Federal Court of Appeal | Cour d'appel fédérale

Date: 20210630

Docket: A-114-20

Citation: 2021 FCA 131

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY J.A.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

GEREMY ABEL

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

THE ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION (AQAADI) and THE IMMIGRATION AND REFUGEE BOARD OF CANADA

Interveners

Heard by online videoconference hosted by the registry on June 22, 2021.

Judgment delivered at Ottawa, Ontario, on June 30, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant, Geremy Abel, is a citizen of Haiti. After reportedly being subjected to serious threats, he left his country in January 2010 and initially stayed in the Dominican Republic until 2014, at which time he went to Brazil, where he obtained permanent resident

status in December 2015. Following further persecution that he alleges he experienced in that country, he fled to the United States and lived there for 14 months without ever applying for asylum. He eventually crossed the border into Canada in 2017, where he made a claim for refugee protection.

[2] Before the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (the IRB or the Board), the respondent, the Minister of Citizenship and Immigration, intervened in writing to argue that Mr. Abel was a permanent resident of Brazil. The RPD accepted that argument and found that the appellant was excluded from the application of the United Nations *Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the Convention) because he was a person referred to in Article 1E of the Convention, which has been incorporated into Canadian law through section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). Section E of Article 1 of the Convention provides that the Convention shall not apply "to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." In its decision, the RPD considered the fact that foreign nationals apparently lose their permanent resident status in Brazil if they leave the country for a period of more than two years; since Mr. Abel had left Brazil in April 2016, his permanent resident status was still valid at the time of the RPD hearing in February 2018. In arriving at that conclusion, the RPD first explicitly relied on this Court's decision in *Zeng* (*Canada (Citizenship and Immigration) v. Zeng*, 2010 FCA 118, [2011] 4 F.C.R. 3), in which it was determined that the assessment under Article 1E must be performed on the date of the RPD hearing. Second, the RPD also found that Mr. Abel had not established that he had a well-founded fear of persecution or that he would face a threat to his life or a risk of

being subjected to one of the types of harm that would make him a person in need of protection with respect to Brazil.

[3] The Refugee Appeal Division (RAD) confirmed that determination on March 27, 2019. Firstly, the RAD found that there was no error in the RPD's findings regarding the alleged persecution in Brazil or in its rejection of the allegation regarding a threat to his life in that country. Secondly, the RAD stated that it was of the view that the RPD was correct in finding that Mr. Abel was not a refugee by application of Article 1E of the Convention. In that regard, the RAD reiterated that the proper date to consider as part of the assessment under Article 1E of the Convention is the date of the RPD hearing, as this Court determined in *Majebi v. Canada (Citizenship and Immigration)*, 2016 FCA 274 (*Majebi*) and as the Federal Court determined in *Romelus v. Canada (Citizenship and Immigration)*, 2019 FC 172.

[4] In his application for judicial review before the Federal Court, Mr. Abel argued that the RAD had erred in failing to consider that he had lost his permanent resident status in Brazil at the time that his appeal was considered, in March 2019. In a decision indexed as 2020 FC 525, the Federal Court dismissed that argument, finding that it was reasonable for the RAD to follow the approach taken in *Majebi*. In that regard, the Federal Court's position is not devoid of ambiguity. First, the Court makes a point of noting that the issue in this case is similar to that raised in *Majebi*:

> [21] In addition, the RAD explained that it was applying *Majebi* [TRANSLATION] "on the facts of this case". The issues in each case are indeed similar. I disagree with the applicant's argument that the Federal Court of Appeal's decision in *Majebi* is erroneous in light of the RAD's jurisdiction to assess new facts under subsection 110(4) of the *IRPA*. In both *Majebi* and this case, the applicants did not provide new evidence relating to their status in their country of residence that meets the criteria of subsection 110(4) of the *IRPA*. In

> *Majebi*, the Federal Court of Appeal found that it was reasonable for the RAD to have refused to consider the claimant's evidence that he had lost his permanent resident status because that evidence was available before the RPD made its decision. As such, the evidence was not "new" within the meaning of subsection 110(4) of the *IRPA*. In this matter, the applicant relies on the National Documentation Package [NDP] to argue that he lost his status, without providing any new evidence, other than the passage of time, and there is no evidence from an expert (e.g., a lawyer) or an official of Brazil to prove that Mr. Abel is no longer a permanent resident. The NDP documents were before the RPD. This evidence, cited before the RAD, was therefore not new. The applicant's argument regarding the jurisdiction of the RAD under subsection 110(4) of the *IRPA* might be applicable if Mr. Abel had presented evidence that meets the requirements of that subsection of the *IRPA* and the case law.

[5] However, a few paragraphs further, the judge agrees to certify a question, even though he found that the question proposed by the appellant would not be determinative of the outcome of the appeal and that *Majebi* is clear. The judge explains this by stating that the RAD apparently "blindly followed *Majebi* without providing reasons (1) analyzing the facts to determine whether the passage of time, in conjunction with the content of the NDP, constituted new evidence; (2) if so, determining whether that new evidence was sufficient to prove that Mr. Abel lost his permanent resident status between the date of the RPD hearing and the date of the RAD hearing; and (3) if so, determining what effect, if any, it had on the applicable date for the purposes of the analysis, given the jurisdiction of the RAD under subsection 110(4)" (at paragraph 25). On that basis, the judge certified the following question:

> For the purposes of the application of *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274, must the RAD first determine whether there is, and, if so, consider the probative value of, evidence that a person is not considered by the competent authorities of the country in which that person has taken residence to have the rights and obligations attached to the possession of the nationality of that country that arose after the date of the RPD hearing, by which the RPD had found that the individual in question was not a refugee by application of Article 1E of the Convention and section 98 of the *IRPA* because of that "residency status".

[6] Before this Court, the appellant argues that the RAD was required to reassess the exclusion based on the situation that existed at the time when it made its decision, and therefore take into account the alleged loss of permanent resident status in Brazil that had occurred after the RPD's decision was rendered. According to the appellant, the RAD was not bound by *Majebi* because that case did not involve new facts that arose after the RPD hearing, contrary to the situation in this case.

[7] On the contrary, the respondent argues that there is no difference between the appellant's situation and the situation in *Majebi* and that the principle of *res judicata* weighs in favour of the appeal being dismissed. For one, the appellant's alleged loss of permanent resident status is a new issue that was not before the RPD and that the RAD cannot examine. Furthermore, the simple passage of time between the RPD hearing and the appeal before the RAD cannot be likened to presenting new evidence within the meaning of subsection 110(4) of the IRPA. To clarify what he considered to be the true issue in dispute, the respondent proposed rephrasing the question as follows: [TRANSLATION] "If the RPD did not err, can the RAD decide a new issue on appeal that was not before the RPD, but that arises from a new fact or change in circumstance that occurred after the RPD hearing?"

[8] By orders of this Court dated April 23, 2021, and May 26, 2021, the Association québécoise des avocats et avocates en droit de l'immigration (AQAADI) and the Board were given leave to intervene in this appeal. In particular, the AQAADI raises the question of whether it is time to reassess *Majebi* in light of its consequences and recent developments in international law. As for the Board, it was given leave to intervene only to present its submissions on the Minister's proposed rephrasing of the certified question. In his memorandum, the Minister is

indeed asking us to broaden the scope of the certified question to include refugee protection claims that do not fall under Article 1E and to determine under what circumstances the RAD can decide a new issue on appeal that was not before the RPD but that arises from a new fact or from a change in circumstance that occurred after the RPD hearing. The Board argues essentially that the approach proposed by the Minister would unduly restrict the RAD's jurisdiction.

[9] Shortly before the hearing of this appeal, on May 4, 2021, the appellant obtained permanent resident status in Canada. Three weeks later, the respondent filed a motion seeking to have the appeal dismissed for mootness. The Minister submits that there is no longer any live controversy between the parties and that there are no grounds for this Court to exercise its discretion to hear this appeal despite its mootness. The appellant and the AQAADI, however, are opposed to this motion given the importance of the issues and the large number of refugee protection claims that raise similar issues.

[10] In a direction issued on May 26, 2021, the Court advised the parties that the respondent's motion to have the appeal dismissed would be heard at the start of the hearing on the merits of the appeal. This motion was indeed debated before the Court, which reserved judgment on it before hearing the parties' arguments on the merits of the appeal.

[11] After carefully considering the submissions of all the parties, I have arrived at the conclusion that the appeal has become moot and that the conditions have not been met for the Court to exercise its discretion to hear this appeal regardless.

[12] It is settled law that a court may decline to decide a case which raises merely a hypothetical or abstract question: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (*Borowski*). This is the case when the decision that the court could render cannot have any practical effect on the rights of the parties. That is precisely the situation in this case as the appellant has obtained permanent resident status and can no longer be deported from Canada. As this Court stated in *N.O. v. Canada (Citizenship and Immigration)*, 2016 FCA 214 at paragraph 4, citing *Velasquez Guzman v. Canada (Citizenship and Immigration)*, 2007 FCA 358 at paragraph 4, the mere fact that the appellant could lose his permanent resident status at some point does not justify proceeding with an appeal which is moot.

[13] That being said, the courts nevertheless retain the discretion to hear a case despite its mootness where the circumstances so warrant. In *Borowski*, the Supreme Court set out that three factors must be considered in exercising that discretion: (1) the existence of an adversarial relationship; (2) the need to promote judicial economy; and (3) the need for the court to consider the nature of its law-making function in the Canadian political framework.

[14] With regard to the first factor, the appellant argues that there is no need to ensure that there is an adversarial relationship between the parties underlying the resolution of the dispute in this case because two interveners were given leave to make submissions that go beyond their sole interests and respond to the Minister’s submissions. The appellant also argues that he retains an interest in having his refugee protection claim decided because the advantages of being granted refugee status are greater than those conferred by permanent resident status under the IRPA.

[15] It is true that the presence of the two interveners would to some extent enable the Court to hear opposing points of view on the certified question. However, it is important to keep in mind the limited scope of intervention of the IRB, which decided to intervene only to object to what it considered to be an attempt by the Minister to broaden the debate before this Court considerably. In the IRB's opinion, the Minister's rephrasing of the certified question was intended to limit in general (rather than only in cases of exclusion) the RAD's ability to consider new evidence or a change in circumstance to only those cases where an error was purportedly made by the RPD. The Minister set the record straight, and his submissions are now limited to the question of whether the RAD may examine new evidence or new circumstances when acting under the framework of section 98 of the IRPA. At the hearing, counsel for the Board clearly stated that she did not want to take a position on this more limited question or on the merits of *Majebi*.

[16] As for the appellant's continued interest in a decision being rendered on his refugee protection claim because that status would provide him with benefits that permanent resident status does not, I do not consider that argument to be sufficient to find that this dispute is adversarial in nature. Counsel for the appellant argued that the Convention provides individuals who are granted refugee status with rights and advantages that they cannot access as permanent residents, namely with regard to work permits, the opportunity to obtain citizenship and the inclusion of minor children. Even supposing that that is the case, those advantages have nothing to do with the purpose of the IRPA with respect to refugees, which is to provide protection against refoulement to individuals who have no status in a safe country. The permanent resident status that Mr. Abel obtained gives him essentially the same rights as Canadian citizens and

protects him against refoulement to another country. Consequently, section 98 of the IRPA and Article 1E of the Convention apply, and the appellant cannot claim refugee status.

[17] I am therefore of the opinion that the decision that this Court could render in this case, even supposing that it would be favourable to the appellant, could not have any practical side effects on his rights. Therefore, and despite the presence of the interveners, I find that the dispute has lost its adversarial nature.

[18] The appellant also argues that it is important for the Court to decide on the issues in this case because they are raised in many other cases. In this regard, one of the cases that the appellant cites is a recent RAD decision, which the Chairperson of the IRB has designated as a jurisprudential guide, where *Majebi* was applied despite the expression of concerns about the merits of that decision: *X(Re)*, 2020 CanLII 101305 at paras. 18–21. In that case, the RAD stated that it wanted this Court to reconsider its decision in *Majebi* given the fact that the RAD regularly admits new evidence of changed circumstances if this evidence satisfies the admissibility requirements set out in the IRPA. The appellant also relies on the letter that his counsel sent to the Court on April 7, 2021, with the concurrence of the respondent, in which he sought a hearing as soon as possible given the great importance to the IRB of resolving the issues, which will have [TRANSLATION] "an impact on a substantial number of refugee protection claim cases".

[19] In my view, the concern for judicial economy and the consideration of the role of the courts in our political system argue in favour of refusing to decide the appeal on the merits, on a number of grounds. For one, as previously noted, the decision that this Court could render would

have no practical effect on the parties' rights. Moreover, vague allusions to the considerable number of cases that apparently raise the same questions are not sufficient to establish the urgency to intervene. There is no indication that the questions raised in this case will evade all judicial review and cannot be dealt with on the basis of a factual framework that is more conducive to their resolution.

[20] In this regard, counsel for the Board asked the Court not to decide on the question the Minister rephrased regarding the circumstances in which the RAD may admit new evidence or examine a state of facts that differs from that which existed at the time of the RPD hearing. I agree with that approach. I consider it more prudent to leave it to the RAD to decide on this question, on the basis of a complete factual record, even if it means subsequently assessing the reasonableness of the solutions that were retained as part of applications for judicial review. As the Supreme Court noted in *Borowski* (at page 361):

> . . . The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[21] I am mindful of the fact that an extensive record has been developed in this case, that a hearing took place and that the Court heard the submissions of the parties on the merits after having reserved judgment on the respondent's motion, and that two parties (including the Board) were given leave to intervene. Although these factors obviously must be taken into consideration, they are not determinative on their own. The Supreme Court also indicated in

Borowski (at pages 363–364) that giving effect to such arguments would inevitably emasculate the mootness doctrine.

[22] The same is true of the importance of the questions raised in this appeal. Once again, this factor (as subjective as it is) cannot justify the intervention of the courts when a question has become moot, even when a constitutional argument is made. Unless it can be demonstrated that the social cost of uncertainty in the law outweighs the concern for the economics of judicial involvement, the courts will generally refrain from intervening. Furthermore, this Court has refused on numerous occasions to rule on questions that had become moot despite the importance they might have had: see, in particular, *Sinnappu v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 9261 (FCA); *Mohamed v. Canada (Citizenship and Immigration)*, 2012 FCA 303, [2012] F.C.J. No. 1483 (*Mohamed*); *Canada (National Revenue) v. McNally*, 2015 FCA 248, 477 N.R. 389; *Band Council of Whitesand First Nation v. Diabo*, 2011 FCA 96, 420 N.R. 7; *Alexander v. Canada (Solicitor General)*, 2006 FCA 386, 360 N.R. 167.

[23] Lastly, it is appropriate to briefly address the question that was certified. As noted above at paragraphs 4 and 5 of these reasons, the Federal Court does not question the authority and merits of *Majebi* or even the similarity between the material facts in that case and those in the case at hand. In both cases, as the Federal Court notes, the applicants did not present new evidence before the RAD other than the passage of time. Therefore, it was reasonable for the RAD to follow the approach taken in *Majebi*.

[24] I am consequently of the view that the Federal Court was correct in refusing to certify the question proposed by the appellant, on the ground that it would not be determinative of the outcome of the appeal. With that in mind, I find it difficult to explain how the Federal Court could have certified another question that, if I am understanding it correctly, essentially reiterates the one that the appellant had submitted. Both questions are seeking to determine whether the RAD erred in refusing to consider the passage of time since the RPD hearing and the resulting loss of status. By the Federal Court's own admission, from the moment *Majebi* clearly disposed of that question, thus binding the RAD to comply with it, I fail to see how the certified question could have any impact whatsoever on the outcome of the appeal.

[25] If, however, the Federal Court's objective in certifying that question was to invite this Court to reconsider *Majebi*, another problem arises. It is settled law that sound judicial administration and the rule of law require that an appellate court not depart from its prior decisions, save in exceptional circumstances. In accordance with *Miller v. Canada (Attorney General)*, 2002 FCA 370, 293 N.R. 391, this Court will not overrule the decision of another panel unless it can be demonstrated that the previous decision is manifestly wrong. To do this, it must be established that the Court overlooked a relevant statutory provision or a case. However, the parties made no attempt to make such a demonstration.

[26] Moreover, the Federal Court did not even examine the question it certified. If the phrasing of the certified question in this case was intended to allow for the reconsideration of the findings in *Majebi*, the Court did not discuss any basis for suggesting, in its opinion, that the decision was "manifestly wrong". In short, it is impossible to understand from its reasoning on what jurisprudential or legislative basis such a reconsideration would be conducted. This Court

has reiterated numerous times that it will only answer a certified question when it is not deprived of the judge's view and reasoning on the point at issue. Certifying a question is not to be used as a means of referring a question to this Court: see, in particular, *Mohamed* at para. 6; *Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, 467 N.R. 198 at para. 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365 at para. 12; *Nguesso v. Canada (Citizenship and Immigration)*, 2018 FCA 145 at para. 21. Although that is not a determinative consideration, I am of the view that this omission favours refusing to exercise our discretion to hear the appeal, since our only response could be to refer the question back to the Federal Court.

[27] For all of the above reasons, I am therefore of the view that the respondent's motion to have the appeal dismissed should be granted given that the appellant has obtained permanent resident status, that his refugee protection claim no longer has any practical interest and that there are no grounds for this Court to exercise its discretion to hear this appeal despite its mootness. Without costs.

"Yves de Montigny"

J.A.

"I agree.
Marianne Rivoalen J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-114-20
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