

**Date: 20080514**

**Docket: A-376-07**

**Citation: 2008 FCA 179**

**Present: RICHARD C.J.**

**BETWEEN:**

**MINISTER OF CITIZENSHIP AND IMMIGRATION  
and THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Appellants**

**and**

**MOHAMED HARKAT**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 14, 2008.

**REASONS FOR ORDER BY:**

**RICHARD C.J.**

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**REASONS FOR ORDER**

[1] This is a motion brought in writing by the respondent pursuant to Rule 369 of the *Federal Courts Rules* for an Order:

- a) granting costs in this matter to be paid on a solicitor-and-client basis for all aspects of this appeal, including the Application to Certify Questions and
- b) for Directions pursuant to Rule 403.(1) to the assessment officer respecting the costs in this matter.

[2] The grounds for the motion are as follows:

- a) On March 31, 2008 the appellants filed a Notice of Discontinuance of this appeal.
- b) The appeal had been perfected and was scheduled to be argued on May 6, 2008.
- c) Rule 400(6)c) allows the Court to order all or part of the costs on a solicitor-and-client basis.
- d) The Notice of Discontinuance of the appeal was sent out in response to a motion in writing to terminate the appeal filed with the Court on March 18, 2008.
- e) The unique circumstances of the matter, having regard to it being a total waste of the Court's time, is a "special reason" to justify a costs award against the appellants.

[3] In response the appellants allege that the appeal was brought in good faith in order to have this Court answer the serious questions certified by the motions judge and when new legislation was passed in February 2008 the transitional provisions effectively terminated the proceeding underlying the appeal. After the respondent brought a motion to dismiss the appeal for mootness, the appellants discontinued the appeal.

[4] The appellants position is that there has been no delay or misconduct on their part and there are therefore no special reasons to award costs, let alone solicitor-and-client costs.

[5] Since this appeal is subject to the *Federal Courts Immigration and Refugee Protection Rules* there can be no award of costs on an appeal absent special reasons. Rule 22 reads as follows:

22. Not costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the court, for special reasons, so orders.

[6] Based on the record I find that there are no special reasons to award costs of this appeal, let alone costs on a solicitor-and-client basis.

[7] The judgment under appeal was delivered on May 11, 2007. Pursuant to subsection 74(d) of the *Immigration and Refugee Protection Act* the Federal Court Judge certified three serious questions of general importance on August 13, 2007.

[8] The three certified questions are as follows:

1. Did the Federal Court judge err in his interpretation of the Supreme Court's decisions in *Charkaoui* and *Suresh* in that they do not require a stay of the judicial review proceedings in this case?
2. Did the Federal Court judge err in law in that he ordered the stay based on speculation that a future evidentiary record, in this case, would be materially different from the present record?
3. Is the Supreme Court's determination in *Charkaoui* that detention reviews and reasonableness hearings can proceed under the existing IRPA scheme during the one-year period of suspension inconsistent with the Federal Court judge's decision in this case that the judicial review cannot proceed during the one-year period of suspension?

[9] Given that the motions judge certified three separate questions on the grounds that they were serious questions or general importance it cannot be claimed that the appeal was frivolous or vexatious.

[10] On October 22, 2007, Bill C-3 was introduced in Parliament. The new legislation significantly amended the security certificate process, in response to the Supreme Court's judgment in *Charkaoui*.

[11] On February 22, 2008, Bill C-3 came into force. Section 8 of the transitional provisions terminated any existing proceeding involving the respondent relating to section 112 or 115 of the IRPA, including the decision underlying the judicial review proceeding.

[12] On March 18, 2008, the respondents brought a motion to dismiss the appeal for mootness. On March 31, 2008, the appellants wholly discontinued this appeal.

[13] The test for awarding solicitor-and-client costs is whether a party has engaged in reprehensible, scandalous or outrageous conduct *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817 at 864. On reviewing the record the test for solicitor-and-client costs has not been met and this is not an appropriate situation to award costs on a solicitor-and-client basis.

[14] The respondent also requests that costs of the interlocutory steps leading up to the appeal be granted. The Federal Court's order certifying the three questions is silent as to costs and I see no reason to disturb this decision.

[15] Accordingly the motion for costs will be dismissed.

“J. Richard”

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C.J.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-376-07

**STYLE OF CAUSE:** Minister of Citizenship and  
Immigration and the Minister of  
Public Safety and Emergency  
Preparedness

and

Mohamed Harkat

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** RICHARD C.J.

**DATED:** May 14, 2008

**WRITTEN REPRESENTATIONS BY:**

Donald MacIntosh FOR THE APPELLANTS

Paul Copeland FOR THE RESPONDENT  
Matthew Webber

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