeal can be removed from the Court file in circumstances such as these: *Rock-St. Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144.

[10] The appellants also submit that the costs award against counsel is something separate and apart from the subject-matter of immigration and that somehow this allows them to evade the bar against appeals in para. 72(2)(*e*) of the Act.

[11] I disagree. The notice of appeal purports to appeal an order of the Federal Court that determined both the merits of the reconsideration motion and the issue of costs. The costs award is part and parcel of the reconsideration motion and relates to counsel's conduct of the motion. The motion took place in a file that came into being under the *Immigration and Refugee Protection Act* and concerned whether a refusal of leave under the Act should be reconsidered. All proceedings in the file were prosecuted and decided under the *Immigration and Refugee Protection Act* and were regulated by the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*. The costs award is founded upon an exercise of discretion under Rule 22 of those Rules. Thus, through and through, this matter falls within the bar against appeals set out in para. 72(2)(*e*) of the Act.

[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.

[13] The appellants submit that this Court has the power to entertain their appeal under section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Section 27 is a general provision clothing this Court with jurisdiction to hear appeals from decisions of the Federal Court.

[14] I do not accept this submission. As a matter of statutory interpretation, specific provisions addressing particular circumstances can derogate from more general provisions of broad application: see, *e.g.*, *James Richardson & Sons, Ltd. v. Minister of National Revenue et al.* [1984] 1 S.C.R. 614, 9 D.L.R. (4th) 1; *Munich Reinsurance Co. v. Canada*, 2001 FCA 365, [2002] 1 C.T.C. 199 at para. 21. This is the case here: the specific bars against appeals in the *Immigration and Refugee Protection Act*, of which para. 72(2)(*e*) is one, derogate from the general appellate jurisdiction of this Court in section 27 of the *Federal Courts Act*. This Court has previously so ruled: *Canada (Minister of Citizenship and Immigration) v. Edwards*, 2005 FCA 176, 335 N.R. 181 at paras. 4, 5 and 12; *Huntley v. Canada (Citizenship and Immigration)*, 2011 FCA 273, 426 N.R. 152 at paras. 6-7; *Mahjoub v. Canada (Citizenship and Immigration)*, 2011 FCA 294, 426 N.R. 49 at paras. 7-12.

[15] The appellants submit that para. 72(2)(*e*) does not apply where the appeal involves "constitutional questions" or matters concerning "the Federal Court's role in the conduct of judicial review." No authority supports that proposition. In fact, this Court's decision in *Chung v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 31 is against it. The presence in an appeal of constitutional questions or issues relating to this Court's role on judicial review is not a recognized exception to the bars against appeals in the *Immigration and Refugee Protection Act*: see, *e.g.*, *Mahjoub*, above; *Es-Sayyid v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3.

[16] The appellants spend much time in their submissions arguing the merits of their appeal and, in particular, the constitutionality of section 72 of the *Immigration and Refugee Protection Act*. They suggest that all of section 72 of the Act, including the requirement that leave to commence a judicial review be obtained from the Federal Court, is unconstitutional. They do this without addressing a number of binding decisions of this Court that have upheld the constitutionality of section 72 and sections like it: see, *e.g.*, *Krishnapillai v. Canada*, 2001 FCA 378, [2002] 3 F.C. 74; *Huntley*, above at para. 14; *Huynh v. Canada*, [1996] 2 F.C. 976, 197 N.R. 62. It is well-known that appeals are statutory and there is no residual appellate jurisdiction guaranteed by the Constitution: see, *e.g.*, *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689 at paragraph 50.

[17] The lack of merit of an appeal does not normally go to the Court's jurisdiction to hear it. However, here, it does affect another of the appellants' submissions.

[18] Above, I mentioned that there is no recognized exception to the bar against appeals when parties raise constitutional questions or issues relating to this Court's role on judicial review. But, in another submission, the appellants go further. They invite us to recognize a new exception in such cases and allow their appeal to go forward.

[19] I decline to do so. It would be all too easy for parties to insert constitutional questions or issues relating to this Court's role on judicial review into a notice of appeal as a matter of course regardless of their merit—in this case, despite their complete absence of merit based on the authorities of this Court— and evade the bar against appeals in para. 72(2)(*e*) of the *Immigration and Refugee Protection Act*. Para. 72(2)(*e*) is the law of the land; it is no part of our role to fashion an exception that effectively repeals Parliament's bar.

[20] I add that the appellants, or either of them, could have launched their challenge in the Federal Court. In that Court, they could have asserted that the Federal Court is constitutionally obligated to entertain a full judicial review in these circumstances—not just an application for leave—and that they are constitutionally entitled to a full right of appeal to this Court. But they chose not to do so.

[21] The same may be said for another constitutional argument the appellants intend to make in this appeal. The appellants intend to argue that an award of costs against counsel personally is unconstitutional. In response to the Minister's submission in the Federal Court that such costs were warranted, the appellants had every opportunity to make that argument. But they chose not to do so.

[22] In the circumstances of this case, the appellants' failure to advance their constitutional arguments in the Federal Court disables this Court from considering them. The arguments require an evidentiary foundation: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385. Evidence is needed on the nature, purposes and effects of the statutory bar against appeals and awards of costs personally against counsel; having not been received by the Federal Court, the evidence will not be present in this Court.

[23] Appellate courts cannot entertain new legal issues on appeal if those issues require an evidentiary foundation, the parties did not build that foundation in the first-instance court, and the rule against fresh evidence on appeal applies: see, *e.g.*, *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *Bell ExpressVu v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at paras. 58-59; *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 268, 393 N.R. 395 at para. 5; see also *Danson v. Ontario (A.G.)*, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686, a summary dismissal of a constitutional challenge to a procedural rule permitting awards of costs against counsel personally because the challenger failed at first instance to lay a satisfactory evidentiary foundation.

[24] The constitutional arguments raised by the appellants lie at the core of their notice of appeal. At a level of generality, the *Federal Courts Act* and the *Federal Courts Rules* contemplate that the necessary evidence in support of their constitutional arguments must be called in the Federal Court, a first-instance court, not this Court, an appellate court. In this sense, the notice of appeal conflicts with the *Federal Courts Act* and the *Federal Courts Rules*.

[25] For the foregoing reasons, I conclude that the notice of appeal does not accord with the bar against appeals in para. 72(2)(*e*) of the *Immigration and Refugee Protection Act*, the *Federal Courts Act* and the *Federal Courts Rules*.

[26] I also agree with the Minister's submission that the notice of appeal does not contain sufficient particularity to qualify as a "notice of appeal" as contemplated by the *Federal Courts Rules* and thus is inconsistent with the Rules within the meaning of Rule 74: see Rule 337(*d*) and *Canada (National Revenue) v. J.P. Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 39-40 and 50.

[27] Therefore, in accordance with Rule 74, I would order that the notice of appeal be removed from the Court file and the Court file be closed.

[28] There are no special reasons under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* that would warrant an award of costs against the appellants. Therefore, I would not make any award of costs.

"David Stratas"
J.A.

"I agree
Marc Noël C.J."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-235-16
STYLE OF CAUSE:	LAWRENCE WONG (BARRISTER AND SOLICITOR), AND KAI ZHAN LIANG v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	NOËL C.J. DAWSON J.A.
DATED:	SEPTEMBER 15, 2016

WRITTEN REPRESENTATIONS BY:

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