Date: 20080502

Docket: A-37-08

Citation: 2008 FCA 171

Present: **EVANS J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CANADIAN COUNCIL FOR REFUGEES,
CANADIAN COUCIL OF CHURCHES,
AMNESTY INTERNATIONAL, and
JOHN DOE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 2, 2008.

REASONS FOR ORDER BY: EVAN J.A.

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REASONS FOR ORDER

EVANS J.A.

[1] I have before me a motion in writing brought on behalf of Her Majesty the Queen, the appellant, to adduce fresh evidence in an appeal from a decision of the Federal Court (*Canadian Council for Refugees v. Her Majesty the Queen*, 2007 FC 1262), which is to be heard by this Court later this month. The respondents oppose the motion.

[2] In the decision under appeal, Justice Phelan granted an application for judicial review by the Canadian Council for Refugees and others, and held invalid sections 159.1-159.7 of the

Immigration and Refugee Protection Regulations, SOR/2002-227, and the Safe Third Country Agreement between Canada and the United States of America.

[3] On the basis of the evidence adduced before him, Justice Phelan held that it was unreasonable for the Governor in Council to have designated the United States as a safe third country the policies and practices of which complied with Article 33 of the Refugee Convention and Article 3 of the *Convention Against Torture*. Accordingly, he held that the Agreement and the impugned provisions of the Regulations were *ultra vires* the enabling legislation, section 102 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), and violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and were not saved by section 1.

[4] One aspect of refugee protection policy and practice of the United States discussed by Justice Phelan concerned the exclusion from refugee protection of those involved with terrorism, including persons who have provided "material support" to terrorist activities or organizations. However, United States' law permits the waiver of the terrorism exclusion. Justice Phelan held that these provisions were overbroad and could result in the *refoulement* of refugees contrary to Article 33 of the Refugee Convention, including those who had been coerced into providing "material support" to a terrorist group. This finding was one of the bases of his conclusion that it was unreasonable for the Governor in Council to have designated the United States as being in compliance with the Refugee Convention.

[5] The fresh evidence sought to be adduced by the appellant is contained in a third supplementary affidavit (supported by four exhibits) affirmed by Professor David A. Martin, an expert in immigration and refugee law in the United States. It describes legal developments in the United States concerning the terrorism exclusion and waiver, which occurred after February 2007, when the hearing before Justice Phelan was held.

[6] The fresh evidence comprises notices published in the Federal Register in March 2007 applying the waiver to certain named groups, notices published in March and May 2007 setting up a procedure for waiving, case-by-case, the exclusion of those who had provided "material support" under duress to terrorist groups or activities, statutory changes respecting the use of waivers, and a summary describing these developments.

[7] This evidence is designed to respond to Justice Phelan's finding (at para. 186) that there was "insufficient evidence that the waiver, either in principle or in practice ameliorates the unusually harsh provisions of the U.S. law." Justice Phelan was advised at the hearing that the Department of Homeland Security was in the process of developing policy on the application of the waiver to asylum cases. Thus, in a sense, Professor Martin's affidavit merely "updates" evidence that had been before the Applications Judge.

[8] Fresh evidence is admissible pursuant to rule 351 of the *Federal Courts Rules,* SOR/98-106, in "special circumstances". This is a limited exception to the general principle that the function of an appellate court is to determine whether the decision of the court below is erroneous, based on the

materials that were before it. In determining whether “special circumstances” exist, the Court must consider whether the fresh evidence was discoverable with reasonable diligence before the end of the trial, is credible, and is practically conclusive of the appeal. Evidence which does not satisfy these three tests may still be admitted “if the interests of justice require it.” See *Humanist Assn. of Toronto v. Canada*, 2002 FCA 322 at para. 4.

Reasonable diligence

[9] Since Professor Martin’s affidavit provides evidence of events occurring after the hearing of the application of judicial review, it is not evidence that could have been “discovered” in time to put before the Judge.

[10] However, it is relevant to consider whether the affidavit could reasonably have been brought to the attention of this Court earlier: Justice Phelan’s reasons were issued on November 29, 2007, notice of the present motion was given on April 11, 2008, and the appeal is to be heard on May 21, 2008. As I have noted, the publications in the Federal Register attached as Exhibits A and B to the affidavit appeared more than a year ago. The legislative amendments (Exhibit C) are dated December 2007, and a synopsis by Human Rights First of the changes to the terrorism exclusion provisions is dated January 29, 2008 (Exhibit D).

[11] In my opinion, this evidence, especially the Federal Register publications, could reasonably have been adduced earlier than in April 2008, just over a month before the appeal is to be heard.

Credibility

[12] The affidavit and the exhibits appear credible, in the sense that they prove the policy and legislative changes with which they are concerned. However, as explained below, this evidence is incomplete.

Practically conclusive of the appeal

[13] Although the appellant takes the position in her memorandum of fact and law filed to support the appeal that Phelan J. could not conduct the factual assessment that was embarked upon, the motion appears to be brought in support of the appellant's contention that, in any event, compliance with Article 33 of the Refugee Convention was in fact demonstrated. I am not persuaded that the affidavit and the attached exhibits are "practically conclusive" of this aspect of the appeal. First, the terrorist exclusion and waiver provisions comprised only one of four issues which Justice Phelan found undermined the reasonableness of the Governor in Council's conclusion that the United States was in compliance with Article 33 of the Refugee Convention. In addition, Justice Phelan found that it was unreasonable for the Governor in Council to have concluded that the United States complied with Article 3 of the *Convention against Torture*, and that the Governor in Council had failed to keep under review the Agreement and the conditions for refugee claimants in the United States, as required by subsection 102(3) of *IRPA*.

[14] I appreciate that Justice Phelan noted that the issues in dispute, including the terrorist exclusion issue, "which individually and *more importantly collectively*" [emphasis added], undermined the reasonableness of the Governor in Council's conclusion. However, he also held the

Regulations to be invalid on unrelated grounds, namely an unreasonable conclusion by the Governor in Council that the United States complies with Article 3 of the *Convention against Torture* and the Governor in Council's failure to perform the review required by subsection 102(3) of *IRPA*.

[15] The respondents further submit that policy or statutory changes are only a part of the picture, because subsection 102(2) of *IRPA* also requires consideration of a designated state's *practices* concerning refugee protection. Professor Martin does not address the on-the-ground effects of the changes he describes.

[16] In view of the above considerations, I am not persuaded that the fresh evidence is "practically conclusive" of the appeal

The interests of justice

[17] The respondents submit that it would be unfair to admit this affidavit and its exhibits without also permitting them to: adduce evidence on the extent to which the legislative and policy changes on the grant of waivers from the terrorism exclusion rule have been implemented in practice; cross-examine Professor Martin; and introduce fresh evidence on other relevant developments in the United States' refugee protection system. This Court could then be put in the inappropriate position of fact-finder. To admit the fresh evidence may well require an adjournment of the hearing of the appeal.

[18] The interests of justice would not be served by further complicating an already complex record, nor by delaying the disposition of this important matter, especially since a stay has been granted of Justice Phelan's order pending the disposition of the appeal.

[19] For all these reasons, the motion will be dismissed.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-37-08
STYLE OF CAUSE:	*Her Majesty The Queen v. Canadian Council For Refugees, Canadian Council of Churches, Amnesty International and John Doe*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Evans J.A.
DATED:	May 2, 2008

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