Federal Court of Appeal  Cour d'appel fédérale

Date: 20180605

Docket: A-50-17

Citation: 2018 FCA 112

CORAM: **NEAR J.A.**
DE MONTIGNY J.A.
LASKIN J.A.

BETWEEN:

NISREEN ALMADHOUN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on February 6, 2018.

Judgment delivered at Ottawa, Ontario, on June 5, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal launched by Ms. Nisreen Almadhoun (the appellant or Ms. Almadhoun) pursuant to paragraph 27(1.1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 from a decision rendered from the bench on October 14, 2016 (the Reasons) by the Honourable Justice Henry A. Visser (the Judge) of the Tax Court of Canada (the Tax Court). Her Majesty the Queen (the

respondent) filed a notice of cross-appeal with respect to that decision, pursuant to rule 341 of the *Federal Courts Rules*, S.O.R./98-106.

[2] The appeal raises the question of whether the Judge erred in concluding that the appellant was not an "eligible individual" as defined in section 122.6 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) for the purposes of receiving child tax benefits. Subsidiarily, the appellant has raised for the first time on appeal the constitutionality of section 122.6 of the Act with regards to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter). On cross-appeal, this Court is seized with the question of whether certain sentences and paragraphs of the Judge's decision referring the matter back to the Minister of National Revenue (the Minister) so that "taxpayer relief in the form of a waiver of any applicable interest and penalties under the Act and also a remission of taxes pursuant to the *Financial Administration Act*" may be "seriously consider[ed]", should be struck.

[3] For the reasons that follow, I would dismiss the appeal and allow the cross-appeal.

I. Facts

[4] The appellant is of Palestinian origin. She arrived in Canada with a visitor's visa on different dates between 2005 and 2011, at which time she was a Jordanian citizen. On June 27, 2011, after having been informed that her former husband (who she claimed was abusive with her) would deprive her of custody and access to her son N.A., a Canadian citizen, Ms. Almadhoun flew from Kuwait to Canada. On October 11, 2011, she filed a Claim for Refugee

Protection. She was declared eligible for a decision by the Refugee Protection Division and as such, received a Refugee Protection Claimant Document on October 12, 2011.

[5] Ms. Almadhoun and her son resided in Ottawa, Ontario during the period in issue where the appellant's son attended public school. She does not have any property in Jordan or elsewhere and her brothers also reside in Canada. The appellant did not use her passport to travel outside Canada at any time after October 12, 2011, and she was not preparing to permanently leave Canada. She had a Canadian driver's license, health care coverage, a bank account, an apartment rental and a work permit. On February 22, 2013, the appellant's refugee claim was denied by the Immigration and Refugee Board. She explains that she was not subject to a removal order. On September 16, 2015, Ms. Almadhoun was granted permanent residency on humanitarian and compassionate grounds and she still resides in Canada.

[6] At the beginning of 2012, Ms. Almadhoun submitted an application for the Canada Child Tax Benefit (the CCTB), on the advice and with the assistance of the Catholic Centre for Immigrants' employees. In response to a Canada Revenue Agency (the CRA) request for information about her Canadian immigration record, the appellant submitted a copy of her Refugee Protection Claimant Document (Appeal Book at 115). On June 20, 2012, the appellant received a lump sum CCTB payment.

[7] While the CRA paid the appellant her CCTB for 2010, 2011, 2012 and 2013, it advised her for the first time on April 15, 2014 that it was rescinding her eligibility for the CCTB. She provided all requested documents. On June 25, 2014, she was advised that she was no longer

eligible for the CCTB as of November 2011. Indeed, it was determined that she was not an "eligible individual" for the purposes of section 122.6 of the Act since she did not meet the criteria laid out in paragraph (e) of the definition. The Minister concluded that she was neither a temporary resident of Canada, nor a protected person within the meaning of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[8] The appellant filed a Notice of Objection on September 15, 2014. On December 4, 2015, the redetermination was confirmed. On February 25, 2016, Ms. Almadhoun appealed to the Tax Court, where she was not represented by counsel. On October 14, 2016, the appeal was dismissed from the bench.

II. Decision below

[9] In short reasons, the Judge found against Ms. Almadhoun and dismissed her appeal. Despite being of the view that Ms. Almadhoun was a credible witness, it was clear in his view that she did not meet any of the criteria laid out in paragraph (e) of the "eligible individual" definition under section 122.6 of the Act.

[10] Since the Judge was of the view that the CRA initially made a "serious" mistake in originally granting the appellant CCTB, a mistake which will have a "serious impact" on the appellant, he referred the matter back to the Minister so that "taxpayer relief in the form of a waiver of any applicable interest and penalties under the Act and also a remission of taxes pursuant to the *Financial Administration Act*" may be "seriously consider[ed]". In support of this course of action, the Judge referred to a previous decision of the Tax Court whereby a similar

case was referred back to the Minister and where some CRA officials were severely criticized for their lack of care.

III. Issues

[11] The questions raised in this appeal are the following:

A. Did the Judge err in concluding that the appellant was not an "eligible individual" as defined in section 122.6 of the Act and consequently, in dismissing the appeal?

B. Is the appellant entitled to raise a challenge under subsection 15(1) of the Charter for the first time before this Court? If so, did the Judge err in not considering whether the Minister's interpretation of the definition of "eligible individual" under section 122.6 of the Act was discriminatory and arbitrary and therefore, contrary to subsection 15(1) of the Charter?

[12] The question raised in the cross-appeal is the following:

C. Did the Judge exceed his jurisdiction in sending the matter back to the Minister so that taxpayer relief in the form of a waiver of any applicable interest and penalties and a remission of taxes may be considered?

IV. Analysis

[13] I agree with the respondent that the question of whether the appellant is an "eligible individual" within the meaning of paragraph (e) of section 122.6 of the Act is a question of

mixed fact and law subject to the standard of overriding and palpable error (*Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26 and 36, [2002] 2 S.C.R. 235 (*Housen*)).

A. *Did the Judge err in concluding that the appellant was not an "eligible individual" as defined in section 122.6 of the Act and consequently, in dismissing the appeal?*

[14] The appellant asserts that she can be considered an "eligible individual" since she is either (1) a "temporary resident" within the meaning of the IRPA, who was resident in Canada throughout the 18 month period preceding that time (definition of "eligible individual", subpara. (e)(ii), s. 122.6 of the Act); or (2) a "protected person" within the meaning of the IRPA (definition of "eligible individual", subpara. (e)(iii), s. 122.6 of the Act). Unfortunately, Ms. Almadhoun does not fit into either of these categories. Consequently, the Judge did not make any palpable and overriding error in concluding that she was not an "eligible individual" for the purposes of paragraph (e) of section 122.6 of the Act.

[15] Ms. Almadhoun argues that once an immigration officer has determined that an application is neither inadmissible nor ineligible, as in her case, then the applicant must be taken to have been granted an interim status as a refugee claimant. Since she was not subject to removal until her application had been considered, she enjoyed a *de facto* status as a protected person. In her submission, such an approach would be consistent with the objectives of the IRPA and with the principle that benefit-conferring legislation should be interpreted in a broad and generous manner. In short, a person whose application for status as a protected person is pending must necessarily be considered an "eligible individual" for the purposes of the CCTB, lest there be a gap in the Act.

[16] The appellant clearly does not meet the definition of a "protected person" found in the IRPA. Pursuant to subsection 95(2) of the IRPA, "[a] protected person is a person on whom refugee protection is conferred under subsection (1)". That subsection reads as follows:

95 (1) Refugee protection is conferred on a person when	95 (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :
(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;	a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié au sens de la Convention ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;
(b) the Board determines the person to be a Convention refugee or a person in need of protection; or	b) la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de personne à protéger;
(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.	c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

[17] This provision is clear and does not leave much room for interpretation. From a plain reading of it, there is no such thing as a *de facto* status of protected person; in other words, refugee claimants awaiting a determination of their claims do not temporarily qualify as protected persons. To the contrary, they are subject to a conditional removal order that will come into force if the claim is rejected (see subsection 49(2) of the IRPA). There is absolutely nothing in the legislation to support the appellant's assertion that section 122.6 of the Act necessarily includes a person whose application for status as a protected person is pending, and the appellant was unable to provide any case law in support of her contention. Contrary to Ms. Almadhoun's

argument, there is no gap in the legislation; Parliament made a conscious policy choice as to the groups of persons on whom social benefits would be conferred. It is not for this Court to second-guess that deliberate choice. This is particularly true when interpreting the Act, which is an instrument "dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 13, [2005] 2 S.C.R. 601). Relying on that decision and others to the same effect from the Supreme Court, this Court reiterated in *Canada v. Quinco Financial Inc.*, 2014 FCA 108 at paragraph 7, [2014| F.C.J. No. 423 (Q.L.) that where a provision is clear and unambiguous, its words must simply be applied; one cannot rely on a "supposed purpose" to "supplant" clear language. Such is the case here.

[18] The same reasoning applies in response to the appellant's second argument, namely that she should be considered at the very least a "temporary resident" within the meaning of the IRPA. The IRPA provides a process for the determination of temporary residency, which is not an open and flexible category. In the appellant's submission however, she met the conditions required to be considered as a "temporary resident" as a result of having been issued a Refugee Protection Claimant Document.

[19] The problem with this argument is that the IRPA temporary resident regime explicitly requires the conferral of temporary residency by an immigration officer. Section 22 of the IRPA states:

22(1) A foreign national becomes a temporary resident <u>if an officer is satisfied</u> that the foreign national has applied for that status, has met the	22 (1) Devient résident temporaire l'étranger dont <u>l'agent constate</u> qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)b),

obligations set out in paragraph 20(1)(b), is not inadmissible and is not the subject of a declaration made under subsection 22.1(1).	n'est pas interdit de territoire et ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1).
(emphasis added)	(nos soulignements)

[20] This provision leaves no room for ambiguity. The status of temporary resident is granted by an immigration officer, upon being satisfied that all required criteria have been met. In order to be granted the status of temporary resident, one must have applied and have been issued a temporary resident visa. Section 179 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the IRPR) makes it even clearer, stating that an "officer shall issue a temporary resident visa to a foreign national" if a number of conditions are met, the first one of which being that the foreign national "has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class". To be sure, section 190 of the IRPR does provide for some exemptions to the requirement of holding a temporary resident visa, but Ms. Almadhoun does not fit into any of these categories.

[21] Once again, there is no such thing as a *de facto* temporary resident status. There is no jurisprudence in support of that proposition, and the appellant referred to none. To the contrary, the law is clear that in order to be granted permanent resident status, one must request and obtain it from an immigration officer.

[22] As a result, Ms. Almadhoun cannot prevail. From June 27, 2011 to February 21, 2013, she was a refugee claimant. She was neither a protected person nor a temporary resident. She was subject to a conditional removal order which was not yet in force. From February 22, 2013

(when her refugee claim was denied) to September 15, 2015 (when permanent residency was granted to her), the appellant had no status in Canada. She was subject to a removal order, but none was issued pursuant to section 44 of the IRPA. Accordingly, she was not eligible for the CCTB, and the Tax Court made no reviewable error in dismissing her appeal.

B. *Is the appellant entitled to raise a challenge under subsection 15(1) of the Charter for the first time before this Court? If so, did the Judge err in not considering whether the Minister's interpretation of the definition of "eligible individual" under section 122.6 of the Act was discriminatory and arbitrary and therefore, contrary to subsection 15(1) of the Charter?*

[23] The appellant asserts for the first time in her memorandum of fact and law before this Court that the CCTB regime is contrary to subsection 15(1) of the Charter. More particularly, the appellant submits that section 122.6 of the Act creates a distinction based on immigration status and that she has therefore been denied a benefit that protected persons will receive.

[24] This question was not before the Tax Court and no Notice of Constitutional Question was filed before that court. However, after the respondent filed its memorandum of fact and law and objected to that issue being raised for the first time in this Court and without any prior notice of a constitutional question, the appellant filed a Notice of Constitutional Question on November 6, 2017. Therefore, the only issue to be determined regarding the admissibility of the constitutional question is whether the fact that it was not raised before the Tax Court should prevent this Court from addressing it.

[25] The Supreme Court has determined, in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at paragraph 33, [2002] 1 S.C.R. 678, that "[t]he Court is free

to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice". However, in *Guindon v. Canada*, 2015 SCC 41 at paragraph 23, [2015] 3 S.C.R. 3, the Supreme Court cautioned that the discretion to hear and decide new issues will be exercised sparingly, especially in the case of constitutional questions:

> …The Court must be sure that no attorney general has been denied the opportunity to address the constitutional question and that it is appropriate for decision by this Court. The burden is on the appellant to persuade the Court that, in light of all of the circumstances, it should exercise its discretion to hear and decide the issue. There is no assumption of an absence of prejudice. The Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties.

[26] In the case at bar, the respondent submits that the Attorney General would suffer prejudice from the absence of any evidence on the record in respect of the alleged discriminatory purpose, policy or effect of section 122.6 of the Act. The Supreme Court has often cautioned against deciding constitutional questions without an adequate evidentiary record (*Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at para. 9, 61 D.L.R. (4th) 385; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 28, [2007] 1 S.C.R. 873). This is particularly apposite with respect to a challenge involving section 15, "where the jurisprudence mandates a complex, multi-factored, contextual inquiry by the reviewing court into whether the impugned legislation not only creates differential treatment, but also is discriminatory in the constitutional sense" (*Bekker v. Canada*, 2004 FCA 186 at para. 13, 323 N.R. 195; see also *Fannon v. Canada (National Revenue)*, 2013 FCA 99 at para. 5, 445 N.R. 339 and *Forrest v. Canada (Attorney General)*, 2006 FCA 400 at para. 14, 357 N.R. 168 (*Forrest*)). Moreover, the Crown did not have any opportunity to adduce evidence susceptible to demonstrate that the eligibility criteria in

section 122.6 meet the *Oakes* test, namely that the infringement of the appellant's rights is proportional to a pressing and substantial objective, and as such would be justified under section 1 of the Charter (*R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-71, 26 D.L.R. (4th) 200).

[27] In these circumstances, I am of the view that this Court ought not to entertain the Charter challenge.

[28] I am comforted in this view by the fact that the appellant's argument appears to be devoid of any merit. I agree with the respondent that immigration status is not a personal characteristic that is immutable or changeable only at great personal cost. Unlike the prohibited grounds enumerated in subsection 15(1) of the Charter, immigration status is a characteristic that the government has a legitimate interest in expecting the person to modify. The Supreme Court has consistently recognized that non-citizens do not have an unqualified right to enter or remain in Canada, and the government has a valid interest in expecting those present in Canada to have a legal right to be here (see, *inter alia*, *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 46, [2005] 2 S.C.R. 539; and *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at 733, 90 D.L.R. (4th) 289). The jurisprudence of this Court is also very clear that immigration status is not an analogous ground for the purposes of subsection 15(1) of the Charter, and there is no need to reconsider the issue (*Forrest* at para. 16; *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 at para. 99, 420 N.R. 364).

[29] The only remaining issue to be addressed, therefore, is that raised on cross-appeal by the respondent, to which I shall now turn.

C. *Did the Judge exceed his jurisdiction in sending the matter back to the Minister so that taxpayer relief in the form of a waiver of any applicable interest and penalties and a remission of taxes may be considered?*

[30] This question involves the jurisdiction of the Tax Court, a pure question of law, and as such, is subject to a correctness review (*Housen* at para. 8). Therefore, this Court can intervene if it is satisfied that the Judge erred in the interpretation of the Tax Court power to dispose of an appeal.

[31] Subsection 171(1) of the Act limits the Tax Court's power to dispose of an appeal:

171 (1) The Tax Court of Canada may dispose of an appeal by	171 (1) La Cour canadienne de l'impôt peut statuer sur un appel :
(a) dismissing it; or	a) en le rejetant;
(b) allowing it and	b) en l'admettant et en :
(i) vacating the assessment,	(i) annulant la cotisation,
(ii) varying the assessment, or	(ii) modifiant la cotisation,
(iii) referring the assessment back to the Minister for reconsideration and reassessment.	(iii) déférant la cotisation au ministre pour nouvel examen et nouvelle cotisation.

[32] I agree with the respondent's submission that the Tax Court acted beyond the scope of its powers in referring the matter back to the Minister. Once the correctness of the tax assessment under appeal is confirmed and the appeal is dismissed, there is nothing more for the Tax Court to

adjudicate. It is only when the Tax Court allows an appeal that it can refer the assessment back to the Minister for reconsideration and reassessment.

[33] Nor is it for the Tax Court to interfere with the discretion of the Minister, if only by suggesting that the Minister "may" seriously consider taxpayer relief in the form of a waiver of any applicable interest and penalty under the Act, and a remission of taxes pursuant to the *Financial Administration Act*, R.S.C. 1985, c. F-11. The Minister's power to waive interest and penalty under subsection 220(3.1) of the Act may only be exercised on her own initiative or following an application by the taxpayer. Similarly, a remission order is granted by the Governor in Council on the recommendation of the Minister, pursuant to subsection 23(2) of the *Financial Administration Act*. The Tax Court Judge overstepped his jurisdiction in referring the "matter" back to the Minister, for the sole purpose of "seriously considering" these two forms of relief.

[34] This is not to say that the Judge could not express his views as part of his reasons. Indeed, he did so in his oral reasons delivered from the bench on October 14, 2016. The Judge noted his sympathy to Ms. Almadhoun's claim, and stressed that the CRA made a mistake in initially allowing Ms. Almadhoun's CCTB application. He then quoted from reasons given by Justice Lamarre, as she then was, where in similar circumstances she criticized the lack of care of some CRA officials and referred the matter back to the Minister so that a remission to the appellant pursuant to the *Financial Administration Act* may be "seriously consider[ed]" (*Bituala-Mayala v. The Queen*, 2008 TCC 125 at paras. 8-9, [2008] T.C.J. No. 90 (Q.L.)). Agreeing with that decision, he acknowledged that the Tax Court does not have jurisdiction to order that the Minister remit taxes and waive interest and penalties, but nevertheless noted that his order

dismissing the appeal "will include a reference to the recommendation regarding remission of taxes and the waiver of interest and penalties" (Appeal Book at 72). In all due respect, this is where the Judge erred.

[35] A judge is certainly entitled to express his or her views on issues that are not, strictly speaking, essential to the determination of the matter he or she has to decide (*Samson v. Minister of National Revenue*, [1943] Ex. C.R. 17 at para. 17, [1943] 2 D.L.R. 349; *Celliers du Monde Inc. v. Dumont Vins & Spiritueux Inc.*, [1992] 2 F.C. 634 at para. 12, 139 N.R. 357 (F.C.A.); *Abbott Laboratories v. Canada (Minister of Health)*, 2006 FC 69 at paras. 16-17, [2006] F.C.J. No. 91 (Q.L.)). Such opinions, or *obiter dicta*, are often helpful in suggesting to Parliament avenues for reform, in offering a judge's views as to how the common law could or should evolve, or more prosaically in expressing the judge's discomfort with the result reached (J.J. George, *Judicial Opinion Writing Handbook* (Buffalo: William S. Hein & Co., Inc., 2007) at 331 and 351-352). This is precisely what Justice Lamarre did in her reasons for the decision relied upon by the Judge. Interestingly, I note that Justice Lamarre did not repeat in her judgment the remarks quoted by the Judge here, and merely stated that the appeal from the redetermination of the CCTB was dismissed.

[36] I am therefore of the view that the Judge should not have sent the matter back to the Minister so that he may consider taxpayer relief. While he was entitled to express his views about the impact of the CRA's error and the fact that relief should be considered in his reasons, he should have limited himself, in the judgment, to dismissing the appeal. The cross-appeal should therefore be allowed.

V. Conclusion

[37] For all of the foregoing reasons, I would dismiss the appeal and allow the cross-appeal.

Rendering the decision that should have been given, the Tax Court judgment should read:

> The appeal from the redeterminations issued by the Minister of National Revenue under the *Income Tax Act* on July 18, 2014 in respect of Canada Child Tax Benefits for the Appellant's 2010, 2011 and 2012 base taxation years is dismissed, without costs.

"Yves de Montigny"
J.A.

"I agree
D.G. Near J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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