Federal Court of Appeal | Cour d'appel fédérale

Date: 20220210

Docket: A-315-21

Citation: 2022 FCA 27

[ENGLISH TRANSLATION]

PRESENT: LOCKE J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

ABDELHAK SEDKI
ZINEB EL AOUD

Respondents

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 10, 2022.

REASONS FOR ORDER BY: LOCKE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220210

Docket: A-315-21

Citation: 2022 FCA 27

PRESENT: LOCKE J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

ABDELHAK SEDKI
ZINEB EL AOUD

Respondents

REASONS FOR ORDER

LOCKE J.A.

I. Overview

[1] The appellant is seeking an order staying, for the duration of the appeal, the part of the appeal decision (*Sedki v. Canada (Citizenship and Immigration)*, 2021 FC 1071) that reads as follows:

> 1. The application for judicial review is allowed. Mr. Sedki's H&C application, together with the applicants' sponsorship application, is referred to a different IRCC officer for examination on the merits.

[2] The appellant is entitled to appeal this decision because the Federal Court certified the following question as a serious question of general importance:

> Can a foreign national inadmissible for misrepresentation pursuant to subsection 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) apply, during the period set out in paragraph 40(2)(*a*) of the *IRPA*, for permanent resident status on humanitarian and compassionate grounds under subsection 25(1) of the *IRPA*, despite the prohibition on applying for permanent resident status set out in subsection 40(3) of the IRPA?

[3] Subsection 25(1) of the *Immigration and Refugee Protection Act* (IRPA) reads as follows:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des

criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[4] Section 40 of the IRPA reads, in part, as follows:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
…	[…]
Application	**Application**
(2) The following provisions govern subsection (1):	**(2)** Les dispositions suivantes s'appliquent au paragraphe (1) :
(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and	**a)** l'interdiction de territoire court pour les cinq ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;
…	[…]

Inadmissible	**Interdiction de territoire**
(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).	**(3)** L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

[5] The material facts are not in dispute. The male respondent, Abdelhak Sedki, is a foreign national who was declared inadmissible pursuant to subsection 40(1) of the IRPA for misrepresentations found within a temporary resident visa application made in 2017. Pursuant to paragraph 40(2)(*a*) of the IRPA, this inadmissibility will last until December 6, 2022.

[6] The male respondent filed an application for a permanent residence visa (APR) as a member of the family class, and the female respondent, Zineb El Aoud, who is a Canadian citizen and who is married to the male respondent, filed a sponsorship application for the APR. To address the inadmissibility, the male respondent included in his APR a humanitarian and compassionate considerations (H&C) application under subsection 25(1) of the IRPA.

[7] The APR was refused on the basis of the inadmissibility, without the H&C considerations being addressed. Later, the Federal Court allowed an application for judicial review of that decision and issued the order that is currently under appeal, which brings us to this motion for a stay.

[8] For the following reasons, I will dismiss the motion.

II. Preliminary issue

[9] Before the motion for a stay is addressed, it is necessary to respond to the appellant's motion for an extension of the time limit set out in subrule 369(3) of the *Federal Courts Rules*, S.O.R./98-106, to serve and file his reply to the respondents' written representations on the motion for a stay.

[10] The respondents' written representations were served and filed on Monday, January 10, 2022. Therefore, the time limit for serving and filing the reply, pursuant to subrule 369(3), was four days later, namely, on Friday, January 14, 2022. Counsel for the appellant accidentally used five days in her calculation instead of four, which gave her a deadline of Monday, January 17, 2022. Counsel described this as a careless mistake caused by the COVID-19 symptoms from which she was suffering at the time.

[11] Counsel realized her mistake on January 18, 2022, and filed her motion for an extension of time on January 19, 2022. The respondents do not consent to this motion, but they are not challenging it either.

[12] I will allow the motion for an extension of the time limit to serve and file the appellant's reply. I am satisfied that the interests of justice justify an extension. The explanation that counsel for the appellant gave for the error is reasonable, and she took the necessary steps to promptly correct it.

III. Analysis of the motion for a stay

[13] The parties agree that the legal tests that must be met in order to obtain a stay are those set out in *RJR – Macdonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117, [1994] 1 S.C.R. 311 (*RJR – Macdonald*), namely:

> (a) the existence of a serious question to be tried on appeal;
>
> (b) that irreparable harm will result for the moving party; and
>
> (c) that the balance of convenience is in the moving party's favour.

[14] I have addressed each of these tests in the following paragraphs.

A. *Serious question*

[15] The parties agree that there is a serious question to be tried in this appeal, and I concur. By certifying a question, the Federal Court recognized the existence of a serious question of general importance: *Mohamed v. Canada (Citizenship and Immigration)*, 2012 FCA 112 at paras. 14 and 18.

B. *Irreparable harm*

[16] As set out at page 341 of *RJR – Macdonald*:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[17] Furthermore, this Court noted in *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 (*Janssen*) at paragraph 24 that "the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later", and that it would be "strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief."

[18] The appellant refers to various types of irreparable harm if the present motion for a stay were to be dismissed. Firstly, the appellant states that this appeal could become moot if the APR were to be decided again while taking into account the H&C considerations. In such a situation, the dispute between the parties would no longer exist, and the appeal would be moot. The issue of determining whether this Court should exercise its discretion in order to hear the appeal despite its mootness would depend on a stringent test. The parties and the public would risk not benefiting from the guidance of the Court with respect to the certified question.

[19] A second type of irreparable harm that the appellant mentions is the denial of any effective recourse if the APR (including the H&C considerations) were to be approved before the appeal is decided, and if the appeal were to be subsequently decided in favour of the appellant. The male respondent would have already obtained permanent residence. What is more, the appellant would have had to allocate resources to considering a matter that, ultimately, should not have been assessed.

[20] The respondents note that the appellant's allegations of irreparable harm are not supported by the evidence and that the appellant is relying on speculation. For example, if this

appeal were to become moot, the appellant would then have the opportunity to submit to the Court that the appeal must be decided.

[21] With respect to the issue of the absence of evidence to support the allegations of irreparable harm, I accept the appellant's rebuttal argument that the evidence is not necessary because these allegations arise as a logical consequence. That being said, it is true that it is possible that the types of irreparable harm raised by the appellant will not occur. Therefore, the harm that the appellant referred to is hypothetical and, contrary to what is required in *Janssen*, it is not unavoidable. I also accept that, if this appeal were to become moot, the appellant will have another opportunity to convince this Court of the importance of ruling on the certified question.

[22] I find that the harm mentioned by the appellant is not irreparable, as is required.

C. *Balance of convenience*

[23] Even if I were satisfied that the appellant had shown that irreparable harm had occurred, I would not be convinced that the balance of convenience is in the appellant's favour. As indicated in the previous section, the harm raised by the appellant is hypothetical.

[24] Conversely, the harm that the respondents would suffer if the Federal Court order were to be stayed is certain. It is also significant. The appellant acknowledges that a stay of the Federal Court decision would cause an additional delay in receiving a decision on the male respondent's APR. This additional delay could result in an added delay in terms of the reunification of the respondents. It is true, as the appellant states, that the outcome of the APR decision is not

guaranteed given the discretionary nature of H&C applications, but it seems fairly certain that there would be an additional delay in receiving this decision.

[25] The respondents also note that the male respondent's inadmissibility will end in December 2022, which reduces the inconvenience to the appellant. In any event, the male respondent's APR will be considered within the next few months.

[26] I find that the balance of convenience is in the respondents' favour.

IV. Conclusion

[27] The motion for a stay will be dismissed. If the appellant would like to reduce the inconvenience to him, he still has the option of requesting that the appeal be expedited, which he has not done to date.

[28] As no costs were requested, no costs will be awarded.

"George R. Locke"
J.A.

Certified true translation
Melissa Paquette, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-315-21
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. ABDELHAK SEDKI, ZINEB EL AOUD

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	FEBRUARY 10, 2022

WRITTEN SUBMISSIONS:

Lynne Lazaroff	FOR THE APPELLANT
Guillaume Cliche-Rivard	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE APPELLANT
Cliche-Rivard, Avocats inc. Montreal, Quebec	FOR THE RESPONDENTS