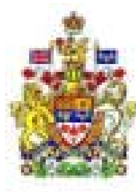
Federal Court of Appeal



Cour d'appel fédérale

Date: 20120220

Docket: A-483-11

Citation: 2012 FCA 59

CORAM: **LAYDEN-STEVENSON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

AL-MUNZIR ES-SAYYID

Appellant

and

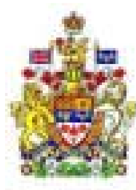
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on February 16, 2012.

Judgment delivered at Ottawa, Ontario, on February 20, 2012.

REASONS FOR JUDGMENT: THE COURT

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT OF THE COURT

[1] The appellant, a Convention refugee, wants to remain in Canada. The Minister disagrees. He issued a danger opinion: the appellant is a danger to the public and would not be at risk if returned to his country of origin because of changed country conditions. Based on this danger opinion, the Minister intends to enforce a removal order against the appellant.

[2] In response, the appellant filed an application for leave and judicial review of the danger opinion in the Federal Court. He also moved for a stay of the removal order.

[3] On the stay motion, the parties filed evidence and written submissions. Oral submissions were received by way of teleconference. The Federal Court (*per* Justice Shore) denied the stay: 2011 FC 1489. This is an appeal from that decision.

[4] In this appeal, the appellant seeks to quash the denial of the stay on the basis that the judge is biased. The appellant does not suggest that the judge is biased in all cases. Indeed, the appellant stated in this Court that the judge is conscientious and takes each case seriously. Rather, the appellant says that the judge has a bias only in a limited category of cases – this case falling within it – namely cases where criminality is involved. Further, the judge's bias is said to be "unconscious," stemming from a "fixation" about "enforcement."

[5] For the reasons that follow, we would dismiss the appeal.

A. The stay motion in the Federal Court

[6] In the immigration context, the leading case on stays is *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.). Although pre-dating the Supreme Court's seminal stay decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, *Toth* is not inconsistent with that decision, as both are based on *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.).

[7] To grant a stay, the Court must be convinced that a serious issue exists, irreparable harm would result if the removal is not stayed, and the balance of convenience favours staying the removal. The test is conjunctive. All three branches must be satisfied.

[8] We shall set out a brief summary of the facts relevant to the parties' arguments concerning the stay motion in the Federal Court in order to situate the issues that the judge had to consider.

[9] At the time of the stay motion, the appellant was twenty-two years of age and has been in Canada since he was seven.

[10] Central to the appellant's submissions on the stay motion was his allegation that he faces danger if he were removed from Canada and sent back to Egypt. This danger stems from his parents' persecution in Egypt, including instances of extrajudicial detention and torture. While out of Egypt, his father was convicted *in absentia* for ties to terrorist groups. Ultimately, the appellant and his family fled to Canada and claimed refugee protection. Today, the appellant says he has no relationship with his parents' extended family, and has no memory of ever living in Egypt. Some of his close relatives are now naturalized Canadians.

[11] Among other things, the appellant contended that although the regime in Egypt had changed, the old security apparatus remains and poses a threat to the appellant.

[12] In response to the stay motion, the Minister emphasized the appellant's criminal record in Canada. Over the last seven years, the appellant was convicted of armed robbery, robbery, conspiracy to commit robbery, theft, carrying a concealed weapon, assault, possession of heroin while incarcerated, uttering threats, possession of property obtained by crime, and obstructing a police officer. This is only a partial summary of the convictions. Some victims were female escorts and patrons at a private club. Weapons included a knife and a shotgun.

[13] The Minister, relying on the danger opinion, submitted in the Federal Court that the appellant no longer has a well-founded fear of persecution in Egypt and no longer faces a risk of harm in Egypt. In the Minister's view, the regime in Egypt has been overthrown, members of the group Al Jihad (of which the appellant's father was allegedly once a member) have been released from prison, and arrests currently happening in Egypt do not involve family members of persons considered to be former political dissidents.

[14] As stated earlier, the parties filed their materials and written evidence. The stay motion came before the judge. A teleconference hearing took place.

[15] At the outset of the teleconference hearing, the appellant alleged that the judge was biased in cases involving criminality. He asked the judge to recuse himself. At this time, the appellant referred only to statistics compiled by counsel concerning the Minister's success rate in cases such as this.

[16] Although it appears that an opinion report (the "opinion") analyzing the judge's cases was in preparation, it had not been finalized. Therefore, it was not filed before the judge in support of the allegation of bias.

[17] After receiving the parties' oral submissions on whether he should recuse, the judge declined to recuse himself. He assured counsel that he was not biased and that he approached each matter with an open mind.

[18] After receiving the parties' oral submissions on the merits of the matter, the judge reserved for a short time. Ultimately, he accepted the Minister's position and dismissed the stay motion, finding that none of the branches of the test for a stay had been met.

[19] In this Court, the appellant appeals from the refusal of the stay.

B. Events before the hearing of this appeal

[20] The appellant sought an interim stay in this Court, preventing his removal from Canada pending the disposition of this appeal. In support of this, the appellant filed the opinion that had been under preparation. This Court granted the interim stay by order dated January 6, 2012.

[21] The appellant has included the opinion in the appeal book. At the hearing of this appeal, this Court expressed concern that it should not have been included because it did not form part of the

evidentiary record before the Federal Court and considered by the judge. In response, the appellant attempted to justify its inclusion, relying upon time pressures, the quick pace of the matter, and the lack of advance notice about the identity of the judge hearing the stay motion in the Federal Court.

[22] The presence of the opinion in the motion record for the interim stay does not mean that it can be included in the appeal book. Normally only those materials that were before the Federal Court can be included in the appeal book.

[23] The appellant did not bring a formal motion to include the opinion as fresh evidence in this appeal, though some of his submissions can be taken as a plea to consider it on that basis. We need not consider whether the opinion could meet the test for fresh evidence because we find later in these reasons that the opinion is inadmissible and, in any event, owing to its flaws, is of no assistance to us on the issues in this appeal.

[24] Also filed for the first time on appeal was an affidavit attaching Department of Justice submissions in nine other cases. Like the opinion, it should not have been included in the appeal book without bringing a motion for fresh evidence. The affidavit is inadmissible.

C. The bias allegations

[25] As mentioned earlier, in this Court, the appellant again alleges bias. He relies on three particular grounds:

(1) The judge is unconsciously biased in cases such as this. Here, the appellant offers the opinion in support;

(2) The judge created a reasonable apprehension of bias by copying into his reasons dismissing the stay motion most of the Minister's written submissions, without attribution; and

(3) The judge created a reasonable apprehension of bias by delving far too deeply into the merits of the matter, rather than engaging in the normally cursory examination done under the "arguable case" branch of the test for granting a stay.

The appellant says that these three grounds support and reinforce each other and must lead to the conclusion that the judge should have recused himself.

D. Jurisdictional considerations

[26] The parties agree that there are severe jurisdictional restrictions on this Court hearing appeals in matters such as this.

[27] The decision under appeal is an interlocutory decision and, except in well-defined, narrow circumstances, appeals are not available. Paragraph 72(2)(*e*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") bars an appeal from an interlocutory judgment of the Federal Court. Paragraph 72(2)(*e*) appears in Division 8 of the Act. Provisions in Division 8, such as paragraph 72(2)(*e*), prevail over any inconsistent provisions of the *Federal Courts Act*, R.S.C. 1985, c. F-7, including the provisions concerning appeals: subsection 75(2) of the Act.

[28] The well-defined, narrow circumstances are where a judge refuses to exercise jurisdiction to decide the matter (*Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27) and where there is a reasonable apprehension of bias on the part of the judge (*Re Zundel*, 2004 FCA 394). However, this Court does not have jurisdiction to hear appeals based on submissions, even submissions that appear to possess considerable merit, that errors of law have been committed (*Mahjoub v. Canada*, 2011 FCA 294).

[29] In our view, based on these authorities, we find that this Court has jurisdiction to hear the appellant's appeal based on the ground that the judge was unconsciously biased and that his copying

of the Minister's written submissions without attribution created a reasonable apprehension of bias. These are the first and second of the three grounds for appeal set out above.

[30] The jurisdiction of this Court to consider the third ground raised by the appellant is more problematic. To reiterate, this was the judge's excessive delving into the merits of the matter under the arguable case branch of the stay test.

[31] Based on the reasons written by the judge, the judge did engage in a microscopic examination of the merits of the matter under the arguable case branch of the test, embarking upon twenty-four detailed paragraphs of each of the appellant's arguments concerning the danger assessment and a further eight detailed paragraphs concerning the risk assessment. Subject to certain well-defined exceptions, not present here, this is not the approach called for under the *Toth* test for a stay.

[32] In future cases, the approach followed by the judge should be avoided. Further, in the leave application in this case, the judge hearing the matter should disregard the judge's microscopic examination of the merits of the matter under the arguable case branch of the test.

[33] The appellant submits that the judge's approach is indicative of bias. To us, this is not a submission about bias. Instead, it smacks of a submission about the merits of the judge's decision-making, a matter that cannot be appealed to this Court.

[34] Therefore, remaining before us are two grounds offered by the appellant in support of bias, a matter that can be appealed to this Court. To reiterate, these are the grounds based on unconscious bias and the unattributed copying in the reasons.

E. Analysis

[35] The parties agree that the following test applies:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information… [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

(*Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394.)

(1) Alleged unconscious bias by the judge

[36] As mentioned previously, the opinion, authored by a law professor, has been offered in support of this ground.

[37] The opinion examines 54 of the judge's decisions in this area and purports to analyze them, placing particular emphasis on their outcomes, not on whether they were well-founded on the facts and the law. Ultimately, the opinion concludes that "it is more likely than not that [the judge] will enter a courtroom in these kinds of cases without the kind of open mind that is needed to give a fair hearing to both parties."

[38] As the Supreme Court has said, an allegation of bias of the sort made here "calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice": *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at paragraph 113.

[39] There is a strong presumption that judges will carry out their duties properly, and with integrity: *S.(R.D.)*, *supra* at paragraph 32 *per* L'Heureux-Dubé J. and McLachlin J. (as she then was), and at paragraphs 116-17 *per* Major J.; *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267 *per* Abella J.; *Wewaykum Indian Band v. Canada*, 2003 SCC 445, [2003] 2 S.C.R. 259 *per* McLachlin C.J. This presumption can be rebutted only by a "serious" and "substantial" demonstration made by "convincing evidence": *Wewaykum, supra* at paragraph 76; *S.(R.D.)*, *supra* at paragraph 32.

[40] The opinion offered in support of this allegation of bias falls well short of the mark. In fact, in these circumstances, for the reasons set out below, the opinion is inadmissible and, in any event, no weight can be accorded to it.

[41] First, the opinion is inadmissible. Expert evidence is admissible when it is "necessary in the sense that it provide[s] information 'which is likely to be outside the experience and knowledge of a judge'": *R. v. Mohan*, [1994] 2 S.C.R. 9, citing *R. v. Abbey*, [1982] 2 S.C.R. 24. Stripped to its essence, the opinion merely summarizes legal decisions, offers legal submissions on those decisions, and then expresses the author's personal views on the ultimate issue that is for this Court to decide, namely whether there is a reasonable apprehension of bias. In actuality, the opinion is analogous to a memorandum of fact and law. It fails the *Mohan* test.

[42] Second, at the hearing, we drew to the attention of counsel that Rule 52.2 of the *Federal Courts Rules*, SOR/ 98-106 had not been followed. That Rule sets out an exacting procedure that must be followed for the admission of expert evidence, a procedure that, among other things, is designed to enhance the independence and objectivity of experts on whom the courts may rely: see Rule 52.2(2) and the Code of Conduct for Expert Witnesses in the Schedule to the Rules.

[43] Third, and related to the non-compliance with Rule 52.2, we have grave concerns about the objectivity and independence of the opinion. There has been much judicial commentary on the desirability of experts being independent of the parties and objective and impartial in their opinions: see, for example, *National Justice Campania Naveria SA v. Prudential Assurance Co. Ltd. ("The Ikarian Reefer")*, [1993] 2 Lloyd's Rep. 68, at pages 81-82. Some of the schedules to the opinion reveal editorial comments about some of the decisions using language that is gratuitous, intemperate and ideological. Further, the opinion expresses dislike for some of the jurisprudence of the Federal

Court and this Court. This colours the opinion's assessment of the judge's decisions, many of which follow this jurisprudence.

[44] Fourth, this opinion is in draft form and is unsigned.

[45] Quite aside from admissibility, we can accord this opinion no weight. The opinion is a statistical analysis by someone with no statistical expertise of 54 cases decided by the judge between 2005-2010 involving "cases in which criminality was a relevant feature of the immigration or refugee law issues in the case." The limitations of statistics are well-known. Even in the specific areas where statistics are acknowledged to be useful (not here), the degree of usefulness is linked to the scientific methodology followed and the intellectual rigour used in their compilation and analysis. Here, the lack of acceptable methodology and intellectual rigour, along with several obvious errors, reduces the weight of this opinion to naught. There are many examples, but a few will suffice:

- The 54 cases that make up the statistical analysis were found by a student acting for counsel for the appellant. The law professor did not undertake his own case law research.

- The opinion does not examine all of the judge's relevant decisions since appointment. It is unknown why the 2005-2010 period was chosen and whether all of the relevant decisions of the judge in that period were examined. We were

advised at the hearing that the 54 decisions were gathered from an electronic database. However, counsel for the appellant acknowledged that this database may not include all of the judge's decisions on stay motions.

- A number of the 54 decisions are not analogous to this case, *i.e.*, a number do not concern stays. One of the cases does not even involve criminality.

- The opinion does not say that any of the 54 decisions was wrongly decided on the facts and the law. No attempt was made to review the records of the cases in order to see whether the judge reached fair and arguable outcomes.

- The opinion is internally inconsistent. There are many examples of this, but one will suffice. The opinion tells us that the statistics on the 54 cases are "impossible to ignore," it later tells us that the 54 cases cannot be used to "establish actual bias *per se*," and then it tells us that only one example of "problematic judging" is enough to establish bias.

- The opinion alleges that the judge is biased because the judge uses the balance of convenience branch of the test and the existence of criminality to "zealously and rhetorically deepen the lack of merit in the motion." Far from being an example of bias, this is an example of adherence to a statement by this Court that the protection of the Canadian public is a paramount factor under the balance of convenience

branch: *Tesoro v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148. On other occasions, the opinion does not take into account the law that the judge must consider, law that results in relief being granted only exceptionally, regardless of the judge deciding the matter. In this regard, the opinion does not consider the decisions of other judges deciding matters such as this, nor does it consider the success rate of parties before those other judges.

- The opinion alleges that the judge applies a test more favourable to the Minister on the "serious issue" branch of the test for a stay. In support of this, the opinion notes that in one case brought by the Minister, the judge used the expression "not frivolous or vexatious" rather than the expressions "serious issue," "arguable issue," and "arguable case," expressions that are used by the judge in cases brought by individuals. But often the particular expression used in reasons by a judge is influenced by the expression used by the parties in their submissions. And, as those familiar with the law in this area know, these terms are often used interchangeably.

- The opinion suggests that the judge is biased in his treatment of questions proposed for certification. That serious allegation is based on only ten cases, and no evidence is offered to suggest that any of the questions proposed in those cases met the test for certification. From this, the opinion concludes that the judge does not want to be judged and "does not have an expansive enough view of law and of the world." This

> pattern of reasoning in the opinion – slight evidence, questionable analysis, extreme conclusion – happens at several places in the opinion.

[46] Our rejection of the opinion – for many reasons – leaves the appellant's allegation of unconscious bias on the part of the judge without any support whatsoever. Therefore, we reject this allegation.

[47] Before leaving this issue, we wish to make three final comments.

[48] First, we note that because the opinion states that bias was most apparent on stay motions, we examined those cases with particular attention. We saw nothing in them that would give the informed and reasonable person, viewing the matter realistically and practically, any reason to think that the judge decided in a biased way.

[49] Second, counsel for the appellant urged us, regardless of the weight we might give to the opinion, to consider the statistics concerning the outcomes reached by the judge. In our view, such statistics, without more, are of no probative value on the issue of bias.

[50] Finally, the Supreme Court has said that alleging bias is "a serious step that should not be undertaken lightly": *S. (R.D.)*, *supra* at paragraph 113. Given the harm caused to the administration of justice when unsubstantiated allegations are made, and given the serious shortcomings of the opinion tendered in this case, we cannot help but express our deep disappointment.

(2) The judge's reasons

[51] The appellant is correct that the judge copied into his decision, almost *verbatim*, much of the Minister's written submissions, without attribution. Indeed, the judge substantially copied 62 of 66 paragraphs of the Minister's written submissions.

[52] The judge's copying must be placed in its proper context.

[53] First, at the beginning of his analysis, the judge wrote the following:

> [20] The Court, subsequent to reading all of the submitted materials, having heard both parties in a teleconference hearing and reflected on the matter, agrees with the position of the Respondent [Minister].
>
> [21] The Applicant fails to raise an arguable issue in his underlying application and fails to establish that he would face irreparable harm if the stay scheduled for the 19th, 20th or 21st of December, 2011 were not granted. The Court agrees with the Respondent that the balance of convenience weighs in favour of the public interest in this case. The Applicant is a foreign national who is to be removed subsequent to his having been determined to be inadmissible for serious criminality, all of which is explained below[.]

This was the judge's original prose.

[54] In argument before us, counsel for the appellant admitted that if the judge had written only these two paragraphs and nothing else, the reasons would have been sufficient and would not have created any apprehension of bias.

[55] Second, the appellant asked the judge to render judgment very quickly in order to facilitate onward review and the judge acceded to that request. Seen in this light, the judge's resort to copying of the 62 paragraphs from the Minister's written submissions could be seen as an attempt – quick, convenient and shorthand, yet ill-advised – to outline the Minister's position that he had adopted.

[56] Third, the nature of the teleconference hearing conducted by the judge forms part of the context. At the hearing of this appeal, we informed the parties that we had obtained the Registrar's minutes of the teleconference hearing and we invited the parties to make submissions on what we had learned from those minutes.

[57] The minutes show that the teleconference lasted just under two hours. All but twenty-five minutes of the hearing concerned the merits of the stay motion. Those twenty-five minutes concerned the request that the judge recuse himself. During the entire hearing, the judge asked many questions of both parties. Counsel for the appellant estimated that teleconference hearings concerning stay motions take between 30 and 45 minutes on average, and, on occasion, an hour. Accepting that estimate for argument's sake, the argument on the merits in this case lasted double the average.

[58] The appellant notes that the judge has engaged in the copying of a party's submissions without attribution in other cases. Indeed, the judge has done this in varying degrees in some other cases, but not just in cases involving the Minister and not just in cases involving criminality. We do

not think that this furthers the appellant's argument that the judge was biased in favour of the Minister in this case.

[59] On a fair construction of the judge's reasons, viewed in light of the foregoing contextual facts, we are of the view that any fully-informed, reasonable person would conclude that the judge considered the material before him and the parties' submissions and decided the matter before him in an open-minded, independent and impartial way.

[60] Therefore, we reject the appellant's submission that there was bias or a reasonable apprehension of bias in the case arising from the unattributed copying of the Minister's submissions. However, more must be said.

[61] This Court has warned against the practice of copying a substantial part of a party's written submissions without acknowledging that it is doing so: *Janssen-Ortho Inc. v. Apotex Inc.*, 2009 FCA 212. Copying the bulk of a party's written submissions "may lead to the impression that the judge has not done the work which he is called upon to do, namely, to examine all of the evidence before him and to make the appropriate findings" (at paragraph 77). As the appellant has observed, submissions of the Minister copied, without attribution, into reasons will be seen by later readers as the reasons of the judge, when in fact the Minister drafted them.

[62] We reiterate the warning in *Janssen-Ortho* in the strongest possible terms. Judges should draft their own prose, explaining the basis for their decisions. Adopting or incorporating into the

reasons, with attribution, portions of the written submissions is permissible. But that is subject to an important overriding consideration – in the end, the reasons must always be, and be seen to be, the end-product of the judge's own assessment of the key issues raised in the case. In this regard, we emphasize (and appellant's counsel agreed) that only a paragraph or two may suffice in cases such as this. Here, the issues were straight-forward, the law was well-settled, and speed was of the essence.

[63] Absolutely nothing good can come from the practice followed by the judge in this case, *i.e.*, copying a substantial portion of one of the parties' submissions without attribution. It creates a cloud over those who engage in it and harms the reputation of the administration of justice. This practice must stop.

(3) The grounds taken together

[64] In the event that we found that none of the grounds individually established bias, the appellant asked us to consider the matter globally. Looking at the overall circumstances and assessing them all together, would an informed person, viewing the matter realistically and practically, consider that the judge was, or appeared to be, biased? Based on the above analysis, we answer this in the negative.

F. Further relief requested

[65] Earlier, we noted that this Court granted an interim stay preventing the Minister from carrying out the removal order "until the disposition of [this] appeal by this Court."

[66] In the event that this Court were to dismiss the appeal, the appellant requested that this Court delay the coming into force of its judgment until the Supreme Court decided his application for leave to appeal. On the appellant's view of the January 6, 2012 interim stay order, this would prevent the Minister from carrying out the removal order until that time. The Minister opposes.

[67] This Court has the jurisdiction to grant such relief in its judgment: *Federal Courts Rules*, Rule 53(1) (ability to attach terms to an "order") and Rule 2 (an "order" includes a judgment).

[68] In light of the reasons for granting of the interim stay, it makes sense to delay the coming into force of our judgment by three weeks, *i.e.*, March 12, 2012. For clarity, the words "until the disposition of [this] appeal by this Court" in the interim stay order of January 6, 2012 shall be interpreted to mean March 12, 2012. This would allow counsel for the appellant, if so advised, to take whatever steps may be appropriate in the Supreme Court of Canada.

[69] Therefore, we shall dismiss the appeal. Our judgment shall not take effect until March 12, 2012, at which time the interim stay granted by order of this Court on January 6, 2012 shall expire.

"Carolyn Layden-Stevenson"
J.A.

"Johanne Gauthier"
J.A.

"David Stratas"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-483-11

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE SHORE DATED DECEMBER 19, 2011, NO. IMM-7645-11

STYLE OF CAUSE:	Al-Munzir Es-Sayyid v. The Minister of Public Safety and Emergency Preparedness
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 16, 2012
REASONS FOR JUDGMENT BY THE COURT:	Layden-Stevenson, Gauthier, Stratas JJ.A.
DATED:	February 20, 2012

APPEARANCES:

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