Federal Court of Appeal  Cour d'appel fédérale

Date: 20130705

Docket: A-20-13

Citation: 2013 FCA 178

Present: **STRATAS J.A.**

BETWEEN:

INTERNATIONAL RELIEF FUND FOR THE AFFLICTED AND NEEDY (CANADA)

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing and by teleconference held on July 4, 2013.

Order delivered at Ottawa, Ontario, on July 5, 2013.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. The pending appeal

[1] The appellant, the International Relief Fund for the Afflicted and Needy (Canada), used to be registered as a charity under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). On December 11, 2011, the Minister of National Revenue issued a Notice of Confirmation of her decision to revoke

the appellant's registration. The appellant appeals the December 11, 2011 Notice under subsection 172(3) of the Act.

[2] In its appeal, the appellant alleges that the Minister abused her discretion and acted unreasonably, in a procedurally unfair manner, and with a closed mind. The appellant also alleges that the Minister's decision violates sections 2 and 15 of the Charter by violating its "associational rights with partner organizations abroad and charitable contributing communities and individuals in Canada" and its equality rights.

B. The nature of the pending appeal

[3] The pending appeal is from an administrative decision, the making of the Notice, made by an administrative decision-maker, the Minister. The only relief sought is the "vacating of the assessment," which I take to mean the setting aside of the Notice.

[4] Although prosecuted as an appeal, in reality this is an administrative law review: *Canadian Committee for the Tel Aviv Foundation v. Canada*, 2002 FCA 72 at paragraph 27.

C. The appellant's motion

[5] In this motion, the appellant seeks to introduce into this appeal certain material that was not before the Minister when she made her Notice. The appellant phrases its motion as one seeking a ruling that certain "fresh evidence" should be admitted.

D. Should the motion be determined at this time?

[6] Questions of admissibility in administrative law reviews can be deferred to the panel hearing the merits of the review.

[7] However, questions of admissibility should be resolved on pre-hearing motion if resolving the questions would allow the hearing to proceed in a more timely, orderly and efficient way, the questions involve a clear question of law rather than discretionary matters, and the answers to the questions are clear cut or obvious: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraphs 10-13; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8; *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff'd 2005 FCA 389.

[8] In my view, the appellant's motion can be determined at this time. It raises questions that are clear cut and non-discretionary. Resolving them now would allow the hearing to proceed in a more timely, orderly and efficient way.

E. The material that is admissible on an administrative law review: the general rule

[9] As a general rule, the only material that can appear in the appeal book on an administrative law review is material that was before the Minister when she made her decision: *Renaissance International v. Minister of National Revenue*, [1983] 1 F.C. 860 (C.A.); *Stawicki v. Canada*

(Minister of National Revenue), 2006 FCA 262; *United Scottish Cultural Society v. Canada (Canada Revenue Agency)*, 2004 FCA 324 at paragraph 5.

[10] Limited exceptions to the general rule exist: *Association of Universities, supra* at paragraph 20; *McFadyen v. Canada (Attorney General)*, 2005 FCA 360 at paragraphs 14-15; *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). These include materials:

- that provide general background in circumstances where that information might assist;

- necessary to bring to the attention of the reviewing court procedural defects, such as bias, that cannot be found in the evidentiary record of the administrative decision-maker; and

- that highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

These exceptions are best understood not as rules to be blindly applied, but rather applied sensitively in light of the differing roles played by the reviewing court and the administrative decision-maker: *Association of Universities, supra* at paragraphs 14-19.

F. Applying these principles: material available to the appellant before the December 11, 2012 Notice

[11] In a proposal letter dated August 28, 2012, the Minister set a deadline of September 28, 2012 for the appellant to provide responding submissions. However, the Minister added that she would "take into consideration any additional information provided to [her] before reaching a final decision [issuing a Notice] in this matter."

[12] On September 28, 2012, counsel for the appellant wrote the Minister, advising her that she had just received some materials from the appellant. She asked for an extension of time to October 1, 2012 to make submissions. The Minister agreed to the extension.

[13] In my view, this shows the Minister's willingness and flexibility to receive further information and submissions before she decided the matter, consistent with the promise made in her proposal letter of August 28, 2012.

[14] Much of the material the appellant seeks to introduce into this appeal is dated between October 1, 2012 and the date of the Minister's decision, *i.e.*, the December 11, 2012 Notice. The appellant could have written the Minister and could have asked to submit this material. But the appellant did not do so.

[15] In my view, the appellant cannot now seek to introduce in this appeal the material available to it before December 11, 2012: *Johnson v. Canada (Attorney General)*, 2011 FCA 76 at paragraph

27. With diligence, the appellant could have provided this material to the Minister before she issued the Notice on December 11, 2012.

[16] Accordingly, in this motion, I shall only consider material sought to be introduced by the appellant that it obtained on December 11, 2012 or later.

G. Applying these principles: material available to the appellant only on December 11, 2012 or later

(1) News reports

[17] Exhibit "A" to the Affidavit of Naseer Syed are a series of news reports. The appellant alleges that these documents show the Minister was biased. They show that the Government of Canada had particularly warm ties with and an outlook similar to the Government of Israel.

[18] However, I note that in its October 1, 2012 submissions letter the appellant did not put an allegation of bias squarely to the Minister. In that letter, the appellant asserted some limited facts that could demonstrate a certain mindset on the part of some in the Government of Canada. But that is not an allegation of bias.

[19] Allegations of bias are most serious and must be raised clearly at the earliest possible time: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *In re Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103 (C.A.). One cannot discover facts that might indicate impermissible bias on the part of the administrative decision-maker, remain silent on the

matter of bias, await the outcome of the administrative decision, and then, if the decision is adverse, claim on appeal that the decision-maker was biased.

[20] Some of the allegations made in the October 1, 2012 submissions letter and the documents in Exhibit "A" to the Affidavit that predate the December 11, 2012 Notice show that the appellant knew many of the facts it now seeks to put before the Court in support of a claim of bias. It could have clearly raised bias before the December 11, 2012 Notice was made, but did not.

[21] This conclusion is not only founded upon the authorities cited. It is also founded upon procedural fairness to the Minister. Had this bias issue been clearly raised, the Minister would have been able to respond in her decision. Then this Court would have the benefit, on review, of the formal allegation of bias and the decision-maker's response.

[22] There is a further reason for not including in the appeal book the documents in Exhibit "A" that postdate the December 11, 2012 Notice (Documents 13 to 18). In my view, the appellant has not established the relevance and materiality of these documents. In supplementary submissions made after a teleconference (described below), the appellant states that these documents "provide a further and more *contemporary* portrait of the strengthening of ties between Canada and Israel" [my emphasis]. Contemporary they are – by and large, they tend to record incidents reflective of the general state of Canada-Israel relations at the time they were written, which was after the December 11, 2012 Notice. I am not persuaded they speak to the orientation or apparent orientation of the Minister when she issued the Notice.

[23] Therefore, the documents in Exhibit "A" shall not appear in the appeal book.

[24] This ruling does not foreclose the appellant from relying upon the materials properly in the appeal book and submitting, as it intends to do, that the Minister's decision was unreasonable, made without regard to the evidence, or based on improper considerations (assuming, for the sake of argument, that the last two grounds have not been subsumed by post-*Dunsmuir* reasonableness review).

(2) Documents pertaining to a book said to be defamatory

[25] These documents appear in Exhibit "D" to the Affidavit of Naseer Syed. They all appear to postdate the December 11, 2012 Notice.

[26] These documents have no bearing on the legality of the Minister's decision. Either the Minister had sufficient material before her to make a decision within a range of reasonable outcomes on December 11, 2012, or she did not.

[27] In this case, these post-decision materials do not affect this question. Rather, the attempt to adduce these materials smacks as an attempt to introduce more information of the sort that was already before the Minister at the time she made her decision. These materials also have no relevance to the appellant's other grounds for appeal.

[28] Therefore, the documents in Exhibit "D" shall not appear in the appeal book.

(3) Access to Information documents in unredacted form

[29] The Affidavit of Naseer Syed describes a number of documents produced to the appellants in response to access to information requests. Some of these were produced with redactions. These are attached as Exhibit "H" to the Affidavit.

[30] In this motion, the appellant seeks an order that the Minister produce these documents in unredacted form. The appellant also seeks an order that these be included in the appeal book.

[31] The difficulty with the appellant's submission is that these documents were only in redacted form before the Minister. When she made her decision, the Minister did not consider the documents in unredacted form: Affidavit of Martina Bourque, paragraph 16. The appellant neither cross-examined Ms. Bourque on this statement nor attempt to rebut it. It is generally "not appropriate to order the tribunal to produce information beyond what was before it when it made its decision": *Ominayak v. Verre* (2000), 193 F.T.R. 160 (F.C.A.).

[32] The appellant submits that the failure of the Minister to produce the documents in unredacted form in the proceedings leading up to the Notice worked procedural unfairness. However, in those proceedings, the appellant did not request the Minister to produce the documents in unredacted form.

[33] Therefore, the access to information documents in unredacted form need not be produced by the Minister. They shall not appear in the appeal book. The access to information documents with redactions that were considered by the Minister shall appear in the appeal book.

(4) Documents pertaining to bank termination notices

[34] These documents, appearing in Exhibit "C" to the Affidavit of Naseer Syed, relate to the banking privileges of the appellant that were terminated after the Minister's decision on December 11, 2012.

[35] I am not satisfied these documents have any bearing on whether the Minister made a reasonable decision on December 11, 2012, committed procedural unfairness leading up to the making of the decision, or was biased. The appellant also has not convinced me that these have any bearing upon whether the Minister's decision breached the Charter rights of the appellant.

[36] Initially, this motion was to be determined on written materials alone. However, having read the written materials, I invited the parties to attend by teleconference to answer certain questions. I am grateful for their attendance and for their subsequent written submissions.

[37] In the teleconference, the appellant confirmed it is arguing in this appeal that the Minister's allegations that the appellant was associated with a certain terrorist group caused it harm, such as the termination of its banking privileges, effects on its finances, and the termination of its involvement in the Reviving the Islamic Spirit event. The appellant says that these effects, and perhaps others,

manifest injury to its Charter rights and freedoms, particularly its associational freedoms and equality rights. The appellant is not arguing that the issuance of the Notice itself infringed the Charter.

[38] The record on this motion shows that, indeed, the Minister alleged that the appellant was associated with a certain terrorist group. But there is no evidence that the Minister decided to disseminate those allegations to anyone but the appellant for the purpose of obtaining the appellant's evidence and submissions on the matter.

[39] The Notice, itself, does not refer to the allegations. Rather, as one of the four grounds for revocation, it says that the appellant did not "maintain direction and control over the use of its resources and failed to implement due diligence procedures," contrary to paragraph 168(1)(*b*) of the Act. In the teleconference, the Minister confirmed that the allegations were relevant only to this ground of revocation.

[40] The mere making of allegations is not a decision susceptible to review under the *Federal Courts Act*, R.S.C. 1985, c. F-7. If recourse for that can be had, it lies elsewhere.

[41] Only the legality of the Notice is before us in this appeal, not the allegations made. This is confirmed by the wording of the appellant's amended notice of appeal and the relief sought: see paragraph 3 above.

[42] The effects of the allegations made, said to work an infringement of the Charter, are irrelevant to the legality of the Notice. Accordingly, the documents appearing in Exhibit "C" to the Affidavit of Naseer Syed shall not appear in the appeal book.

(5) Documents relating to the 2012 finances of the appellant

[43] These documents, collected at Exhibit "E" to the Affidavit of Naseer Syed, show the financial effects of the Minister's decision. But these are irrelevant to the analysis of reasonableness of the decision made on December 11, 2012. Either the Minister had sufficient material before her to make a decision within a range of reasonable outcomes on December 11, 2012, or she did not.

[44] The appellant also has not convinced me that these have any bearing upon the other grounds raised by it.

[45] To the extent that the appellant is saying that the effects have been caused by the Minister's making of allegations, as I have explained above, that is not a matter susceptible to review. Only the legality of the Notice is in issue before us.

[46] Accordingly, the documents, collected at Exhibit "E" to the Affidavit of Naseer Syed, are not relevant to the appeal and shall not be included in the appeal book.

(6) Documents concerning the Reviving the Islamic Spirit event

[47] The documents in Exhibit "B" to the Affidavit of Naseer Syed show that the appellant had planned to be a major sponsor of this event, which took place after the revocation of the appellant's charity status, but had to withdraw from it.

[48] These have no bearing on the legality of the Minister's decision made on December 11, 2012. Similarly, to the extent that these are relevant to the appellant's Charter arguments and relate to the Minister's allegations, only the decision made (the Notice), not the allegations, are properly before us: see paragraphs 37-42 above.

H. Disposition of the motion

[49] Overall, none of the material described in the Affidavit of Naseer Syed shall appear in the appeal book.

[50] Commendably, the parties have made considerable progress towards reaching an agreement on the contents of the appeal book under Rule 343. This is shown by a lengthy draft agreement in the record before me. For the purposes of Rule 343, I shall deem time to begin as of the date of my Order. This should give the parties enough time to agree on the contents of the appeal book and file it with the Court, or, alternatively, to bring a motion to resolve any disputes. The respondent shall have its costs of the motion.

[51] I thank the parties for their helpful submissions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-20-13
STYLE OF CAUSE:	International Relief Fund for the Afflicted and Needy (Canada) v. Minister of National Revenue

MOTION DEALT WITH IN WRITING AND BY TELECONFERENCE HELD ON JULY 4, 2013

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	July 5, 2013

WRITTEN REPRESENTATIONS BY:

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