

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20081126

Docket: A-51-08

Citation: 2008 FCA 367

Present: LÉTOURNEAU J.A.

IN THE MATTER OF a certificate under subsection 77(1) of the
Immigration and Refugee Protection Act, SIGNED BY THE
Minister of Immigration and the Solicitor General of Canada (Ministers)
S.C. 2001, c. 27 (IRPA);

IN THE MATTER OF the referral of this certificate to the Federal Court of Canada
under subsection 77(1) and
sections 78 and 80 of the IRPA;

IN THE MATTER OF a motion to quash subpoenas *duces tecum* filed by
Joël-Denis Bellavance and Gilles Toupin and the
objections resulting from questions raised on an examination on affidavit;

AND IN THE MATTER OF
Adil Charkaoui

BETWEEN:

JOËL-DENIS BELLAVANCE
and
GILLES TOUPIN

Appellants

and

ADIL CHARKAOU
and
MINISTER OF CITIZENSHIP AND IMMIGRATION
and
SOLICITOR GENERAL OF CANADA

Respondents

Written motion decided without appearance by parties.

Order made at Ottawa, Ontario, on November 26, 2008.

REASONS FOR ORDER BY:

LÉTOURNEAU J.A.

Federal Court
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REASONS FOR ORDER

LÉTOURNEAU J.A.

[1] The appellants, who are journalists, are applying to the Court to determine the content of the appeal book, the parties having been unable to agree on the issue.

[2] They are challenging a decision of Justice Simon Noël of the Federal Court in which he dismissed their motion to quash the subpoenas *duces tecum* and the objections to the questions asked of one of them during his examination on affidavit.

[3] The respondent, Mr. Charkaoui, filed a motion to dismiss the appeal, which was dismissed. At that time, the appellants were granted leave to file an amended notice of appeal: see Justice Trudel's order dated July 15, 2008.

[4] At the heart of the debate on appeal are the amendments made to the legislative scheme applicable to immigrants and refugees by the *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3 (Bill C-3).

[5] When the amendments came into force, the Federal Court had not yet ruled on the reasonableness of certificate DES-3-03 issued against the respondent Mr. Charkaoui.

[6] An important result of these amendments can be found in subsection 7(1) of Bill C-3, where it is stipulated that “[a] proceeding relating to the reasonableness of a certificate referred to the Federal Court under subsection 77(1) of the Act is terminated” on the coming into force of this Act. The Act refers here to the amended legislation, namely the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[7] Clearly, the termination of the current proceeding and the issuance of a new security certificate raised questions, *inter alia*, with regard to the very validity of the orders for subpoenas *duces tecum* made in this proceeding and the rejection of the objections made during the examination on affidavit of one of the appellants.

[8] According to the amended notice of appeal, the issues raised by the parties are the following:

[TRANSLATION]

The issue to be determined is the following: does Bill C-3 which terminated the proceeding relating to the reasonableness of certificate DES-3-3 render the judgment under appeal moot and unenforceable?

Alternatively, the questions raised by the present appeal are the following:

- a) Did the trial judge err in refusing to recognize that the protection of the identity of journalistic sources is entrenched in paragraph 2(b) of the Charter?
- b) Did the trial judge err in concluding that the examinations of the journalists were required for the motion for a stay of proceedings relating to security certificate DES-3-03?

c) Did the trial judge err in concluding that the journalists' publication of the information contained in the article published in *La Presse* newspaper on June 22, 2007, was unlawful?

d) Did the trial judge err in factually and legally obliging the journalists to guarantee the confidentiality of the information justifying security certificate DES-3-03?

e) Did the trial judge err in his interpretation and application of the *Wigmore* tests?

[9] The appellant proposed two draft agreements on the appeal book. The drafts were approved by the respondent Ministers but not by Mr. Charkaoui, who wishes to include many other documents, such as:

[TRANSLATION]

All the correspondence between the parties and/or with the Court regarding the motions filed at trial (stay of proceedings, quashing of subpoenas, dismissal of the appeal, etc.);

All judgments and instructions concerning the motions filed at trial (stay of proceedings, quashing of subpoenas, dismissal of the appeal, etc.);

All minutes of telephone conversations held in relation to the motions filed at trial (stay of proceedings, quashing of subpoenas, dismissal of the appeal, etc.);

All the documents relied upon and cited (including all exhibits) in support of the motions filed at trial (stay of proceeding, quashing of subpoenas, dismissal of the appeal, etc.);

All exhibits from docket DES-3-03 . . .;

Charkaoui judgment 2007 SCC 9, Justice Lemieux's judgement 2008 FC 765 . . .;

Order bringing Bill C-3 into force . . .; and

Private document filed before Justice Noël (*ex parte* on July 13)

[10] Mr. Charkaoui also wants to add the following basket clause to the agreement on file:

[TRANSLATION]

It is agreed that if it is useful or relevant to the issues, the parties may refer to all exhibits of docket DES-3-03.

I agree with the appellants that Mr. Charkaoui's claims go far beyond the framework necessary for resolving their appeal. Several are simply not warranted and flout Rule 344(1) of the *Federal Courts Rules*.

[11] It should not be forgotten that the appellants are merely the interveners in a dispute in which Mr. Charkaoui called them to testify for a motion for a stay of proceedings concerning the security certificate. They do not necessarily have access to the material in file DES-3-03, particularly that which is confidential.

[12] Moreover, the appeal is not concerned with the reasonableness of the certificate or the motion for a stay of proceedings in docket DES-3-03. It is limited to the decision on the motion to quash subpoenas *duces tecum* and the objections made during the examination on affidavit.

[13] The irrelevance of some of Mr. Charkaoui's claims becomes clear when one considers that he wants to include Justice Lemieux's judgement in the appeal book for example. The *Lemieux* judgment refers to a decision made in docket DES-4-08 in which the Federal Court dismissed Mr. Charkaoui's motion for a temporary stay of the review of the reasonableness of the security certificate issued against him on February 22, 2008.

[14] In the interest of justice, [TRANSLATION] “the content of the appeal book”, as the appellants suggest, [TRANSLATION] “should be limited to the documents that are required to resolve the issues under appeal, the documents that were filed at trial and define the issues under appeal, and the documents that are relevant”.

[15] Consequently, the appeal book shall be comprised of the exhibits listed in Schedule A of the proposed order contained at Tab 4 of the appellants’ motion record.

“Gilles Létourneau”

J.A.

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-51-08

STYLE OF CAUSE: Joël-Denis Bellavance and Gilles
Toupin v. Adil Charkaoui *et al*

WRITTEN MOTION DECIDED WITHOUT APPEARANCE BY PARTIES

REASONS FOR ORDER BY: LÉTOURNEAU J.A.

DATED: November 26, 2008

WRITTEN REPRESENTATIONS:

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FOR THE APPELLANTS

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Charkaoui

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