Federal Court of Appeal Cour d'appel fédérale

Date: 20241024

Docket: A-292-24

Citation: 2024 FCA 174

CORAM: **STRATAS J.A.**
BOIVIN J.A.
HECKMAN J.A.

BETWEEN:

JIA LI

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 24, 2024.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
HECKMAN J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellant appeals from a direction of the Federal Court. The Federal Court directed that the appellant’s motion for a stay of removal was premature because travel documents for the appellant were not ready. As a result, the Federal Court refused to schedule the motion.

[2] The respondents now move for an order terminating this appeal. Specifically, the respondents invoke Rule 74 of the *Federal Courts Rules,* SOR/98-106. That Rule provides that the Court may order that a document, here the notice of appeal, be removed from a court file if, among other things, the filing of the document is contrary to an Act of Parliament.

[3] Alongside Rule 74 are the Court's plenary powers—the implied and necessarily incidental but very real powers it possesses as a Court under section 101 of the *Constitution Act, 1867* (UK), 20 & 31 Vict, c. 3, s. 101, reprinted in R.S.C. 1985, Appendix II, No. 5, a Court of equal status and standing with others in this country.

[4] In the case of notices of appeal, Rule 74 and the Court's plenary powers have empowered the Court to remove a notice of appeal where the Court lacks jurisdiction to hear an appeal or the appeal is doomed to fail from the outset: *Dugré v. Canada (Attorney General)*, 2021 FCA 8 and the cases cited at paras. 19-24; *Virgo v. Canada (Attorney General)*, 2019 FCA 167; *Coote v. Canada (Human Rights Commission)*, 2021 FCA 150; *Lee v. Canada (Correctional Service)*, 2017 FCA 228. This Court has exercised this power in the immigration context: see *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144, [2018] 2 F.C.R 344, *Wong v. Canada (Citizenship and Immigration)*, 2016 FCA 229, 487 N.R. 294 and *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 (all attempts to appeal a Federal Court order in the face of the bars against appeals in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27).

[5] Here, this Court lacks jurisdiction to hear this appeal and so under Rule 74 and the plenary powers of the Court, the notice of appeal must be removed from the Court file and the Court file closed.

[6] Before the Court is an appeal from a direction of the Federal Court. The general rule is that such directions cannot be appealed to this Court: *Tajdin v. His Highness Prince Karim Aga Khan*, 2012 FCA 238; *Simon v. Canada (Attorney General)*, 2019 FCA 28; *Froom v. Canada*, 2003 FCA 141, 312 N.R. 282.

[7] This general rule admits of at least one exception. If a direction affects the rights of a party in a substantial way, for example in the sense of foreclosing substantive arguments for all time or imposing procedures that are fundamentally unfair and prejudicial, the party may ask the Federal Court to embody its direction in a formal order so that it can be appealed. A good example is seen in *Subhaschandrun v. Canada (Solicitor General)*, 2005 FCA 27, 249 D.L.R. (4th) 269, where the Federal Court refused to deal with a request for a stay of a removal order, adjourning the matter to a time when the request would be moot.

[8] The appellant did not pursue that recourse in the Federal Court. Nor could it have done so. The direction here is only about the timing of a stay motion. I am not persuaded that the timing of the stay motion affects the appellant’s substantive arguments or rights for all time or works any fundamental unfairness or prejudice to the appellant.

[9] As well, now that the respondents know that the appellant intends to bring a motion for a stay of removal, the respondents must not proceed with the removal in a way that deprives the appellant of the right to seek a stay on an urgent and highly expedited basis. In fact, in their written representations, the respondents are well aware of their obligations. They promise that "[t]he appellant will have [a] full and fair opportunity to bring a motion for a stay of removal before the Federal Court if and when travel documents are secured and removal arrangements are made".

[10] Another reason why this Court lacks jurisdiction to hear this appeal is the statutory bar against appeals to this Court under s. 74(d) of the *Immigration and Refugee Protection Act*.

[11] There are some judge-made exceptions to that bar based on the constitutional principle of the rule of law: *Tennant* at para. 14. The appellant submits that a number of exceptions apply here.

[12] First, the appellant alleges that the Federal Court exceeded its "jurisdiction" and so this Court should hear the appeal.

[13] Here, there is no issue of jurisdiction. The appellant's use of "jurisdiction" is misplaced. As this Court said in *Tennant* at para. 20:

> Seen in this way, "jurisdiction" is not some sort of a magic password that opens the door to access to this Court. Rather, it is nothing more than a rhetorical label people sometimes use to try to boost a garden-variety issue of statutory interpretation into something more significant. In my view, in describing this very rare exception to the statutory bars it would be best if this word [jurisdiction] were

> avoided altogether. Rather, the exception is for fundamental flaws in well-defined, extraordinary circumstances.

[14] On the issue of jurisdiction, the appellant further submits that the Federal Court had no power to remove the appellant's motion from the Court's general sittings. This is incorrect. The Federal Court has the right to control its own processes and can adjourn, schedule and reschedule matters as is appropriate and fair. This right is founded in a plenary power:

> The Federal Courts' power to control the integrity of its own processes is part of its core function, essential for the due administration of justice, the preservation of the rule of law and the maintenance of a proper balance of power among the legislative, executive and judicial branches of government. Without that power, any court—even a court under section 101 of the *Constitution Act, 1867*—is emasculated, and is not really a court at all.

(Canada (National Revenue) v. RBC Life Insurance Company, 2013 FCA 50, 443 N.R. 378 at para. 36.)

[15] Next, the appellant alleges that by acting on a letter sent by counsel for the respondents and not waiting for the appellant to respond, the judge created a reasonable apprehension of bias in favour of the respondents.

[16] Actual bias is a judge-made exception to the statutory bars against appeals in the *Immigration and Refugee Protection Act*. I have not been provided with a case that suggests that an apprehension of bias, as opposed to actual bias, is an exception to the statutory bars and I am aware of none. And it may be that an apprehension of bias does not implicate the rule of law as

seriously as an allegation of actual bias and so a judge-made exception should not be recognized. The issue need not be decided here.

[17] In any event, the appellant is making an allegation of procedural fairness, which is not an exception to the statutory bars, and is labelling it as a "reasonable apprehension of bias". In the circumstances of this case, this is mere wordplay. When assessing allegations, this Court fastens only onto matters of substance*: JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[18] Some of the appellant's submissions come close to and perhaps smack of an allegation of actual bias on the part of the Federal Court. I am sure that the appellant does not mean to allege any actual bias. To be clear, allegations of bias should never be made lightly: *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3. There is a strong presumption that judges will carry out their duties properly, and with integrity: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 141 D.L.R. (4th) 193 at para. 32 *per* L'Heureux-Dubé J. and McLachlin J. (as she then was), and at paras. 116–117 *per* Major J.; *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, *per* Abella J.; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, *per* McLachlin C.J. This presumption can be rebutted only by a "serious" and "substantial" demonstration made by "convincing evidence": *Wewaykum* at para. 76; *S. (R.D.)* at para. 32; *Horne v. Canada (MCI)*, 2010 FCA 337, 414 N.R. 97 at para. 5. This case falls well short of the mark.

[19] Finally, the appellant alleges that there is a “rule of law” concern and the constitutional principle of the rule of law animates the judge-made exceptions to the statutory bar. In this case, the Federal Court merely made a decision about the timing of the stay motion. In these circumstances, for the reasons set out in paragraph 8, this does not trigger any rule of law concerns.

[20] Therefore, for the foregoing reasons the appeal will be dismissed.

“David Stratas”
J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Gerald Heckman J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-292-24
STYLE OF CAUSE:	JIA LI v. MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
CONCURRED IN BY:	BOIVIN J.A. HECKMAN J.A.
DATED:	OCTOBER 24, 2024

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