Federal Court of Appeal | Cour d'appel fédérale

Date: 20140612

Docket: A-71-14

Citation: 2014 FCA 160

CORAM: **GAUTHIER J.A.**
MAINVILLE J.A.
BOIVIN J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

VITALY SAVIN
ARTEM GARANIN

Respondents

Heard at Montréal, Quebec, on June 12, 2014.

Judgment delivered at Montréal, Quebec, on June 12, 2014.

REASONS FOR JUDGMENT BY: THE COURT

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140612

Docket: A-71-14

Citation: 2014 FCA 160

CORAM: **GAUTHIER J.A.**
MAINVILLE J.A.
BOIVIN J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

VITALY SAVIN
ARTEM GARANIN

Respondents

REASONS FOR JUDGMENT OF THE COURT

[1] The Minister of Citizenship and Immigration is appealing from a direction of a Federal Court judge, given on November 21, 2013, during the hearing of docket No. IMM-1975-13.

[2] By order dated January 22, 2014, Justice Trudel allowed the notice of appeal to be filed because the Minister's argument regarding the judge's jurisdiction had sufficient merit, in light

of the record as it stood at that preliminary stage in the proceedings, that it was worth being heard on the merits by this Court (*Rock St-Laurent v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 192; *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27 [*Subhaschandran*]).

[3] The underlying application for judicial review concerns a decision of the Immigration and Refugee Board that rejected the claim for refugee protection of the respondents, two homosexuals alleging a risk of persecution by reason of their sexual orientation should they be removed to Russia, their country of origin.

[4] The oral direction at issue in this appeal reads as follows:

> [TRANSLATION]
>
> The matter is adjourned. If the government does not agree to concede the case, then both counsel will be in a situation where the suggested timetable for the additional documents will be submitted to the Court. Under the proposed timetable the applicant shall file a new memorandum by April 1, 2014, and the respondent shall file a response by May 1, 2014. Given the situation in the courtroom regarding the documents in the record that did not show the entire situation following the developments in the country in question, the case is adjourned until May 1, 2014 as regards the documents to be received. In addition, a date will be fixed for the hearing of the case, except if the government concedes so that the case is referred back to the IRB for rehearing, which would result in the case being withdrawn from the Court.
>
> A joint letter is to be filed with the Court, as requested by Justice Shore at the hearing on 21-11-2013, [TRANSLATION] "in which it shall be stated whether the government concedes with respect to referring the matter back to the IRB, or on the contrary, that the parties will be filing additional documents with a view to continuing the application for judicial review in accordance with the terms set out in the oral direction".

[5] The appellant did not file an affidavit in support of his arguments based entirely on the hearing transcript and on the above text of the direction. The respondents, on the other hand, filed an affidavit that explains what happened at the hearing, particularly during the brief recess mentioned in the transcript.

[6] The appellant interprets this direction as a refusal by the judge to exercise his jurisdiction. On this point, the appellant argues in particular that the judge refused to exercise his jurisdiction in adjourning for several months, without valid reason, a case that he should have disposed of without delay and in a summary way under paragraphs 74(*b*) and (*c*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

[7] Moreover, he appellant also submits that the judge exceeded his jurisdiction in asking the parties to file additional representations regarding developments in the situation of homosexuals in Russia — that is, regarding events subsequent to the decision under judicial review.

[8] In response, the respondents present an entirely different version of the facts, which is based on the way in which the hearing was conducted according to the transcript, and on the affidavit of Didier Leroux.

[9] According to the respondents, the judge clearly asked for additional representations well before the possibility of a settlement was raised. In addition, it was the respondents who asked for a brief recess before the end of their oral presentation and who then proposed to the appellant

a settlement of the case. It was after this proposal that the parties asked the judge to adjourn the hearing for a week.

[10] There is no question that the direction is poorly worded. Among other things, it does not reflect the proceedings as described in the transcript. And the language used, such as the word [TRANSLATION] "concede", is certainly unfortunate. That being said, when the direction is read in its context and in the light of the evidence before us, this is not enough to persuade us that the version of the relevant facts put forward by the appellant is the correct one.

[11] It should be noted that the appellant admitted at the hearing before this Court that the judge did not put any pressure whatsoever on the appellant to settle the case, contrary to what the appellant's written submissions suggest. This issue is therefore no longer before us. However, it must be stated that a party should not make such allegations against a judge without having serious grounds for doing so, which was not the case here.

[12] The appellant had the burden of proving that this Court has jurisdiction given the plain language of paragraph 72(2)(*e*) of the IRPA, which prohibits appeals of interlocutory judgments, and of paragraph 74(*d*) of the IRPA, which limits the right of appeal to cases where the Federal Court has certified a question.

[13] The appellant has not persuaded us that this is a case that falls within the well-defined and very limited circumstances in which this Court may nevertheless intervene.

[14] This is not a situation analogous to that described in the case law on which the appellant relies. In *Subhaschandran*, the long adjournment ordered by the judge amounted to granting the remedy sought — a stay — without having to exercise his jurisdiction. Such is not the case here.

[15] Furthermore, there is no evidence before us that indicates that the parties objected before the judge to the timetable set for filing additional submissions. In addition, we do not know whether the parties and the judge were available to resume the hearing at an earlier date. All that we know is that the parties had requested a one-week adjournment. The Court cannot presume that the judge acted in bad faith, nor can it ascribe to him any particular intent.

[16] If the time limit fixed by the judge was too long, the appellant certainly had the opportunity to ask him for a tighter timetable after receiving instructions from his client regarding the settlement proposed by the respondents. These are case management issues that cannot be appealed.

[17] Regarding the filing of additional representations, the appellant could very well have included in such representations the arguments that he seeks to advance before us, and he may still do so. We cannot make any assumptions as to what the judge will ultimately decide in this regard.

[18] While the law on when new evidence can be considered on judicial review is clear, the respondents argue, and they have in fact served a notice of constitutional question in this regard, that this case raises a new issue, in light of the amendments to the applicable statutory regime. In

their view, the judge should have considered these new facts so as to avoid infringing their rights under section 7 of the *Canadian Charter of Rights and Freedoms*. It is premature for us to deal with these issues. The parties will have the opportunity to have a question in this regard certified in due course, if need be. Therefore, in this case, absent such a certified question, this Court simply does not have jurisdiction.

[19] This appeal clearly delayed the progress of the case before the Federal Court. In the circumstances, and to ensure that it is dealt with as soon as possible, the matter will be referred to the office of the Chief Justice of the Federal Court, who is to see to it that a new hearing date is set as quickly as possible. It will be up to the Chief Justice to decide whether, to that end, the hearing should continue before the judge or should be taken over by another judge.

[20] The appeal will therefore be dismissed for lack of jurisdiction, with costs.

"Johanne Gauthier"

J.A.

"Robert M. Mainville"

J.A.

"Richard Boivin"

J.A.

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-71-14
(APPEAL FROM A DIRECTION OF JUSTICE SHORE OF THE FEDERAL COURT DATED NOVEMBER 21, 2013, DOCKET NO. IMM-1975-13)	
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. VITALY SAVIN ET AL.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 12, 2014
REASONS FOR JUDGMENT BY:	GAUTHIER J.A. MAINVILLE J.A. BOIVIN J.A.
DATED:	JUNE 12, 2014

APPEARANCES:

Jocelyne Murphy Alain Langlois	FOR THE APPELLANT
Noël Saint-Pierre	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT
Saint-Pierre, Leroux Avocats Inc. Montréal, Quebec	FOR THE RESPONDENTS