Date: 20060830

Docket: IMM-7818-05

Citation: 2006 FC 1046

Toronto, Ontario, August 30, 2006

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

CANADIAN COUNCIL FOR REFUGEES, CANADIAN COUNCIL OF CHURCHES, AMNESTY INTERNATIONAL, and JOHN DOE

Applicants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a Motion brought on behalf of the Applicants for an Order pursuant to section 18.2 of the *Federal Court Act* restraining the Respondent from denying John Doe and his wife entry to Canada or, in the alternative, an Order directing the Respondent to allow John Doe and his wife to enter Canada from the United States pending determination on Judicial Review as to whether or not the Safe Third Country Agreement applies to them to bar them from eligibility to make a refugee claim. The motion is brought within the context of a larger Application in which the validity of the designation of the United States of America as a "Safe Third Country" and certain regulatory

provisions respecting “Safe Third Country” legislation in Canada is being challenged by the Applicants.

[2] At the core of the Application is a challenge to certain *Regulations* appearing in the *Immigration and Refugee Protection Regulations* S.O.R./2002-227 established with reference to section 101 and 102 of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 [*IRPA*]. These *Regulations* came into force in December 2004, and provide that a refugee claim is ineligible to be considered if the claimant came directly or indirectly to Canada from a third country other than their original country of nationality, which third country has been designated as “safe” by the new *Regulations*. The United States of America is presently the only designated country.

[3] These *Regulations* arise from the Safe Third Country Agreement signed by Canada in December 2002. The Regulatory Impact Statement published in Part II of the Canada Gazette on 12 October, 2002 [C. Gaz. 2002 II. Vol. 136] described these *Regulations* as a necessary step towards international cooperation in the orderly handling of refugee claims. Thus, a person who has originally come from a country where they have been persecuted and who has first gone to the United States of America, cannot thereafter seek to claim refuge in Canada. Prior to the establishment of these *Regulations*, a sojourn in the United States of America, did not preclude a person from coming to Canada and claiming refugee protection.

[4] The Applicants, other than John Doe, were opposed to the passage of these *Regulations* and since their passage, have been seeking a means to challenge their validity in Court. These Applicants frankly acknowledge that they have spent considerable time and effort to locate an

individual whose circumstances would better enable them to challenge the validity of the *Regulations*. Eventually the Applicant John Doe, whose anonymity was preserved by an earlier Order of the Court, was selected as a joint Applicant for purposes of challenging the *Regulations*.

[5] The Affidavit of John Doe filed in the Application establishes that he and his wife are citizens of Columbia where they resided until June 2000 when they entered the United States of America apparently under a tourist visa. Doe unsuccessfully sought employment in the United States. In August 2001, the United States government commenced removal proceedings against him. In December 2001, Doe made an application for asylum in the United States and the withholding of the removal order. He claimed that when he was in Columbia, he was targeted by a rebel group (FARC) who made threats against his life apparently by reason of certain political views that he had openly expressed. He fears that if he is returned to Colombia he would be persecuted on the basis of his political beliefs. Asylum was denied by a United States Immigration Judge in February 2005. The withholding of the removal order was denied at the same time. Doe now claims that he would like to seek asylum in Canada.

[6] There is no evidence that Doe has ever been to Canada or attempted to enter Canada. He has no relatives here. There is no evidence that Doe ever had any interest in making a refugee or asylum claim in Canada prior to the denial of his claim for asylum in the United States. There is no evidence as to whether Doe has attempted to enter or make a refugee or asylum claim in any country other than the United States. There is no evidence as to efforts if any, made by Doe to exhaust any other remedies, whether by appeal or otherwise, as may remain available to him in the United States.

[7] The purpose of the mandatory injunction now sought by the Applicants has been set out in an affidavit, not of Doe, but of an "assistant" in the offices of the solicitor for the Applicants other than Amnesty International. The assistant claims to have spoken by telephone to Doe and obtained the information. Paragraphs 6 and 7 of that Affidavit states:

> *6. John Doe is unable to pay the legal fees required to appeal the decision of the BIA, and so is not eligible for an extension of time for voluntary departure. He is therefore required to depart the United States on or before September 11, 2006. it appears that his spouse will also be required to leave at this time, as her asylum claim was joined to that of John Doe, though she was not named in the appeal. If they fail to depart voluntarily, they will be deported to Colombia, where their lives are at risk and where they continue to face a serious risk of persecution, torture and ill treatment. Recent documentation of the human rights situation in Colombia is attached as Exhibit A to my affidavit.*
>
> 7. *John Doe and his spouse have no place to go where they can be safe. They have been ordered to depart from the USA and have no status in any country other than Colombia. They would have approached a Canadian port of entry to seek refugee protection in Canada, but have not done so because they are ineligible to seek Canada's protection under the Safe Third Country Agreement. Unless this court orders the Respondent to admit them to Canada for the purpose of pursuing the herein application for judicial review of the Safe Third Country Agreement, they will be forced to return to the very country they fled in fear for their lives, Colombia.*

There is no evidence to show why Doe did not provide an affidavit personally.

Jurisdiction of the Federal Court to Grant the Mandatory Injunction Requested

[8] The motion for a mandatory injunction is brought within the context of an Application challenging certain *Regulations* established under *IRPA*. Neither that Act nor those *Regulations* provide for such relief. However, section 44 of the *Federal Court Act*, R.S.C. 1985, c.F-7 provides

that the Court may grant other relief including a *mandamus* or injunction, or an order for specific performance in all cases in which appears to be just and convenient to do so.

[9] The Supreme Court of Canada in *Canadian Human Rights Commission v. Canadian Liberty Net*, [1998], 1 S.C.R. 626 [*Canadian Liberty*] at paragraphs 35 to 37 of the majority decision held that the Federal Court, having administrative jurisdiction over certain federal tribunals, has within the intent of section 44 of the *Federal Court Act*, the power to grant other relief of the kind contemplated here. In this case the general powers of supervision given by Parliament to the Federal Court under *IRPA* and the *Regulations*, taken together with section 44 of the *Federal Court Act*, give to the Court jurisdiction to grant the type of relief requested here.

Status of the Applicants to seek a Mandatory Injunction

[10] The Applicants, other than John Doe, describe themselves as public interest litigants having a particular interest in the *Regulations* at issue. None of these Applicants are named in any way as persons affected by *IRPA* or *Regulations*.

[11] There is no dispute that John Doe is a person that could be affected by the *Regulations*. As to the other Applicants, no remedy that could be provided by this Court by way of a mandatory injunction could affect them in any way. The status of persons such as the Applicants other than Doe has been the subject of several decisions of the Supreme Court of Canada. A principal decision is that of *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575. The question of status of persons claiming to be public interest litigants is considered in light of the genuine interest of the

litigant and whether or not there is no other reasonable and effective manner in which the issue may be brought before the Court. In *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 it was considered that where several persons directly affected had already filed Court challenges, a public interest litigant should not be given status to challenge.

[12] I prefer to leave the matter open at this time. The issue of status can be argued more fully and properly at the time that the Application is heard.

Criteria to be met in the Granting of an Interlocutory Mandatory Injunction

[13] An interlocutory injunction is typically sought so as to preserve matters as they are until the final determination of the issues in a proceeding at a full trial on the merits. In this way any relief granted following such a trial will not be meaningless. The injunction is granted usually to preserve the *status quo*.

[14] A mandatory injunction sought before a full trial on the merits is somewhat different. It seeks to make one of the parties do something that it ordinarily would not do. It seeks to change the *status quo*. Again, the purpose is the same, to prevent any relief given following a trial from being meaningless. Here the Applicant argued that unless Doe were to be allowed to come to Canada to make a refugee claim before being removed from the United States to Colombia, his challenge to the validity of the *Regulations* would be meaningless.

[15] At one time, the Courts were reluctant to grant mandatory injunctions but, over time, the Court have been somewhat more willing to do so. Still, some greater level of caution arises when, particularly at an interlocutory stage, the Court is asked to order somebody to take a positive action that will change the *status quo* [see Robert Sharpe, *Injunctions and Specific Performance*, Looseleaf ed., (Aurora, ON: Canada Law Book Inc., 2005), paras. 1500 to 1580].

[16] The criteria for consideration by the Court as to whether to grant an interlocutory injunction, mandatory or not, are those as set out by the Supreme Court of Canada in *RJR MacDonald Ltd. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at pp. 332-333. The criteria are:

> 1. A preliminary assessment of the merits of the case is to be made so as to ensure that there is a serious issue to be tried.
>
> 2. It must be determined whether the applicant(s) were to suffer irreparable harm if the application were refused.
>
> 3. An assessment must be made as to which of the parties would suffer harm from granting or refusals of the remedy providing a decision on the merits. Sometimes this is simply called the balance of convenience.

[17] In the *Canadian Liberty* case, *supra* at paragraphs 46 and following, the Supreme Court of Canada cautioned that some modification of these criteria may be needed in non-commercial cases. In cases such as this the public interest requires particular consideration. I will be paying attention to the public interest in considering the balance of convenience.

[18] Each of these criteria will be examined in the context of the present motion.

1. Serious Issues:

[19] The validity of the "Safe Third Country" *Regulations* and the designation of the United States of America as one such country is the predominant issue for a hearing on the merits. I do not propose to examine in depth the arguments raised, nor to assess the likelihood of success as to the outcome. It must be noted that the validity of *Regulations* is to be reviewed on a correctness standard (*Sunshine Village Corp. v. Canada (Parks)*, [2004] 3 F.C.R. 600 at para 10). However, *Regulations* have rarely been found to be invalid by Courts, partly, no doubt, because of the broad grant of delegated power under which they are made (*deGuzman v. Canada (MCI)*, 2005 FCA 436 at para 25).

[20] Counsel for the Applicants argued that the earlier Order of this Court granting leave to commence a Judicial Review was determinative in that a serious issue was raised. This is not the case, the standard for granting an Order permitting judicial review is low. The matter at that point is to be dealt with in a summary way. The standard on a leave application is whether or not a fairly arguable case is disclosed (*Bains v. Canada (M.E.I.)* (1990), 47 Admin. L.R. 317).

[21] It is sufficient for the purposes of this motion to say that I am satisfied that the arguments to be raised at the ultimate hearing of the Application do not appear to be frivolous and possess sufficient merit to meet the very low threshold usually applied in considering this criteria.

2. Irreparable Harm:

[22] The Applicants argue that John Doe and his wife will be returned to Colombia to face possible torture or death unless they are given the chance to enter Canada and make a refugee claim here. They argue that Doe and his wife will, as of early September, be removed from the United States to Colombia and will lose forever any opportunity to claim refugee status in Canada. I am not persuaded that this is the case.

[23] First, it appears that Doe has not exhausted the remedies that still remain open to him in the United States. The Affidavit of Martin, an expert in United States immigration and refugee law, states that a number of avenues for relief remain open to Doe in the United States so that it is still an open question as to whether he and his wife will be returned to Colombia or if so, whether they will be returned in the near future.

[24] The applicants argue that Doe has no funds so as to retain counsel to engage in the pursuit of these further avenues. I am not persuaded that this is the case. The evidence as to lack of funds is hearsay, only the assistant makes this statement, Doe does not. Doe only says that he has not worked for some time. The evidence shows that Doe had counsel in the United States proceedings to date. The evidence also shows that there is a functional *pro bono* system available in the United States to persons in Doe's circumstances. I would have expected clearer evidence from Doe if he could not avail himself of these further remedies whether for financial reasons or otherwise. The onus is upon Doe to prove the likelihood of irreparable harm. He had an opportunity to respond to these issues and did not. This important aspect of his case has simply not been addressed properly.

[25] Second, the Affidavit of Manni indicates that there are a number of countries including Argentina, Brazil, Chile, Costa Rica, Ecuador, Panama, Mexico, Spain and Venezuela that do not require a visa from persons such as Doe to enter. The Applicants argue that simply because Doe could enter such countries without a visa does not mean that he could sojourn or remain there. The Respondent argues that the evidence shows that these countries are signatories to the *Convention Relating to the Status of Refugees*, 28 July 1951, U.N.T.S. 189 [the *Convention*], just as Canada is, thus they must afford a person an opportunity to make a refugee claim. The Applicants say that there is no evidence that, having signed the Convention, any of these countries have implemented its terms into their laws or if there are exceptions that would prevent or allow Doe and his wife from making a refugee claim. Again, the Respondent has raised the issue, albeit imperfectly, it would have been expected that the applicant's would have lead some evidence to address it.

[26] Third, the evidence of Doe himself as to irreparable harm is not robust. In his affidavit filed in the main application he says, paragraph 25, "I would like to seek asylum in Canada", in paragraph 26, he says, "I am deeply concerned about what might happen to my parents etc. if my whereabouts became know to FARC….If the Court declines to issue an order protecting my identity….I will be compelled to withdraw from this case…" This statement in paragraph 26 suggests that Doe does not fear irreparable harm if he is not permitted to enter Canada for purposes of making a claim. What is does indicate is that he is willing to drop his case entirely if his identity is revealed. Presumably anonymity is more important to Doe than the making of a refugee claim in Canada.

[27] The Prothonotary's Order permitted anonymity states that the fear that Doe has as a consequence of any revelation of his true identity is uncontradicted on the evidence and is not speculative, but rather is substantial and continuing. That finding is directed to the issue of anonymity, not to the issue of irreparable harm if a mandatory injunction were not to be granted.

[28] The only evidence of irreparable harm comes from an affidavit of an "assistant" in the office of the solicitor for Doe. The relevant part of that affidavit is paragraph 7 which has previously been set out in full in these Reasons. That paragraph says that Doe and his spouse "…have no place to go" and that "…they will be forced to return to the very country they fled in fear for their lives, Colombia".

[29] This affidavit is very unsatisfactory by way of evidence. First, the "assistant" gives no basis for statements such as that Doe has nowhere to go and will be forced to return to Colombia. The assistant does not purport to be an expert in the relevant legal areas.

[30] Second, while the Court can, particularly in interlocutory proceedings, accept hearsay evidence, there is no stated reason why Doe could not provide an affidavit as to irreparable harm. Why do we need his solicitor's assistant? Rule 82 of this Court says that a solicitor should not swear an affidavit filed on a motion and also appear to argue that motion. This has been pointed out in an immigration setting in *Ly v. Canada (M.C.I.*), 2003 F.C. 1184. The same has been held to apply to assistants and others in the solicitor's office (*Hyundai v. Cross-Canada*, 2005 FC 1254). Solicitor affidavits directed to non-controversial matters are often accepted by this Court. However, an affidavit from an assistant in the office of the solicitor arguing the case, directed to critical or

controversial matters, if not rejected outright, should be given much less weight than if it came directly from the person who is a litigant. No meaningful cross-examination could be conducted upon the "assistant". No reason was given as to why Doe could not furnish evidence directly.

[31] I find that the Applicants, who bear the onus, have failed to establish that irreparable harm would be the result to Doe should the relief sought not be granted.

3. Balance of Convenience

[32] Much has been said as to the balance of convenience in this matter. The Supreme Court of Canada in *Manitoba A.G. v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at paragraphs 38 and 39 cautions that where the constitutional validity of a legislative provision is challenged the Court must take the public interest into consideration. The court must consider the far-reaching, albeit temporal, practical consequences of its Order. At paragraphs, 54 to 56 of that decision the Supreme Court directs that a Court, in considering the balance of convenience, rise above the interests of private litigants. Will the grant of the order requested frustrate the pursuit of the common good?

[33] In *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 the Supreme Court of Canada, at paragraph 9 said that the Court will not lightly order that laws that Parliament has duly enacted for the public good are inoperative in advance of a complete hearing as to their validity. In the present case, to order a mandatory injunction would be to render the *Regulations* essentially inoperative against Doe and quite possibly many others.

[34] The Respondent argues that the "Third Safe Country" Agreement is part of the orderly scheme in the administration of refugee claims and protected claims. He further argued that to allow the relief claimed on the motion would be effectively to suspend the effect of the *Regulations* not only as far as Doe is concerned, but also in respect of a large number of other individuals whose situations would be essentially undistinguishable from that of Doe.

[35] The Applicants argue that Doe's claim is highly fact specific and that only few persons would be sufficiently emboldened by Doe's success on this motion so as to risk exposure to authorities in the United States, or elsewhere, for the purpose of making a claim in Canada. I am not persuaded that this narrow view is correct.

[36] I find that the balance of convenience favours the Respondent. The *Regulations* have been enacted in the public interest. Private interests of those such as Doe must yield to the public interest unless and until those *Regulations* have been held to be invalid.

In Conclusion

[37] I have found that, on a low threshold criteria, the Applicants have established a *prima facie* case. However, the Applicants have failed to establish irreparable harm would result should the requested relief not be granted. The balance of convenience favours the Respondent. Accordingly, the application will be dismissed.

[38] Since this motion was brought within the context of an application ostensibly made under *IRPA*, there is a procedural as well as a substantive question as to whether a question has to be certified before any appeal from this Order can be taken. The parties have asked that I provide an

opportunity for them to make submissions on this issue. They will have five days to file written submissions in this regard.

[39] The parties have agreed that costs shall be in the cause and it will be so ordered.

ORDER

THIS COURT ORDERS that

1. The motion is dismissed;
2. The parties shall, within five (5) business days from the date of this Order file written submissions as to whether certification of a question is required and if so, what that question might be; and
3. Costs shall be in the cause.

"Roger T. Hughes"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe v. Her Majesty the Queen
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