

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20121010**

**Docket: A-77-12**

**Citation: 2012 FCA 256**

**CORAM: NOËL J.A.  
DAWSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**RODERIC LAIDLAW**

**Appellant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

Heard at Toronto, Ontario, on October 10, 2012.

Judgment delivered from the Bench at Toronto, Ontario, on October 10, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

DAWSON J.A.

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario, on October 10, 2012)**

**DAWSON J.A.**

[1] The Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD) found that the appellant, Roderic Laidlaw, is neither a Convention refugee nor a person in need of protection. A judge of the Federal Court (Judge), in reasons cited as 2012 FC 144, 6 Imm. L.R. (4<sup>th</sup>) 223, dismissed Mr. Laidlaw's application for judicial review of the decision of the RPD. The Judge certified the following serious question of general importance:

Does the Immigration and Refugee Protection Board violate the provisions of section 7 of the *Charter* if it declines to postpone its hearing based on risk to life where there is a pending humanitarian and compassionate application also based on risk to life?

[2] This is an appeal from the decision of the Federal Court.

[3] On this appeal, Mr. Laidlow raises the following three issues:

- i) Did the RPD err by failing to adjourn his refugee hearing in light of the constitutional issues he raised and the fact that a pending humanitarian and compassionate application remained undetermined?
- ii) Did the RPD err in law by ignoring evidence, misconstruing evidence and failing to have regard to the totality of the evidence?
- iii) Does subparagraph 97(1)(b)(iv) of the *Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Act)*, as interpreted by the RPD and the Federal Court, violate section 7 and subsection 15 (1) of the *Charter* and, if so, can such violation be justified under section 1 of the *Charter*?

[4] For the reasons that follow, the certified question will be answered in the negative and the appeal will be dismissed.

## The Facts

[5] Mr. Laidlow is a citizen of Saint Vincent and the Grenadines (Saint Vincent). In May 2009, while living in Canada without status, he was diagnosed with a brain tumor. The tumor was removed, but as a result Mr. Laidlow suffers from a deficiency of certain necessary hormones. His condition is known as panhypopituitarism. The RPD found that Mr. Laidlow requires daily medication and will do so for the rest of his life. Of particular relevance is DDAVP nasal spray which Mr. Laidlow asserts is unavailable on a consistent basis in Saint Vincent. Mr. Laidlow's doctor wrote in a letter put in evidence before the RPD that Mr. Laidlow requires this spray in order to survive.

[6] In September 2009, Mr. Laidlow submitted a refugee claim on the basis that his life would be put at risk if he was deported to Saint Vincent. He later applied on the same basis for permanent residence on humanitarian and compassionate grounds.

[7] Subparagraph 97(1)(b)(iv) of the Act provides:

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

...

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

...

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

[8] As part of his application for protection Mr. Laidlow claimed that this provision infringes both section 7 and subsection 15 (1) of the *Charter*.

[9] A refugee protection hearing originally scheduled for September 17, 2010, was adjourned at the request of Mr. Laidlow's counsel. However, a second adjournment request was denied. Counsel for Mr. Laidlow reapplied at the refugee protection hearing for an adjournment. This request was also denied.

[10] The basis of the request for an adjournment was Mr. Laidlow's counsel's position that the humanitarian and compassionate application should be determined prior to the refugee claim. Counsel relied on the decision of this Court in *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2006] F.C.J. No. 1682 at paragraph 60 and 61 to argue that all non-constitutional avenues are to be exhausted prior to consideration of any *Charter* issues. Thus, in counsel's submission, the humanitarian and compassionate request should be determined prior to the refugee protection hearing in which *Charter* issues were raised.

[11] The RPD denied the request for an adjournment and rejected the *Charter* arguments. The RPD found as a fact that "there is no factual foundation for the claim that the claimant is at risk to his life, should he return to Saint Vincent".

[12] This decision was upheld by the Federal Court.

## Consideration of the Issues

(a) *The certified question*

[13] Counsel for Mr. Laidlow did not make any submissions concerning the certified question.

[14] The Judge dealt with this issue at paragraphs 34 to 37 of his reasons, where he wrote at paragraphs 34 and 35: [emphasis in original]

**34** The question is whether the *possibility* of risk to life and *possible* salvation if an H & C decision favourable to the Applicant is made means that section 7 of the *Charter* has been violated because the Board did not adjourn its hearing?

**35** In this respect, the decision of the Federal Court of Appeal in *Poshteh v Canada (Minister of Citizenship and Immigration)*, [2005] 3 FCR 487, is instructive. Rothstein JA (as he then was) wrote for the Court at paragraphs 62 and 63:

*62 The principles of fundamental justice in section 7 of the Charter are not independent self-standing notions. They are to be considered only when it is first demonstrated that an individual is being deprived of the right to life, liberty or security of the person. It is the deprivation that must be in accordance with the principles of fundamental justice. (See, for example, Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, at paragraph 47.)*

*63 Here, all that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights. (See, for example, Barrera v. Canada (Minister of Employment and Immigration), [1993] 2 F.C. 3 (C.A.)) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, [page510] fundamental justice in section 7 of the Charter is not of*

*application in the determination to be made under paragraph 34(1)(f) of the Act.*

[15] In the absence of submissions on this issue asserting some particular error, we have been unable to identify any error in the Judge's reasons. Substantially for the reasons given by the Judge we would answer the certified question in the negative.

(b) *Did the RPD err by failing to adjourn the refugee hearing because the refugee claim raised Charter issues?*

[16] As noted above, Mr. Laidlow's argument that the refugee hearing should be adjourned was based upon this Court's decision in *Covarrubias*. There, at paragraphs 60 and 61 the Court wrote:

[60] As I stated earlier in these reasons, the applications Judge found that the male appellant has failed to provide sufficient evidence of a risk to his life on account of inadequate medical care should he be deported to Mexico. The applications Judge found, and I agree, that the appellants' allegations of specific *Charter* violations are without evidentiary foundation. Hence, there is no factual basis for entering into a *Charter* analysis here.

[61] In addition, and as the applications Judge noted, there is an adequate alternative remedy in this case for the appellants, namely, the pending H&C application, judicial review of that decision should the appellants be unsuccessful, and an appeal to the discretion of the Minister. In keeping with the reasons of Martineau J. in *Adviento v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1430 (CanLII), (2003), 242 F.T.R. 295 (F.C.), at paragraph 54, I find that it is inappropriate for the appellants to turn to the Court for relief under the *Charter* before exhausting their other remedies.

[17] Mr. Laidlow's reliance upon this passage is, in our view, ill-founded. The RPD has jurisdiction to consider *Charter* issues and did decide the *Charter* issues raised by Mr. Laidlow. *Covarrubias* is distinguishable because the decision-maker whose decision was under review did not have jurisdiction to determine *Charter* issues. Nothing in the reasons of this Court supports the argument that the RPD was required to hold its proceeding in abeyance indefinitely pending a

decision on the humanitarian and compassionate application. Mr. Laidlow's right to request an adjournment so he could exhaust his non-constitutional remedies does not create a corresponding obligation on the RPD to structure its hearing so that Mr. Laidlow's constitutional arguments are heard last.

(c) *Did the RPD ignore or misconstrue evidence, or make a finding that was not supported by the evidence?*

[18] The Judge found the RPD reasonably concluded that Mr. Laidlow's life would not be at risk if he were removed to Saint Vincent. This is substantially a question of fact on which the Judge is entitled to deference, unless it can be shown that the Judge's finding was premised on a wrong legal principle or that it was vitiated by some palpable and overriding error (*Canada (Information Commissioner) v. Canada (Minister of National Defense)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 23).

[19] Mr. Laidlow's situation is undoubtedly difficult, however no error of law or palpable and overriding error in the Judge's appreciation of the evidence has been established. While there was evidence before the RPD that supported Mr. Laidlow's claim, equally there was evidence that reasonably supported the conclusion reached by the RPD. As Mr. Laidlow's counsel conceded in oral argument the evidence was not entirely clear.

(d) *The Charter issues*

[20] The consequence of the RPD's finding that Mr. Laidlow's life would not be at risk if he were removed to Saint Vincent is that his *Charter* claims lack an evidentiary foundation. It follows



that it is not necessary for us to consider the Judge's analysis of the *Charter* arguments, and we decline to do so.

**Conclusion**

[21] For these reasons the certified question is answered in the negative and the appeal will be dismissed.

“Eleanor R. Dawson”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-77-12

**(APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE HUGHES OF THE FEDERAL COURT DATED 3-FEB-2012, FILE NO. IMM-3383-11)**

**STYLE OF CAUSE:** RODERIC LAIDLOW v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 10, 2012

**REASONS FOR JUDGMENT OF THE COURT BY:** (NOËL, DAWSON & STRATAS JJ.A.)

**DELIVERED FROM THE BENCH BY:** DAWSON J.A.

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