F ederal Court of A ppeal

Cour d'appel fédérale

Date: 20100414

Docket: A-311-09

Citation: 2010 FCA 100

CORAM: **NOËL J.A.**
EVANS J.A.
DAWSON J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

SHAREH SAJI

Respondent

Heard at Toronto, Ontario, on April 12, 2010.

Judgment delivered at Toronto, Ontario, on April 14, 2010.

REASONS FOR JUDGMENT BY: EVANS J.A.

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

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal under section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, by the Minister of Citizenship and Immigration from an order of the Federal Court, dated July 30, 2009, in Court File No. T-548-09. In that order, Justice Hughes ("the Motions Judge") dismissed the Minister's motion to strike the notice of application filed by Sharareh Saji to appeal a citizenship judge's refusal to approve her application for citizenship on the ground that she had not met the statutory residence requirement.

[2] The basis of the Minister's motion was that Ms Saji had not filed her notice of application to appeal to the Federal Court within the time limit prescribed by paragraph 14(5)(*b*) of the *Citizenship Act,* R.S.C. 1985, c. C-29, that is, 60 days from the day when notice of the citizenship judge's decision "was mailed or otherwise given".

[3] The appeal raises two issues. First, is the jurisdiction of this Court under paragraph 27(1)(*c*) of the *Federal Courts Act* to hear an appeal from an interlocutory judgment of the Federal Court ousted by subsection 14(6) of the *Citizenship Act*? This provides that a decision of the Federal Court pursuant to an appeal from a decision of a citizenship judge is "final and notwithstanding any other Act of Parliament, no appeal lies therefrom". Second, if the Court has jurisdiction to hear this appeal, did the Motions Judge commit a reversible error in dismissing the Minister's motion to strike Ms Saji's appeal as out of time?

[4] In my opinion, the Motions Judge's dismissal of the Minister's motion to strike Ms Saji's application on the ground that it was statute-barred was not a decision "pursuant to an appeal made under subsection (5)" of the *Citizenship Act*, because it was unrelated to the ultimate question to be decided by the Federal Court on the appeal under subsection 14(5), namely, whether the citizenship court judge had erred in not approving Ms Saji's application. Accordingly, subsection 14(6) does not oust this Court's appellate jurisdiction under paragraph 27(1)(*c*) over the Motions Judge's dismissal of the motion to strike.

[5] I am also of the view that the Motions Judge erred in not striking the appeal. When notice of a citizenship judge's decision is sent to an applicant by registered mail, and is properly addressed,

the 60-day limitation period for filing a notice of appeal in the Federal Court, which the Judge has no discretion to extend, starts on the day that notice is mailed, not when it is received by the applicant.

[6] Accordingly, I would allow the Minister's appeal with costs and, making the order that the Motions Judge should have made, grant the Minister's motion to strike Ms Saji's notice of application, and dismiss her appeal to the Federal Court.

B. FACTUAL BACKGROUND

[7] The relevant facts are not in dispute. The citizenship judge refused to approve Ms Saji's application for Canadian citizenship in a decision dated July 9, 2008. Notice of the decision, together with information about the right of appeal and the time within which a notice of appeal must be filed with the Registry of the Federal Court, was mailed on January 23, 2009, to the address indicated on the Use of Representative Form submitted by Ms Saji's spouse on behalf of himself and his family.

[8] The letter was delivered to this address on January 26, 2009, where it was signed for by Lisa Moradi, a receptionist for a paralegal firm with which the immigration consultant representing Ms Saji shared office space. However, as a result of an error by Ms Moradi, the letter was misplaced and Ms Saji's representative did not learn of the decision until February 6, 2009.

[9] Ms Saji filed a notice of application to appeal with the Registry of the Federal Court on April 6, 2009. This was more than 60 days after notice of the citizenship judge's decision was mailed, but less than 60 days after Ms Saji's representative became aware of it.

C. LEGISLATIVE FRAMEWORK

[10] Subsection 27(1) of the *Federal Courts Act* creates a right of appeal to the Federal Court of Appeal from interlocutory and final judgments of the Federal Court.

27. (1) An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court:	27. (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Cour fédérale :
(a) a final judgment;	*a*) jugement définitif;
…	[…]
(*c*) an interlocutory judgment; or	*c*) jugement interlocutoire;
…	[…]

[11] Section 14 of the *Citizenship Act* governs the decision-making process respecting applications for citizenship and appeals. Subsection (1) provides that a citizenship judge must consider applications for citizenship referred to the judge, and determine whether the applicant satisfies the statutory requirements for citizenship.

14. (1) An application for	14. (1) Dans les soixante jours de sa saisine, le juge de la citoyenneté statue sur la conformité — avec les dispositions applicables en l'espèce de la présente loi et de ses règlements — des demandes déposées en vue de :
(*a*) a grant of citizenship under subsection 5(1) or (5),	*a*) l'attribution de la citoyenneté, au titre des paragraphes 5(1) ou (5);
…	[…]
shall be considered by a citizenship judge who shall, within sixty days of the day the application was referred to the judge, determine whether or not the person who made the application meets the requirements of this Act and the regulations with respect to the application.	

[12] Subsection (2) requires the citizenship judge to approve, or not to approve, the application as she or he has determined under subsection (1), and to notify the Minister of the decision and the reasons for it.

14. (2) Forthwith after making a determination under subsection (1) in respect of an application referred to therein but subject to section 15, the citizenship judge shall approve or not approve the application in accordance with his determination, notify the Minister accordingly and provide the Minister with the reasons therefore.	14. (2) Aussitôt après avoir statué sur la demande visée au paragraphe (1), le juge de la citoyenneté, sous réserve de l'article 15, approuve ou rejette la demande selon qu'il conclut ou non à la conformité de celle-ci et transmet sa décision motivée au ministre.

[13] Subsections (3) and (4) provide for the notification of the applicant if the citizenship judge does not approve the application for citizenship, and permits notice of the decision to be sent to the applicant by registered mail at his or her last known address.

14. (3) Where a citizenship judge does not approve an application under subsection (2), the judge shall forthwith notify the applicant of his decision, of the reasons therefor and of the right to appeal.	14. (3) En cas de rejet de la demande, le juge de la citoyenneté en informe sans délai le demandeur en lui faisant connaître les motifs de sa décision et l'existence d'un droit d'appel.
14. (4) A notice referred to in subsection (3) is sufficient if it is sent by registered mail to the applicant at his latest known address.	14. (4) L'obligation d'informer prévue au paragraphe (3) peut être remplie par avis expédié par courrier recommandé au demandeur à sa dernière adresse connue.

[14] Subsection (5) enables the Minister or the applicant to appeal a decision of a citizenship judge to the Court, which is defined in subsection 2(1) as the Federal Court, and prescribes the time permitted for filing a notice of appeal.

14. (5) The Minister or the applicant may appeal to the Court from the decision of the citizenship judge under subsection (2) by filing a notice of	14. (5) Le ministre et le demandeur peuvent interjeter appel de la décision du juge de la citoyenneté en déposant un avis d'appel au greffe de la Cour

appeal in the Registry of the Court within sixty days after the day on which	dans les soixante jours suivant la date, selon le cas :
(*a*) the citizenship judge approved the application under subsection (2); or	*a*) de l'approbation de la demande;
(*b*) notice was mailed or otherwise given under subsection (3) with respect to the application.	*b*) de la communication, par courrier ou tout autre moyen, de la décision de rejet.

[15] Subsection (6) provides that a decision of the Federal Court "pursuant to an appeal made under subsection (5)" is final and not subject to appeal.

14. (6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.	14. (6) La décision de la Cour rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

D. ISSUES AND ANALYSIS

[16] As is not unusual in the disposition of motions in writing, the Motions Judge gave no formal reasons for his decision. Instead, he issued a speaking order, from which it would appear that he was of the view that the appeal should not be struck for delay because it would be unfair to prejudice Ms Saji by visiting on her the negligence of a receptionist in failing to bring the registered letter to the attention of her representative.

[17] The basis of the Motions Judge's order seems to be either that the Act implicitly confers a discretion on the Federal Court to extend the 60 day limitation period or that, in order to avoid prejudice to an applicant, the limitation period runs from the date when, through no fault of either the applicant or her representative, the representative learns of the citizenship judge's decision. In

my view, despite this lack of clarity, the record enables a proper determination to be made, on the standard of correctness, of the legal questions arising from this appeal.

[18] Despite its almost wearisome familiarity, the statement of the contemporary approach to the interpretation of legislation, adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 41, from Elmer A. Driedger, 2nd ed., *The Construction of Statutes* (Toronto: Butterworths, 1983), still bears repeating in a case where the issues concern statutory interpretation.

> Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

However, as will become apparent, the first of the interpretative issues is largely resolved by the application of prior jurisprudence.

Issue 1: Does subsection 14(6) of the *Citizenship Act* oust the appellate jurisdiction of this Court under paragraph 27(1)(*c*) of the *Federal Courts Act* over the interlocutory judgment of the Federal Court not to strike Ms Saji's appeal as out of time?

[19] For ease of reference, I set out again the text of subsection 14(6).

14. (6) A decision of the Court pursuant to an appeal made under subsection (5) is, subject to section 20, final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.	14. (6) La décision de la Cour rendue sur l'appel prévu au paragraphe (5) est, sous réserve de l'article 20, définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

[20] Subsection (5) refers to the right of "the Minister or the applicant to appeal from a decision of a citizenship judge under subsection (2)". Subsection (2) requires the citizenship judge to approve or not to approve a citizenship application in accordance with the citizenship judge's determination under subsection (1) of whether the applicant meets the statutory requirements of citizenship.

[21] It is asserted in the memorandum of fact and law submitted on behalf of the Minister in this appeal that subsection (6) applies only to a decision by the Federal Court "under subsection (5)", that is the citizenship judge's approval or non-approval of the citizenship application.

[22] This is not quite accurate: subsection (6) precludes an appeal to this Court from a decision of the Federal Court "pursuant to an appeal under subsection (5)". On their face, the words "pursuant to" may seem to broaden the scope of subsection (6) beyond the question appealed to the Federal Court, namely, whether the citizenship judge erred in approving or not approving an application for citizenship. In contrast, subsection 18(3) precludes an appeal to this Court from the Federal Court of "a decision under" subsection (1), which concerns, among other things, the revocation of citizenship. It is presumed that when Parliament uses different words on the same topic, in the same statute, it intends them to have different meanings.

[23] However, the French version of subsection 14(6), « *La decision de la Cour rendue sur l'appel prévu au paragraphe (5) »* suggests a narrower meaning. In addition, jurisprudence arising from the interpretation of another preclusive provision of the *Citizenship Act,* subsection 18(3), indicates that the words "pursuant to" in subsection 14(6), do not include every Federal Court decision made in the context of a citizenship appeal.

[24] Thus, one issue in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 ("*Tobias*s"), was whether the Court had jurisdiction to hear an appeal from a decision of a Federal Court judge to grant a stay of a citizenship revocation proceeding. Subsection 18(3) of the *Citizenship Act* provides that no appeal lies from a decision of the Federal Court "made under subsection (1)", which deals with decisions of the Court as to whether a person had, among other things, obtained citizenship on the basis of false representation or fraud.

[25] Upholding the decision of this Court ([1997] 1 F.C. 828), the Supreme Court concluded (at paras. 50-53) that the decision of the Federal Court judge at first instance to stay the proceeding was not made under subsection 18(1), since proceedings are stayed for reasons unrelated to the circumstances surrounding the obtaining of citizenship. Rather, the decision to stay was made under the general power conferred by section 50 of the *Federal Court Act,* as it then was. Consequently, the appeal was not barred by subsection 18(3).

[26] The Court also stated (at para. 56) that there was "much force" in the argument that subsection 18(1) includes not only the ultimate decision on the circumstances in which a person obtained citizenship, but also

> those decisions made during the course of a s. 18 reference which are related to this determination. This would encompass all the interlocutory decisions which the court is empowered to make in the context of a s. 18 reference.

[27] Without deciding whether subsection 18(1) should be read this broadly, the Court said this (at paras. 57-8):

> However, whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings.
>
> Unlike interlocutory decisions, a stay of proceedings will not be made in order to more efficiently determine the ultimate question of whether citizenship was obtained by false pretences. An order staying proceedings is therefore not related to this ultimate decision (emphasis added).

[28] *Tobiass* was applied by this Court in *Canada (Minister of Citizenship and Immigration) v. Obodzinsky*, 2002 FCA 518, [2003] 2 F.C. 657, where (at para. 38) the Court likened to the stay considered in *Tobiass* a decision by a Federal Court judge in the course of a citizenship revocation matter as to whether it was appropriate to proceed by way of summary judgment. Hence, the Judge's decision respecting the motion concerning summary judgement was not covered by the preclusive provision of subsection 18(3).

[29] By analogy to the present case, an appeal from the Federal Court to this Court is only precluded by subsection (6) as a decision made "pursuant to an appeal under subsection (5)" if the decision in question relates to the ultimate question, namely, whether the citizenship judge erred in approving or not approving a citizenship application, or in determining a question related to it. In my view, a decision by a Federal Court Judge disposing of a motion to strike an appeal as being out of time is not related to the ultimate question to be decided on that appeal, regardless of whether the motion is granted or denied. This is because, in the words used in *Tobiass* at para. 58, the decision "will not be made in order to more efficiently determine the ultimate question".

[30] It is also relevant to note that the former subsection 80(3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which precluded appeals from a Federal Court Judge on the reasonableness of a security certificate, has been held not to apply when the ground of the appeal is that there was a reasonable apprehension that the Judge was not impartial or the legislation is unconstitutional: see *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 136, approving *Zűndel (Re)*, 2004 FCA 394, and *Charkaoui (Re),* 2004 FCA 421, [2005] 2 F.C.R. 299 at para. 47, where the relevant authorities are marshalled.

[31] In my opinion, the same would be true under subsection 14(6) if the ground of appeal was that the legislation was unconstitutional or that the hearing before the Federal Court judge had been procedurally unfair, either because there was a reasonable apprehension of bias on the part of the Federal Court judge or the applicant had been denied an adequate opportunity to participate in the hearing, regardless of whether the judge had allowed or dismissed the appeal from the citizenship judge. The propriety of the hearing conducted by a Federal Court Judge in a citizenship appeal is unrelated to the ultimate question: the preclusion of an appeal by subsection (6) applies only to a procedurally fair determination by the Federal Court of whether the citizenship judge erred in deciding the citizenship application. However, a mere unsupported allegation of procedural unfairness will not suffice to avoid a clause precluding an appeal: *Canada (Minister of National Revenue) v. Papa*, 2009 FCA 112 (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), subsection 225.2(13) ("ITA")).

[32] Counsel for the respondent also brought to the Court's attention *Tennina v. Canada (Minister of National Revenue)*, 2010 FCA 25. However, that case concerned a different issue. It

held that there was no right of appeal to this Court against a jeopardy order made by a Federal Court judge under subsection 225.2(2) of the ITA, because Parliament had specifically provided a remedy in subsection 225.2(8), namely, a right to apply to another Federal Court judge to review the order.

[33] Accordingly, in my opinion, this Court has jurisdiction to entertain the Minister's appeal, and I turn now to the second issue.

Issue 2: Did the Motions Judge err in law by not granting the Minister's motion to strike Ms Saji's appeal as out of time?

[34] Counsel for Ms Saji points out that paragraph 14(5)(*b*) specifies that notice of an appeal must be filed in the Federal Court within 60 days after the day on which

(*b*) notice was mailed or otherwise given under subsection (3) with respect to the application.	*b*) de la communication, par courrier ou tout autre moyen, de la décision de rejet.

She argues that, in the circumstances of the present case, the underlined words authorize the Motions Judge to decide that time runs from the day that Ms Saji's representative received the notice.

[35] I do not agree. First, the plain meaning of paragraph 14(3)(*b*) is that when notice is mailed, as it was here, the 60 day period starts at the date of mailing, as Federal Court jurisprudence has held: see, for example, *So (Re),* [1978] F.C.J. No. 922; *Conroy (Re),* [1979] F.C.J. No. 307. The words "or otherwise given under subsection (3)" apply only in a case where notice is given other than by mail, as the French text makes even plainer, « par courier ou tout autre moyen ».

[36] Second, in *Liu v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 94, 362 N.R. 81 ("*Liu*"), the Court held that the limitation period in subsection 14(5) is mandatory and may not be extended by the Federal Court Judge which, in effect, the Motions Judge's order did in this case. Incidentally, the Court in *Liu* appears to have assumed that it had jurisdiction to hear the appeal. The Court's short oral reasons for decision do not deal with the question of whether the Federal Court of Appeal's jurisdiction under subsection 27(1) to hear appeals from the Federal Court had been ousted by subsection 14(6) so as to bar an appeal from the Judge's decision to allow a motion to extend the time for appealing.

[37] Finally, this interpretation of paragraph 14(5)(*b*) cannot be said to have prejudiced Ms Saji. First, the notice of the citizenship judge's decision referred to the time within which an appeal may be filed; her representative still had 45 days, from the day when the representative became aware of the letter, to file a timely notice of appeal. There is no evidence explaining this delay; a person delays at their peril filing a document in a legal proceeding until what he or she has calculated to be the last, or almost the last, minute. Second, the citizenship judge's decision is not definitive of Ms Saji's ability to apply to become a Canadian citizen since she may renew her application at any time.

E. CONCLUSION

[38] For these reasons, I would allow the Minister's appeal with costs here and below, grant the Minister's motion to strike Ms Saji's appeal, and dismiss her appeal from the citizenship judge's decision not to approve her citizenship application.

"John M. Evans"
J.A.

“I agree
Marc Noël J.A.”

“I agree
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-311-09
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HUGHES, DATED JULY 30, 2009, DOCKET NO. T-548-09)	
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION v. SHARAREH SAJI
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REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	NOËL J.A. DAWSON J.A.
DATED:	April 14, 2010

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