Federal Court of Appeal | Cour d'appel fédérale

Date: 20210219

Docket: A-228-19

Citation: 2021 FCA 31

CORAM: **WEBB J.A.**
BOIVIN J.A.
LOCKE J.A.

BETWEEN:

CHIRADEEP DUTTA GUPTA

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the Registry on January 19, 2021.

Judgment delivered at Ottawa, Ontario, on February 19, 2021.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: WEBB J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] Mr. Chiradeep Dutta Gupta (the appellant) appeals from the judgment dated May 14, 2019 of the Federal Court (*per* Walker J.): 2019 FC 669. The Federal Court Judge granted the motion for summary judgment, put forward by Her Majesty the Queen (the respondent), pursuant

to Rule 213 of the *Federal Courts Rules*, SOR/98-106, and dismissed the appellant's action for damages in its entirety on the basis that there was no genuine issue for trial with respect to the appellant's claim.

II. Facts

[2] The background facts of this matter are well set out by the Federal Court Judge (Decision at paras 6-22). These facts are recalled below given their relevance in the context of this appeal.

[3] The appellant is an Indian citizen and has been a permanent resident of Canada since December 2002.

[4] In April 2010, the appellant's application for Canadian citizenship was approved by a Citizenship Judge. The appellant was thereafter scheduled to take his citizenship oath at a ceremony on September 10, 2010.

[5] In July 2010, the appellant returned to the United States of America (US) to take care of business matters where he was arrested and indicted for health care fraud.

[6] On September 7, 2010, the US Federal Bureau of Investigation (FBI) contacted Immigration, Refugees and Citizenship Canada (IRCC) (then Citizenship and Immigration Canada or CIC) to inform them of the appellant's charges, and to convey the FBI's concerns that

if released on bail and allowed to return to Canada, the appellant would not return to the US for his trial.

[7] On September 9, 2010, a US court granted the appellant permission to travel to Canada for one day on September 10, 2010 to attend his citizenship ceremony. It is noteworthy that, at the time, the *Citizenship Act* (R.S.C. 1985, c. C-29) did not contain any prohibitions precluding citizenship to applicants having committed a crime abroad. Be that as it may, IRCC officials brought the appellant's situation to the attention of Ms. Maha Suleiman, a citizenship officer who had carriage of the appellant's file.

[8] One day later on September 10, 2010, at or just prior to the oath ceremony, Ms. Suleiman informed the appellant that his oath was being postponed until IRCC could obtain more information regarding his residence in Canada and the US criminal proceedings against him.

[9] On September 16, 2010, the appellant sent a letter to IRCC stating that the criminal charges laid against him would be settled quickly and that he would update IRCC accordingly. He requested that his citizenship oath be postponed until the charges against him were resolved. In so doing, the appellant also provided his Toronto address.

[10] On October 18, 2010, IRCC's Case Management Branch (CMB) recommended that the appellant's file be referred to the Canada Border Services Agency (CBSA) for an admissibility review due to the criminal charges in the US, and a letter be sent to him regarding IRCC's residency concerns. Due to a business realignment, no action was immediately taken on the

appellant's file. Six months later, on April 8, 2011, the appellant's file was reassigned to another citizenship officer: Ms. Livia Cardamone.

[11] On October 26, 2012, the appellant was convicted of health care fraud and money laundering in the US.

[12] On June 7, 2013, Ms. Cardamone unsuccessfully attempted to contact the appellant regarding the outcome of his criminal charges.

[13] A few months later, on January 24, 2014, the appellant was sentenced to 10 years in prison and ordered to pay over $10 million USD in restitution. The appellant received an additional two years on his sentence when US authorities intercepted him attempting to board a flight to India. He began serving his prison sentence on February 4, 2015.

[14] In early 2015, IRCC's Case Processing Centre conducted a review of its outstanding citizenship files.

[15] On April 9, 2015, Ms. Laura Miggiani, a citizenship officer, contacted the CBSA to indicate that IRCC had discovered that the appellant had been convicted and sentenced to 10 years in prison in the US. Ms. Miggiani further inquired as to whether the CBSA intended to pursue enforcement action against the appellant on account of his criminal inadmissibility. On that same day, the CBSA informed IRCC that it would indeed pursue enforcement action and requested that his citizenship application be put on hold. In addition, Ms. Cardamone instructed a

colleague to schedule the appellant to take the citizenship oath at a ceremony on April 27, 2015. She further indicated that the appellant's file should be deemed abandoned if he did not appear at the ceremony.

[16] On or about April 13, 2015, a Notice to Appear was accordingly sent to the appellant at his last known address on file, summoning him to a citizenship ceremony on April 27, 2015.

[17] On April 14, 2015, the CBSA advised IRCC that no further action could be taken on the appellant's file until his release from prison and that his file would be flagged.

[18] The appellant did not attend the oath ceremony on April 27, 2015. IRCC's Notice to Appear was returned undelivered on May 5, 2015. On June 9, 2015, IRCC sent to the appellant a letter of abandonment of citizenship application. This letter was also returned undelivered.

[19] On August 5, 2015, the appellant's counsel wrote to IRCC stating that the appellant had failed to update his contact information. The appellant's counsel further requested that the appellant's file be reopened and that his citizenship ceremony be rescheduled once he was released. The letter explained that his failure to attend the oath ceremony was beyond his control.

[20] On October 27, 2015, pursuant to an Access to Information request, the contents of the appellant's citizenship file were disclosed to him, including the emails among IRCC and CBSA officials that formed the basis of the appellant's claim before the Federal Court.

[21] On July 28, 2016, the appellant served and filed an action for damages against the respondent based on allegations of gross misconduct, conspiracy, and breach of his fundamental rights by representatives of the Minister and the CBSA in their treatment of his Canadian citizenship application from 2010 to 2015 (Appeal Book, Statement of Claim, pp. 59-74). The appellant sought moral damages of $30,000 per year since 2010 and exemplary damages of $50,000 for the loss of his citizenship rights and the violation of his fundamental rights. After examinations for discovery and settlement discussions, the appellant filed a requisition for a pre-trial conference in July 2018. Shortly thereafter, the respondent informed the Federal Court and the appellant that they would be presenting a motion for summary judgment.

[22] On October 15, 2018, the respondent thus filed a motion for summary judgment on the grounds that (i) the appellant's claim was statute-barred pursuant to the Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B because the proceeding was commenced more than two years after the claim was discovered and that, (ii) the appellant's action raised no genuine issue for trial.

[23] On May 14, 2019, the Federal Court Judge granted summary judgment and dismissed the appellant's action for damages in its entirety on the basis that there was no genuine issue for trial with respect to the appellant's claim.

[24] Before our Court, the appellant appeals the Federal Court judgment. For the reasons that follow, I would dismiss the appeal with costs.

III. The Federal Court Judge's decision

[25] As noted earlier, the Federal Court Judge set forth the background facts and provided a brief review of the law governing motions for summary judgment according to the *Federal Courts Rules*. The Federal Court Judge also summarized the parties' positions and the applicable provisions of the *Citizenship Act* as they were in 2010 (2010 *Citizenship Act*). Addressing the appellant's claim, the Federal Court Judge noted that it was premised on the alleged misconduct of IRCC and CBSA officials in conspiring with US officials to deny the appellant his citizenship. The Federal Court Judge further observed that the appellant's claim failed to refer to a specific actionable tort. The Federal Court Judge thus framed the claim as an action in misfeasance in public office by named IRCC and CBSA officials due to the claim's premise of alleged misconduct of these officials. The Federal Court Judge also addressed the tort of conspiracy, as the theme of an alleged extended plot appeared repeatedly in the appellant's written materials.

[26] Upon carefully reviewing the evidence, the Federal Court Judge found that the appellant had not presented proof of the torts of misfeasance in public office or conspiracy by IRCC and/or CBSA officials, and that the evidence provided did not support his claims. Consequently, the Federal Court Judge held that no genuine issue for trial existed as the appellant had not established the material facts underlying his allegations of misfeasance and conspiracy. The Federal Court Judge further ruled that the appellant had not raised any serious issues of credibility in the respondent's evidence that would require a trial.

[27] With respect to the appellant's submissions regarding damages, the Federal Court Judge determined that they were inconsistent when viewed against the theory of the appellant's case, which were "difficult to follow", and were "not supported by the evidence" (Decision at paras 100-110, 117). The Federal Court Judge also found that the appellant's *Charter* submissions raised "no viable argument", and that he failed to plead the constituent elements of the *Charter* rights cited (Decision at paras 111-116). The Federal Court Judge did not address the issue of the applicable limitation period as she was "satisfied that … this is a clear case in which summary judgment should be granted" (Decision at para 46). Therefore, the Federal Court Judge granted the motion for summary judgment and dismissed the appellant's action in its entirety.

IV. Issues

A. Did the Federal Court Judge err in finding that there was no genuine issue for trial?

B. Did the Federal Court Judge err in her application of section 17 of the 2010 *Citizenship Act*?

V. Standard of review

[28] The Federal Court decision is reviewable pursuant to the principles set out by the Supreme Court of Canada in *Housen v. Nikolaisen* 2002 SCC 33, [2002] 2 S.C.R. 235. Conclusions of law are reviewable on the standard of correctness, whereas findings of fact and findings of mixed fact and law are reviewable on the standard of palpable and overriding error.

VI. Analysis

A. Did the Federal Court Judge err in finding that there was no genuine issue for trial?

[29] However trite, it is recalled that under the *Federal Courts Rules*, a motion for summary judgment will be granted only if the Court is satisfied that the said claim raises no genuine issue for trial. As such, the appellant in the circumstances had the burden before the Federal Court to demonstrate, with specific evidence, that his claims in his pleadings raised a genuine issue for trial. In *Manitoba v. Canada*, 2015 FCA 57, 470 N.R. 187, our Court specified that "there is no genuine issue" if there is no legal basis to the claim or if the judge has "the evidence required to fairly and justly adjudicate the dispute" (at para 15). As mentioned by the Federal Court Judge in this case, "[a] responding party must put their best foot forward" in the context of a motion for summary judgment (Decision at para 40). Following a review of the evidence, the Federal Court Judge found that the appellant had failed to establish the material facts underlying his claim, hence the absence of a genuine issue for trial (Decision at paras 69-99).

[30] Before our Court, the appellant challenges the Federal Court Judge's findings and essentially argues that she made credibility findings in reaching her conclusion and that she erred in so doing as she "impermissively put herself in the place of trial judge". In support of this contention, the appellant points to several paragraphs in the Federal Court Judge's decision. Yet, in so doing, the appellant conflates the Federal Court Judge making findings of fact, or finding a lack of evidence, with her making assessments of credibility.

[31] For example, the Federal Court Judge, at paragraph 10, as part of her summary of the facts, refers to the parties' disagreement as to whether the appellant was removed from the oath ceremony as the ceremony started, or privately just before the ceremony. The appellant submits that the Federal Court Judge erred in this regard because she ruled on a disputed fact and in so doing, put herself in the place of the trial judge. However, whether the appellant was removed from the oath ceremony as it started or privately beforehand, it remains that his removal is a given: it is fact. Likewise, the Federal Court Judge rightly observed that the appellant submitted no evidence in support of his claim for damages caused by his removal from the ceremony. Specifically, a letter to IRCC did not point to the appellant experiencing any alleged humiliation and stress from his removal from the oath ceremony (Decision at paras 104-106). It follows that there is no basis for the appellant's contention that the Federal Court Judge erred in finding that the issue of the appellant's removal from the oath ceremony was not a disputed fact and therefore not a genuine issue for trial.

[32] Similarly, paragraph 77 of the Federal Court Judge's decision is merely a description of the contents of an email, in particular, whether or not the email contained a direction to stop the appellant from taking his oath. At paragraph 83, the Federal Court Judge addresses the appellant's argument attacking Ms. Suleiman's credibility that she did not receive any instruction or direction from IRCC officials on the processing of the appellant's file. Based on the evidence, the Federal Court Judge found that the information provided to Ms. Suleiman in this regard was "advisory in nature." Along the same lines, the appellant submits that the decision of Ms. Cardamone to schedule the appellant's oath ceremony on April 27, 2015 with the knowledge that he was incarcerated in the United States at the time amounted to misfeasance. The Federal

Court Judge acknowledged that Ms. Cardamone's decision was ill-informed but her conduct was not deliberately unlawful (Decision at para 91). It was open to the appellant to challenge Ms. Cardamone's decision by filing a judicial review application before the Federal Court. However, the appellant did not pursue this avenue.

[33] It is apparent from the Federal Court Judge's decision that the appellant's allegations are unsupported by the evidentiary record. For instance, the Federal Court Judge observed that the appellant had produced no evidence to support his allegations of conspiracy regarding the decision of Ms. Cardamone to schedule an oath ceremony while the appellant was incarcerated (Decision at paras 91-92). Also, despite the appellant's disagreements with Ms. Cardamone's affidavit evidence, the Court found that he provided no evidence contradicting her affidavit. As such, several findings of the Federal Court Judge were a direct consequence of the appellant's failure to lead evidence in support of his claims. Hence, on the basis of the evidentiary record, the Federal Court Judge properly applied the principles governing summary judgment and did not commit a reviewable error in finding that there were no genuine issues for trial in the circumstances.

B. Did the Federal Court Judge err in her application of section 17 of the 2010 *Citizenship Act*?

[34] The appellant submits that the Federal Court Judge erred in law in relying on section 17 of the 2010 *Citizenship Act*, instead of subsection 22(1), as the provision authorizing the Minister to prevent an individual from taking the citizenship oath. Specifically, the appellant argues that, since his citizenship application was approved by a Citizenship Judge, it follows that the

Minister had granted him citizenship and that the oath ceremony could not be prevented pursuant to section 17 of the 2010 *Citizenship Act*. In other words, according to the appellant, when Canadian citizenship is granted by a Citizenship Judge, the oath merely becomes a formality because Canadian citizenship has already been granted.

[35] The appellant's position is misconceived. First, section 3(1)(c) of the *Citizenship Act* states that in order to become a Canadian citizen, both the grant of citizenship and the citizenship oath are required:

3 (1) Subject to this Act, a person is a citizen if	3 (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :
…	[…]
(c) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;	c) ayant obtenu la citoyenneté — par attribution ou acquisition — sous le régime des articles 5 ou 11 et ayant, si elle était âgée d'au moins quatorze ans, prêté le serment de citoyenneté;

[36] Second, in this case, the appellant was not prevented from taking the oath. Rather, the appellant's oath was postponed. Contrary to the appellant's position, the Minister was under no obligation to immediately administer the oath subsequent to a decision by a Citizenship Judge regarding a citizenship application (*Magalong v. Canada (Citizenship and Immigration)*, 2014 FC 966 at para 41, [2014] F.C.J. No. 1024). In fact, the Minister retains residual discretion to postpone the administration of an oath if he has a reasonable cause to do so. Here, the Minister had reason to believe that the appellant may have misrepresented his residency in Canada during

the relevant period for determining residency under the *Citizenship Act* (*Khalil v. Canada (Secretary of State) (CA)*, [1999] 4 F.C. 661, 176 D.L.R. (4th) 191, at para 14). The Minister therefore postponed the oath until completion of further enquiries regarding the uncertainty surrounding the appellant's residency requirement under the *Citizenship Act*.

[37] The appellant also criticizes the Federal Court Judge for embarking on an analysis of section 17 of the 2010 *Citizenship Act*. However, the appellant himself referred to section 17 of the 2010 *Citizenship Act* in his Statement of Claim:

> 83. Defendant's agents lied to the Plaintiff in stating that his file needed to be reviewed for the reason stated at the time: There is not even a shred of evidence that an inquiry, even a review of the file took place during the reference period, in accordance with the *Citizenship Act* as it was then at section A17:
>
> > *"17 Where a person has made an application under this Act and the Minister is of the opinion that there is insufficient information to ascertain whether that person meets the requirements of this Act and the regulations with respect to the application, the Minister may suspend the processing of the application for the period, not to exceed six months immediately following the day on which the processing is suspended, required by the Minister to obtain the necessary information."*

[38] Be that as it may, and assuming without deciding that the Federal Court Judge committed an error in applying section 17 of the 2010 *Citizenship Act* in the context of this case, it is unnecessary to address the appellant's argument on this issue in order to resolve the appeal. Indeed, having found that the Federal Court Judge did not err in concluding that there was an absence of evidence to support the appellant's claims related to the issues underlying the motion for summary judgment, section 17 of the 2010 *Citizenship Act* is irrelevant to the outcome of this case.

VII. Conclusion

[39] For all of these reasons, I would dismiss the appeal with costs.

"Richard Boivin"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-228-19
STYLE OF CAUSE:	CHIRADEEP DUTTA GUPTA v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	JANUARY 19, 2021
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	WEBB J.A. LOCKE J.A.
DATED:	FEBRUARY 19, 2021

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