Federal Court of Appeal  Cour d'appel fédérale

Date: 20220613

Docket: A-262-21

Citation: 2022 FCA 113

CORAM: **STRATAS J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

XY

Respondent

Heard at Vancouver, British Columbia, on June 13, 2022.

Judgment delivered from the Bench at Vancouver, British Columbia, on June 13, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: MACTAVISH J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on June 13, 2022).

MACTAVISH J.A.

[1] The Minister of Public Safety and Emergency Preparedness appeals from a judgment of the Federal Court allowing the respondent XY's application for judicial review of the decision of a Canada Border Services Agency (CBSA) officer to prepare a report under section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). This report found that there

were reasonable grounds to believe that XY was inadmissible on the ground of organized criminality for being a member of an organization that itself was believed to be or to have been engaged in organized criminality. XY also sought judicial review of the decision of a Minister's delegate referring the section 44 report to the Immigration Division of the Immigration and Refugee Board for an inadmissibility hearing. This application was also allowed by the Federal Court.

[2] The Federal Court considered the jurisprudence of this Court holding that a relatively low level of procedural fairness is owed to individuals involved in the section 44 process: see, for example, *Cha v. Canada (Minister of Citizenship and Immigration*), 2006 FCA 126 at para. 52; *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para. 29. This is because the section 44 process is akin to a screening exercise in that there is no finding of inadmissibility, nor any alteration of an individual's status: *Lin v. Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 at para. 4.

[3] The Federal Court nevertheless allowed XY's application for judicial review, finding that the nature of the decisions in issue in this case was such that an elevated level of procedural fairness was owed to XY as a permanent resident of Canada faced with an allegation of inadmissibility on the ground of organized criminality. The Federal Court further found that XY had not been provided with the requisite degree of procedural fairness in the section 44 process, and his application for judicial review was accordingly allowed.

[4] In allowing XY's application, the Federal Court certified the following question:

> To what extent does a Minister's delegate acting pursuant to section 44(2) of the *IRPA* have an obligation to consider Canada's obligations under the *Refugee Convention*, including the reliability of the evidence it is relying upon, whether the allegations are tied to state persecutory efforts, and/or whether the allegations would ultimately give rise to invoking an exception to non-refoulement principle in deciding to refer the case of a refugee claimant to the Immigration Division on the grounds of organized criminality?

[5] Decisions of the Federal Court in immigration matters are generally intended to be final. Paragraph 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.

[6] 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 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.

[7] There is considerable jurisprudence from this Court addressing what constitutes a serious question of general importance and providing guidance in this regard. Amongst other things, this Court has held that:

a) A serious question of general importance is one that is dispositive of the appeal: *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para. 46; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at para. 28; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004

FCA 89 at para. 11; *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36;

b) The corollary to the fact that a question must be dispositive of the appeal is that it must be a question that has been raised and dealt with in the Federal Court's decision: *Zazai*, above at para. 12; *Lunyamila* above at para. 46; *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at para. 9. Otherwise, the certified question is nothing more than a reference to the Federal Court of Appeal: *Zazai*, above at para. 12;

c) If the Federal Court decides that a question need not be dealt with, it is not an appropriate question for certification: *Zazai*, above at para. 12;

d) It is a mistake to reason that because all issues on appeal may be considered once a question is certified, that any question that could be raised on appeal may be certified: *Varela*, above at para. 43; *Zhang*, above at para. 10;

e) The certification process is neither to be equated with the reference process established by section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, nor is it to be used as a tool to obtain declaratory judgments from the Federal Court of Appeal on questions that need not be decided in order to dispose of a particular case: *Liyanagamage v. Canada (Secretary of State*), 176 N.R. 4, 51 A.C.W.S. (3d) 910 at para. 4 (F.C.A.D.).

[8] We agree with the respondent that the question certified by the Federal Court in this case was not appropriate for certification as it is not dispositive of the appeal.

[9] It is true that the parties made submissions to the Federal Court with respect to the duty of CBSA personnel writing and referring section 44 admissibility reports to consider Canada's obligations under the *Refugee Convention*, and to ensure that their decisions are made in conformity with these obligations. However, the question certified did not ultimately bear on the Federal Court's decision.

[10] The Federal Court commented only briefly on this issue, without seriously engaging with it. The Court specifically found that "[t]he facts do not support that the Officer and Minister's Delegate pursued the inadmissibility ground of organized criminality with the intention that it would preclude the Applicant's access to the Refugee Protection Division". The Court also made only brief reference to the fact that Parliament's policy choices related to organized crime inadmissibility and the seriousness with which it is dealt in the statutory scheme does not support a duty to consider Canada's obligations under the *Refugee Convention*. The decision did not consider the substance of Canada's obligations under international law, nor how they were or were not engaged in this case.

[11] Indeed, the Federal Court decided the case on a different issue – namely that the duty of procedural fairness required that XY be afforded an opportunity to provide submissions on the substance of the inadmissibility allegations against him, and that he be provided with an appropriate level of disclosure to allow him to understand the case against him.

[12] The fact that the certified question was not the basis of the Federal Court's decision is borne out by the fact that the Minister does not address the issue raised by the certified question in his memorandum of fact and law. Rather than engage with the certified question, the Minister's memorandum deals with the issues that actually formed the basis of the Federal Court's decision: the content of the duty of procedural fairness in this case, and the scope of the discretion conferred on CBSA personnel to consider the personal circumstances of the individual concerned.

[13] In support of this approach, the Minister observes that on an appeal such as this, this Court is not confined to dealing with the question or questions that have been certified by the Federal Court, and it is open to this Court to address any issue in the appeal. This is a correct statement of the law: *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 at para. 19; *Lewis*, above at para. 37; *Sharma*, above at para. 13. However, it presumes the existence of a properly certified question.

[14] The statutory requirement for a certified question set out in paragraph 74(*d*) of *IRPA* is a precondition to a right of appeal. Where a question does not meet the test for certification, the necessary precondition is not met, and the appeal must be dismissed: *Varela*, above at para. 43. *Zhang*, above at para. 10; *Nguesso v. Canada (Minister of Citizenship and Immigration)*, 2018 FCA 145 at para. 21. This being the case here, the appeal is dismissed.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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