

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161109

Docket: A-52-16

Citation: 2016 FCA 274

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

BETWEEN:

**HENRY MAJEBI
DAISY OYIEAMED SULEMAJEBI
MARIAN OMONIGHO SULEMAJEBI
CHANTEL RECHIA SULEMAJEBI**

Appellants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

Heard at Toronto, Ontario, on November 9, 2016.

Judgment delivered from the Bench at Toronto, Ontario, on November 9, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on November 9, 2016).

DAWSON J.A.

[1] For reasons cited as 2016 FC 14, the Federal Court dismissed an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board. The

Appeal Division confirmed the decision of the Refugee Protection Division of the Immigration and Refugee Board that the appellants were excluded from refugee protection by operation of section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and Article 1E of the *United Nations Convention Relating to the Status of Refugees*, 189 U.N.T.S. 150. The Federal Court stated and certified the following question:

In determining whether an individual is excluded from refugee protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, is the assessment of whether the individual has the rights and obligations which are attached to the possession of the nationality of the country in which the person has taken residence to be made at the time of the hearing before the Refugee Protection Division [RPD], at the time of the RPD's decision, or at the time of any appeal before the Refugee Appeal Division?

[2] This is an appeal from the judgment of the Federal Court. On this appeal we would reformulate the certified question as follows:

1. Should the Refugee Protection Division assess exclusion under Article 1E of the *Convention* at the time of the refugee hearing?
2. When the Refugee Protection Division correctly concludes that a claimant is or is not excluded under Article 1E of the *Convention*, can the Appeal Division reassess the applicability of the exclusion on the basis of facts that arise after the hearing before the Refugee Protection Division?

[3] On this appeal the appellants argue that the Federal Court:

- i. incorrectly found that it was reasonable for the Appeal Division to assess the applicability of Article 1E of the *Convention* at the time of the hearing before the Refugee Protection Division; and,

- ii. erred in law by concluding that the role of the Appeal Division was confined to considering whether the Refugee Protection Division erred in law, fact or mixed fact and law.

[4] In our view, despite the able submissions of counsel for the appellants, the Federal Court did not err as asserted. We reach this conclusion for the following reasons.

[5] First, we disagree that the Federal Court incorrectly reviewed the decision of the Appeal Division on the reasonableness standard of review. As the Federal Court correctly noted, this Court has expressed different opinions on the standard of review that applies to decisions interpreting international instruments. However, authorities that pre-date the articulation of the presumption of reasonableness review set out in cases such as *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 must be approached with caution. In the present case we agree with the Federal Court that nothing in the legislative context reveals Parliament's intent "not to protect the tribunal's jurisdiction" (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at paragraph 46). Nor does the interpretation of the *Convention* fall into one of the categories of questions to which the correctness standard continues to apply as explained in *Alberta Teachers'* at paragraph 30. This conclusion is consistent with the more recent decision of this Court in *B010 v. Canada (Citizenship and Immigration)*, 2013 FCA 87, [2014] 4 F.C.R. 326, at paragraphs 58-72.

[6] It follows that the Appeal Division's interpretation of the *Convention* was correctly reviewed on the reasonableness standard of review.

[7] The Appeal Division applied the decision of this Court in *Canada (Citizenship and Immigration) v. Zeng*, 2010 FCA 118, [2011] 4 F.C.R. 3 to conclude that the appellants' status should be considered as of the last day of the hearing before the Refugee Protection Division. We agree with the Federal Court that this was a reasonable conclusion for the Appeal Division to reach.

[8] Finally, we reject the appellants' submission that the Appeal Division was required to come to its own independent conclusion about whether a claimant was excluded at the time of the appeal. This submission is inconsistent with the decision of this Court in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, 396 D.L.R. (4th) 527 where this Court, at paragraphs 78 and 79, found that "the role of the [Appeal Division] is to intervene when the [Refugee Protection Division] is wrong in law, in fact or in fact and law" and that "an appeal before the [Appeal Division] is not a true *de novo* proceeding." Put simply, the Appeal Division could not intervene in circumstances where it found the decision of the Refugee Protection Division excluding the appellants was correct. The correctness review conducted by the Appeal Division required it to consider the appellants' status on the same day as considered by the Refugee Protection Division. Otherwise the Appeal Division would be deciding a different question.

[9] It follows that the appeal will be dismissed. The reformulated certified question will be answered as follows:

Question: Should the Refugee Protection Division assess exclusion under Article 1E of the *United Nations Convention Relating to the Status of Refugees* at the time of the refugee hearing?

Answer: In accordance with this Court's decision in *Canada (Citizenship and Immigration) v. Zeng*, 2010 FCA 118, [2011] 4 F.C.R. 3, an assessment of exclusion under Article 1E is to be made at the time of the hearing before the Refugee Protection Division.

Question: When the Refugee Protection Division correctly concludes that a claimant is or is not excluded under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, can the Appeal Division reassess the applicability of the exclusion on the basis of facts that arise after the hearing before the Refugee Protection Division?

Answer: Unless the Appeal Division concludes that the decision of the Refugee Protection Division was made in error, the Appeal Division may not reconsider the issue of exclusion pursuant to Article 1E *de novo*.

“Eleanor R. Dawson”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-52-16

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THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
NEAR J.A.
WOODS J.A.

DELIVERED FROM THE BENCH BY: DAWSON J.A.

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