Federal Court of Appeal | Cour d'appel fédérale

Date: 20231116

Docket: A-156-23

Citation: 2023 FCA 225

CORAM: **DE MONTIGNY C.J.**
GOYETTE J.A.
HECKMAN J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

COLIN JAMES EWEN

Respondent

Heard at Ottawa, Ontario, on September 12, 2023.

Judgment delivered at Ottawa, Ontario, on November 16, 2023.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

CONCURRED IN BY: GOYETTE J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] This appeal raises a rather unusual question with respect to the jurisdiction of the Federal Court to order an interim stay within an urgent motion to stay a removal order (the Order). More specifically, the issue to be decided is whether the Motion Judge could, on his own motion, raise at the hearing an issue pursuant to the *Canadian Charter of Rights and Freedoms,* Part I of the

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter), that is unrelated to any immigration matters and order an interim stay of the respondent's removal from Canada in order to adjudicate that issue.

[2] Having carefully thought the matter through, I am of the view that this course of action was not only inappropriate and unwarranted, but more importantly, in excess of the Federal Court's jurisdiction. For the reasons that follow, I would grant the appeal, quash the Federal Court's interlocutory order of June 6, 2023 for lack of jurisdiction, and decline to refer the underlying motion for a stay to the Federal Court as doing so would serve no useful purpose.

I. Background

[3] The respondent, Mr. Colin James Ewen, is a citizen of the United Kingdom (UK) presently residing in Canada. He is the subject of a removal order because he was declared inadmissible to Canada by the Immigration and Refugee Board of Canada (IRB) in October 2019, on grounds of serious criminality. This was based on the respondent's three separate convictions of offences committed between 1997 and 2005 in the UK, one of which, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least ten years pursuant to paragraph 36(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). As a result, the IRB issued a deportation order (which is one of three types of removal orders) against him. The respondent was also charged with offences in Canada from 2013 to 2019, which did not form part of the IRB's inadmissibility assessment.

[4] The respondent filed an application for leave and judicial review of the 2019 inadmissibility decision in January 2023, for which a decision on leave is still pending (IMM-748-23). He has also filed an application for leave and judicial review of the IRB's 2019 removal order, which was dismissed by the Federal Court on August 18, 2023 (IMM-558-22).

[5] The respondent was first scheduled for removal on March 6, 2023, but the removal was deferred and rescheduled for April 12, 2023. The respondent made a request for deferral, which was refused by the Canada Border Services Agency (CBSA) on March 30, 2023; an application for judicial review of that decision was dismissed by the Federal Court on April 12, 2023 (IMM-4332-23). Nevertheless, the removal was again postponed due to a medical issue resulting in a hospital visit, and rescheduled for June 7, 2023 (Direction to report).

[6] The respondent again requested a deferral of his removal on the basis of arguments previously rejected by the CBSA and the Federal Court in his earlier proceedings. Additionally, he argued that he ought not to be removed to the UK until he either receives a medical diagnosis for his health issues, or a decision on both his application for judicial review of the IRB's inadmissibility decision and on his pending spousal sponsorship application. This request was refused by the CBSA on May 31, 2023.

[7] On June 1, 2023, Mr. Ewen then filed with the Federal Court an application for leave and judicial review of the CBSA's refusal to defer his removal, as well as a motion to stay the removal. The oral hearing of that stay motion took place on June 6, 2023.

[8] At the start of the hearing, the parties were asked if they had any preliminary matters to raise (to which they answered in the negative). The Motion Judge then raised on his own initiative a new issue in these terms:

> I have, I have one issue, and it's an issue that, that I've been observing for some time and this, this appears to be an opportunity to raise it. And it will come as a bit of a surprise to both parties […].
>
> (Transcript, Public Appeal Book, Tab 3, at pp. 18-19.)

[9] The Motion Judge proceeded to highlight the use of "he" and "him" in the appellant's written submissions to refer to the respondent, and contrasted these with other parts of the appellant's submissions where "they/their" are used in reference to the respondent. After referring to many of these discrepancies in the appellant's written submissions, the Motion Judge asked the appellant's counsel whether the use of "they/their" pronouns allegedly violated the respondent's Charter right to his gender identity. After being told that "they" was used as a gender neutral pronoun, he then turned to the respondent and asked what he had to say about this. The respondent said that he found the use of "they/their" a little confusing, and the following exchange then took place between the Motion Judge and the respondent:

> THE COURT: And how do you identify, Mr. Ewen? You identify as a he, a she or a they?
>
> COLIN JAMES EWEN: I identify as a he.
>
> THE COURT: And how do you feel about the Government of Canada identifying you as a they or a their or a them?
>
> COLIN JAMES EWEN: It's not very direct. If you're dealing with someone that is he, it should be stated that he said this, he did that. Not they did this, or they did that, or them. It is pretty confusing as well.
>
> THE COURT: What about your dignity? Does it affect your dignity?

> COLIN JAMES EWEN: Kind of, yes, because it is not directly aimed at me, you know. I identify as a he, not a they, not a she, not a them.
>
> (Transcript, Public Appeal Book, Tab 3, at p. 27.)

[10] The Motion Judge then directed the parties to file written submissions on three questions on the issue of gender identification and the Charter:

(i) Is gender identification a protected right under the Charter, specifically section 15?

(ii) If so, in the circumstances, has Mr. Ewen's right to his gender identification been violated by the Government of Canada in its submissions on this judicial review application? and

(iii) If his right to gender identification has been violated, what is the appropriate remedy, if any, under section 24 of the Charter?

(See Transcript, Public Appeal Book, at p. 28. See also Order of Justice Bell dated June 6, 2023, (the Order), at pp. 14-15.)

[11] The Court made no final determination of the stay motion, but instead granted an interim stay of the removal, to an unspecified date, in order to receive the requested written submissions.

[12] In light of the Order granting an interim stay, the removal was cancelled. If Mr. Ewen is eventually to be removed at a later date, the CBSA will have to schedule a new removal date. At that point, Mr. Ewen will have the opportunity to make another request for deferral of removal and, if it is dismissed, an application for leave and for judicial review, and stay motion.

[13] Following the Order at issue in this appeal which, in addition to the granting of an interim stay, also required section 15 Charter submissions, the appellant filed a notice of appeal and brought a motion for a stay of the Order pending this appeal. This Court exceptionally granted a stay of the Order pending appeal, and ordered that the appeal be expedited as requested by the appellant. The appellant also consented to an order that, pending final judgment in this appeal, the respondent shall not be removed from Canada.

II. Issues

[14] This appeal raises three issues:

A. Does this Court have jurisdiction to hear this appeal of an interlocutory order of the Federal Court?

B. Did the Federal Court err by failing to exercise its jurisdiction to determine the stay motion before it, and/or exceed its jurisdiction by raising a new Charter issue that was not raised by the parties?

C. If the first two questions are answered in the affirmative, should this Court refer the stay motion back to the Federal Court?

III. Analysis

A. *Does this Court have jurisdiction to hear this appeal of an interlocutory order of the Federal Court?*

[15] It is beyond dispute that interlocutory decisions in immigration matters are not ordinarily subject to appeals pursuant to the preclusive clause contained in paragraph 72(2)(*e*) of IRPA,

which states that “no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment”. Furthermore, an appeal from a final judgment is only available when the judge rendering it certifies a serious question of general importance (see paragraph 74(*d*) of IRPA).

[16] Yet, paragraph 27(1)(*c*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 authorizes an appeal from an interlocutory judgment of the Federal Court. On the basis of that provision, a body of jurisprudence has developed, empowering this Court in exceptional circumstances to entertain an appeal of an interlocutory decision, or of a final decision where no question has been certified, despite the statutory bars found in the IRPA.

[17] In a long line of cases going back to at least the decision of this Court in *Subhaschandran v. Canada (Solicitor General)*, 2005 FCA 27 at paras. 13, 17, it has been recognized that appellate review may be available when a case raises “very fundamental matters” or “truly exceptional matters” that “strike right at the rule of law”: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144 at paras. 19-21. There is an additional exception to the rule that no appeal lies from interlocutory orders. Where the alleged error has been made in the context of a “separate, divisible judicial act”, and involves the exercise of a power that is not found in the IRPA, appellate review is not governed by that Act: *Harkat v. Canada (Attorney General)*, 2021 FCA 209 at para. 25; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, 1997 CanLII 322 (S.C.C.) at para. 66.

[18] In my view, the case at bar exemplifies this second exception. The Motion Judge's decision to order an interim stay to inquire into whether the Government of Canada's use of gender-neutral pronouns in its submissions infringed the respondent's Charter rights has no basis in the IRPA's provisions. The preclusive clauses found in paragraphs 72(2)(*e*) and 74(*d*) of IRPA therefore cannot find application in the very particular and exceptional circumstances of this case.

B. *Did the Federal court err by failing to exercise its jurisdiction to determine the stay motion before it, and/or exceed its jurisdiction by raising a new Charter issue that was not raised by the parties?*

[19] The Federal Court exceeded its jurisdiction by unilaterally raising a new Charter issue that did not stem from the issues as framed by the parties, and that was irrelevant to the underlying motion for a stay of removal or the application for leave for judicial review.

[20] Reading from the transcript, it is obvious that the Motion Judge put an issue to the parties that was of particular interest to him, and that he knew such issue would come as a surprise to the parties. Before the parties could even address the merits of the respondent's motion for a stay, the Motion Judge stated:

> I have, I have one issue, and it's an issue that, that I've been observing for some time and this, this appears to be an opportunity to raise it. And it will come as a bit of a surprise to both parties, but I'll, I'll go through it […].
>
> (Transcript, Public Appeal Book, Tab 3, at pp. 18-19.)

[21] The Motion Judge then proceeded to take the appellant's counsel through both parties' records, highlighting the usage of "he" and "him" in reference to the respondent, and contrasted

that usage with the inconsistent use of “he/him” and “they/their” pronouns in the appellant’s written submissions. Not being satisfied by the appellant’s counsel’s oral response at the hearing that attempted to clarify its usage of “they/their” pronouns as gender-neutral terminology, and counsel’s apology for any confusion caused, the Motion Judge adjourned the hearing and ordered an interim stay until the Charter issue, that he had himself identified, could be argued in a separate hearing and be ultimately decided.

[22] This course of action was flawed. In *R. v. Mian*, 2014 SCC 54 [*Mian*], the Supreme Court provided some guidance as to when and how appellate courts should exercise their discretion to raise new issues. While recognizing that appellate courts have that discretion, the Supreme Court signalled that it should be used sparingly and “only in rare circumstances”. It further explained that a new issue should only be raised “when failing to do so would risk an injustice”, “whether there is a sufficient record on which to raise the issue”, and where it would not result in “procedural prejudice to any party” (at para. 41). In my view, these guiding principles, which derive from the dual role of courts to remain independent and impartial, and also to ensure that justice is done, apply by analogy with equal force to a reviewing court, especially in a summary procedure. In the case at bar, I find that the Motion Judge failed to properly exercise his discretion in raising a new issue.

[23] First, I fail to see how the failure to raise the section 15 Charter issue would have worked an injustice to the respondent, especially once the confusion was clarified at the hearing. I appreciate that the respondent is self-represented, but if he felt that his dignity was affected or imperiled by the use of gender-neutral pronouns, it was for him to raise it. His tentative answer at

the hearing when prompted by the Court is far from convincing in this respect. Moreover, it is clear that counsel for the appellant was prejudiced by the Motion Judge's unexpected line of reasoning to order an interim stay. Of course, the appellant was given the opportunity to address the Motion Judge's concerns in writing at a later date, but that was done at the expense of being able to enforce a removal order and to have a timely decision of the Court on the motion for a stay of the Direction to report.

[24] Perhaps more importantly, there was no sufficient record on which to raise the Charter issue. This consideration is particularly important when a new issue raised relates to the Charter. By raising a claim of Charter infringement absent a sufficient evidentiary record, the Motion Judge exceeded his jurisdiction and overstepped his role as an independent and impartial judicial decision-maker. Contrary to the teachings of the Supreme Court, he could be seen as going "in search of a wrong to right" (*Mian* at para. 42).

[25] In several cases, this Court and the Supreme Court have cautioned that an administrative tribunal should not raise a new section 15 Charter issue on its own initiative: see, for example, *Weatherley v. Canada (Attorney General)*, 2021 FCA 158 at para. 20. Similarly, in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, the Supreme Court was quite clear that it was an error for a court of appeal to decide an appeal on the basis of a section 15 Charter violation in the absence of any factual record (paras. 25-27).

[26] In the present case, the requisite elements to determine a Charter issue were absent:

- There was no statement of claim or notice of application alleging a Charter breach and pleading the required elements to which the appellant could respond;
- There was no evidence before the Federal Court from the respondent respecting an alleged breach of his section 15 Charter rights;
- The respondent did not raise the issue when the Federal Court asked if the parties had any preliminary issues, nor did he seek a declaration of a breach or a remedy under subsection 24(1) of the Charter; and
- There was no opportunity to file evidence or to cross-examine.

[27] From the very early cases dealing with Charter issues, the Supreme Court has made it crystal clear that courts must not resolve them in a factual vacuum. As the Court stated in *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, 1989 CanLII 26 (S.C.C.) at p. 361 [*Mackay*], "[t]o attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions". See also: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 1986 CanLII 12 (S.C.C.) at pp. 762, 767-768; *Konesavarathan v. University of Guelph Radio*, 2020 FCA 148 at para. 12; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262 at para. 67. It is for a claimant to demonstrate, through evidence, that there is a nexus between government action and an alleged section 15 infringement.

[28] An urgent motion for a stay is obviously not the appropriate procedure to assess a new Charter claim, especially when the issue has not been raised by the parties in the underlying application for judicial review. These motions, by their very nature, are dealt with expeditiously and on the basis of a stripped-down record, and many of the procedural rights required for a

Charter issue to be properly litigated and adjudicated are lacking. Further submissions, as ordered by the Motion Judge, will not cure these shortcomings. Moreover, a decision of the Federal Court on the Charter issue could be immune from appellate review as a result of section 72 of IRPA and the requirement of there being a certified question. Finally, I would add that subsection 18.2 of the *Federal Courts Act* does not authorize the granting of interim declarations in the context of an interim stay for relief, because declarations are final: see *Francis v. Mohawk Council of Akwesasne*, 1993 CarswellNat 423, [1993] F.C.J. No. 369 (F.C.) at para. 2; Peter Hogg, Wade Wright, and Patrick Monahan, *Liability of the Crown*, 4th ed. (Toronto: Thomson Reuters Canada, 2011) at p. 39.

[29] For all of the above reasons, I am of the view that the Order is fundamentally flawed and should be quashed.

[30] At the hearing and in his oral submissions, the respondent argued that the Federal Court properly exercised its jurisdiction in issuing the Order and the interim stay because in so doing, it was managing its proceedings to ensure that he was treated fairly and equally. The respondent is correct to point out that judges are advised to ensure equality in its proceedings, as well as to ensure that self-represented litigants are treated fairly: see *Ethical Principles for Judges* (Ottawa: The Canadian Judicial Council, 2021) at p. 35, para. 4.B.3 and p. 41, para. 5.A.8. For a recent application of these principles, see: *Haynes v. Canada (Attorney General)*, 2023 FCA 158.

[31] While judges must strive to ensure that self-represented litigants receive the same level of procedurally fair justice as that accorded to other Canadians, these principles are not a licence to

circumvent the scope of the *Federal Courts Act*. Furthermore, the advisory principles relate to procedural accommodations, and are not meant to authorize the judge to stray from their role as a neutral arbiter between the parties, and even much less to advocate on behalf of a party or to pursue their own line of inquiry. There is a line to be drawn between ensuring a procedurally fair process free from discrimination or other abusive behaviour, and raising a new substantive question (be it in relation to Charter rights) that is absent from the parties' submissions and does not stem from the issues as framed by the parties.

C. *If the first two questions are answered in the affirmative, should this Court refer the stay motion back to the Federal Court?*

[32] Being of the view that the interim stay order should be quashed, the normal course of action would be to refer the matter back to the Federal Court so as to adjudicate the underlying motion for a stay.

[33] The appellant claims that when the respondent's removal was cancelled, the stay motion became moot because there was no longer a live controversy between the parties: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123 (S.C.C.) at pp. 353-54 [*Borowski*]. He argues that this is not a case in which this Court should exercise its discretion to decide a moot matter: *Borowski* at pp. 358-363. The appellant also relies on the principle that courts should refrain from deciding questions where there is no obvious, useful purpose to be served by granting the relief sought or where a proceeding would have no practical effect.

[34] It is not necessary for the resolution of this matter to decide whether or not the stay motion is moot. Regardless of whether one invokes the case law on mootness or the case law to the effect that a matter should not be sent back following an appeal when no purpose would be served by such a remedy, the underlying motion for a stay can no longer proceed and should not proceed given the following circumstances.

[35] The respondent is no longer subject to an imminent enforced removal. In light of the interim stay order, the removal of the respondent could not occur on June 7 and was cancelled by the CBSA. As pointed out by the appellant, any future enforcement of the removal order will involve the following steps:

- A new pre-removal interview;
- A new removal date;
- A new direction to report;
- The opportunity for the respondent to submit a request for deferral of removal; and
- A further opportunity, if unsuccessful on his request for deferral, to submit an application for leave and judicial review, as well as a new motion for a stay of removal.

[36] If the appellant were to choose to take these steps, the respondent would have an opportunity to make a request for deferral of removal. He could apply for leave and for judicial review of a negative deferral decision and could once again seek an urgent stay of removal on the basis of a fresh evidentiary record and of an updated set of circumstances.

[37] Returning the stay motion to the Federal Court would not promote judicial economy and would serve no useful purpose. Stay motions are meant to be summary proceedings to deal with an urgent situation, with a bare bone record and very little time for the Court to ponder the issues raised by the parties. Were this Court to refer the stay motion back to the Federal Court, it would be argued based on a stale record and on a set of circumstances over five months out of date, making any decision on the motion of limited relevance and usefulness. Now that Mr. Ewen is no longer subject to an imminent enforced removal pursuant to a Direction to report, it is preferable to leave the issues that he raised in his stay motion for the consideration of the Federal Court in the context of the underlying judicial review application or a contemporaneous record should a new motion for stay of removal be made.

IV. Conclusion

[38] For all of the above reasons, I would grant the appeal and set aside the Federal Court's interlocutory Order of June 6, 2023. I would not refer the underlying stay motion back to the Federal Court, as this would serve no useful purpose. The interim stay ordered by this Court on June 29, 2023 of all proceedings in file IMM-6831-23 should be lifted with respect to the application for leave and judicial review. There shall be no costs in this appeal.

"Yves de Montigny"
C.J.

"I agree.
Nathalie Goyette J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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