F ederal Court of A ppeal  Cour d'appel fédérale

Date: 20101209

Docket: A-181-10

Citation: 2010 FCA 337

CORAM: **SEXTON J.A.**
EVANS J.A.
PELLETIER J.A.

BETWEEN:

CHERYL SANDRA HORNE,
MARK ANSELM HORNE,
SUE ANNY SOPHIA HORNE,
AND SULAN MARYN HORNE,
BY THEIR LITIGATION GUARDIAN
CHERYL SANDRA HORNE

Appellants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on December 9, 2010.

Judgment delivered at Toronto, Ontario, on December 9, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario on December 9, 2010)

EVANS J.A.

[1] Cheryl Horne and her children, citizens of St. Vincent and the Grenadines, have appealed from two decisions of the Federal Court, in which Justice Boivin dismissed their applications for

leave and judicial review made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] The present appeal (Court File A-181-10) is against the refusal of an application for leave to review a decision of an immigration officer to deny the appellants' application to remain in Canada on humanitarian and compassionate grounds. The other appeal (Court File A-182-10) is against a refusal of leave to review a decision by the same officer to deny their application for a pre-removal risk assessment. The Judge's order dismissing both leave applications was issued on April 26, 2010. The appeals to this Court raise identical issues and these reasons apply to both. A copy of these reasons will be inserted in Court File A-182-10.

[3] The problem facing the appellants in bringing this appeal is that IRPA, paragraph 72(2)(*e*) provides that no appeal lies from a decision of the Federal Court with respect to an application for leave made under subsection 72(1), or any interlocutory decision. With respect to the judicial review of other decisions made under the Act, no appeal lies from the Federal Court to this Court, unless, in rendering judgment, the Federal Court judge certifies that a serious question of general importance is involved and states the question: IRPA, paragraph 74(*d*).

[4] Despite these preclusive clauses, this Court has held that they are not to be interpreted literally. Neither precludes an appeal under section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, on the ground of jurisdictional error by a Federal Court judge, including a reasonable apprehension that the judge was biased: *Subhaschandran v. Canada (Solicitor General)*, 2005 FCA

27, [2005] 3 F.C.R. 255 at para. 17; *Narvey v. Canada (Minister of Citizenship and Immigration)*, (1999) 235 N.R. 305 (F.C.A.).

[5] A litigant who alleges that a judge is disqualified by bias must adduce "convincing evidence to that effect" (*R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 32), particularly when the reasonable apprehension is said to arise from the judge's encounters, in his or her judicial capacity, with the parties or the issues (*Apotex Inc . v. Sanofi-Aventis Inc.*, 2008 FCA 394 at para. 6).

[6] The appellants seek to rebut the presumption of judicial impartiality on two grounds. First, they say, Justice Boivin was disqualified by bias from deciding the leave application because, on February 11, 2010, he had dismissed their motion to stay their removal pending the disposition of the application for leave and judicial review. The Judge found (IMM-311-10) that the appellants had not proved that removal to St. Vincent and the Grenadines would cause them such serious hardship as to constitute irreparable harm.

[7] This Court quashed the appellants' appeal on the ground that they had not established that even if, as counsel alleged, Justice Boivin had misapplied the tripartite test for a stay he thereby lost jurisdiction (2010 FCA 55).

[8] We are all of the view that this allegation would not cause a reasonable person who had thought the matter through in a realistic and practical manner to conclude that the Judge was biased. In our view, Justice Boivin did not decide the merits of the leave application when he refused the

stay. In considering the first prong of the tripartite test governing stays, he stated that he was prepared to assume, without deciding the question, that the appellants had raised a serious issue. Nor do we accept counsel's argument that legal error by a judge gives rise to a reasonable apprehension of bias.

[9] Counsel provided no authority for the proposition that judges who have heard a motion for an interlocutory injunction are thereby disqualified from presiding at the trial. Similarly, there is no basis for concluding that the mere fact that the Judge had heard the stay motion predisposed him *improperly* to deny the leave application.

[10] Second, the appellants say, events after Justice Boivin refused the stay, but before he denied their leave application, also gave rise to a reasonable apprehension of bias. They ague that counsel's forceful criticism of the Judge's reasons in the appellants' attempted appeal to this Court against the refusal of the stay, and in the leave application itself, including an allegation that Justice Boivin so misapplied the law as to exceed his jurisdiction, would have caused him to be biased against them.

[11] We do not agree. Like every one else, judges prefer bouquets to brickbats. Nonetheless, allegations of error are such an integral part of the judicial lot that we are not persuaded that a reasonable person would conclude that counsel's criticism would cause the Judge to disregard his judicial oath in order to punish the appellants. Counsel cannot create bias by intemperate criticism of a judge's reasons.

[12] The appellants also rely on their counsel's complaint to the United Nations Human Rights Committee that deportation would violate their internationally protected human rights. Canada's Border Services Agency complied with a request from the UN High Commissioner for Human Rights not to remove the appellants until the Committee had had time to study their complaint.

[13] We do not agree that a reasonable person would think that the Judge would regard these events as an affront that would prevent him from judging the leave applications impartially. In *Boparai v. Canada*, 2008 FC 251, Justice Snider refused to recuse herself on the ground that counsel had previously complained unsuccessfully to the Canadian Judicial Council that she was biased in immigration cases. The argument of the appellants in the present case is analogous, and similarly unpersuasive.

[14] For these reasons, the appeal will be dismissed.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-181-10
(APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE BOIVIN OF THE FEDERAL COURT DATED APRIL 26, 2010, IN DOCKETS IMM-311-10 AND IMM-310-10)	
STYLE OF CAUSE:	CHERYL SANDRA HORNE, MARK ANSELM HORNE, SUE ANNY SOPHIA HORNE, AND SULAN MARYN HORNE, BY THEIR LITIGATION GUARDIAN CHERYL SANDRA HORNE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 9, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	(SEXTON, EVANS & PELLETIER JJ.A)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

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