Federal Court of Appeal | Cour d'appel fédérale

Date: 20200903

Docket: A-47-20

Citation: 2020 FCA 136

CORAM : **WEBB J.A.**
RIVOALEN J.A.
LEBLANC J.A.

BETWEEN:

NARINDER KAUR AND GURJANT KHAIRA

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 3, 2020.

REASONS FOR ORDER BY: LEBLANC J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200903

Docket: A-47-20

Citation: 2020 FCA 136

CORAM : **WEBB J.A.**
RIVOALEN J.A.
LEBLANC J.A.

BETWEEN:

NARINDER KAUR AND GURJANT KHAIRA

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

LEBLANC J.A.

[1] As permitted by subsection 52(*a*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the respondent is seeking an order to quash the appellants' appeal of a decision of the Federal Court, dated January 9, 2020 (Federal Court order), on the basis that this Court is without jurisdiction to entertain the appeal since the Federal Court judge, in rendering her decision, did not certify that the matter involves a serious question of general importance. The respondent also claims that the

appellants' appeal is moot because there is no longer a tangible and concrete dispute between the parties.

[2] The judicial dispute between the parties stems from the decision of an immigration officer denying a temporary resident visa to a member of the appellants' family. Claiming that the officer's decision violates their right to associate with that family member here in Canada, contrary to subsection 2(*d*) of the *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (Charter), the appellants launched judicial review proceedings in the Federal Court against that decision.

[3] Those proceedings were met with a motion to strike on the grounds that the appellants lacked standing to bring them and that they were brought in contravention of the requirement to seek leave of the Federal Court pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C., 2001, c. 27 (Act).

[4] On January 9, 2020, the Federal Court judge granted the respondent's motion to strike "on the terms recited". She made no order as to costs. On February 7, 2020, the appellants filed their notice of appeal. They claim that the Federal Court order is unintelligible and brings the administration of justice into disrepute. They further claim that they have standing to challenge the officer's decision on the ground that "the respondent's agents have engaged in a conspiracy to breach [their] s. 2(d) Charter right". As such, they assert, their challenge of the officer's decision is rooted in subsection 24(1) of the Charter, not in the Act, ousting thereby the

requirement of subsection 72(1) of the Act that their challenge of the officer's decision be commenced by an application for leave.

[5] Subject to section 87.01 of the Act, which has no application in the present matter, an appeal of a decision of the Federal Court disposing of a judicial review application under the Act may only be made, according to subsection 74(*d*) of the Act, if, in rendering judgment, the Federal Court judge "certifies that a serious question of general importance is involved and states the question."

[6] No serious question of general importance was certified in this case and according to the motion material before this Court, no request to certify such a question was made to the Federal Court judge.

[7] As is well established, subsection 74(*d*) of the Act operates as a statutory bar against appeals brought to this Court under the Act; this goes to the jurisdiction of the Court to entertain these appeals (*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, [2018] F.C.J. No. 707 at para. 14 (*Tennant*) and authorities cited therein). As the respondent points out, there are "well-defined" and "narrow" judge-made exceptions to this statutory bar, all of which "exemplify rule of law concerns" (*ibid.* at para. 11; see also, *e.g.*, *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 at para. 28). These exceptions are where a judge refuses to exercise jurisdiction to decide the matter in circumstances where he or she must exercise it, or where the judge loses jurisdiction due to a fundamental flaw in the proceedings going to the roots of his or her ability to decide the case,

such as a reasonable apprehension of bias or a blatant exceedance of authority obvious from the face of the judgment (*ibid.* at paras. 14 and 17). None of these exceptions apply here.

[8] It is worth adding that an alleged error of law, "even one where 'an appeal would certainly succeed if it were entertained,'" is no exception to the statutory bar in subsection 74(*d*) of the Act (*ibid.* at para. 15, citing *Mahjoub v. Canada (Citizenship and Immigration)*, 2011 FCA 294, 426 N.R. 49 at para. 12).

[9] The same is true of matters where the alleged error concerns an alleged violation of Charter rights. In *Mahabir v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 133, [1991] F.C.J. No. 1044 (QL/Lexis) (*Mahabir*), this Court, in the context of the Act's predecessor, the *Immigration Act*, R.S.C. 1985, c. I-2 (Immigration Act), held that even where a constitutional question is at issue, the need to bring a leave application is not impeded if the redress sought is contemplated by that act. In particular, it held that by having chosen to seek a Charter remedy through a proceeding authorized by the Immigration Act, the applicant in that case was bound by the condition precedent that he obtain leave to so proceed (*Mahabir*, at para. 5). *Mahabir* was decided at a time when this Court was vested with original jurisdiction to judicially review decisions taken under the Immigration Act. However, there is no principled reason not to apply the teachings of that decision to the statutory bar found at subsection 74(*d*) of the Act.

[10] While the appellants may be alleging the violation of their Charter rights, the starting point of their claim is the actions of the immigration officer taken under the authority vested in

him or her under the Act. Therefore, there is no basis to depart in this case from the statutory requirement that there be, before this Court, a serious question of general importance certified by the Federal Court judge in order to enable this Court to entertain the appellants' appeal. In the absence of such a question, this Court has no jurisdiction to entertain this appeal.

[11] The appellants rely heavily on *Mills v. The Queen*, [1986] 1 SCR 863, 29 DLR (4th) 161 (*Mills*) and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, 433 DLR (4th) 381 (*Chhina*) in support of their position that this Court has jurisdiction to entertain their appeal despite the absence of a certified question. However, these cases do not assist them. *Mills*, a criminal law matter, provides a framework for determining what a "court of competent jurisdiction" within the meaning of section 24 of the Charter is. As this Court pointed out in *Mahabir*, section 24 of the Charter does not, in and of itself, give jurisdiction to a Court but rather provides a remedial power to be exercised in disposing of a matter that is properly before the Court of competent jurisdiction (*Mahabir* at para. 5). Here, the matter raised by the appellants, in the absence of a certified question of general importance, is not properly before our Court.

[12] *Chhina* dealt with the availability of *habeas corpus* in immigration detention matters. The majority held that the Act failed to provide relief that is as broad and advantageous as *habeas corpus* in response to the applicant's challenge to the legality of the length and uncertain duration of his detention. Therefore, it concluded that the detention review process put in place by the Act did not fall within the limited exceptions to the availability of *habeas corpus*. Again, this case is of no assistance to the appellants as it occurred in a wholly different context than the

present case, which results from the refusal of an immigration officer to issue a temporary residence visa.

[13] For these reasons, I would grant the respondent's motion and quash the appellants' appeal for want of jurisdiction. I would make no order as to costs.

"René LeBlanc"
J.A.

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

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-47-20
STYLE OF CAUSE:	NARINDER KAUR AND GURJANT KHAIRA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LEBLANC J.A.
CONCURRED IN BY:	WEBB J.A. RIVOALEN J.A.
DATED:	SEPTEMBER 3, 2020

WRITTEN REPRESENTATIONS BY:

Narinder Kaur Gurjant Khaira	FOR THE APPELLANTS (on their own behalf)
Ian Hicks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT