**Date: 20070314**

**Docket: A-134-06**

**Citation: 2007 FCA 109**

**CORAM:** **NADON J.A.**
**SHARLOW J.A.**
**MALONE J.A.**

**BETWEEN:**

**JOSE VALLE LOPEZ**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA,**
**MINISTER OF CITIZENSHIP AND IMMIGRATION, and**
**SOLICITOR GENERAL OF CANADA**

**Respondents**

Heard at Toronto, Ontario, on March 14, 2007.

Judgment delivered from the Bench at Toronto, Ontario, on March 14, 2007.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Toronto, Ontario, on March 14, 2007)**

**SHARLOW J.A.**

[1] This is an appeal of a judgment of Chief Justice Lutfy (2006 FC 347) granting the motion of the respondents to strike the application of the appellant Mr. Lopez.

[2] It is well established that an application in the Federal Court will not be struck unless it is so clearly improper as to be bereft of any possibility of success: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.),* [1995] 1 F.C. 588. It is argued for Mr. Lopez that Chief Justice Lutfy misapplied that test. We do not agree, and will dismiss this appeal for the following reasons.

[3] Mr. Lopez is the subject of an admissibility hearing to be conducted under subsection 44(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, on the basis of the report of an immigration officer that Mr. Lopez is inadmissible.

[4] Mr. Lopez has given notice to the Attorney General that he expects to disclose at his admissibility hearing information that he believes to be "sensitive information" or "potentially injurious information" within the meaning of section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. That notice was given to comply with section 38.01 of the *Canada Evidence Act*.

[5] The sensitive or potentially injurious information is described in the section 38.01 notice as follows:

> 1. Mr. Valle Lopez will provide details of the manner in which he was trained to commit crimes against humanity;
>
> 2. He will provide details, including names, of the relationship between the Honduran Army and the members of the United States Armed Forces and members of other United States governmental agencies who at the request of the government of Honduras and with the consent of the United States government trained him in methods and techniques to use in committing crimes against humanity;
>
> 3. He will provide details, particularly including the names and photographs of individual members of the CIA who personally trained him in methods and techniques to use in committing crimes against humanity;
>
> 4. He will provide details of the documents, created and provided to him

by representatives of the Untied Sates government, to assist in his training to commit crimes against humanity, such as the CIA Torture Manual of that date;

5. He will provide details, including identity, of not less than one current senior member of the administration of the current United States president Bush who actively, knowingly and enthusiastically participated and facilitated Mr. Valle Lopez education in how to commit crimes against humanity in a manner consistent with the standards and practices expected of those trained to commit such crimes on behalf of the united States of America;

6. He will provide details of how he arranged through the United Nations High Commission for Refugees to flee Honduras and gain asylum in the Canadian embassy in Mexico City, in order to provide testimony of the existence and nature of crimes against humanity that were being organized and conducted by and on behalf of the government of Honduras, with the assistance of the government of the United States;

7. He will provide evidence that the Canadian government was aware that he had committed crimes against humanity prior to being given permission to enter the Canadian embassy in Mexico City;

8. He will give evidence of his continuous stay within the Canadian embassy while he was debriefed regarding his training for, and commission of crimes against humanity;

9. He will give evidence of the names and identity of the individuals acting on behalf of the Canadian government who debriefed him, or with whom he had conversations regarding these matters;

10. He will give evidence of the documents he generated himself while

being debriefed over a period of days, the documents prepared by these individuals for his review and for his confirmation of their contents, and of the contents of conversations between himself and these individuals regarding these matters;

11. He will give evidence that the Canadian government was well aware of the totality of his training and of the crimes against humanity committed by him prior to his being granted a Minister's permit to enter Canada, including confirmation that these crimes included murder, which was an offence sufficiently serious at the time to bar Mr. Valle Lopez from entry into Canada without a Minister's permit;

12. He will give evidence that the Canadian government has admitted into Canada, since the Crimes Against Humanity legislation received royal assent, one or more individuals associated with, or member of, the United States and/or Honduran governments, who it knew at that time to have been inadmissible due to information provided to the Canadian government by Mr. Valle Lopez in Mexico City;

13. He will give evidence that he did not omit any relevant information during this process in general and in particular that to the best of his knowledge nothing such as would constitute new evidence before the Minister sufficient for the Minister to initiate admissibility proceedings can or does exist.

[6] Section 38.03 permits the Attorney General to authorize the disclosure of any information set out in a section 38.01 notice, subject to such conditions as the Attorney General thinks appropriate. Subsection 38.04(2) provides, among other things, that if the Attorney General authorizes the disclosure of only part of the information in a notice, or authorizes disclosure subject

to conditions, the Attorney General "shall" apply to the Federal Court for an order. That application begins a process in which the Federal Court may make a number of determinations, including a determination as to whether or not to authorize the disclosure and on what terms.

[7] In this case the Attorney General responded to Mr. Lopez' notice with a letter stating as follows:

> The Attorney General of Canada has now reached a decision with respect to the disclosure of this information and is authorizing the disclosure of all the information referred to in the Notice. Please note, however, that the authorization to disclose information extends only to the information that appears on the face of the thirteen paragraphs; specifically, this authorization should not be understood to be authorization to disclose the details and documents that are alluded to in the thirteen paragraphs but that are not either included or described in those paragraphs. You will understand that the Attorney General of Canada cannot make a decision with respect to the disclosure of information of which he is unaware.

[8] Counsel for Mr. Lopez responded with a letter pointing out that the documents referred to in the notice are in the possession of the Attorney General, and asserting that Mr. Lopez intends to disclose all evidence to which the notice refers, directly or indirectly. He also filed a notice of application seeking four alternative remedies, which may be summarized as follows:

(1) a declaration that the Attorney General is required by law to bring an application under paragraph 38.04(2)(a) of the *Canada Evidence Act*,

(2) an order compelling the Attorney General to bring such an application,

(3) a declaration that, if the Attorney General does not bring such an application, Mr. Lopez is free to give any and all evidence in his own defence in the admissibility hearing, or

(4) a declaration that certain provisions of the *Canada Evidence Act* are unconstitutional.

[9] It is that application that the respondents moved to strike. Chief Justice Lutfy granted the motion on the basis that an essential precondition for an application under subsection 38.04(2) is a decision by the Attorney General to authorize only part of the information in the section 38.01 notice, or to impose conditions on the disclosure. He read the Attorney General's letter as an unconditional authorization to disclose the information in the notice. We read that letter the same way. That compels the conclusion that there is no foundation for an application under subsection 38.04(2), and necessarily defeats the application of Mr. Lopez for the first and second remedies listed above.

[10] As to the third remedy, Chief Justice Lutfy said (at paragraph 23 of his reasons), and we agree, that if there is any evidence Mr. Lopez wishes to present at the admissibility hearing that is not mentioned specifically in the section 38.01 notice he has given, he is free to give a further notice. That can be done by a formal notice now or in the course of the hearing as the need arises. Until he does so, the application discloses no factual foundation for the third remedy listed above. Similarly, until the proper procedure is played out, there is no factual foundation for a constitutional challenge.

[11] This appeal will be dismissed with costs, fixed at $1,000.00.

"K. Sharlow"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-134-06 |
| **STYLE OF CAUSE:** | JOSE VALLE LOPEZ |
| | Appellant |
| | and |
| | ATTORNEY GENERAL OF CANADA ET AL. |
| | Respondents |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | March 14, 2007 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | (NADON, SHARLOW & MALONE JJ.A.) |
| **DELIVERED FROM THE BENCH BY:** | SHARLOW J.A. |

**APPEARANCES:**

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| Jan Brongers | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

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| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENTS |