Federal Court of Appeal | Cour d'appel fédérale

Date: 20121115

Docket: A-313-12

Citation: 2012 FCA 296

Present: STRATAS J.A.

BETWEEN:

MOHAMED ZEKI MAHJOUB

Appellant

and

MINISTER OF IMMIGRATION AND CITIZENSHIP
MINISTER OF PUBLIC SAFETY and THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 15, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. This motion

[1] Mr. Mahjoub moves for an order:

- requiring the Attorney General to reimburse him for his counsel fees and disbursements in this appeal;

- in the alternative, requiring the respondents to pay him an award of costs before the hearing and determination of this appeal;

- in the further alternative, a six-month suspension of the appeal pending in this Court so he can raise funds for legal representation or obtain *pro bono* legal representation to prosecute his appeal.

B. The nature of the appeal in this Court

[2] Mr. Mahjoub is named in a security certificate signed by the respondent Ministers under subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[3] The certificate has been referred to the Federal Court. During ongoing, lengthy proceedings, the Federal Court is examining whether the certificate should be upheld as reasonable.

[4] This appeal is from an abuse of process ruling made by the Federal Court (*per* Justice Blanchard): 2012 FC 669. Only a cursory explanation of the nature of the abuse of process ruling is necessary at this time.

[5] Certain confidential materials belonging to Mr. Mahjoub were commingled with those of the Ministers. Mr. Mahjoub alleged that this constituted an abuse of process. He brought a motion to

stay the Federal Court's proceedings permanently and for other relief, invoking, among other things, sections 7, 8 and 24(1) of the Charter.

[6] As a first step in determining Mr. Mahjoub's motion, the Federal Court judge wanted to assess the possible prejudice caused to Mr. Mahjoub. So he established a protocol under which the commingled documents could be separated and returned to Mr. Mahjoub. The Federal Court judge then assessed the prejudice to Mr. Mahjoub and ruled on his motion to stay the proceedings permanently.

[7] In his ruling, the Federal Court judge found that the Minister had committed an abuse of process. However, he declined to stay the proceedings permanently. In his view, if the proceedings continued, certain commingled documents would not be used in a prejudicial way.

[8] Nevertheless, the Federal Court judge granted Mr. Mahjoub some relief for the abuse of process. The Federal Court judge ordered that persons on the Minister's litigation team be permanently removed from the file and barred from discussing and accessing file materials. In the judge's view, this remedy was reasonably capable of removing any prejudice suffered by Mr. Mahjoub.

[9] Mr. Mahjoub has appealed from the ruling of the Federal Court judge. This is the appeal presently before this Court. Mr. Mahjoub's motion for state funding arises within this appeal.

C. Analysis

[10] The primary relief Mr. Mahjoub seeks in this motion is court-ordered state funding for legal representation in his appeal before this Court.

[11] His request is put in two different ways. In the first, he seeks complete funding, under *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) and its progeny. In the second, he seeks partial funding, through "advance costs," under *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 and its progeny.

[12] These two lines of authority have developed separately. But they are aimed at the same thing: court-ordered state funding for legal representation. Therefore, unsurprisingly, the tests prescribed by these lines of authority share some features.

[13] As shall be shown below, one feature common to both is that court-ordered state funding for legal representation is an absolute last resort. Among other things, a moving party must demonstrate that there is no other way in which the moving party can obtain legal representation.

[14] In this respect, the appellant's evidence falls short of the mark.

(1) Orders for complete or substantial funding: *Rowbotham* and its progeny

[15] To promote trial fairness in criminal prosecutions, in narrow circumstances courts have been prepared to order a stay of proceedings unless the Crown funded an accused in whole or in part: *Rowbotham*, *supra*. Accused persons are entitled to this relief if they are (a) indigent, (b) not eligible for legal aid, (c) unable to represent themselves adequately and (d) involved in a serious and complex legal proceeding affecting their liberty.

[16] In the criminal context, a number of courts have emphasize the need for an accused seeking a *Rowbotham* order to establish that significant efforts have been made to find other legal representation or funding: see e.g. *R. v*. *Rain*, 1998 ABCA 315 at paragraph 88; *R. v*. *Malik*, 2003 BCSC 1439; *R v Dew (E.J.)*, 2009 MBCA 101 at paragraphs 22, 25 and 98; *R. v*. *Rushlow*, 2009 ONCA 461 at paragraphs 28-30.

[17] *Rowbotham* and its progeny are limited to entitling an accused person, in appropriate and rare circumstances, to a stay if funding is not granted. But in *New Brunswick (Minister of Health and Community Services) v*. *G.(J.)*, [1999] 3 S.C.R. 46, the Supreme Court extended this sort of relief in two ways: an order requiring state funding of a litigant, rather than just a stay, can be made, and such an order can be made in certain civil proceedings.

[18] In *G.(J.)*, the Supreme Court of Canada ordered funding for a litigant in child welfare proceedings where section 7 Charter rights were implicated. However, factually, *G.(J.)* was an exceptional case. The Supreme Court ordered funding because the litigant had convinced it, among other things, that the litigant had no other way of securing legal representation.

[19] Applications for court-ordered state funding for legal representation are most rare in the Federal Courts. Two authorities on point, however, are consistent with *G.(J.)* in that they require the applicant to demonstrate, among other things, that, absent an order for state funding, there is no other way in which legal representation can be obtained. In other words, court-ordered state funding is a last resort.

[20] In *Canada (Minister for Public Safety and Emergency Preparedness) v. Muse*, 2005 FC 1380, the Federal Court dismissed an application for state funded legal counsel brought on the basis of *Rowbotham*. The Federal Court found that the litigant had access to legal services in earlier stages to the proceeding and was not "indigent." Overall, the Court was not satisfied that court-ordered state funding was a last resort.

[21] The only recorded instance of a *Rowbotham* application for state funded legal counsel in this Court is *A.B. v. Canada (Minister of Citizenship and Immigration)* (2001), 197 F.T.R. 320 (C.A.). In *A.B.*, the litigant was receiving provincial legal aid funding but claimed that the amounts provided were insufficient. This Court found that the federal government was not constitutionally obligated to top-up the litigant's funding, especially since the federal government had already contributed to the provincial scheme.

[22] Importantly, in *A.B.*, the reasons of the Court show no indication that the litigation would have to be discontinued without further funding. Indeed, the litigant had some funding and simply desired and needed more. *A.B.* was not a case where the litigant had explored every possible means of obtaining funds for counsel or *pro bono* or reduced-rate counsel.

[23] For completeness, I would note that on one occasion this Court, on its own motion, ordered the Crown "if necessary" to financially assist an employment insurance claimant in obtaining counsel to advance a submission: *Canada (Attorney General) v. Purcell*, [1995] F.C.J. No. 1331 (C.A.). The words "if necessary" are consistent with the requirement that court-ordered state funding be a last resort, not a first resort or even an intermediate resort.

(2) Advance costs orders: *Okanagan* and its progeny

[24] In *Okanagan Indian Band*, *supra*, the Supreme Court reaffirmed courts' ability to grant an award of costs in favour of a litigant in advance of the determination of the matter. Such advance costs awards were said to be available upon a demonstration of the moving party's inability to proceed with the case due to impecuniosity, a *prima facie* case of sufficient merit, and special circumstances justifying an extraordinary exercise of discretion.

[25] In this test, the Supreme Court did not explicitly require the moving party to show that no other sources of funding were available. But that was arguably inherent in the requirement that special circumstances be shown.

[26] Any doubt on this was cleared up in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38. There, the Supreme Court confirmed that the moving party must "explore all other possible funding options" including "public funding options," "other programs designed to assist various groups in taking legal action," and "private funding" including "fundraising campaigns, loan applications, contingency fee agreements and any other available options" (at paragraph 40). See also *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 at paragraph 41.

[27] Quite consistently with these holdings, this Court has emphasized the obligation of a moving party to provide a very complete account of all potential sources of funding, including friends and family: *Al Telbani v. Canada (Attorney General)*, 2012 FCA 188. Bald statements will not suffice: *Metrolinx (GO Transit) v. Canadian Transportation Agency*, 2010 FCA 45 at paragraph 10.

(3) Application of these principles

[28] Mr. Mahjoub filed three affidavits in support of his motion: one from himself, one from an assistant in his lawyers' office, and a final one from one of his lawyers. This evidentiary material establishes the following:

- Mr. Mahjoub does "not possess the necessary funds to pay for the fees/disbursements required by counsel." He does not have savings or other income. Further, he is under house arrest and is not working.

- His counsel's fees and disbursements for this appeal are not covered by legal aid funding. His counsel will not continue to act on his behalf without funding.

- Mr. Mahjoub wants his counsel to continue to represent him on the appeal because they have been his counsel throughout the security certificate proceedings.

- Mr. Mahjoub does not have the legal skills necessary to prepare the oral and written argument for the appeal, including language ability.

[29] This evidence falls well short of establishing that court-ordered state funding is necessary as a last resort. There is no evidence that Mr. Mahjoub has taken any steps to raise funds or search for counsel willing to act on a reduced fee or *pro bono* basis.

[30] Indeed, Mr. Mahjoub has conceded this in asking that the progress of this appeal be suspended for six months. During the six months, he intends to engage in fundraising or seek *pro bono* counsel.

[31] In the circumstances, Mr. Mahjoub seems to have sought court-ordered state funding as a first resort, not as a last resort.

[32] Therefore, for the foregoing reasons, this motion must be dismissed.

[33] In closing, I note that the respondents urged that court-ordered state funding is not available in security certificate cases, or in this particular appeal. In the alternative, they urged that Mr. Mahjoub did not meet the other requirements for obtaining court-ordered state funding. I express no comment on these issues.

D. The motion to suspend the appeal for six months

[34] As previously mentioned, the appellants ask that the appeal be suspended in order to engage in fundraising and investigation into the availability of *pro bono* counsel.

[35] This Court can delay an appeal when it is in the interests of justice to do so: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312.

[36] On June 29, 2012, the appellant filed his notice of appeal. On August 13, 2012, he filed an agreement on the contents of the appeal book. All that remains is the production of the appeal book, the preparation and filing of a memorandum of fact and law, and the filing of a requisition for hearing.

[37] I consider the request for a suspension of the appeal to be premature. In the next two months, Mr. Mahjoub might be able to locate *pro bono* or reduced-rate counsel or raise funds for

legal representation. Then he can file the appeal book and memorandum, along with a simple motion for an extension of time for doing so. At that point, with only a minimum of delay, the appeal will be back on track.

[38] If that is not done, two months from now the Court will automatically issue a notice of status review under Rule 382.2. Under Rule 382.3(1), Mr. Mahjoub will have to respond to the notice, failing which his appeal will be dismissed. As part of that response, I expect that Mr. Mahjoub will supply the Court with information concerning his efforts to fundraise or to locate *pro bono* or reduced-rate counsel since the date of this motion. Also as part of that response, Mr. Mahjoub can make submissions concerning the timing of the remaining steps in the appeal.

E. Conclusion

[39] Therefore, Mr. Mahjoub's motion is dismissed. The respondents have not asked for costs and none shall be awarded.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-313-12
STYLE OF CAUSE:	Mohamed Zeki Mahjoub v. Minister of Immigration and Citizenship *et al.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	November 15, 2012

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