

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120227

Docket: A-263-11

Citation: 2012 FCA 66

**CORAM: DAWSON J.A.
TRUDEL J.A.
STRATAS J.A.**

BETWEEN:

KHAN KHOKHAR

Appellant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS CANADA**

Respondent

Heard at Toronto, Ontario, on February 27, 2012.

Judgment delivered from the Bench orally at Toronto, Ontario, on February 27, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench orally at Toronto, Ontario on February 27, 2012)

DAWSON J.A.

[1] This is an appeal by Khan Khokhar from an order of the Federal Court made on June 7, 2011.

[2] The order, issued in Court file No. IMM-3647-11, provided that:

- a. the motion of the applicant, Bhasmini Singh, for an order staying her removal from Canada was dismissed;

- b. an award of costs, fixed in the amount of \$1000.00, was made against Ms. Singh's former immigration consultant Mr. Khokhar; and
- c. a copy of the Court's order was to "be brought to the attention of the appropriate governing bodies that Mr. Khokhar may be a member of for any action they may deem appropriate."

[3] Mr. Khokhar was not a party to that proceeding and had no notice that any order would be made against him. At the hearing, the respondent did not ask for any relief against Mr. Khokhar.

[4] The Judge's reasons for granting relief against Mr. Khokhar were expressed as follows:

7. I would be remiss if I did not consider the affidavit material filed by the Respondent with respect to the activities of Khan Khokhar, an immigration consultant who acted for the Applicant throughout her past immigration history. Mr. Khokhar wrote to Caribbean Airlines on May 31, 2011 and advised the airline of the Applicant's pregnancy and stated that the Applicant was having complications with her pregnancy. The letter also states "Please note that if she is allowed to travel by your airline you will be held responsible for any problems that develop as a result". This correspondence was not conveyed to the Respondent by Mr. Khokhar but was communicated by the airline to the Respondent just prior to the stay application this morning. In my view such a letter was threatening in tone and improper and sought to prevent the removal of the Applicant despite what this Court may have ordered. Such behaviour must be discouraged as it is an affront to both the immigration process and this Court. I would direct that a copy of this Order be brought to the attention of the appropriate governing bodies that Mr. Khokhar may be a member of for any action they may deem appropriate.

- a. Further, I am of the view that an award of costs should be made against Mr. Khokhar personally in this matter.
- b. For these reasons, the motion for a stay of removal is dismissed and the Respondent is entitled to costs fixed in the sum of \$1,000.00 as against Mr. Khan Khokhar personally.

[5] The text of Mr. Khokhar's letter was as follows:

We represent Ms. Bhasmini Singh who is scheduled by Canada Border Services Agency Immigration Section to depart Toronto (Pearson Int. Airport) to Guyana on June 7, 2011 at 23:30 p.m.

It is our duty to advise you that the Canada Border Services Agency has **NOT** disclosed that the passenger, Bhasmini Singh (our client) is pregnant and has only seven (7) weeks left for delivery and is having complications related to her pregnancy. Her Doctor advised that she needs bed rest, she is currently undergoing test [sic] and follow up with her gynaecologist for further investigation of the complications.

Her Doctor has advised that she is not fit to travel until after her delivery; however, arrangements have still been made for her removal from Canada on June 7, 2011 via your airline. We enclose copies of supporting documents from Dr. Allan H.H. Leung M.D.

Please note that if she is allowed to travel by your airline you will be held responsible for any problems that develop as a result.

We trust that this information is adequate; however, if there is need for more information, please feel free to contact the undersigned.

Thank you.

[6] Mr. Khokhar's letter in turn enclosed a letter from Dr. Leung, the text of which stated:

This patient is attending my office. Right now she is pregnant and in her second trimester. Recently she developed dizziness, weakness and fainting spells. These symptoms are related to her pregnancy and also resulted from stress and anxiety related to the fact that she was ordered to leave Canada. She is at present undergoing tests and will be seeing her gynecologist for further investigation and follow-up. At the present time she is advised not to travel until she has completed her investigations and consultation with her gynecologist/obstetrician. She will begin her third trimester soon, it is advisable that she does not travel until after her delivery.

Sincerely yours,

[7] On this appeal, the respondent fairly concedes that Mr. Khokhar was entitled to notice of the Court's intention to make an order against him. The respondent also concedes the Mr. Khokhar was entitled to an opportunity to be heard before an order was made against him. The opportunity to be heard included the right to adduce evidence on his behalf and to challenge the respondent's evidence. Mr. Khokhar received neither notice of the Court's intention nor an opportunity to be heard.

[8] The respondent argues, however, that this Court does not have jurisdiction to hear an appeal from the decision of the Federal Court in the absence of certification of a serious question of general importance (see: subsection 74(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act)). The respondent does not make any submission with respect to the application of subparagraph 72(2)(e) of the Act, relating to interlocutory judgments, and we decline to consider it.

[9] Subsection 74(d) of the Act provides:

74. Judicial review is subject to the following provisions:

(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire :

d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

[10] In subsection 74(d) Parliament has evidenced its intention to limit the right of appeal to this Court by parties to applications for judicial review brought under the Act. That said, we cannot read

this provision as depriving a non-party from a right of appeal in the rare circumstance where an order is made against a non-party without any notice and without affording the non-party any opportunity to be heard.

[11] We therefore reject the submission of the respondent that we lack jurisdiction to hear this appeal in the unique circumstances before us.

[12] Turning to the merits of the appeal, in the circumstances here, where the order under appeal was made without any notice to Mr. Khokhar and without affording him any opportunity to be heard, we owe no deference to the findings of the Federal Court Judge.

[13] On the record before us, portions of which are set out above, we are not satisfied that the order under appeal can be sustained. This is particularly so because at the hearing before the Federal Court the respondent did not seek costs or any other relief against Mr. Khokhar.

[14] For these reasons, the appeal is allowed with costs and the order of the Federal Court as it pertains to Mr. Khokhar is set aside. For clarity, the Federal Court's direction with respect to Mr. Khokhar's governing bodies is of no effect.

“Eleanor R. Dawson”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-263-11

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE NEAR OF THE
FEDERAL COURT DATED JUNE 7, 2011 IN DOCKET NO. IMM-3647-11.**

STYLE OF CAUSE: KHAN KHOKHAR v. THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 27, 2012

**REASONS FOR JUDGMENT OF THE
COURT BY:** (DAWSON, TRUDEL & STRATAS JJ.A.)

DELIVERED FROM THE BENCH BY: DAWSON J.A.

APPEARANCES:

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