Federal Court  Cour fédérale

Date: 20160728

Docket: IMM-150-16

Citation: 2016 FC 884

Ottawa, Ontario, July 28, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

DONNA CYNTHILIA GEORGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. George is a citizen of Saint Vincent and the Grenadines who claimed refugee protection in Canada due to her fear of harm on the basis of her sexual orientation and because she alleges she is a victim of domestic violence perpetrated by her husband.

[2] Ms. George's claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB], a finding that was upheld by the Refugee Appeal Division [RAD] of the IRB. Ms. George brought an application seeking leave from this Court to judicially review the RAD decision. That application was dismissed in January, 2015 for lack of perfection.

[3] In October, 2015, Ms. George submitted an application to the RAD to reopen the RAD decision. She alleged inadequate representation before both the RPD and the RAD resulting in a breach of natural justice.

[4] In December, 2015, the RAD dismissed Ms. George's application to reopen the appeal. The RAD concluded, relying on section 171.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Sub-Rule 49(1) of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules] that it did not have jurisdiction to reopen an appeal on any ground where this Court has made a final determination.

[5] Ms. George asks that I quash the decision of the RAD dismissing her application to reopen her appeal. She argues because this Court dismissed her application for leave on the basis of a lack of perfection, there has been no final determination of the matter. She submits that the purpose of section 171.1 of the IRPA and sub-Rule 49(1) of the RAD Rules is to prevent re-litigation of the same issue. She argues this Court did not consider the reasonableness or correctness of the original RAD decision or the merits of her application. As such the dismissal for lack of perfection does not constitute a final determination.

[6] To determine this application I need to address the following issues:

A. What is the standard of review?

B. Did the RAD err in concluding that dismissal by this Court for lack of perfection constitutes a final determination pursuant to section 171.1 of the IRPA and Sub-Rule 49(1) of the RAD Rules?

[7] I am not persuaded by Ms. George's arguments and dismiss the application for the reasons that follow.

II. Analysis

A. *What is the standard of review?*

[8] The parties agree that the correctness standard of review applies to true questions of jurisdiction (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 59; *Smith v Alliance Pipeline Ltd*, [2011] 1 SCR 160 at para 26). Ms. George submits that the issue raised is one of jurisdiction and a correctness standard of review applies. I disagree.

[9] The category of true questions of jurisdiction is narrow (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39). The RAD is granted sole and exclusive jurisdiction to determine "all questions of law and fact, including questions of jurisdiction" in matters brought before it (IRPA ss 162(1)). The issue raised in this application is not a true question of jurisdiction but rather a question of the interpretation of

section 171.1 of the IRPA, the RAD's home statue. The RAD is entitled to deference and I will apply a reasonableness standard of review.

B. *Did the RAD err in concluding that dismissal by this Court for lack of perfection constitutes a final determination pursuant to section 171.1 of the IRPA and Sub-Rule 49(1) of the RAD Rules?*

[10] It was both reasonable and correct for the RAD to conclude that a decision of this Court dismissing an application for leave and judicial review due to a lack of perfection constitutes a final determination within the meaning of section 171.1 of the IRPA and RAD Rule 49(1).

[11] Section 171.1 of the IRPA states:

171.1 The Refugee Appeal Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — an appeal in respect of which the Federal Court has made a final determination.	**171.1** La Section d'appel des réfugiés n'a pas compétence pour rouvrir, pour quelque motif que ce soit, y compris le manquement à un principe de justice naturelle, les appels à l'égard desquels la Cour fédérale a rendu une décision en dernier ressort.

[12] The issue raised is one of statutory interpretation (*NO v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1186 [*NO*]). Statutes are to be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd Re*, [1998] 1 SCR 27 at para 21).

[13] In *NO* Justice Heneghan considers the meaning of "final" as that term is used in section 170.2 of the IRPA, a section that addresses the reopening of a matter by the RPD. The wording is identical to section 171.1. In interpreting the meaning of "final" Justice Heneghan refers to

paragraph 50 of *Blackmore v British Columbia (Attorney General)* (2009), 2009 BCSC 1299 at para 50 which states:

> The grammatical and ordinary meaning of the word "final" is "ultimate ... not to be undone, altered or revoked ... [and] conclusive": Simpson and Weiner, *The Oxford English Dictionary*, 2nd ed., Volume V (Oxford: Clarendon Press, 1989) at pp. 191 to 192.

[14] In this case the decision of the Court to dismiss the application for lack of perfection was a "final" decision. It was not to be undone or revoked. However, Ms. George argues that "decision" must be interpreted differently than "determination", the term used in section 171.1. While the decision of the Court might have been a "final decision" it was not a "final determination" because the merits of the matter had not been considered. Again I am unable to agree.

[15] In this case the "Final Decision" of the Court was to dismiss the application for lack of perfection. This decision ultimately determined the matter; it was not simply a procedural step but a final determination *(Frenkel v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 96 at paras 12-13, 148 FTR 8 (TD)). While a decision to dismiss for lack of perfection can be set aside in very narrow circumstances, the jurisprudence of this Court consistently holds: (1) the decision is final; (2) the decision is not subject to appeal within the meaning of paragraph 72(2)(e) of the IRPA; and (3) the Court has no jurisdiction to consider the same matter again (*Nkangura Twagirayezu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1384 at paras 10, 11; *Jalil v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 321 at para 8; *Bergman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1082 at para 6; *Shokri v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 785 at para 12).

[16] While the merits of the matter have not been considered where an application is dismissed for lack of perfection, the dispute as between the parties has been resolved. The matter is settled. It is final. An ordinary, contextual reading of section 171.1 does not import a requirement for a consideration of the merits but rather a requirement that the matter be finally determined by this Court.

III. Certified Question

[17] Ms. George has proposed the following question for certification:

> Does the RAD pursuant to section 171.1 of IRPA and Rule 49 of the RAD Rules have jurisdiction to reopen an appeal where the Federal Court dismisses an application for leave to commence judicial review for lack of perfection?

[18] Ms. George's counsel argues that the question posed transcends the issues raised in this particular case and differs from the question certified in *NO*.

[19] The respondent relies on *Lai v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 21 at para 4 in submitting that the Court should only certify questions of general importance which are dipositive of the appeal. The respondent notes that the applicant argued that the facts of this case are unique and as such not a question of general importance.

[20] I have found, as set out above, the jurisprudence unambiguously establishes that a proceeding dismissed for lack of perfection is a final decision or determination of the matter. As such I am not satisfied that the question proposed raises an issue of general importance. I will not certify the question.

IV. Conclusion

[21] It was both reasonable and correct for the RAD to conclude that this Court had "made a final determination" in respect of the appeal when it dismissed the application for lack of perfection. Having reasonably concluded this to be the case, the RAD correctly concluded it did not have jurisdiction to reopen the appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ashley Fisch	FOR THE APPLICANT
David Cranton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kaminker Weinstock Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT