Federal Court of Appeal  Cour d'appel fédérale

Date: 20161109

Docket: A-549-15

Citation: 2016 FCA 272

CORAM: **DAWSON J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

R. K. AND C. K.

Respondents

Heard at Toronto, Ontario, on November 7, 2016.

Judgment delivered at Toronto, Ontario, on November 9, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The claim for refugee protection advanced by the adult claimant and her infant son was rejected by the Refugee Protection Division of the Immigration and Refugee Board because it found the adult claimant's testimony lacked credibility.

[2] The decision of the Refugee Protection Division was appealed to the Refugee Appeal Division of the Immigration and Refugee Board. The appeal was not based on any error said to have been made by the Refugee Protection Division. Rather, the appeal was framed on the basis of new evidence that the adult claimant had been sexually assaulted while in detention in her country of origin. The Appeal Division admitted the new evidence and elected to hold a hearing restricted to the credibility of the allegation of sexual assault and, if the allegation was found to be credible, whether the claimants had rebutted the presumption of state protection.

[3] The Appeal Division dismissed the claimants' appeal on the basis that the new allegation lacked credibility.

[4] For reasons cited as 2015 FC 1304, the Federal Court allowed the claimants' application for judicial review of the decision of the Appeal Division on the sole ground that the Appeal Division failed to conduct a full *de novo* review of the claimants' claim on the basis of all of the evidence. The Federal Court rejected the submission of the Minister of Citizenship and Immigration that the Appeal Division was not required to conduct a *de novo* hearing upon all of the evidence but only upon the new evidence. The Federal Court stated and certified the following question:

> Is there any deference owed by the Refugee Appeal Division (RAD) to the Refugee Protection Division's (RPD) credibility findings where the RAD holds a hearing under section 110(6) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27?

[5] This is an appeal brought by the Minister from the judgment of the Federal Court.

[6] In my view, this appeal turns on a single issue: the failure of the claimants, the respondents in this Court, to request a *de novo* hearing before the Appeal Division. Because the claimants did not request that the Appeal Division conduct a *de novo* hearing on all of the evidence, they were precluded from raising in the Federal Court any issue relating to the Appeal Division's failure to hold a *de novo* hearing. This is because the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue not put to it particularly where, as in the present case, the new issue raised for the first time on judicial review relates to the Appeal Division's specialized functions or expertise (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 23-25).

[7] Before us the respondents argue that they did raise the issue of a *de novo* hearing at the Appeal Division. I disagree for the following reasons:

i. The relief sought by the respondents in their memorandum filed before the Appeal Division was an order quashing the decision of the Refugee Protection Division and returning the matter for a new hearing before the Refugee Protection Division. This relief is inconsistent with a *de novo* hearing before the Appeal Division.

ii. The list of issues for hearing provided by the Appeal Division stated the hearing would be "restricted" to the following issues:

> 1. Is the allegation of rape made by the Principal Appellant … in her affidavit, pages 18 to 24 of the Appellant's Record credible and trustworthy?
>
> 2. If so, are the Principal Appellant and the Minor Appellant … entitled to refugee protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and, in particular, is it established that the appellants have rebutted the presumption of state protection?
>
> 3. All new evidence.

An amended list of issues, provided by the Appeal Division after the new evidence was admitted, repeated that the hearing would be restricted to the first two issues.

The respondents raised no objection to the issues as framed by the Appeal Division.

iii. The following exchanges took place at the Appeal Division between the presiding member and counsel for the respondents:

> **PRESIDING MEMBER**: Okay. Now as we discussed earlier, Counsel, this is an oral hearing that's come out of a request from a rejection of an RPD claim and the oral hearing arises out of new evidence. The issue is restricted to that of the sexual assault.
>
> And I'll go through the exhibit list although I will be admitting that evidence, well I'll separate it into the original evidence that arrived at the Board with the request for an oral hearing as opposed to the evidence that's arrived since. And I will explain to you why I will not be accepting that evidence.
>
> (Transcript page 1105, lines 26-34)
>
> …
>
> **PRESIDING MEMBER**: Well no, the whole issue is sexual assault, let me deal with that.
>
> **COUNSEL**: Sure.
>
> **PRESIDING MEMBER**: The oral hearing was granted on the basis of a new issue which it had not arisen at the original hearing.
>
> **COUNSEL**: Right.
>
> **PRESIDING MEMBER**: That's quite plain and simple. The issue is, the new issue is sexual assault.
>
> **COUNSEL**: Okay.
>
> **PRESIDING MEMBER**: So I'm asking that you restrict your questions to that.
>
> **COUNSEL**: Sure.
>
> (Transcript page 1107, lines 27-44)
>
> …

PRESIDING MEMBER: So it's a 96 and 97. But the purpose I guess, the concern I had too with your late documents, notwithstanding the fact that they had no Rule 29 application, to a large extent there were documents there relating to the Board's original decision and trying to answer, respond to it, that is not the idea of an oral hearing.

COUNSEL: Okay.

PRESIDING MEMBER: An oral hearing is to address new evidence only.

COUNSEL: Sure.

PRESIDING MEMBER: And it's not to refute or respond to what the RPD wrote in its original decision. Okay?

So, and your submission supports what I've just said.

COUNSEL: Mm-hmm.

PRESIDING MEMBER: You've basically, in fact you even said in your submission, I re-read it last night, that the Board's finding on the basis of not indicating this issue was reasonable.

COUNSEL: Sure.

PRESIDING MEMBER: So really this is the only issue.

COUNSEL: Okay.

PRESIDING MEMBER: So is that fair enough?

COUNSEL: Absolutely.

(Transcript page 1108, lines 6-36)

…

(PRESIDING MEMBER): Is there anything else, Counsel, I'm just going to check and make sure that I haven't omitted anything.

And I'll just reiterate in terms of the issue that it's Rule 57 which restricts the hearing to matters relating to the issues provided with the notice to appear, so I think you understand that, Counsel.

COUNSEL: Yes.

(Transcript page 1109, lines 5 to 11)

[8] These facts are inconsistent with the submission that the respondents sought a full *de novo* hearing before the Appeal Division.

[9] The respondents also argue that the appellant is impermissibly arguing, for the first time on appeal, that the issue of the *de novo* hearing was not properly before the Federal Court. There is no merit in this submission because the issue was not raised in the respondents' application for leave and judicial review and was not included as one of the four issues framed by the respondents in their memorandum of fact and law filed in support of the leave application.

[10] For these reasons I would allow the appeal and set aside the judgment of the Federal Court. Pronouncing the judgment the Federal Court should have pronounced, I would dismiss the application for judicial review. I would decline to answer the certified question because the issue of a full *de novo* hearing and the related issue of the degree of deference owed to the findings of the Refugee Protection Division were not raised before the Appeal Division and were not properly before the Federal Court. If these issues are raised in the future, this Court and the Federal Court ought to have the benefit of the views of the Appeal Division on the issues.

"Eleanor R. Dawson"

J.A.

"I agree
D.G. Near J.A."

"I agree
Judith M. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-549-15
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. R. K. AND C. K.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 7, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NEAR J.A. WOODS J.A.
REASONS DATED:	NOVEMBER 9, 2016

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