Federal Court of Appeal  Cour d'appel fédérale

Date: 20120625

Docket: A-108-12

Citation: 2012 FCA 192

Coram: **NADON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

SHANTI MATHILDA ROCK-ST LAURENT

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 25, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellant, Ms. Rock-St Laurent, appeals from an order dated March 1, 2012 made by the Federal Court (*per* Justice Boivin).

[2] This is a matter arising under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. That Act bars appeals to this Court, except where the Federal Court has stated a certified question.

Where no certified question has been stated, this Court has developed jurisprudence that permits appeals only in well-defined, narrow circumstances.

[3] Here, the Federal Court did not state a certified question. When Ms. Rock-St Laurent presented her notice of appeal for filing, the Registry did not accept it. The Registry was concerned that this Court lacked jurisdiction to entertain an appeal in the circumstances disclosed in the notice of appeal in the absence of a certified question. So it referred the notice of appeal to this Court for direction.

[4] As explained below, this Court reviewed the notice of appeal and concluded that there was a serious question concerning whether this Court has jurisdiction over the appeal. It invited the parties to file submissions on the issue.

[5] Having received and considered those submissions, I find that this Court does not have jurisdiction to hear this appeal. Accordingly, I would order that the notice of appeal be removed from the Court file and that the Court file be closed.

A. Proceedings in the Federal Court

[6] Ms. Rock-St Laurent brought an application for judicial review to the Federal Court from a decision dated May 2, 2011 of the Immigration and Refugee Board (file no. MB0-00092). The Board had rejected her claim to refugee protection. The Board found that state protection was

available and that Ms. Rock-St Laurent had failed to avail herself of it before seeking refugee protection.

[7] In its Order dated February 3, 2012, the Federal Court said it was allowing the application for judicial review. However, its reasons supported the dismissing of the application, not allowing the application.

[8] In its reasons, the Federal Court found the Board's finding on the availability of state protection to be reasonable. Although not mentioned by the Federal Court in its reasons, it is well-known that such a finding disentitles an applicant to refugee status: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at page 722; *Hinzman v. Canada (Citizenship and Immigration)*, 2007 FCA 171. In *Hinzman*, this Court stated (at paragraph 42):

> The appellants say they fear persecution if returned to the United States. However, to successfully claim refugee status, they must also establish that they have an objective basis for that fear: *Ward* at page 723. In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. As the Supreme Court of Canada explained in *Ward* at page 722, "[i]t is clear that the lynch-pin of the analysis *is* the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." [Emphasis in original.] Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status.

[9] By leaving the Board's finding on state protection in place, the Federal Court should have dismissed Ms. Rock-St Laurent's application for judicial review. However, the Federal Court's Order of February 3, 2012 allowed her application for judicial review.

B. The Minister's motion to correct the Order under Rule 397(1)(*a*)

[10] Ten days later, the Minister brought a motion asking the Court to amend the February 3, 2012 Order and bring it into accord with the reasons it gave. The amendment sought was the dismissal of the application for judicial review. In the Minister's view, the Court simply made a mistake or slip when it made its Order and wrote that the application was allowed.

[11] The Minister's motion was based upon Rule 397(1)(*a*) of the *Federal Courts Rules*. It provides as follows:

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	**397.** (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
(*a*) the order does not accord with any reasons given for it;	*a*) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;

[12] The Federal Court (again *per* Justice Boivin) received responding submissions from Ms. Rock-St Laurent. She opposed the Minister's motion on the basis that Rule 397(1)(*a*) was not available to the Federal Court in these circumstances.

[13] The Federal Court granted the Minister's motion and amended its February 3, 2012 Order. The amended Order, dated March 1, 2012, is identical in all respects to the February 3, 2012 Order except that it now dismisses the application for judicial review.

[14] The Federal Court declined to state a certified question for the consideration of this Court. Nevertheless, Ms. Rock-St Laurent presented a notice of appeal to the Registry of this Court. Despite the absence of a certified question, she wants to appeal to this Court from the decision of the Federal Court.

C. This Court's jurisdiction to hear appeals under the *Immigration and Refugee Protection Act*

[15] The *Immigration and Refugee Protection Act* provides that:

- "no appeal [lies] from the decision of the [Federal] Court with respect to the application [for leave to commence a judicial review] or with respect to an interlocutory judgment": paragraph 72(2)(*e*); and

- no appeal from a judgment of the Federal Court that disposes of the merits of a judicial review may be initiated unless the Federal Court judge "certifies that a serious question of general importance is involved and states the question" for consideration of this Court: paragraph 74(*d*).

[16] Despite this bar against appeals without a certified question, this Court has held that it will entertain such appeals, but only in well-defined, narrow circumstances:

> The well-defined, narrow circumstances are where a judge refuses to exercise jurisdiction to decide the matter (*Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27) and where there is a reasonable apprehension of bias on the part of the judge (*Re Zundel*, 2004 FCA 394). However, this Court does not have jurisdiction to hear appeals based on submissions, even submissions that appear to possess considerable merit, that errors of law have been committed (*Mahjoub v. Canada*, 2011 FCA 294).

See *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at paragraph 28.

D. Proceedings in this Court

(1) The notice of appeal

[17] In her appeal, Ms. Rock-St Laurent intends to argue that the Federal Court had no jurisdiction under Rule 397(1)(*a*) to make the amended Order. This is seen from the only specific ground of appeal listed in the notice of appeal:

> …the Honourable Boivin J. committed jurisdictional error in granting the Respondent's motion to reconsider in that he was *functus officio* and had no jurisdiction to apply Rule 397 in the circumstances of the appellant's case.

[18] Ms. Rock-St Laurent presented her notice of appeal to this Court's Registry for filing. However, the Registry initially did not accept it for filing. Upon review of the notice of appeal, the Registry became concerned that the Court lacked jurisdiction to hear the appeal. It referred the notice of appeal to the Court for direction.

(2) Analysis of Rules 72 and 74

[19] Rules 72 and 74 potentially apply in this situation. They read as follows:

72. (1) Where a document is submitted for filing, the Administrator shall	**72.** (1) Lorsqu'un document est présenté pour dépôt, l'administrateur, selon le cas :
(*a*) accept the document for filing; or	*a*) accepte le document pour dépôt;
(*b*) where the Administrator is of the opinion that the document is not in the form required by these Rules or that other conditions precedent to its filing have not been fulfilled, refer the document without delay to a judge or prothonotary.	*b*) s'il juge qu'il n'est pas en la forme exigée par les présentes règles ou que d'autres conditions préalables au dépôt n'ont pas été remplies, soumet sans tarder le document à un juge ou à un protonotaire.
(2) On receipt of a document referred under paragraph (1)(*b*), the judge or prothonotary may direct the Administrator to	(2) Sur réception du document visé à l'alinéa (1)*b*), le juge ou le protonotaire peut ordonner à l'administrateur :
(*a*) accept or reject the document; or	*a*) d'accepter ou de refuser le document;
(*b*) accept the document subject to conditions as to the making of any corrections or the fulfilling of any conditions precedent.	*b*) d'accepter le document à la condition que des corrections y soient apportées ou que les conditions préalables au dépôt soient remplies.

(3) A document that is accepted for filing shall be considered to have been filed at the time the document was submitted for filing, unless the Court orders otherwise.	(3) Sauf ordonnance contraire de la Cour, le document qui est accepté pour dépôt est réputé avoir été déposé à la date où il a été présenté pour dépôt.
74. (1) Subject to subsection (2), the Court may, at any time, order that a document that is not filed in accordance with these Rules or pursuant to an order of the Court or an Act of Parliament be removed from the Court file.	**74.** (1) Sous réserve du paragraphe (2), la Cour peut à tout moment ordonner que soient retirés du dossier de la Cour les documents qui n'ont pas été déposés en conformité avec les présentes règles, une ordonnance de la Cour ou une loi fédérale.
(2) An order may be made of the Court's own initiative under subsection (1) only if all interested parties have been given an opportunity to be heard.	(2) La Cour ne peut rendre une ordonnance en vertu du paragraphe (1) de sa propre initiative que si elle a donné aux parties intéressées l'occasion de se faire entendre.

[20] The Registry's power to refuse to accept documents for filing is set out in Rule 72. Under that rule, the Registry can either accept a notice of appeal for filing or refer it to the Court for direction.

[21] Under Rule 72(1)(*b*), the Registry may refer documents to the Court in only two circumstances: where it believes that the document is "not in the form required by these Rules" or where the "conditions precedent to its filing have not been fulfilled."

[22] In this case, the Registry was correct in referring Ms. Rock-St Laurent's notice of appeal to the Court. That notice of appeal had to conform to an important "condition precedent." It had to be in Form IR-4: *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, Rule 20(1).

Form IR-4 requires that the certified question be set out in the notice of appeal. Ms. Rock-St Laurent's notice of appeal did not set out a certified question.

[23] Accordingly, in an appeal to this Court under the *Immigration and Refugee Protection Act*, whenever a notice of appeal is filed with this Court and does not set out a certified question, Rule 72(1)(*b*) is triggered. In accordance with that Rule, the Registry must forward the notice of appeal to the Court for review.

[24] When the Court receives a non-compliant notice of appeal from the Registry, it may engage in two possible stages of review under Rules 72 and 74.

[25] First, under Rule 72, a single judge of the Court may review whether the notice of appeal substantially complies with Form IR-4, *i.e.* although the notice of appeal does not set out a certified question, nevertheless it sets out grounds for appeal that, at least as a matter of form, address jurisdiction in a tenable way.

[26] For example, the notice of appeal might allege that there was a reasonable apprehension that the Federal Court judge was biased. As discussed above, that is a ground upon which this Court can accept jurisdiction. If the allegation of bias is tenable in the sense that the allegation is not stated in a bald or idle way but rather is supported by some information set out in the notice of appeal, the reviewing judge can conclude that the notice of appeal substantially complies with Form IR-4 and can direct the Registry to file it.

[27] Under this first stage of review, where a notice of appeal presented to the Registry does not contain a certified question and does not set out tenable grounds upon which this Court can exercise jurisdiction, the notice of appeal is wholly non-compliant and the reviewing judge should direct the Registry not to allow the filing of the notice of appeal.

[28] After completing that first stage of review, the reviewing judge may wish to proceed further. The notice of appeal might set out tenable grounds upon which this Court can exercise jurisdiction, but the reviewing judge may still have an articulable doubt as to whether jurisdiction is truly present. To try to resolve that doubt, the reviewing judge may allow the filing of the notice of appeal under Rule 72 and then engage in a second level of review under Rule 74.

[29] Under Rule 74, where the judge has a concern that the notice of appeal is "not filed in accordance with …[provisions of] an Act of Parliament" – *i.e.*, contrary to the bars on appeals to this Court under the *Immigration and Refugee Protection Act* – on his or her own motion the judge can invite submissions on the matter. Upon consideration of those submissions, two outcomes are possible:

- It may be clear that jurisdiction is lacking. In that case, Rule 74 permits the Court to order that the notice of appeal to be "removed from the Court file." Such an order means that the appeal can progress no further.

- In other cases, the appellant may have established a sufficiently arguable case for jurisdiction or, even after submissions, the situation might remain unclear or in doubt. In these cases, the Court can allow the appeal to progress under the Rules in the usual manner. It would be for the panel hearing the appeal on its merits to make the final decision concerning jurisdiction.

[30] In my view, if the Court decides under Rule 74 to order a notice of appeal to be removed from the Court file for want of jurisdiction, it should act as a panel of three judges rather than as a single judge. This Court's uniform practice is to act as a panel of three when dismissing proceedings that have been filed before it. See, for example, Rule 382.4(2)(*a*), in which a proceeding may be dismissed following a status review. Although Rule 382.4(2)(*a*) empowers a "judge" to dismiss a proceeding, the practice of this Court is to do so only by way of a panel of three judges.

[31] Acting under Rule 74, this Court can set a highly expedited schedule for the exchange of written submissions or even hold a very brief teleconference to receive oral submissions almost immediately after the Registry brings the notice of appeal to the Court's attention. After all, the jurisdictional issue is a narrow one based on well-defined case law and it can be handled quickly.

[32] The effect of the foregoing analysis is that Rules 72 and 74 can be used in appropriate cases to screen out appeals under the *Immigration and Refugee Protection Act* that this Court has no jurisdiction to hear. If there were any ambiguity in these Rules, I would invoke Rule 3. It provides as follows:

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3.** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Notices of appeal should be drafted with care and should supply a jurisdictional basis for the appeal either by complying strictly with Form IR-4 or by establishing in the stated grounds for appeal a jurisdictional basis for it. Using Rules 72 and 74 to screen out notices of appeal that do not disclose a jurisdictional basis for the appeal is fair, consistent with the objective of expedition, prevents parties from incurring unnecessary costs, and ensures that the scarce resources of the Court are devoted only to cases that are properly before it.

(3) Application of Rules 72 and 74 to this case

[33] Acting under Rule 72, the Registry forwarded Ms. Rock-St Laurent's notice of appeal to the Court. It came to me, acting at that time as the duty judge. In retrospect, based on the above analysis, I could have acted under Rule 72 because this notice of appeal fails to set out a certified question and fails to set out grounds for appeal that address jurisdiction in a tenable way. However, in this case, I decided to allow the notice of appeal to be filed under Rule 72 and then, under Rule 74, I invited the parties to provide submissions on the matter.

[34] Accordingly, a panel of three judges of this Court was set. The panel has received and considered the parties' submissions.

[35] As mentioned above, the only stated ground of appeal in the notice of appeal is the Federal Court judge's disposition of the motion under Rule 397(1)(*a*) and his decision to amend his Order.

[36] This ground does not fall within the well-defined, narrow circumstances in which this Court will entertain an appeal.

[37] This is a matter related to the Federal Court judge's consideration of the merits of the issue, a subject-matter that cannot be appealed to this Court in the absence of a certified question. The Federal Court judge adjudicated the merits of the matter before him and issued an Order. However, the Order contained an error. Acting on a motion under Rule 397(1)(*a*), the judge corrected a mistake in his Order to bring it into accord with the reasons on the merits he had already given.

[38] In doing this, the judge did not refuse to exercise jurisdiction over the matter or create a reasonable apprehension of bias.

[39] It follows that the notice of appeal is inconsistent with the *Immigration and Refugee Protection Act* and our Court's associated jurisprudence, both of which forbid appeals to our Court in these circumstances. Therefore, under Rule 74, the notice of appeal should be removed from the Court file.

E. Proposed disposition

[40] For the above reasons, I would order that the notice of appeal be removed from the Court file. The appeal cannot proceed. Therefore, I would also order that the Court file be closed.

"David Stratas"

J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-108-12
STYLE OF CAUSE:	Shanti Mathilda Rock-St Laurent v. The Minister of Citizenship and Immigration

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
CONCURRED IN BY:	Nadon J.A. and Gauthier J.A.
DATED:	June 25, 2012

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