Federal Court of Appeal Cour d'appel fédérale

Date: 20120803

Docket: A-313-12

Citation: 2012 FCA 218

Present: DAWSON J.A.

BETWEEN:

MOHAMED ZEKI MAHJOUB

Appellant

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP
THE MINISTER OF PUBLIC SAFETY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 3, 2012.

REASONS FOR ORDER BY: DAWSON J.A.

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REASONS FOR ORDER

DAWSON J.A.

[1] The appellant, Mohamed Zeki Mahjoub, is named in a security certificate signed by the respondent Ministers pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). The certificate has been referred to the Federal Court, which is in the process of determining whether the certificate is reasonable.

[2] By notice of motion dated September 16, 2011, Mr. Mahjoub sought the following relief in the Federal Court:

a. A permanent stay of proceedings in conformity with sections 7, 8 and 24(1) of the *Canadian Charter of Rights and Freedoms,* [Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11] (hereinafter the *Charter*) and section 50 of the *Federal Courts Act* [R.S.C. 1985, c. F-7];

b. An order for the release without conditions of the Applicant;

c. An order reserving the right of the parties to present further submissions for the retrieval, sealing or destruction of the commingled material;

d. In the alternative, such further and other remedy as this Honourable Court considers appropriate and just in the circumstances including the removal of Department of Justice counsel and legal staff on record and Canadian Border Services Agency and Canadian Security Intelligence Service staff.

[3] On May 31, 2012, a designated judge of the Federal Court (Judge) granted the motion in part. The Judge permanently removed a number of members of the respondent Ministers' litigation team from the file. All other relief sought on the motion was denied.

[4] On June 29, 2012, Mr. Mahjoub filed a notice of appeal in this Court from the order of the Judge.

[5] The Ministers now move in writing for an order quashing the appeal pursuant to subsection 52(*a*) of the *Federal Courts Act*. Subsection 52(*a*) allows the Court to "quash proceedings in cases brought before it in which it has no jurisdiction".

Statutory Provisions

[6] As this Court observed in *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 294, 426 N.R. 49 (Mahjoub #1) at paragraph 7 and following, paragraphs 27(1)(*a*) and (*c*) of the *Federal Courts Act* generally provided an appeal to this Court from any final or interlocutory judgment of the Federal Court. This right may, however, be barred by other statutes.

[7] The relevant legislative provision in this case is section 79 of the Act. Section 79 provides:

79. An appeal from the determination may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.	79. La décision n'est susceptible d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les décisions interlocutoires ne sont pas susceptibles d'appel.

The Positions of the Parties

[8] The Ministers assert that the appeal of the Judge's order:

> […] denying his motion to stay the reasonableness hearing should be quashed for want of jurisdiction. It is an attempted appeal of an interlocutory decision made in the course of a proceeding under section 77 of the *IRPA*. Such an appeal is explicitly barred by the privative clause in section 79 of the *IRPA*. This Court has recognized that this privative clause has a broad scope and precludes appeal of decisions made in the course of a section 77 proceeding. The Appellant has no right of appeal in these circumstances.

[9] The Ministers place considerable reliance upon this Court's decision in Mahjoub #1. As the Court explained in those reasons, at paragraphs 14 and 15, the order then under appeal was made in the following circumstances:

> 14 In the course of the section 77 proceedings, the Crown came into possession of documents belonging to counsel for Mr. Mahjoub which contain

> information that Mr. Mahjoub says is subject to solicitor and client privilege and litigation privilege. The documents in issue became commingled with documents belonging to the Crown. Mr. Mahjoub brought a motion before Justice Blanchard for a permanent stay of the proceedings on the basis of sections 7, 8 and 24(1) of the *Canadian Charter of Rights and Freedoms*. The Crown opposed the motion.
>
> 15 Justice Blanchard heard the motion on October 3, 2011 and reserved his decision. It appears that in the course of the hearing, Justice Blanchard concluded that in order to determine the remedy, if any, that would be appropriate in the circumstances, it would be necessary to have the commingled documents separated and returned to the respective parties so that they would be in a position to make specific submissions on the nature and extent of the alleged prejudice. In that context, Justice Blanchard made the order under appeal on October 4, 2011. […]

[10] The order then under appeal established a process for the commingled documents to be separated and returned to the respective parties. This Court quashed the appeal from such order for want of jurisdiction.

[11] The Ministers argue that in Mahjoub #1 this Court found that the order then under appeal was rendered in the course of the section 77 proceedings. They assert that "[g]iven that finding, the decision on the stay motion itself must also have been rendered in the course of the section 77 proceedings and is similarly covered by the privative clause in section 79."

[12] For his part, Mr. Mahjoub argues that:

> […] s. 79 of the *IRPA* has no application to this appeal and […] this appeal is governed by section 27 of the [*Federal Courts Act*]. While the application arose in the context of a hearing under the *IRPA*, the nature of the application had nothing to do with the determination of the reasonableness of the certificate or of the Appellant's release conditions and it is not judicial review covered by section 72 of the *IRPA*. The application was an application for a stay based on government seizure of privileged documents of an adverse party. Section 79 of the *IRPA* only requires certifications for appeals of decisions on the reasonableness of a security certificate and only bar appeals from interlocutory decisions related to the certificate. A final order on an application for a stay under s. 50 of the [*Federal Courts Act*] or under

> section 7 or 24 of the *Charter* is clearly not an interlocutory decision related to the reasonableness of the certificate. Finally, where, as here, the refusal of a stay goes to jurisdiction, the decision is not under s. 79 of the *IRPA* and the section does not apply.

The standard to be met on a motion to quash

[13] In *Arif v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 157, 405 N.R. 381 a panel of Judges of this Court considered whether the Court possessed jurisdiction to hear an appeal from the Federal Court or whether the jurisdiction was ousted by subsection 14(6) of the *Citizenship Act*, R.S.C. 1985, c. C-29. A judge of this Court, sitting alone, had previously denied a motion to quash the notice of appeal on jurisdictional grounds. At paragraph 9 of its reasons, this Court characterized the issue before the single judge on the motion to quash to be "whether it was 'plain and obvious' that the appeal […] had no chance of success (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959)." The decision of the single judge denying the motion to quash "[a]t most" indicated "that he was not convinced at that juncture that the Court was without jurisdiction to hear the appeal".

[14] The test I will apply to this motion, therefore, is whether it is plain and obvious that the Court is without jurisdiction to hear the appeal.

Discussion

[15] I am unable to conclude that it is plain and obvious that this Court is without jurisdiction to hear the appeal. Therefore, the motion to quash will be dismissed and the judges of this Court appointed to hear this appeal will determine whether this Court has jurisdiction.

[16] Because the panel appointed to hear this appeal will decide the issue of jurisdiction, my reasons are brief and should be seen as relevant only to the application of the plain and obvious test.

[17] The privative provision relied upon by the Ministers, section 79 of the Act, must be read in the context of section 78 of the Act. Together they read:

78. The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.	78. Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.
79. An appeal from the determination may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding. [emphasis added]	79. La décision n'est susceptible d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les décisions interlocutoires ne sont pas susceptibles d'appel. [Non souligné dans l'original.]

[18] In my view, relying upon the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, particularly at paragraphs 44 to 66, it is fairly arguable that the decision of the Federal Court either to refuse or grant a stay of the security certificate proceeding was neither a determination whether the security certificate is reasonable, nor an interlocutory decision made in the proceeding. It is, therefore, not plain and obvious that section 79 applies to this appeal so as to oust the jurisdiction of the Court under subsection 27(1) of the *Federal Courts Act*.

[19] To the extent that the Ministers rely upon Mahjoub #1, it is, in my view, fairly arguable that the decision can be distinguished on the ground that it turned on this Court's characterization of the

order then under appeal to be an interlocutory decision rendered in the course of proceedings under section 77 of the Act that fell squarely within section 79 of the Act.

Conclusion

[20] For these reasons, the motion to quash the appeal will be dismissed.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-313-12
STYLE OF CAUSE:	Mohamed Zeki Mahjoub v. Minister of Immigration and Citizenship Minister of Public Safety

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Dawson J.A.
DATED:	August 3, 2012

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