Federal Court  Cour fédérale

Date: 20211123

Docket: T-542-21

Citation: 2021 FC 1284

St. John's, Newfoundland and Labrador, November 23, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

QAISAR MUSTAFA KHAN
EBRAHEEM MUHAMMAD KHAN MUSTAFA (MINOR APPLICANT)

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND ORDER

[1] By a Notice of Motion submitted for consideration without personal appearance, pursuant to Rule 369 of the *Federal Courts Rules*, S.O.R. 98/106 (the "Rules"), Mr. Qaisar Mustafa Khan (the "Principal Applicant") and his son Ebraheem Muhammad Khan Mustafa (the "Minor Applicant"), (collectively "the Applicants") appeal from the Order (the "Order") dated June 8, 2021, of Madam Prothonotary Aylen (as she then was). In that Order, then Prothonotary Aylen adjudicated the Motion filed by the Attorney General of Canada (the "Respondent"), also

pursuant to Rule 369 of the Rules, to strike the Applicants' Application for Judicial Review, seeking to review the purported decision of the Minister of Citizenship and Immigration (the "Minister") about the application for a Canadian citizenship certificate for the Minor Applicant.

[2] The Order strikes the Application for Judicial review without leave to amend, with no Order as to costs.

[3] The "decision" in question is set out in a letter dated March 1, 2021, signed by Ms. Gayle Leith, Senior Decision-Maker of the Case Management Branch of Immigration, Refugees and Citizenship Canada. Paragraphs 2 to 6 of the Order refer to the "decision" as follows:

> [2] The March 1, 2021 letter is authored by Gayle Leith, Senior Decision-Maker of the Case Management Branch of Immigration, Refugees and Citizenship Canada. Paragraph 2 of the letter states:
>
> > I have reviewed the application and the documents provided in support of the application. My purpose in writing is to inform you of my concerns with the information and evidence you have submitted in support of your request that [the Minor Applicant] be used a citizenship certificate pursuant to subsection 3(1)(b) of the *Citizenship Act* on the basis that he is a Canadian citizen by descent.
>
> [3] The letter goes on to state that "following my review of the information and evidence submitted in support of the application, it appears that [the Minor Applicant] may not be entitled to a Canadian citizenship certificate as he is not described under paragraph 3(1)(b) of the *Citizenship Act*". The letter goes on to detail the background, including the communications between the Applicants and the Minister.
>
> [4] Ms. Leith then states that she has concerns that the Applicant has not provided sufficient evidence or documentation to establish that the Applicant is the biological or legal parent of the Minor Applicant. The reasons for Ms. Leith's concerns are particularized in the letter.

> [5] At the conclusion of the letter, Ms. Leith states:
>
> > Given the above information, I am writing to provide you with the opportunity to respond to my concerns. You have 30 days from the date of this letter to submit evidence or documentation which responds to my concerns….
> >
> > If you do not respond to this request within 30 days, the application will be assessed based on the information currently on file. If this is the case, you will receive a letter to inform you of my decision.
>
> [6] It would appear that the deadline for responding to the letter was extended by another 90 days by letter dated April 12, 2021, such that a decision on the Canadian citizenship certificate application has not yet been rendered.

[4] The Respondent moved to strike the Applicants' Application for Judicial Review on the grounds that no "decision" had been made, within the scope of sections 18 and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c-F-7.

[5] Prothonotary Aylen (as she then was) granted the Respondent's Motion. She decided that the letter of March 1, 2021 was not a "decision" and accordingly, it was not subject to judicial review. Second, she determined that the Application was premature since no "decision" had been made concerning the citizenship status of the Minor Applicant. Third, she found that the Application was improperly constituted since section 22.1 of the *Citizenship Act*, R.S.C., 1985, c. C-29, provides that an application for judicial review can be made only with leave of the Court. Prothonotary Aylen (as she then was) found that since no leave was obtained, this was another basis for dismissing the Application.

[6] The Applicants appealed the Order, pursuant to Rule 51(1) of the Rules by a Notice of Motion filed on June 18, 2021 and seek the following relief:

- An Order setting aside the Order of Prothonotary Aylen (as she then was) dated June 8, 2021 and permitting the Application for Judicial Review without the requirement to first obtain the Court's Leave
- An Order directing the Respondent to deliver certified copies of the Tribunal Record
- Leave to appeal the motion decision of Justice Furlanetto dated June 1, 2021
- Any other relief the Honourable Court deems just and appropriate

[7] In general, the Applicants argue that Prothonotary Aylen (as she then was) erred in fact and in law, that she "could not fully understand the primary purpose" of the Application for judicial review, that she did not "consider or understand" the arguments, and did not apply the correct legal test.

[8] The Respondent filed a responding Motion Record. He raises a preliminary objection to the inclusion of affidavit evidence in the Applicant's Motion Record, on the grounds that the appeal is to be determined on the basis of the material that was before the decision maker. He submits that the Court should give no weight to the affidavit evidence and that in any event, this evidence does not assist in determining if Prothonotary Aylen (as she then was) made a reviewable error.

[9] Otherwise, the Respondent argues that there is no "identifiable error" in the Order, that there is "no decision" to ground an application for judicial review and that the appeal should be dismissed with costs in the amount of $1000.00.

[10] The applicable test upon appeal from a decision of a Prothonotary is set out in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, [2017] 1 F.C.R. 331 at paragraphs 27 and 66, as follows:

> [27] …A discretionary decision made by a prothonotary is clearly wrong, and thus reviewable on appeal by a judge, where it is based: (1) upon a wrong principle – which implies that correctness is required for legal principles – and (2) upon a misapprehension of facts – which seems to be the equivalent of the "overriding and palpable error" criterion of the *Housen* standard if it caused the prothonotary's decision to be "clearly wrong".
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> …
>
> [66] In *Housen*, the Supreme Court enunciated the standard of review applicable to decisions of trial judges. More particularly, it concluded that with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness (paragraphs 19 to 37 of *Housen*).

[11] I agree with the submissions of the Respondent about the affidavit evidence submitted by the Applicant in this appeal.

[12] The Principal Applicant submitted his own affidavit, attested to on June 17, 2021. The affidavit refers to ten (10) exhibits.

[13] This material is not relevant to the matter before me, which is an appeal from the Order. The Principal Applicant's affidavit, including the exhibits, will not be considered.

[14] I turn now to the merits of the appeal.

[15] By her Order, the Prothonotary (as she then was) struck out the Applicant's Application for judicial review, without leave to amend, on the basis of prematurity. In doing so, she considered the relevant jurisprudence , including the decisions in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 and *CB Powell Limited v. Canada*, [2011] 2 F.C.R. 332.

[16] No decision has yet been made in respect of the Minor Applicant. Without a "decision", there is no basis for an application for judicial review. I refer to subsection 18.1 (2) of the *Federal Courts Act*, *supra* which provides as follows:

Time limitation	**Délai de présentation**
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or	**(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

allow before or after the end
of those 30 days.

[17] The Prothonotary did not err in striking out the Application for judicial review on the grounds of prematurity.

[18] Neither did the Prothonotary err in observing that the Applicants' failure to obtain leave to commence an application for judicial review. Section 22.1 of the *Citizenship Act*, *supra* provides as follows:

Application for judicial review only with leave	**Contrôle judiciaire sur autorisation seulement**
22.1 (1) An application for judicial review with respect to any matter under this Act may be made only with leave of the Court.	**22.1 (1)** Toute demande de contrôle judiciaire concernant toute question relevant de l'application de la présente loi est subordonnée à l'autorisation de la Cour.

[19] Likewise, I see no reviewable error in the Prothonotary's finding that the relief sought by the Applicants, with the exception of paragraph (a) of the Application, is not available upon an application for judicial review. Upon an application for judicial review, the Court is limited to the remedies set out in subsection 18(1) of the *Federal Courts Act*, *supra*. The Court has no authority to change a statutory requirement, in this case the requirement to obtain leave pursuant to section 22.1 of the *Citizenship Act*, *supra*.

[20] In the result, the Applicants' appeal is dismissed.

[21] The Respondent seeks costs, if successful in resisting the Applicants' appeal. He has cited relevant jurisprudence in support of his request, in particular the decision in *Curtis v. Canadian Human Rights Commission et al*, 2019 FC 43.

[22] Pursuant to Rule 400, costs lie in the discretion of the Court.

[23] The Respondent seeks costs in the amount of $1000.00. He argues that the appeal is essentially an attempt to engage the Court in reweighing the evidence in a decision involving the exercise of discretion by the decision maker.

[24] The circumstances in *Curtis, supra* are different. Mr. Curtis has a long history of litigation in the Court.

[25] There is no evidence of such a litigation history in the present case.

[26] Nonetheless, the Applicants' appeal had little chance of success and there is merit in the Respondent's submissions that the Applicants wanted the Court to reweigh the evidence that was before the Prothonotary.

[27] In the circumstances, a modest costs award is appropriate. In the exercise of my discretion pursuant to Rule 400 of the Rules, I award costs to the Respondent in the amount of $250.00.

ORDER in T-542-21

THIS COURT'S ORDER is that the motion is dismissed, with costs to the Respondent in the amount of $250.00.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-542-21
STYLE OF CAUSE:	QAISAR MUSTAFA KHAN, EBRAHEEM MUHAMMAD KHAN MUSTAFA (MINOR APPLICANT) v. THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT ST. JOHN'S, NEWFOUNDLAND AND LABRADOR PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS AND ORDER:	HENEGHAN J.
DATED:	NOVEMBER 23, 2021

WRITTEN REPRESENTATIONS BY:

Qaisar Mustafa Khan	FOR THE APPLICANTS (SELF REPRESENTED)
Katherine Creelman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT