Federal Court  Cour fédérale

Date: 20210407

Docket: IMM-7880-19

Citation: 2021 FC 300

Ottawa, Ontario, April 7, 2021

PRESENT: Mr. Justice Annis

BETWEEN:

ALABI ADAM SABITU
MARIAM AROMOKE SALIU-ADAM
SUMAYYAH TIWATOPE ADAM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

SUPPLEMENTARY JUDGMENT AND REASONS

[1] Further to my Judgment and Reasons issued on February 23, 2021 (2021 FC 165), the Court is addressing the following Certified questions.

I. Certified Questions

[2] There appear to be significant questions raised in this decision that would meet the requirements to be certified for appeal. Particularly falling under this description is the novel

interpretation of section 72(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) and rule 49(1) of the *Refugee Appeal Division Rules*, SOR/2012-257 (*Rules*) as constraining the Federal Court from proceeding with a judicial review involving issues of failures of natural justice without the applicant first exhausting the Refugee Appeal Division (RAD) appeal process by requesting the reopening of the RAD appeal. This jurisprudence contradicts the traditional procedure of the Court whereby an applicant claiming a failure of natural justice, may proceed directly to have these issues considered with others raised in the principal application for judicial review.

[3] Similarly, an exceptional waiver of the collateral attack doctrine would raise a question of general importance that is determinative of this matter. Admittedly, the question whether to waive the rule to accommodate the particular facts of these Applicants may be framed narrowly as one concerning their interest of justice. Nonetheless, a general principle waiving the collateral attack is also supported on a broader scale. The question is whether waiver of the collateral attack doctrine should be permitted based on underlying policy considerations.

[4] There is also a need to settle the threshold of the effect of a counsel's incompetence as it would bear on the outcome of the original decision, being that of a reasonable probability or a serious possibility.

[5] All of these questions appear to be of serious general importance and determinative of the outcome.

[6] In light of the Court's opinion that certified questions for appeal are in order, the parties were provided a copy of these reasons and were invited to propose appropriate questions for certification for appeal.

[7] While the Applicants object to the certification of questions in this matter, the Respondent suggested the following questions for certification:

a. Does the phrase "any right of appeal" in section 72(2)(a) of the *IRPA* encompass an application to reopen an appeal for failure to observe a principle of natural justice pursuant to rule 49(1) of the *Refugee Appeal Division Rules*, such that applicants are barred from seeking judicial review on that basis where they have not first exhausted their right to request a reopening?
b. Should applicants who have been refused a reopening of their RAD appeal under rule 49(1) be exempt from having to seek judicial review of the reopening decision in a separate application on the basis that a waiver of the collateral attack rule is warranted by underlying policy considerations?
c. With respect to the prejudice component of the test for incompetence of counsel, is the applicable threshold for the effect of a counsel's incompetence on the outcome of the impugned decision a reasonable probability or a serious possibility?

[8] The Applicants submit, in opposition, that the proposed questions do not meet the criteria for certification because they are not of general importance, do not transcend the interests of the parties and/or are not dispositive of the case.

[9] It is advanced that the first question is not of general importance because its answer is demonstrated by the preponderance of its application in existing case law. However, the cases relied on by the Applicants in support of their submissions do not consider or pronounce on the issue of whether a reopening application under rule 49(1) of the *Rules* is a prerequisite to seeking judicial review. Furthermore, there is some conflicting indication from the Federal Court that exhausting all remedies before commencing judicial review would include first pursuing an application to reopen the RAD appeal (see *Brown*; and more recently *Maxamud v Canada (Citizenship and Immigration)*, 2020 FC 121). The foregoing is indicative of general importance requiring guidance encouraging the just application of the law, before the debate as to whether rule 49 is a mandatory or facultative rule expands in acceptability in the Court.

[10] With respect to the second proposed question, the Applicants argue that it does not transcend the immediate interests of the parties as the issue turns on the particular facts of the case. It is acknowledged that the exemption from the collateral doctrine rule has a singular application to the Applicants, given the exceptional circumstances whereby they were arguably misdirected by the Respondent's submissions to resort to rule 49 to reopen the RAD hearing. Nevertheless, the underlying positive policy effects on the administration of justice arising from the waiving of the application of the collateral attack doctrine supports its general application to all unsuccessful rule 49 applications.

[11] The benefits notably arise from encouraging greater recourse to rule 49 reopening applications, for substantive matters even if most are unsuccessful—as in this case—, but without the negative consequences of forcing a separate judicial review application, as was

argued by the Respondent, that serves no real purpose. The principal judicial review application would then determine issues of natural justice, particularly as the Court applies a correctness standard. Allowing the considerations of the RAD in an unsuccessful substantive reopening application to be before the Court in the principal application could well be of assistance, and would promote the administration justice, rather than undermining them. The question therefore, transcends the factual matrix of this matter to a broader more general application, in favour of certification, based on the underlying principles and policies informing the collateral attack doctrine.

[12] Lastly, the Applicants contend that the third proposed question, regarding the legal threshold to prove that a lawyer's incompetence would affect the outcome of the decision as a possibility or a probability, would not be dispositive of the appeal. They submit that the determination of incompetence did not appear to turn on the applicable threshold for the effect of counsel incompetence. This is however inaccurate. The point made in the reasons is that the Court cannot determine the effect of incompetence on the outcome as a probability, i.e. effectively deciding the issue before it is returned, because it does not have the full record before it that may be presented anew to the RAD, besides fettering the RAD's decision.

[13] Moreover, the issue of the legal threshold of incompetent legal services is a matter that should not be permitted to fester, wherein successful leave applications pile up awaiting the Court of Appeal to determine which standard should apply, which may take years before such an issue is certified again. Applicants will naturally argue for the less stringent standard adopted

herein, such that unless it is adopted by all the Judges of the Court, it will continue to beset the parties and the Court until finally settled by the Court of Appeal.

[14] Accordingly, the Court does not agree with the Applicants' submissions and certifies the three questions proposed by the Respondent.

SUPPLEMENTARY JUDGMENT in IMM-7880-19

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter returned to be heard by another RAD panel member, and

2. The following questions are certified for appeal:

    a) Does the phrase "any right of appeal" in s. 72(2)(a) of the *IRPA* encompass an application to reopen an appeal for failure to observe a principle of natural justice pursuant to rule 49(1) of the *Refugee Appeal Division Rules*, such that applicants are barred from seeking judicial review on that basis where they have not first exhausted their right to request a reopening?

    b) Should applicants who have been refused a reopening of their RAD appeal under rule 49(1) be exempt from having to seek judicial review of the reopening decision in a separate application on the basis that a waiver of the collateral attack rule is warranted by underlying policy considerations?

    c) With respect to the prejudice component of the test for incompetence of counsel is the applicable threshold for the effect of a counsel's incompetence on the outcome of the impugned decision a reasonable probability or a serious possibility?

"Peter B. Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ALABI ADAM SABITU, MARIAM AROMOKE SALIU-ADAM, SUMAYYAH TIWATOPE ADAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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