Federal Court of Appeal | Cour d'appel fédérale

Date: 20210309

Docket: A-145-19

Citation: 2021 FCA 49

CORAM: **WEBB J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

NARIMAN ZAKI ABDULFATTAH YOUNIS

Appellant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

Heard at Ottawa, Ontario, on November 9, 2020.

Judgment delivered at Ottawa, Ontario, on March 9, 2021.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: WOODS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue in this matter is whether Ms. Younis has a valid notice of appeal despite the Federal Court Judge, in rendering his judgment (2019 FC 291), not certifying that a serious question of general importance is involved.

[2] For the reasons that follow, I would quash this appeal.

I. Background

[3] Ms. Younis became a permanent resident of Canada on February 15, 2010. Her first application for citizenship was submitted on May 3, 2013. This application was returned to her because her proof of language ability was not accepted and she had only enclosed her most recent passport. Because it took some time for Ms. Younis to complete another language test, she did not submit her next application for citizenship until April 20, 2014.

[4] The Citizenship Judge who reviewed this application determined that she did not meet the residency test as required by the *Citizenship Act*, R.S.C. 1985, c. C-29, as it then read, and rejected her application. Ms. Younis had not accumulated 1,095 days of physical presence in Canada in three of the four years immediately preceding the date of her application. During the four years immediately preceding the date of her application, she had two 35-day visits to the United Arab Emirates (UAE) and a 19-day visit to the United States. As well, she had spent the last 293 days of this relevant period in the UAE. Her husband had a job in the UAE and she left Canada to be with him.

[5] The Citizenship Judge applied the test for residency as set out in *Re Koo*, [1993] 1 F.C. 286, 19 Imm. L.R. (2d) 1 (T.D.). The Citizenship Judge found "that Canada is not the place where the Applicant 'normally, customarily or regularly lives,' and that the applicant has not centralized her mode of existence in Canada" (reasons of Citizenship Judge Pash dated July 31, 2017, File No. 4615216, at para. 24). Her application for citizenship was rejected. Ms. Younis applied for judicial review of this decision. Her application for judicial review was accepted and

this decision of the Citizenship Judge was set aside (2018 FC 209) because the Citizenship Judge was under the mistaken belief that she was a citizen of the UAE. Justice Elliott found that this error alone was sufficient to allow Ms. Younis' application for judicial review (paragraph 20 of her reasons).

[6] A different Citizenship Judge then reviewed her application. In the reasons dated June 7, 2018, Citizenship Judge Brum (File No. 4615216) found, at paragraph 22:

> In light of the above, I find that the Applicant has 395 days of absence, 1065 days of physical presence, and a shortfall of 30 days.

[7] Since Ms. Younis was not physically present for 1,095 days during the relevant period, the Citizenship Judge then chose to adopt the analytical approach to the residence requirement of paragraph 5(1)(*c*) of the *Citizenship Act* as set out in *Re Papadogiorgakis*, [1978] 2 F.C. 208, 88 D.L.R. (3d) 243. In applying this approach, the Citizenship Judge first determined that Ms. Younis had established residency in Canada prior to her first absence. However, she then found that Ms. Younis had ceased to be resident in Canada when she left Canada to join her husband in the UAE 293 days prior to the end the relevant four-year period:

> [31] However, the same cannot be said for her final trip. It was the Applicant's testimony that after her husband left Canada for work in the UAE, she had an open house, sold her belongings, terminated her tenancy, and with her two children, joined her husband. She left behind a bank account, friends, and her husband's cousins. In light of these facts I find that the Applicant ceased to be a resident in Canada and therefore did not maintain her residence in Canada. The Applicant testified that her husband's job is temporary and unstable in the UAE, but I did not find that this was the case. She did not, for instance, leave her belongings in storage expecting to return at a fixed point in time. Rather, I find that the absence was not temporary, but indefinite and ongoing. The Applicant's family did not remain behind, because she took her children with her. She did not

> return to Canada on any occasion before she signed her application outside Canada.
>
> [32] Therefore, in light of the absence, I find that the Applicant ceased to be resident in Canada and that she did not leave it for a temporary purpose. Her family did not remain here and she did not return when the opportunity arose in the period.
>
> [33] Given the foregoing, I find that the Applicant failed to demonstrate that she did not cease to reside in Canada and that she centralized her mode of existence in Canada.

[8] As a result, Ms. Younis' application for citizenship was not approved. She then sought judicial review of this decision of the Citizenship Judge. The Federal Court dismissed her application for judicial review without certifying that a serious question of general importance is involved. This is the decision of the Federal Court that Ms. Younis has attempted to appeal.

II. Statutory framework

[9] When Ms. Younis submitted her application for citizenship on April 20, 2014 (which was the application that was considered by the Citizenship Judges), the residency requirement as stipulated by paragraph 5(1)(*c*) of the *Citizenship Act* was:

5 (1) The Minister shall grant citizenship to any person who	**5** (1) Le ministre attribue la citoyenneté à toute personne qui, à la fois :
[…]	[…]
(*c*) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, and has, within the four years immediately preceding the date of his	*c*) est un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* et a, dans les quatre ans qui ont précédé la date de sa demande,

or her application, accumulated at least three years of residence in Canada calculated in the following manner:	résidé au Canada pendant au moins trois ans en tout, la durée de sa résidence étant calculée de la manière suivante :
(i) for every day during which the person was resident in Canada before his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one-half of a day of residence, and	(i) un demi-jour pour chaque jour de résidence au Canada avant son admission à titre de résident permanent,
(ii) for every day during which the person was resident in Canada after his lawful admission to Canada for permanent residence the person shall be deemed to have accumulated one day of residence;	(ii) un jour pour chaque jour de résidence au Canada après son admission à titre de résident permanent;

[10] Paragraph 5(1)(*c*) of the *Citizenship Act* has since been amended and now stipulates, in subparagraph (i), that the person "has been physically present in Canada for at least 1,095 days during the five years immediately before the date of his or her application".

[11] The dispute in Ms. Younis' application for judicial review to the Federal Court related to the finding by the Citizenship Judge that she did not satisfy the requirement of residency as set out in paragraph 5(1)(*c*) of the *Citizenship Act*. This failure arose because Ms. Younis ceased to be resident in Canada when she left Canada to join her husband in the UAE.

[12] Section 22.2 of the *Citizenship Act* limits appeals to this Court from a judgment rendered in an application for judicial review. An appeal from such judgments can only be made if the judge certifies that a serious question of general importance is involved:

22.2 The following provisions govern the judicial review:	**22.2** Les dispositions ci-après s'appliquent au contrôle judiciaire :
[…]	[…]
(*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.	*d*) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel à la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

III. Issue and standard of review

[13] The issue in this matter is whether Ms. Younis has a valid notice of appeal notwithstanding the preclusive clause in paragraph 22.2(*d*) of the *Citizenship Act*. Since this Court is considering this issue as a court of first instance, there is no standard of review (*Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, at para. 31 (*Tennant 2019*)).

IV. When can an appeal be commenced notwithstanding a preclusive clause?

[14] The issue of when an appeal can be commenced notwithstanding a preclusive clause has been discussed at length in two matters related to Mr. Tennant. The first matter was a motion to quash the notice of appeal that had been filed by the Minister of Citizenship and Immigration (*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 (*Tennant 2018*)). That motion was dismissed by Justice Stratas as a single Judge sitting alone. Justice Stratas summarized the exceptions that have been applied by this Court when determining whether an appeal may be brought notwithstanding a preclusive clause. He also set out a formulation of the exceptions:

[14] The recognized exceptions to the statutory bars – all of which exemplify rule of law concerns – include the Federal Court's failure to exercise jurisdiction in circumstances where it must exercise it (*Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, [2005] 3 F.C.R. 255), and a lack of jurisdiction owing to some fundamental flaw in the proceedings going to the root of the Federal Court's ability to decide the case (*Narvey v. Canada (Minister of Citizenship and Immigration*) (1999), 235 N.R. 305 (F.C.A.); *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1 at para. 6 and *Canada (Citizenship and Immigration) v. Goodman*, 2016 FCA 126 at para. 3), such as a reasonable apprehension of bias (*Re Zundel*, 2004 FCA 394, 331 N.R. 180).

[15] An alleged error of law – even one where "an appeal would certainly succeed if it were entertained" – is not an exception to the statutory bars: *Mahjoub v. Canada*, 2011 FCA 294, 426 N.R. 49 at para. 12; *Huntley* at para. 8; *Goodman* at para. 9.

[16] The case law has not defined particularly well the exception for loss of jurisdiction for some fundamental flaw in the proceeding going to the root of the Federal Court's ability to decide the case. This motion provides this Court with an opportunity to offer a better explanation for it. The explanation I offer does not change the threshold for the exception. It remains an exceedingly difficult one to meet. Indeed, most of the cases in para. 14, above that assert the existence of this exception deny it on the particular circumstances of the case.

[17] This exception covers cases where:

- it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case – examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and

- the flaw raises serious concerns about the Federal Court's compliance with the rule of law.

This exception does not include contentious debates over issues of statutory interpretation, errors of law, exercises of judicial discretion, and the weight that should be accorded to evidence and its assessment.

[15] In the subsequent decision of the three-judge panel (*Tennant 2019*), Justice Laskin, writing on behalf of the Court, also referred to the previous jurisprudence relating to situations in which an appeal was allowed to proceed in the absence of a certified question. At paragraphs 49 to 51, Justice Laskin noted the following in relation to the above explanation provided by Justice Stratas:

> [49] I appreciate and respect the efforts of my colleague Justice Stratas to provide a "better explanation" of the circumstances in which it will be appropriate to entertain an appeal despite a preclusive clause. There is much in his reasons with which I agree.
>
> [50] At the same time, there may be some merit to CARL's concern about describing the exceptions in qualitative terms. Redefining the exception in language such as "fundamental flaw," "blatant exceedance of authority," striking "at the very root" of the judgment, and raising "serious concerns" about the rule of law could present its own set of interpretive difficulties. The rule of law is itself a concept that defies easy definition. In addition, the reasons why a "blatant" or "obvious" exceedance of authority should justify hearing an appeal despite the bar, when an insidious or subtle exceedance would not, may deserve further consideration. Another potential concern is with putting the scope of the appeal bar on a constitutional footing when there is no constitutional right to an appeal: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 136, [2007] 1 S.C.R. 350. Nor does the "rule of law" category appear to capture the "separate, divisible judicial act" cases, some of which turn on the specific statutory language of the preclusive clause in issue. We did not receive extensive (or in some cases any) submissions on these areas of potential concern.
>
> [51] The Minister is correct in his submission that unless and until adopted by a panel of this Court, the views expressed by a member of the Court sitting alone as a motions judge do not change the law as established by the decisions of a panel: *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 at paras. 37-38, [2016] 4 F.C.R. 3. In the end, I do not find it necessary to decide in this case whether to adopt my colleague's formulation or some variation of it. That is because I conclude, for reasons that I will now discuss, that the errors that the application judge is alleged to have made either were not errors at all or were ordinary errors, of a kind that does not displace the preclusive clause in paragraph 22.2(*d*) of the *Citizenship Act*, regardless of how the currently recognized exceptions to the preclusive clauses are expressed.

[16] In a subsequent motion to quash an appeal that had been filed by Narinder Kaur and Gurjant Khaira (*Kaur v. Canada (Citizenship and Immigration)*, 2020 FCA 136) there is a reference in paragraph 7 to the exceptions as described by Justice Stratas in *Tennant 2018*:

> [7] As is well established, subsection 74(*d*) of the Act operates as a statutory bar against appeals brought to this Court under the Act; this goes to the jurisdiction of the Court to entertain these appeals (*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, [2018] F.C.J. No. 707 at para. 14 (*Tennant*) and authorities cited therein). As the respondent points out, there are "well-defined" and "narrow" judge-made exceptions to this statutory bar, all of which "exemplify rule of law concerns" (*ibid*. at para. 11; see also, e.g., *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 at para. 28). These exceptions are where a judge refuses to exercise jurisdiction to decide the matter in circumstances where he or she must exercise it, or where the judge loses jurisdiction due to a fundamental flaw in the proceedings going to the roots of his or her ability to decide the case, such as a reasonable apprehension of bias or a blatant exceedance of authority obvious from the face of the judgment (*ibid*. at paras. 14 and 17). None of these exceptions apply here.

[17] These comments were made in relation to a motion in writing to quash an appeal without any oral argument. There is no reference to, or any analysis of, the issues raised in paragraph 50 of *Tennant 2019*. In any event, the appeal in *Kaur* was quashed because none of the exceptions applied. The appeal in *Kaur* related to an alleged violation of *Charter* rights arising as a result of certain actions taken by an immigration officer under the authority of the applicable statute. Just as in *Tennant 2019*, the question of whether to adopt the formulation as set out by Justice Stratas should be considered to be deferred until a panel of three judges specifically addresses the issue of whether to adopt this formulation or some variation thereof.

V. Grounds as submitted by Ms. Younis

[18] In her memorandum, Ms. Younis categorized her submissions with respect to why her appeal should be allowed to proceed as follows:

(1) "Fundamental flaw … striking at the very ability to decide the case";

(2) "Serious concerns about the Federal Court's compliance with the rule of law"; and

(3) "Infringement of the rule against actual or apparent bias".

[19] The formulation of the first two grounds, as stated by Ms. Younis, contradicts her own written submissions. In paragraph 32 of her memorandum, Ms. Younis quotes paragraphs 14 and 17 of the reasons of Justice Stratas in *Tennant 2018* referred to above (which include the references to "fundamental flaw" and "serious concerns"). In paragraph 33 of her memorandum, Ms. Younis refers to the decision of the three-judge panel of this Court in *Tennant 2019* noting that "the views expressed by a member of the Court sitting alone as a motions judge do not change the law as established by the decisions of a panel". She also noted, in the same paragraph, that this Court "determined that 'it was not necessary to decide in this case whether to adopt my colleagues' formulation or some variation of it'" [emphasis added by Ms. Younis].

[20] In paragraph 34 of her memorandum, Ms. Younis submits:

> As such, Justice Stratas' decision in *Canada (Citizenship and Immigration) v Tennant*, does not change the state of the law and the settled jurisprudence with respect to the narrow exception to the requirement of a certified question for an appeal to this Court. The Appellant submits that the test set out by Justice Stratas should not be adopted by this Court because it requires more than a jurisdictional

> error by the Federal Court, it unnecessarily narrows the threshold for when an exception should be made, and it adds additional language that will result in uncertainty and a lack of clarity.

[21] Ms. Younis therefore acknowledges that the test as set out by Justice Stratas in *Tennant 2018* was not adopted by this Court in *Tennant 2019*. Ms. Younis also submits that this test should not be adopted in this matter. However, notwithstanding this acknowledgment and this submission, Ms. Younis, in framing her grounds for why she should be allowed to appeal, cites the very language that she is submitting should not be adopted. In particular, the first two grounds refer to a "fundamental flaw" and "serious concerns" both of which, as noted by this Court in *Tennant 2019*, could present their own interpretative difficulties.

[22] For the purposes of these reasons, the first two categories of submissions will be identified as "Comments Made During the Hearing and Lack of Preparation" and "Interpretative Issues", instead of the headings used by Ms. Younis in her memorandum. Just as in *Tennant 2019*, it is not necessary, in this matter, to decide whether the formulations, as set out in *Tennant 2018*, should be adopted.

[23] Ms. Younis' submissions in relation to whether her appeal should be heard focus only on the hearing before the Federal Court Judge. The only reference to the decision of the Judge is in paragraph 57 of her memorandum. This reference arises in relation to an argument about the merits of her appeal, not whether any of the exceptions that would allow her appeal to proceed are applicable. Therefore, the focus of these reasons will be on what occurred during the hearing of her application for judicial review.

A. *"Comments Made During the Hearing and Lack of Preparation"*

[24] The first matter raised by Ms. Younis under her heading "Fundamental flaw … striking at the very ability to decide the case" relates to evidence that she submitted the Judge would not consider. In paragraph 40 of her memorandum, she states "the Court said that just because that evidence is placed before the Court, it 'does not mean it is accepted…'. He also stated, '[t]he evidence doesn't count for anything'" [her emphasis].

[25] However, it is important to put the two statements in context. There are undoubtedly many occasions where during the course of a hearing, judges do not articulate their thoughts as carefully as they would have liked. It is important to analyse and look at the context in which the statements were made to determine if such statements would support a finding that Ms. Younis' appeal should be allowed to proceed.

[26] The context in which these statements were made was as follows (beginning at page 84 of the transcript):

> MS. GERAMI [counsel for Ms. Younis]: Well, and also that - - you know, my friend argues that a contextual analysis is - - should be applied here. Well, throughout the hearing this morning, you know, there is this repetition that there was a packing up and leaving Canada. I think it is very important to put that in context, is that this is a woman with two very small kids, financially dependent - -
>
> JUSTICE ANNIS: I think we got a finding of fact, though. It is a little late to argue it now.

MS. GERAMI: No, no, I am not arguing.

JUSTICE ANNIS: All right.

MS. GERAMI: It is in her evidence.

JUSTICE ANNIS: Yes.

MS. GERAMI: It is in her affidavit evidence

JUSTICE ANNIS: Yes, but that doesn't mean - -

MS. GERAMI: - - that she - -

JUSTICE ANNIS: That doesn't mean it is accepted. Evidence - -

MS. GERAMI: But her affidavit was - -

JUSTICE ANNIS: - - you know, 50 miles an hour, 40 miles an hour; the judge finds, as a fact, 50 miles an hour. That is the fact. The evidence doesn't count for anything.

MS. GERAMI: But no, I mean, it wasn't - - they never cross-examined her. And she never - - they even, the citizenship judge didn't say she was not credible. The citizenship judge accepted her evidence, even on her absences, that she was credible. And she didn't - - there is no reason to question her evidence. She had the two kids in Canada. There is proof of that. These children -

JUSTICE ANNIS: Well, if she doesn't mention it, then it is not relevant.

MS. GERAMI: But they were born in Canada. And she had said - -

JUSTICE ANNIS: Well, okay. I am just telling you. Okay. Anyway, I will look at it. Yes.

[emphasis added]

[27] The comments that "[t]hat doesn't mean it is accepted" and "the evidence doesn't count for anything" appear to be an example of a situation where, in hindsight, a particular judge would have chosen different words. There are undoubtedly many situations where judges have misspoken in court in the heat of an exchange and would have chosen different words if they had the benefit of hindsight. The context in which these words were spoken, in my view, simply indicates that the judge had intended to state that a particular trier of fact will make factual findings based on the evidence that is presented. Whether any particular evidence that is presented will be accepted as proof of a particular fact is a matter for the trier of fact to determine. In any event, at the conclusion of this discussion, the Judge indicated that he would look at it. These statements cannot support a finding that Ms. Younis' appeal should be allowed to proceed.

[28] Ms. Younis, in paragraph 41 of her memorandum, also referred to the comments of the Judge to "forget about the legislature". It is, as noted above, important to review the referenced comments in context and not in isolation. In reading this excerpt, it should be noted that in the decision that was under review the Citizenship Judge had found that Ms. Younis did not satisfy the residency requirement because she had ceased to be a resident of Canada before the end of

the four-year period referred to in paragraph 5(1)(*c*) of the *Citizenship Act*. With that context in mind, the exchange leading up to the comment about forgetting the legislature was a discussion of whether a person who leaves Canada after satisfying the three-year residency requirement, would still qualify for Canadian citizenship:

> JUSTICE ANNIS: I mean, this is what they are arguing. So you have been there three years. And you are there, and basically you cut all your connections with Canada. "Hey, I've got my citizenship. It is for life," you know, and everything else. And away we go.
>
> MS. GERAMI: I don't think that is a fair reflection of, you know, essentially - -
>
> JUSTICE ANNIS: No, but I am saying assume, hypothetically.
>
> MS. GERAMI: But even so - -
>
> […]
>
> MS. GERAMI: - - if the legislator intended - -
>
> […]
>
> MS. GERAMI: - - that you meet four years out of four, surely they would have said so.
>
> JUSTICE ANNIS: No, you are not answering my question.
>
> MS. GERAMI: Yes?

JUSTICE ANNIS: My question is you are here for three years.

MS. GERAMI: Yes.

JUSTICE ANNIS: You have cut everything, you have gone. I mean, you know that you are basically going to - - this is basically a place you can come running back to if, you know, they start firing, and they did - - when they did in Lebanon. So everybody has to send over their ships and we bring you back home to get you out safe. Because you, you know, basically make sure that you are safe and sound.

So I mean, basically, you are here for three years, and everything shows - - no, hypothetically, okay?

MS. GERAMI: Right, right.

JUSTICE ANNIS: Because this is what he is trying to say. Hypothetically, you are gone, okay? You have no more connection with Canada. You don't have to pay taxes; I don't know what you do.

MS. GERAMI: Right. But - -

JUSTICE ANNIS: In any event - -

MS. GERAMI: - - the legislature in fact has now amended the requirement of the intent - -

JUSTICE ANNIS: Well, forget about the legislature now. It's what - - yes - -

[Transcript – pages 32 – 33]

[29] The above excerpt is only part of the discussion between the Judge and Ms. Gerami concerning the residency requirement. However, this part illustrates that the comment about forgetting the legislature arose immediately after Ms. Gerami referred to the legislature having amended the requirements of the *Citizenship Act*. Although the comment could have been expressed more clearly, it appears that this is simply in response to the statement that the requirements have changed. What the Judge probably meant to say was that such changes are not relevant to the matter at hand.

[30] Ms. Younis, in paragraphs 41, 43 and 44 of her memorandum, also referred to a lack of preparation by the Judge prior to the hearing. In particular, Ms. Younis notes, in paragraph 43, "[t]he Court's ability to conduct a hearing, ask appropriate questions, decide the case fairly in accordance with the rule of law and on the basis of all the evidence presented, is altogether compromised if the Court has not read all the relevant materials *ahead* of the scheduled hearing" [emphasis added by Ms. Younis]. However, there are undoubtedly situations where a judge does not have the time to review all of the material in advance of a hearing of a motion or an application for judicial review. This may be as a result of the work load of the particular judge (as the Judge stated in this case). There is no basis to find that an appeal should be allowed to proceed in the absence of a certified question simply because the Judge did not review everything in advance of the hearing. As noted by Ms. Younis, the Judge, in this case, had the opportunity to review the materials after the hearing.

[31] There is no basis, either considering these matters individually or collectively, to find that Ms. Younis' appeal should be allowed to proceed.

B. *"Interpretative Issues"*

[32] Ms. Younis' submissions under her heading "Serious concerns about the Federal Court's compliance with the rule of law" relate to the Judge's approach to the interpretation and his interpretation of the relevant provisions of the *Citizenship Act*. However, in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144 (*Mahjoub*), this Court noted, in relation to the parallel provision barring appeals in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

> [21] This is consistent with many cases decided by this Court. Alleged mere errors of law – even important ones – do not get around the statutory bars against appeals under the Act, such as the one in issue here, section 82.3 of the Act: *Canada (Citizenship and Immigration) v. Goodman*, 2016 FCA 126 at paras. 5-9; *Mahjoub v. Canada (Citizenship and Immigration)*, 2011 FCA 294 at para. 12. In substance, in his appeals, Mr. Mahjoub alleges that the Federal Court erred in law, nothing more. The bar in section 82.3 of the Act applies.

[33] The allegations that the Judge erred in his approach to statutory interpretation or in his interpretation of the applicable statute does not warrant a finding that Ms. Younis should be allowed to appeal to this Court in the absence of a certified question.

C. *"Infringement of the rule against actual or apparent bias"*

[34] The transcript of the hearing at the Federal Court discloses an almost continuous dialogue between the Judge and counsel for Ms. Younis, and also between the Judge and counsel for the Crown. From the transcript, it would appear that the Judge, from time to time, became impatient and made some statements that were inappropriate. However, the only issue is whether the

statements would result in a determination that the Judge was biased or that there was a reasonable apprehension of bias.

[35] In *Miglin v. Miglin*, 2003 SCC 24, the Supreme Court of Canada confirmed the test for bias:

> [26] The appropriate test for reasonable apprehension of bias is well established. The test, as cited by Abella J.A., is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 111, *per* Cory J.; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at pp. 394-95, *per* de Grandpré J. A finding of real or perceived bias requires more than the allegation. The onus rests with the person who is alleging its existence (*S. (R.D.*), at para. 114). As stated by Abella J.A., the assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. […]

[36] In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, (*Yukon)* the Supreme Court of Canada noted:

> [26] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:
>
> > ... allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added by the Supreme Court; para. 141.]

[37] As noted by this Court in *ABB Inc. v. Hyundai Heavy Industries Co.*, 2015 FCA 157, at para. 55: "[t]he onus of establishing a reasonable apprehension of bias lies with the person who alleges it, and the threshold for perceived bias is high" (see also *R. v. R.D.S.*, [1997] 3 S.C.R. 484, at para. 114, 151 D.L.R. (4th) 193, and *Miglin*, at para. 26). In this case, the onus is on Ms. Younis to demonstrate that the Judge was biased or that there was a reasonable apprehension of bias.

[38] Since Ms. Younis has the onus of establishing a reasonable apprehension of bias, the focus in these reasons will be on the impugned conduct that Ms. Younis alleges would lead to a conclusion that the Judge was biased. The only impugned conduct that she has identified is set out in paragraphs 51 to 54 of her memorandum. While later in her memorandum, at paragraph 64 (after discussing whether the test for when a certified question could have been raised would be satisfied in this case), Ms. Younis again refers to certain conduct and submits that it demonstrated bias, this is the same conduct that is described in paragraph 54 of her memorandum. There are no footnote references in paragraph 64 to any part of the transcript, which confirms that she is only referring to conduct that she had previously identified in her memorandum.

[39] After setting out what conduct Ms. Younis alleges would establish a reasonable apprehension of bias in paragraphs 51 to 54 of her memorandum, Ms. Younis summarizes her argument related to bias in paragraph 55 of her memorandum:

> 55. Considering all of the above, a reasonable and right-minded person considering the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the judge (whether

> consciously or unconsciously) would not decide the matter fairly. When the Court is not prepared for a hearing, makes inappropriate comments concerning the Appellant and how she uses her brain, arbitrarily discounts the parties' evidence, and disregards the role of the legislature, a reasonable person would certainly lose confidence in the "due administration of justice", and would find against the "strong presumption" that the judge will "carry out his duties properly and with integrity".

[40] It is clear from paragraph 55 of her memorandum that the conduct that Ms. Younis alleges would establish bias is the conduct that she identified in the preceding paragraphs of her memorandum. The allegation related to the lack of preparation for the hearing was not included by Ms. Younis in the section of her memorandum identified as "Infringement of the rule against actual or apparent bias". This was raised by her in the earlier part of her memorandum under the heading "Fundamental flaw … striking at the very ability to decide the case". This allegation was addressed above in these reasons. The lack of preparation for a hearing would not establish a reasonable apprehension of bias. The other identified conduct is addressed in the following paragraphs.

[41] In paragraph 51 of her memorandum, Ms. Younis refers to the Judge's statement that "you sort of have to have the brain that you are going to stay in Canada". In this paragraph, Ms. Younis submitted that this remark was "highly inappropriate and condescending" and suggested that "Ms. Younis is somehow inferior and lacking in intelligence for not remaining in Canada for four years, even though the legislation does not require this". She concluded paragraph 51 by submitting "[t]his is a highly inappropriate and biased remark by a Federal Court judge".

[42] As noted by the Supreme Court in *Miglin* and *Yukon*, the context in which the statement was made is important. This comment arose during the discussion concerning whether a person had to maintain their residency status until the end of the four-year period in issue:

> JUSTICE ANNIS: So those absences should have counted?
>
> MS. GERAMI: Should have counted. I mean, based on the paragraphs 18 - -
>
> JUSTICE ANNIS: Yes.
>
> MS. GERAMI: - - 29 and 30 specifically find that she was - - established her residence in Canada, and that she did not cease to reside in Canada during those absences.
>
> JUSTICE ANNIS: Okay, I understand. I understand there, yes.
>
> MS. GERAMI: Okay? So based on that - - I mean, we don't take issue, she left the last 293. But she only had to demonstrate the three years. I mean, there was no requirement to meet more than three years under section 5(1)(c).
>
> JUSTICE ANNIS: You don't think there is a concept that you sort of have to have the brain that you are going to stay in Canada until the end of the four-year period?
>
> MS. GERAMI: Well, if - -
>
> JUSTICE ANNIS: Isn't that kind of what the argument is?
>
> MS. GERAMI: Well, they are - -

JUSTICE ANNIS: You know, that if you have given up on the country, before you have actually attained/reached/been there for four years, isn't that going to count against you, no matter what?

MS. GERAMI: She hasn't given up on - -

JUSTICE ANNIS: Well, I am sorry, that is - - I am saying interpreting her, well, selling everything and them leasing and all of that - -

MS. GERAMI: Okay. Her family - - your honour, her husband and children are Canadian citizens.

JUSTICE ANNIS: Yes.

MS. GERAMI: Okay? So, as long as she is residing with her husband, she is still a permanent resident. And she hasn't lost her status.

JUSTICE ANNIS: Yes.

MS. GERAMI: And she has met the - -

JUSTICE ANNIS: Okay. Okay, I will forget about it. Go on to your second one, then. We will deal with that. I think there is - -

MS. GERAMI: Okay.

JUSTICE ANNIS: It really turns on how the third, how this sort of leaving the country, how it is applied. That is really what the issue is from the sound of it. And you are saying, "Well, if we have got it, you can't take it away," I guess is what you are saying.

And I am pretty sure Mr. Johnston is going to say "Oh, yes, you've got to have that kind of mindset, right till the end of the four years." And if you don't

MS. GERAMI: Well, I mean - -

JUSTICE ANNIS: - - it doesn't matter.

MS. GERAMI: Well, I am asking - -

JUSTICE ANNIS: Anyway, I am just - -

MS. GERAMI: It is a matter, also, of what the legislator said. If Parliament intended that there should be four years of residency requirement, it wouldn't have said three years out of four.

JUSTICE ANNIS: Yes. Anyway, I am just telling - - understand. I mean, it is a good argument, and I want to hear what Mr. Johnston has to say, and I do understand it.

MS. GERAMI: Right, in light of the clear findings of fact that she had met that three years out of four, it is not in line with the rule of law. I mean, that is what the requirement is.

JUSTICE ANNIS: Okay.

MS. GERAMI: There is no finding been made that she has established herself in the UAE and not - - has permanent residence there.

JUSTICE ANNIS: Yes.

MS. GERAMI: She has only temporary status.

JUSTICE ANNIS: I understand what you are saying. But my sense is that what it is going to come down to, is there also an intention that you have to sort of be committed to Canada, at least for the four years. That is what it is going to come down to, whether you make it or not.

MS. GERAMI: But that is not what the test says.

JUSTICE ANNIS: Well, I guess we will have to look at it, because I obviously have to - -

MS. GERAMI: Right? The test says temporary absences count.

JUSTICE ANNIS: I understand that.

MS. GERAMI: Okay.

JUSTICE ANNIS: But there is - -

MS. GERAMI: So - -

JUSTICE ANNIS: I don't know, I have to read into the legislation. I have to look at the legislation.

[Transcript at pages 18 – 21, emphasis added]

[43] The statement that "you sort of have to have the brain that you are going to stay in Canada" again appears to be simply a poor choice of words. A short time after making the statement in question, the Judge refers to the mindset of the person and then later to the person's intention. This indicates that he was not intending to refer to the intelligence of the particular

person, but rather to their intention. From the context, it appears that he was simply questioning whether an applicant for citizenship had to have the intention to remain in Canada during the full four-year period. This really is a question of the interpretation of the provision and not an indication of bias. In light of the findings of the Citizenship Judge that were in issue before the Federal Court (paragraphs 31 and 32 of the decision of the Citizenship Judge quoted in paragraph 7 above), it would seem evident that Ms. Younis' intention when she left Canada to join her husband in the UAE was a relevant consideration for the Citizenship Judge. Therefore, the relevance of her intention was a matter for discussion and debate at the Federal Court hearing.

[44] Following the statement in issue the Judge also noted that he would have to review the legislation. When viewed in the context of the discussion between the Judge and Ms. Gerami, the statement cannot support a finding that the Judge was biased or that there was a reasonable apprehension of bias.

[45] The second impugned conduct alleged by Ms. Younis is set out in paragraph 52 of her memorandum. Ms. Younis stated that "throughout the hearing, the Court assumed the Applicant 'gave up on Canada'. In his mind, even if a person *has* met their residency requirement, they should still not be permitted to leave Canada" [her emphasis].

[46] However, this discussion reflects the finding of the Citizenship Judge that was in issue in this case. The finding was that Ms. Younis did not qualify for citizenship because she ceased to be resident in Canada. As noted by Ms. Younis during the hearing before the Federal Court, the

Citizenship Judge found that she had 395 days of absence during the relevant four-year period. There is no dispute that this included the last 293 days (after she left Canada to join her husband in the UAE). Therefore, she had accumulated 102 days of absence before the date that, as found by the Citizenship Judge, she ceased to be resident in Canada. If 30 of those 102 days would have counted as days that she resided in Canada (based on including days of temporary absence as days of residence), she would have had 1,095 days of residence without considering the last 293 days of the four-year period.

[47] Without resolving the issue of what portion of these 102 days of absence could count as days of temporary absence, Ms. Younis' application for citizenship was rejected by the Citizenship Judge because she ceased to be resident in Canada before the end of the four-year period. The Judge's comments in relation to a person ceasing to be a resident of Canada after satisfying the residency requirement of three years (1,095 days) but before the expiration of the relevant four-year period were simply a reflection of what the Citizenship Judge had found. They relate to the interpretation of the residency requirement of the *Citizenship Act*. No appeal lies to this Court related to a disagreement or an error in interpreting the *Citizenship Act*, absent a certified question (*Mahjoub*, at para. 21). As well, the Judge cannot be considered to be biased simply because he, in essence, questioned counsel on why the Citizenship Judge erred in interpreting the residency requirement of the *Citizenship Act* or in applying the law to the facts.

[48] The final submission of Ms. Younis related to her argument concerning bias is in paragraph 54 of her memorandum:

> Thirdly, the Court was not at all willing to hear the Appellant's gender-based arguments in replying to the Minister. The Court became very "angry" and asked Counsel to "move on", and stated that the Appellant was splitting her case. In fact, the Appellant was properly responding to Minister's repeated arguments that a contextual approach was required in applying the *Papadogiorgakis* test. The Appellant was explaining Ms. Younis' circumstances as a financially dependent woman, which she also stated in her citizenship application. The Court also stated that Ms. Younis' affidavit was before the Court but that "does not mean it is accepted", and ultimately her evidence did not "count for anything", and we were to just "forget about the legislature now…".
>
> [her emphasis]

[49] In paragraph 64 of her memorandum, Ms. Younis submits that the:

> Judge also did not wish to hear evidence demonstrating that she did not *intend* to leave Canada for good, but rather she did not have a choice given her circumstances as a dependent woman and mother of two small kids. All of this reveals that the Appellant was not splitting her case as the Court alleged, but instead faced a profound display of bias in a Court of law.

[50] The impugned conduct addressed by Ms. Younis in the first part of paragraph 54 and in paragraph 64 relate to certain comments made by the Judge when she was making her submissions in reply to the Minister's submissions. The footnote references in paragraph 54 of her memorandum to her submission that the Judge "became very 'angry'" are to pages 88 and 89 of the transcript where the Judge twice stated that he was "getting angry". The footnote references to the Judge indicating that she should move on are to pages 87 and 88 of the transcript where the Judge told her three times to "move on".

[51] It appears from the transcript that tensions rose when the Judge indicated that Ms. Younis was splitting her case. There are two possibilities: either Ms. Younis was splitting her case or she

was not. If Ms. Younis was splitting her case, it was appropriate for the Judge to raise this issue. If Ms. Younis was not splitting her case, this would simply mean the Judge erred in stating that she was splitting her case. However, simply making an error does not mean that the Judge was biased.

[52] Tense exchanges between a judge and counsel, even if the judge's statements are discourteous, do not necessarily lead to a conclusion that a judge is biased. As noted by the Supreme Court in *Miglin*:

> [26] […] We see no reason to interfere with the Court of Appeal's assessment of the record, nor with its conclusion that although the trial judge's comments were intemperate and his interventions at times impatient, they do not rise to the level necessary to establish a reasonable apprehension of bias.

[53] Similarly, the Ontario Court of Appeal in *Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC*, 2016 ONCA 60, (*Stuart Budd*) noted:

> [72] It is important to acknowledge from the outset that it takes much more than a demonstration of impatience with counsel or even unwarranted discourtesy to rebut the strong presumption of impartiality: *Kelly v. Palazzo*, 2008 ONCA 82, 89 O.R. (3d) 111, at para. 21.
>
> [73] However, courts will be rightly troubled when a motion judge is consistently discourteous towards counsel for no apparent reason. Derisive remarks will therefore be relevant to the issue of bias: see *Yukon*, at para. 52.

[54] The Nova Scotia Court of Appeal also noted, "[m]omentary friction is not bias" (*2446339 Nova Scotia Ltd. v. AMJ Campbell Inc.*, 2008 NSCA 9, at para. 105).

[55] The impugned conduct that Ms. Younis is alleging would support a finding of bias in paragraphs 54 and 64 of her memorandum, are the references in the transcript to the Judge indicating that he was "getting angry", telling her to "move on" and indications that he did not want her to refer to certain evidence. These comments arose because the Judge was convinced that she was splitting her case. As such, the Judge's statements that Ms. Younis should "move on" and that it was not appropriate for her to refer to certain evidence, were simply the consequence of his determination that she was splitting her case and it was, therefore, inappropriate for Ms. Younis to raise the issue of the evidence related to her departure for the UAE in her reply submissions. These comments and the comments that he was getting angry arose because of the timing of when Ms. Younis was attempting to refer to this evidence, and not because they were "gender-based arguments".

[56] Ms. Younis has not established that the impugned conduct as set out by her in the first part of paragraph 54 (and repeated, in part, in paragraph 64) would lead to a conclusion that the Judge was "consistently discourteous towards counsel for no apparent reason" (*Stuart Budd*, at para. 73). In my view, the impugned conduct does not rise to the level that would be necessary to make a finding of bias or a reasonable apprehension of bias.

[57] Ms. Younis in paragraph 54 of her memorandum repeated her reference to the Judge's comments that even though her affidavit was before the Court it "does not mean it is accepted" and her evidence did not "count for anything". She also repeated the Judge's statement to "forget about the legislature now". These comments were addressed above in these reasons and, when

taken in context, do not support a finding of bias. Rather these comments simply reflect a poor choice of words.

[58] In my view, when the entire record is considered, the cumulative effect of the impugned conduct as identified by Ms. Younis does not establish a reasonable apprehension of bias.

[59] There are also statements interspersed throughout the hearing that indicate that the Judge was keeping an open mind. In particular, the Judge, at page 20 of the transcript, refers to Ms. Gerami's argument as a good argument. The Judge, when the Crown was making its submissions, noted, at page 55 of the transcript, "[t]here is merit on both sides, as far as I am concerned". At page 75 of the transcript, he questioned the Crown whether it was fair for the second Citizenship Judge to "choose anything but the Koo" test. He also indicated that this change in the test by the second Citizenship Judge resulted in a "pretty strong argument" in favour of Ms. Younis.

[60] It should also be noted that at the conclusion of the hearing (at page 102 of the transcript), the Judge proposed that possibly two questions be certified which would have permitted Ms. Younis to file an appeal to this Court. If the Judge was biased, presumably he would not have proposed certifying a question that would have granted the unsuccessful party the right to file an appeal. However, at the hearing (at page 103 of the transcript), Ms. Younis argued against having a question certified on the basis that she did not have the resources to pursue a Court of Appeal process. In her memorandum, Ms. Younis submits that this would not have been an appropriate case for a certified question. However, her current submissions that it would not have

been appropriate to certify a question in this case do not assist her argument that her appeal should be heard in the absence of a certified question.

[61] In my view, Ms. Younis has failed to establish that the impugned conduct, as alleged by Ms. Younis, leads to a finding of bias or a reasonable apprehension "in the context of the circumstances, and in light of the whole proceeding" (*Yukon*, at para. 26).

VI. Other Comments Made During the Hearing

[62] In paragraph 65 of her memorandum, Ms. Younis refers to other comments made by the Judge during the hearing:

> 65. In response to the Appellant's Reply submissions and repeated objections, the Court stated, "[d]on't get smart with me" several times. Appellant's Counsel explained that all of her submissions were respectful. In response, the Court finally stated, "Okay, you are respectful. I just was losing it a bit there".

[63] The portion of the transcript that includes the statements referenced in the first part of paragraph 65 of her memorandum is on page 91 of the transcript:

> JUSTICE ANNIS: So let's go to the case, because I cannot look at it without looking at the case, all right?
>
> MS. GERAMI: That is the main case, the Papadogiorgakis case.
>
> JUSTICE ANNIS: Okay. Well, take me there and show me the passage. You have got to lead it - -

MS. GERAMI: It is at tab 15.

JUSTICE ANNIS: All right.

MS. GERAMI: We have looked at it many times today, at paragraph 9.

JUSTICE ANNIS: Don’t get smart with me.

MS. GERAMI: Sir - -

JUSTICE ANNIS: Don’t get smart with me, okay?

MS. GERAMI: Your honour, you are the one who is angry right now.

JUSTICE ANNIS: Don’t get smart with me, all right? Don’t get smart with me. Do you understand that?

[64] At page 93 of the transcript the following exchange occurs:

MS. GERAMI: All of my submissions are meant to be respectful.

JUSTICE ANNIS: I know, but - -

MS. GERAMI: All of them are meant to be respectful.

JUSTICE ANNIS: I understand that, okay?

MS. GERAMI: Okay.

JUSTICE ANNIS: Okay, you are respectful. I just was losing a bit, there.

[65] At the conclusion of the hearing following the general discussion on costs, the Judge stated: “Sorry I got lost (ph) there, a bit, but - -”.

[66] It appears that the Judge was apologizing or attempting to apologize for his conduct. While the comments as set out in paragraph 63 above were intemperate and inappropriate (as implicitly acknowledged by the Judge’s apparent apology), these comments were not considered above in these reasons in relation to the bias argument as Ms. Younis did not include these comments in the conduct that she alleged would lead to a finding of bias. As noted, her only reference to these comments is in paragraph 65 of her memorandum and in paragraph 55 of her memorandum she submits that the conduct that is to be considered in relation to her bias argument is “all of the above” (which would not include the comments to which she refers in paragraph 65 of her memorandum). In any event, even including these comments in relation to the allegation of bias would not lead to a finding that Ms. Younis had established a reasonable apprehension of bias.

VII. Conclusion

[67] As a result, I would quash the appeal. Since the Crown did not ask for costs, no costs will be awarded.

“Wyman W. Webb”
J.A.

“I agree
Judith Woods J.A.”

“I agree
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MARCH 11, 2019, CITATION NO. 2019 FC 291 (DOCKET NO. T-1419-18)

DOCKET:	A-145-19
STYLE OF CAUSE:	NARIMAN ZAKI ABDULFATTAH YOUNIS v. THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 9, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	WOODS J.A. MACTAVISH J.A.
DATED:	MARCH 9, 2021

APPEARANCES:

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