F ederal Court of A ppeal  Cour d'appel fédérale

Date: 20100219

Docket: A-54-10

Citation: 2010 FCA 55

CORAM: **SEXTON J.A.**
EVANS J.A.
SHARLOW J.A.

BETWEEN:

CHERYL SANDRA HORNE, MARK ANSELM HORNE,
SUE ANNY SOPHIE HORNE AND
SULAN MARYN HORNE,
BY THEIR LITIGATION GUARDIAN
CHERYL SANDRA HORNE

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on February 19, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on February 19, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 19, 2010)

SHARLOW J.A.

[1] Before this Court are two motions. One is a motion by the Minister based on paragraph 72(2)(*e*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for an order quashing this appeal for want of jurisdiction. The other motion, which will be considered only if the motion to quash is dismissed, is a motion by the appellants for an order staying their deportation pending the disposition of the appeal.

[2] The facts may be summarized as follows. The appellants are not lawfully in Canada and are subject to a deportation order under the IRPA. The appellants have applied for permanent residency and have asked the Minister to exercise his discretion under section 25 of the IRPA, on humanitarian and compassionate grounds, to permit them to remain in Canada while their application for permanent residence is being considered. The Minister refused that request. The appellants filed an application in the Federal Court (IMM-311-10) under section 72 of the IRPA for leave and for judicial review of the Minister's negative decision and promptly moved for an order staying their deportation pending the disposition of that application. The motion for a stay was heard on February 8, 2010 and dismissed by an order dated February 11, 2010.

[3] The appellants immediately commenced an appeal of the order and filed a notice of motion asking this Court to stay the deportation pending the disposition of their appeal. The appellants asked for the stay motion to be heard on an urgent basis because their deportation is scheduled for February 23, 2010.

[4] The Court was disposed to hear the stay motion on an urgent basis. However, it was obvious that a question would arise as to the validity of the appeal, because the order sought to be appealed is an interlocutory judgment in a judicial review application relating to a decision under the IRPA. Paragraph 72(2)(*e*) of the IRPA states that no appeal lies from such a judgment. However, this Court has held that paragraph 72(2)(*e*) does not bar an appeal from an order that reflects a refusal by a judge to exercise his jurisdiction to determine a stay motion: *Subhaschandran v. Canada (Solicitor General)(F.C.A.)*, [2005] 3 F.C.R. 255, 2005 FCA 27.

[5] It was determined with the consent of all parties that a three judge panel would be convened on an urgent basis, and that the Minister would be permitted to present an oral motion to quash the appeal for want of jurisdiction, which would be dealt with before the stay motion. (Although one judge of this Court may entertain a motion to stay an order pending appeal, a three judge panel is required to deal with a motion to quash an appeal: see subsection 14(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.)

[6] The notice of appeal in this case expresses the grounds for appeal in language that is intended to invoke the principles applied in *Subhaschandran*. The appellants argue, by analogy to *Dubois v. The Queen*, [1986] 1 S.C.R. 366, that the Judge did not exercise the jurisdiction he was required to exercise when sitting on a stay motion, but went further and decided, against the appellants, issues that should have been reserved for the Judge dealing with the underlying application for judicial review. The Minister disagrees, and argues that the appeal is based on allegations of errors of law made by the Judge in applying the tripartite test from *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[7] Despite the able submissions of counsel for the appellants, we agree with the Minister.

[8] We accept that the consequences to the appellants of deportation will be onerous and perhaps harmful. However, in terms of the applicable legal principles, we are unable to conclude that this case bears any resemblance to *Subhaschandran*. On the contrary, we find this case to be indistinguishable from *Canada (Minister of Citizenship and Immigration) v. Edwards*, 2005 FCA

176. Thus, even if the Judge's disposition of the appellants' stay motion is based on one or more legal errors in formulating or applying the tripartite test – and we express no opinion on that point – paragraph 72(2)(*e*) precludes an appeal.

[9] For these reasons, the Minister's motion to quash the appeal for want of jurisdiction will be granted. It follows that the motion for a stay must be dismissed. No costs will be awarded.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-54-10
(A MOTION TO QUASH, IS MOVED BY THE RESPONDENT. A MOTION TO DISPOSE ON AN URGENT BASIS AND AN ORDER FOR AN INTERIM STAY)	
STYLE OF CAUSE:	CHERYL SANDRA HORNE, MARK ANSELM HORNE, SUE ANNY SOPHIE HORNE AND SULAN MARYN HORNE, BY THEIR LITIGATION GUARDIAN CHERYL SANDRA HORNE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 19, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	(SEXTON, EVANS & SHARLOW JJ.A.)
DELIVERED FROM THE BENCH BY:	SHARLOW J.A.

APPEARANCES:

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