Federal Court of Appeal | Cour d'appel fédérale

Date: 20170704

Dockets: A-155-17
A-156-17

Citation: 2017 FCA 144

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

MOHAMED ZEKI MAHJOUB

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 4, 2017.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The respondent Ministers have moved under Rule 74 to remove the notices of appeal in two appeal files and to close the files. They allege that this Court lacks the jurisdiction to determine the appeals.

[2] For the reasons below, I agree with the Ministers and would grant the motions.

A. Background

[3] Mr. Mahjoub is a named person in a security certificate issued against him under section 77 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. As a result of the security certificate, he was arrested and detained. Later, he was released on conditions.

[4] The Federal Court periodically reviews these conditions.

[5] This matter arises from one such review by the Federal Court (*per* Brown J.): 2016 FC 808. Mr. Mahjoub appeals from this. He has also appealed a decision of the Federal Court (*per* Brown J.) concerning proposed questions for certification: 2017 FC 334.

[6] Thus, there are two appeal files before the Court, file A-155-17 and file A-156-17. A copy of these reasons shall be filed in both of these files.

[7] The precise mechanism used by the Ministers to terminate these appeals is set out in Rule 74. In situations where this Court lacks jurisdiction over an appeal, Rule 74 allows this Court to order that the notice of appeal be removed from the court file and the file closed.

[8] The relief the Ministers seek on these motions can be granted only by a three person panel of this Court: *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192,

434 N.R. 144. Thus, a three person panel of this Court has been constituted to determine the motions.

[9] The Ministers say that Rule 74 applies because this Court has no jurisdiction to determine the appeals. They invoke section 82.3 of the *Immigration and Refugee Protection Act*. Section 82.3 provides that appeals to this Court from detention review decisions may only be brought if the Federal Court has certified a "serious question of general importance."

[10] In this case, after receiving submissions, the Federal Court decided that there was no serious question of general importance for this Court to consider. It refused to certify a question.

B. Analysis

[11] Given that the Federal Court did not certify a serious question of general importance, the bar in section 82.3 applies unless we are persuaded that the appeal falls within one of the limited, narrow exceptions recognized in the case law.

[12] The issue in these motions is whether any of these exceptions apply. Mr. Mahjoub has not persuaded me that any apply.

– I –

[13] Mr. Mahjoub submits that the Federal Court failed to exercise its jurisdiction. This Court has recognized that the failure of the Federal Court to exercise its jurisdiction can be appealed in the face of a statutory bar under the Act: *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, [2005] 3 F.C.R. 255 at para. 13. But this is not a failure to exercise jurisdiction. Rather, Mr. Mahjoub takes issue with how the Federal Court exercised its jurisdiction.

[14] Further, Mr. Mahjoub submits that the Federal Court failed to consider constitutional questions placed before it. This is not correct.

[15] First, the Federal Court stated that "[i]nstead of arguing these constitutional questions at the time of the Motion, [Mr. Mahjoub] chose, with permission, to argue them at some later time": 2017 FC 334 at para. 1.

[16] Second, at paras. 4-5 of 2017 FC 334, the Federal Court noted that Mr. Mahjoub "proposes 37 specifically numbered questions to certify comprised of 19 questions to certify plus 18 constitutional questions" and "there is substantial duplication and overlap between the many questions propounded." As a result the Federal Court grouped a number of them and dealt with them.

[17] The substance of the matter must be examined. Were the court to do otherwise, counsel would be encouraged to play a game of raising tens of closely related, confusingly stated,

overlapping questions in the hope that the Federal Court might, in a purely technical sense, miss one. In reviewing the substance of what the Federal Court did, I see no failure on its part to consider the questions placed before it.

– II –

[18] Mr. Mahjoub submits that the matters the Federal Court dealt with were "jurisdictional." He adds that matters of "jurisdiction" are one of the recognized exceptions to the statutory bars under the *Immigration and Refugee Protection Act*: see, *e.g.*, *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223, [2012] 2 F.C.R. 243.

[19] Some matters, like a credible allegation of bias against the judge who decided the matter in the Federal Court, can get around the statutory bars in the Act. This is because they go to very fundamental matters—truly exceptional matters that strike right at the rule of law: *Narvey v. Canada (Minister of Citizenship and Immigration)*, (1999) 235 N.R. 305 (F.C.A.); *Horne v. Canada (Citizenship and Immigration)*, 2010 FCA 337, 414 N.R. 97 at para. 4; *Re Zündel*, 2004 FCA 394. Some cases use the word "jurisdictional" to describe these sorts of matters.

[20] But caution must be exercised in bandying about the word "jurisdictional." The Supreme Court has repeatedly warned against "brand[ing] as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so": *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 36; *Canadian Union of Public Employees, Local 963 v.*

New Brunswick Liquor Corp., [1979] 2 S.C.R. 227 at p. 233, cited in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 35.

[21] This is consistent with many cases decided by this Court. Alleged mere errors of law—even important ones—do not get around the statutory bars against appeals under the Act, such as the one in issue here, section 82.3 of the Act: *Canada (Citizenship and Immigration) v. Goodman*, 2016 FCA 126 at paras. 5-9; *Mahjoub v. Canada (Citizenship and Immigration)*, 2011 FCA 294 at para. 12. In substance, in his appeals, Mr. Mahjoub alleges that the Federal Court erred in law, nothing more. The bar in section 82.3 of the Act applies.

– III –

[22] Mr. Mahjoub emphasizes the constitutional nature of the rulings of the Federal Court that he wishes to appeal.

[23] This Court has never held that the Federal Court's rejection of constitutional arguments can be appealed in the face of the bar against appeals. In fact, as this Court noted in *Wong v. Canada (Citizenship and Immigration)*, 2016 FCA 229 at para. 15, there are many cases confirming that the bar against appeals applies:

> The appellants submit that para. 72(2)(*e*) [another bar against appeals in the *Immigration and Refugee Protection Act*] 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* [*v*. *Canada (Citizenship and Immigration)*, 2011 FCA 294]; *Es-Sayyid v*. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3.

– IV –

[24] Finally, Mr. Mahjoub raises the constitutionality of the requirement for a certified question before an appeal can be brought. He does not mention any of the jurisprudence in which such an argument has been rejected*:* see, most recently, *Wong*, above at para. 16; *Krishnapillai v*. *Canada*, 2001 FCA 378, [2002] 3 F.C. 74; *Huntley v*. *Canada (Citizenship and Immigration)*, 2011 FCA 273, 426 N.R. 152 at para. 14; *Huynh v*. *Canada*, [1996] 2 F.C. 976, 197 N.R. 62. The certified question requirement is constitutional.

C. Conclusion

[25] In substance, these appeals are nothing more than disagreements with the merits of the Federal Court's two decisions. The Federal Court did not consider that there was a serious question of general importance worth placing before this Court for its consideration.

[26] Under Parliament's law, in the absence of a certified question of general importance, the Federal Court's decisions are final: these appeals are barred by section 82.3 of the *Immigration and Refugee Protection Act*.

D. Proposed disposition

[27] Thus, under Rule 74, I would grant the motions and order that the notices of appeal be removed from the court files and the files closed.

"David Stratas"

J.A.

"I agree
Wyman W. Webb J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-155-17 AND A-156-17
STYLE OF CAUSE:	MOHAMED ZEKI MAHJOUB v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTIONS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
DATED:	JULY 4, 2017

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