Federal Court of Appeal | Cour d'appel fédérale

Date: 20190424

Docket: A-373-18

Citation: 2019 FCA 64

Present: **BOIVIN J.A.**
RENNIE J.A.
DE MONTIGNY J.A.

BETWEEN:

HELMUT OBERLANDER

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 24, 2019.

REASONS FOR ORDER BY: RENNIE J.A.
CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR ORDER

RENNIE J.A.

[1] The Attorney General objects to the filing of a notice of appeal by Helmut Oberlander on the basis that no question was certified as a serious question of general importance as required by paragraph 22.2(d) of the *Citizenship Act*, R.S.C., 1985, c. C-29 (*Citizenship Act)*, and that no error falling within the recognized exceptions to the requirement that a question be certified has been made out. He asks that the notice of appeal be removed from the court file in accordance with Rule 74 of the *Federal Courts Rules*, SOR/98-106.

[2] Rule 74 allows the Court to remove a document where it suffers from a fatal substantive defect such as jurisdiction: *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192 at paras. 20-29, 434 N.R. 144. In the immigration context, it is well-established that this Court has discretion to remove a notice of appeal from the court file under Rule 74 in the absence of a certified question and where no recognized exception, including a refusal to exercise jurisdiction or bias, is established: *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 7, 10-11; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144 (*Mahjoub*).

[3] The notice of appeal under consideration arises from the decision of the Federal Court on September 27, 2018 (2018 FC 947, *per* Phelan J.), dismissing Mr. Oberlander's application for judicial review of the Governor in Council's decision to revoke Mr. Oberlander's Canadian citizenship. At the outset of the judicial review hearing, Mr. Oberlander, the appellant, brought a motion requesting that Phelan J. recuse himself on the basis that his participation in the judicial review application gave rise to a reasonable apprehension of bias. Phelan J. dismissed the motion (2018 FC 488).

[4] After releasing his reasons for judgment and dismissing the judicial review application, Phelan J. invited submissions on whether a question should be certified. Although nine questions were posed, the judge found that none met the criteria for certification established by this Court in *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras. 15-16.

[5] The foundation of the bias allegation advanced in the notice of appeal is that in 2008, in citizenship revocation proceedings that were eventually set aside and recommenced, Phelan J. made a finding of fact that the appellant contributed to war crimes or crimes against humanity. The appellant argues that when the matter came before Phelan J. in 2018, the judge reached the same conclusion. The appellant says that "[i]t is the appearance that he has prejudged the very issue…not his mere participation" that supports the argument that there is a credible allegation of bias.

[6] The appellant does not assert actual bias on behalf of the judge (paragraph 9 of the appellant's notice of appeal). Rather, the appellant points to potential bias arising from the judge's prior ruling involving the appellant. A concession that actual bias is not alleged can mean one of three things: that actual bias need not be established because reasonable apprehension of bias is an appropriate surrogate; that unconscious bias can exist even when the judge acts in good faith; or that the presence of actual bias is not the relevant inquiry: *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 63, [2003] 2 SCR 259 (*Wewaykum*).

[7] As actual bias is not in play, the test is whether the circumstances give rise to a reasonable apprehension of bias: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716. The test is well known. It would require a reasonable, right-minded, and informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude that Phelan J., whether consciously or unconsciously, was unable to decide the matter fairly and impartially. The appellant's argument distills to the assertion that although Phelan J. may have acted in good faith and was not

consciously relying on any preconceptions as to the evidence, he was not, when viewed objectively, capable of deciding the matter impartially.

[8] The starting point in considering the issues raised in this proceeding is the Supreme Court of Canada's decision in *Wewaykum* at paragraph 59:

> … "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process and must be presumed. […] the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

[9] The onus is on the appellant to establish "a real likelihood or probability of bias": *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras 25-26, [2015] 2 SCR 282; *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paras. 16, 22, [2013] 2 S.C.R. 357; *Sittampalam v. Canada (Citizenship and Immigration)*, 2010 FC 625 at paras. 32-33. Allegations of bias must also be "tenable" or "credible": *Mahjoub* at para. 19.

[10] The mere fact a judge was involved in an earlier decision and made findings adverse to a party does not, in and of itself, give rise to a reasonable apprehension of bias: *Collins v. Canada*, 2011 FCA 123 at paras. 3-4 (*Collins*); *Ahani v. Canada (Minister of Citizenship and Immigration)* (2000), 2000 CanLII 15800 (FCA), 24 Admin. L.R. (3d) 171 at paras. 7-8; *Canada (Minister of Citizenship and Immigration) v. Jaballah*, 2006 FC 180 at paras. 27-28. There is no authority in the jurisprudence for the proposition that the simple prior involvement of a judge

rendering an adverse decision constitutes an objective foundation to sustain a reasonable apprehension of bias. Judges are often required to reconsider their previous decisions, including decisions of fact, or mixed fact and law. For the argument to succeed, something more in the conduct of the proceedings is required.

[11] The inquiry as to whether or not there is a real likelihood or probability of bias is inherently contextual and fact specific: *Wewaykum* at para. 77. Four contextual factors inform the consideration of the bias argument in this case. They lead to the conclusion that the allegation does not meet the required threshold of being tenable or credible.

[12] The first factor that informs the perspective of the reasonable person is the passage of time: *Wewaykum* at paras 85-87, citing *Locabail (U.K.) v. Bayfield Properties Ltd.*, [2000] Q.B. 451 (Eng. C.A.) at p. 480 and *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33, at para. 16. As I noted earlier, the two decisions of Phelan J. at issue are spanned by a decade.

[13] A second relevant contextual factor is that the legal test that governed each of the two decisions is different. In *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, the Supreme Court changed the test for complicity in war crimes or crimes against humanity from participation or indirect complicity to complicity based on a knowing, significant, and voluntary contribution. The judicial review before Phelan J. in 2018 involved a different legal test than that which governed in 2008.

[14] The third factor is the nature of the proceedings. The proceedings in the Federal Court were a judicial review of a decision of the Governor in Council. The Federal Court, sitting in a supervisory capacity, was not sitting as a trier of fact.

[15] The final contextual observation is that the appellant did not pose bias as a question for certification in the Federal Court even though the appellant had the benefit of the judge's reasons and decision on both the recusal motion and the citizenship revocation judicial review. Bias only arose as a ground in the notice of appeal. This bears on the strength of the allegation and whether the appellant has discharged his burden to establish "a real likelihood or probability of bias" on the basis of some credible or tenable evidence.

[16] There is a strong presumption that judges will comply with their solemn judicial oath to administer justice impartially. This presumption is not easily rebutted, particularly where the previous decision in question which forms the foundation of the bias allegation took place a decade ago, under a different legal regime, and on a different record. The assertion that judges or tribunals would declare themselves biased simply because they are being asked to reconsider or re-determine a matter on which they have previously expressed a view is difficult to advance. Judges are presumed capable of re-directing themselves as to the law according to direction of appellate courts; in excluding evidence which they have previously heard, such as in a *voir dire*, and in reconsidering evidence and argument afresh in light of changes in the law. Given the importance of impartiality to the judicial system, courts must always be alert to the possibility of bias. However, to proceed from the assumption that a prior adverse finding of fact was made in

respect of the same party alone constitutes a foundation for bias would have serious implications for the administration of justice.

[17] The appellant also contends that a jurisdictional error arises from the adoption of a reasonableness standard of review to assess the decision of the Governor in Council. There is no jurisprudential support for the argument that the selection of the standard of review gives rise to a jurisdictional error. Choice of the wrong standard of review is an error of law, but it does not fall within the narrow category of jurisdictional error as framed by the Supreme Court: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31. Nor does the allegation of bias on the part of the Governor in Council fall within the exception for bias. It is the conduct of the Federal Court judge that is relevant.

[18] The appellant further argues that the bar on appeals in the absence of a certified question contained in paragraph 22.2(d) of the *Citizenship Act* violates section 6 and 7 of the Charter. This too does not raise a question which justifies filing a notice of appeal. Similar challenges have been rejected in the context of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) (see IRPA, s. 74(d); *Mahjoub* at para. 24).

[19] I would therefore order, under Rule 74, that the notice of appeal be removed from the court file and that the file be closed.

"Donald J. Rennie"

"I agree

Boivin J.A.”

J.A.

“I agree
de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-373-18
STYLE OF CAUSE:	HELMUT OBERLANDER v. THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	APRIL 24, 2019

WRITTEN REPRESENTATIONS BY:

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