Federal Court of Appeal | Cour d'appel fédérale

Date: 20211028

Docket: A-180-20

Citation: 2021 FCA 209

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

BETWEEN:

MOHAMED HARKAT

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on September 28, 2021.

Judgment delivered at Ottawa, Ontario, on October 28, 2021.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

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

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness signed a security certificate under section 77 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*] stating that Mohamed Harkat was inadmissible to Canada on national security grounds. A designated judge of the Federal Court found that the Ministers' decision to declare Mr. Harkat inadmissible to Canada was reasonable: *Harkat (Re),*

2010 FC 1242, [2012] 3 F.C.R. 432. That decision was ultimately upheld by the Supreme Court of Canada: *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33.

[2] Mr. Harkat was initially detained under an earlier security certificate, and was subsequently released from detention in 2006 on a series of Court-imposed conditions. These conditions remain in effect, although they have been varied from time to time since then.

[3] In 2019, the Ministers brought a motion in the Federal Court [DES-5-08] asking the Court to clarify certain of the existing terms and conditions of Mr. Harkat's release. The Ministers also alleged that, on two occasions, Mr. Harkat had breached a condition of his release relating to his use of a computer. Mr. Harkat was also before the Federal Court in a separate proceeding [IMM-5330-18]. In this latter case, Mr. Harkat was seeking judicial review of a decision of a Minister's delegate under subsection 115(2) of *IRPA* determining that he should be removed to Algeria.

[4] In the context of these two proceedings, Mr. Harkat brought motions seeking orders that the Attorney General of Canada be compelled to pay the legal fees of Barbara Jackman, Mr. Harkat's long-time counsel, at a rate to be negotiated with counsel. Mr. Harkat sought this relief in relation to the Ministers' motion with respect to the conditions of his release, and with respect to any future applications that the Ministers may bring to vary these conditions. Mr. Harkat also sought payment of Ms. Jackman's fees for his application contesting the decision that he should be removed from Canada. Finally, and in the alternative, Mr. Harkat asked for a stay of both

proceedings until arrangements had been made with the Attorney General of Canada for the payment of Ms. Jackman's fees.

[5] In a decision reported as 2020 FC 662, the Federal Court dismissed both of Mr. Harkat's motions. This purports to be an appeal from that decision.

[6] As will be explained below, I have concluded that it is unnecessary to deal with the merits of Mr. Harkat's appeal given that the appeal relates to interlocutory orders made by the Federal Court. If the orders were not interlocutory orders, the result would be the same as no question or questions of general importance were certified by the Court.

I. The Statutory Regime

[7] Pursuant to paragraphs 27(1)(*a*) and (*c*) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, an appeal lies to this Court from any final or interlocutory judgment of the Federal Court. That right of appeal may, however, be barred by other statutes: see subsection 75(2) of *IRPA* and *Mahjoub v. Canada (Citizenship and Immigration)*, 2011 FCA 294, [2013] 3 F.C.R. 36 at paras. 7-8 [*Mahjoub* 2011].

[8] Insofar as appeals from applications for judicial review in immigration matters are concerned, subsection 74(*d*) of *IRPA* provides that an appeal to this Court may only be brought if, in rendering judgment, the Federal Court certifies that a serious question of general

importance is involved and states the question. Paragraph 72(2)(*e*) of *IRPA* further provides that no appeal to this Court lies from an interlocutory decision of the Federal Court.

[9] To a similar effect, section 82.3 of *IRPA* states that no appeal lies from decisions relating to detention reviews in the absence of a certified question, and that no appeal may be taken from an interlocutory decision in the proceeding.

II. The Federal Court's Decision

[10] Mr. Harkat's motions for state-funded counsel were heard on September 18, 2019, as a preliminary matter at the outset of the hearing of the detention review. The Federal Court's decision with respect to Mr. Harkat's motions was rendered on June 3, 2020. The Court's decision with respect to the detention review itself was released on June 19, 2020 (2020 FC 715).

[11] There is no mention in the June 3, 2020 decision or in the Federal Court's recorded entries of any questions having been proposed for certification in relation to the decision denying state funding for Mr. Harkat's counsel. In any event, an appeal would not have been available to Mr. Harkat from that decision given that it was an interlocutory decision of the Federal Court.

[12] The place for Mr. Harkat to challenge the decision denying him state funding for his counsel was in his appeal of the final decision in the detention review. However, a review of the Court record discloses that while Mr. Harkat proposed six questions for certification in relation to the June 19, 2020 judgment with respect to the merits of his detention review, none of his

questions related to the issue of state-funded counsel. The Federal Court ultimately declined to certify any of these questions: *Harkat (Re)*, 2020 FC 818, 321 A.C.W.S. (3d) 752.

[13] Insofar as Mr. Harkat's challenge to the Minister's subsection 115(2) decision is concerned, that proceeding is still at its very early stages, no judgment has as yet been rendered by the Federal Court and the issue of state-funded counsel has not been finally determined. Indeed, Mr. Harkat's counsel conceded at the hearing of this appeal that it remained open to him to file a further request for state-funded counsel on a better evidentiary record.

III. Mr. Harkat's Appeals

[14] Mr. Harkat endeavoured to appeal both the June 3 and June 19, 2020 decisions. Insofar as his appeal of the June 19, 2020 decision with respect to the merits of his detention review was concerned, a panel of this Court, exercising its powers under Rule 74 of the *Federal Courts Rules*, S.O.R./98-106, ordered that the notice of appeal be removed from the Court file, and that the Court file be closed. This was because the Federal Court had not certified a question: *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2021 FCA 85, 332 A.C.W.S. (3d) 273 [*Harkat* 2021].

[15] No preliminary objection was, however, raised by the Attorney General under Rule 74 with respect to the validity of this appeal. Nor does it appear that Mr. Harkat's notice of appeal was drawn to the attention of the Court for consideration in light of Rule 72(1)(*b*), which permits

the Registry to refer documents to the Court for consideration where the "conditions precedent to its filing have not been fulfilled". The appeal accordingly proceeded to a hearing on its merits.

[16] The Attorney General also failed to address the lack of a certified question or the fact that the appeal involved interlocutory orders of the Federal Court in his memorandum of fact and law. However, in response to a Direction from the Court in advance of the hearing seeking submissions on these issues, the Attorney General took the position at the hearing that the statutory bars in paragraph 72(2)(*e*), subsection 74(*d*) and section 82.3 of *IRPA* applied to bar this appeal.

[17] Mr. Harkat notes that the jurisprudence has established a number of exceptions to the general requirement that the Federal Court have certified a question in order for an immigration appeal to proceed. One such exception arises in cases where the immigration appeal in issue relates to a decision, determination or order made by a judge of the Federal Court not arising under *IRPA*.

[18] According to Mr. Harkat, the decision with respect to his request for state-funded counsel was not a decision taken under *IRPA*¸ but was, rather, a separate, divisible act taken under section 7 of the *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[19] In support of his contention that no certified question is required in the circumstances of this case, Mr. Harkat relies on the decision of the Supreme Court of Canada in *Canada (MCI) v.*

Tobiass, [1997] 3 S.C.R. 391, 151 D.L.R. (4th) 119. There the Supreme Court held that a certified question was not required to appeal a decision staying a proceeding under the *Citizenship Act*, R.S.C., 1985, c. C-29 (which contains similar requirements to *IRPA* insofar as the need for certified questions are concerned). This was because the power being exercised in *Tobiass* had its source under a different statutory provision, namely section 50 of the *Federal Court Act*, R.S.C., 1985, c. F-7 (as it then was).

IV. Analysis

[20] I am of the view that the statutory bars on appeals from interlocutory decisions in paragraph 72(2)(*e*) and section 82.3 of *IRPA* apply to bar this appeal. I am further satisfied that the statutory bars on appeals in immigration matters in the absence of questions of general importance would also apply to bar this appeal if the decision were not an interlocutory decision.

[21] The certification requirements of *IRPA* have been described as "the trigger by which an appeal is permitted": *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 at para. 44, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 243 N.R. 22 at para. 12. As a certified question is a precondition to this Court's jurisdiction, this Court has held that it is a requirement that must not be taken lightly: *Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 12, 19.

[22] While the certification provisions appear to create absolute bars, this Court has nevertheless recognized certain narrow, well-defined exceptions to the certification requirement. The Court has allowed appeals in cases falling within certain specified categories to be brought in the absence of questions having been certified by the Federal Court: see, for example, *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, [2020] 1 F.C.R. 231 at para. 37*; Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 at para. 28; *Rock-St Laurent v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144 at para. 2.

[23] These exceptions include cases involving allegations of bias or a reasonable apprehension of bias on the part of the first instance judge: *Es-Sayyid*, above at para. 28; *Zündel (Re)*, 2004 FCA 394, 331 N.R. 180 at para. 2. A further exception arises where there has been a refusal on the part of the Federal Court to exercise jurisdiction: *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, [2005] 3 F.C.R. 255 at paras. 13, 15.

[24] This Court has, moreover, confirmed that to be permitted to pursue an appeal in the absence of a certified question, the case must involve "very fundamental matters" or "truly exceptional matters" that "strike right at the rule of law": *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144, 280 A.C.W.S. (3d) 826 at paras. 19-21 [*Mahjoub* 2017].

[25] A further exception to the certified question requirement arises where errors alleged are made in the context of a "separate, divisible judicial act". That is, a decision involving the

exercise of a power that arises not under *IRPA*, but from some other source: *Tobiass*, above at paras. 65-66.

[26] Mr. Harkat submits that the Federal Court's decision with respect to the provision of state-funded counsel was not a decision under *IRPA*, but was one taken under section 7 of the Charter. Consequently, Mr. Harkat submits that the *Tobiass* exception applies, and this Court has jurisdiction to entertain his appeal.

[27] It is true that this Court has held that a challenge to the constitutional validity of a provision in *IRPA* goes to the jurisdiction of the Court, and not the reasonableness of a security certificate. As a result, it constitutes a "separate, divisible judicial act" within the meaning of the *Tobiass* exception: *Charkaoui (Re)*, 2004 FCA 421, [2005] 2 F.C.R. 299 at para. 45.

[28] That said, this Court has made it clear that constitutional concerns do not, on their own, qualify as an exception to the certified question requirement in cases that do not involve a challenge to the constitutional validity of legislation: *Wong v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 229, 487 N.R. 294 at paras. 18-19; *Mahjoub* 2017, above at paras. 23-24; *Chung v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 31, 253 A.C.W.S. (3d) 166 at para. 6.

[29] Indeed the Court stated unequivocally in *Mahjoub* 2017 that this Court has never held that the Federal Court's rejection of constitutional arguments could be appealed to this Court

notwithstanding the statutory bars against appeals being brought in the absence of certified questions: above at paras. 23, 24.

[30] In *Wong*, this Court agreed that there was no recognized exception to the bar against appeals where parties raise constitutional questions: above at para. 15. The Court also declined the appellants' invitation to recognize a new exception in such cases, and to allow their appeal to go forward: at paras. 18, 19. This Court came to a similar conclusion in *Harkat* 2021: above at para. 17.

[31] It will be recalled that the appeal in *Harkat* 2021 related to the Federal Court's decision with respect to the merits of Mr. Harkat's detention review. As noted earlier, the Federal Court refused to certify any of the questions proposed by Mr. Harkat in this regard.

[32] In *Harkat,* 2021, the Minister moved under Rule 74 for an order removing the notice of appeal from the Court file on the basis that this Court was without jurisdiction to hear Mr. Harkat's appeal in the absence of a question having been certified by the Federal Court. In responding to the Minister's motion, Mr. Harkat submitted that section 82.3 was constitutionally invalid because it violated the principles of fundamental justice under section 7 of the Charter, and was not saved by section 1 of the Charter. According to Mr. Harkat, his constitutional argument justified an appeal being permitted from the detention review decision, notwithstanding the absence of a certified question.

[33] The panel found that this argument was doomed to fail: *Harkat* 2021, above at para. 8. Not only was there an existing body of jurisprudence finding that section 82.3 of *IRPA* was constitutionally valid, the Court also held that constitutional concerns alone did not qualify as an exception to the certification requirement: *Harkat* 2021, above at paras. 17, 18.

[34] There is no challenge to the constitutional validity of the detention review provisions of *IRPA* in this case. Nor is there a challenge to the constitutional validity of subsection 115(2) of the Act. Indeed, a review of the notice of appeal here reveals that the stated grounds of appeal relate to "ordinary errors" or "mere errors of law".

[35] However, this Court has made it clear that "ordinary errors" or "mere errors of law" will not permit an appeal to be brought in the absence of a certified question: *Harkat* 2021, above at para. 15; *Canada (Citizenship and Immigration) v. Huntley*, 2011 FCA 273, [2012] 3 F.C.R. 118 at paras. 7-8. This is the case even if there appears to be considerable merit to the allegation that errors of law have been committed: *Mahjoub* 2011, above at para. 12; *Rock-St Laurent*, above at para. 16*; Es-Sayyid*, above at para. 28.

[36] This Court has, moreover, confirmed that to be permitted to pursue an appeal in the absence of a certified question, the case must involve "very fundamental matters" or "truly exceptional matters" that "strike right at the rule of law": *Mahjoub* 2017, above at paras. 19-21; *Tennant*, above at paras. 38-40.

V. Conclusion

[37] Mr. Harkat's appeal from an interlocutory decision of the Federal Court is barred by paragraph 72(2)(*e*) and section 82.3 of *IRPA*. Moreover, as Justice Stratas noted in *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132, 294 A.C.W.S. (3d) 299 at paragraph 16, it is exceedingly difficult to bring a case within one of the exceptions to the certified question requirements of *IRPA*: see also *Younis v. Canada (Minister of Immigration, Refugees and Citizenship)*, 2021 FCA 49, 334 A.C.W.S. (3d) 24 at para. 14. As Mr. Harkat has failed to do so here, I would quash his appeal. The Attorney General of Canada does not seek his costs and I would not award any.

"Anne L. Mactavish"
J.A.

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

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	OCTOBER 28, 2021

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