Date: 20090306

Docket: A-469-07

Citation: 2009 FCA 66

CORAM: **DÉCARY J.A.**
SEXTON J.A.
BLAIS J.A.

BETWEEN:

NAWAL HAJ KHALIL
ANMAR EL HASSEN
ACIL EL HASSEN

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 4, 2009.

Judgment delivered at Ottawa, Ontario, on March 6, 2009.

REASONS FOR JUDGMENT BY : THE COURT

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REASONS FOR JUDGMENT BY THE COURT

[1] This is an appeal from the decision of Justice Layden-Stevenson (then of the Federal Court), dismissing the appellants' action for damages in respect of delay in processing their applications for permanent residence. The appellants claimed that the delay was both negligent, and infringed their Charter rights. The trial judge also dismissed their Charter challenges to the validity of paragraph

34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"). She awarded substantial costs to the respondent.

[2] The reasons for judgment are reported at 2007 FC 923, [2008] 4 F.C.R. 53. The award of costs is reported at 2007 FC 1184, 324 F.T.R. 168.

[3] The primary appellant, Nawal Haj Khalil, is a Syrian-born stateless Palestinian. Her husband, Riyad El Hassen, resides in Gaza. The other appellants are Ms. Haj Khalil and Mr. El Hassen's now-adult children, Anmar El Hassen and Acil El Hassen, who were both eventually granted permanent resident status in Canada by 2007.

[4] All three appellants came to Canada in 1994 and were recognized as Convention refugees. They applied for landing in 1995.

[5] Ms. Haj Khalil has been deemed inadmissible as a former member of an organization engaged in terrorism (Fatah) because she wrote or claims to have written for a Palestine Liberation Organization (PLO) publication and was paid by Fatah from the late 1970s to 1993. Ms. Haj Khalil continues to wait for a resolution of the question regarding her status in Canada.

[6] Turning to the claim in negligence, the trial judge found that the Minister did not owe the appellants a duty of care. Applying the framework from *Cooper v. Hobart*, 2001 SCC 79, [2001]

3 S.C.R. 537, she first concluded that the alleged duty did not fall within an existing category of duty. Thus, she went on to consider the two-stage test for the recognition of a novel duty of care.

[7] Relying heavily on *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, she held that there would be a conflict between a duty to the appellants, and the Minister's overarching duties to the public under the IRPA. Therefore, the trial judge held that a *prima facie* duty of care did not arise – even if she were to assume foreseeability for the sake of her analysis, the potential for conflict was a "compelling policy reason" to refuse to find proximity (at paras. 188, 190, 193).

[8] She further held that even if a *prima facie* duty of care existed, she would have found it to be negated by residual policy considerations at the second stage of the *Cooper* test (at para. 193). The availability of seeking an order of *mandamus* to force a decision was considered an adequate alternative remedy (at paras. 194-202), as contemplated by Justice Abella in *Syl Apps, supra* at para. 28. Justice Layden-Stevenson also expressed concern that if a duty of care was recognized, claimants would be able to appeal to the Federal Court of Appeal as of right, circumventing the requirement in the IRPA that a question of general importance be certified (at para. 203).

[9] Further, the trial judge expressed concern about the costs of litigation in these circumstances. The costs to the parties (or in this case, legal aid), and the strain on judicial resources also favoured that such issues be resolved through administrative law remedies (at para. 205).

[10] Finally, Justice Layden-Stevenson felt that the spectre of indeterminate liability "loomed large" if the proposed duty of care were recognized "solely on the negative impact of delay on an applicant as opposed to actual misconduct on the part of immigration officers" (at para. 207). For all of these reasons, she held that no duty of care arose in the circumstances.

[11] The trial judge also held that even if a duty of care existed and was breached, the appellants had not demonstrated that the alleged damages were caused by the Minister's negligence.

[12] The trial judge also dismissed the appellants' claims that the delay violated section 7 of the Charter. She concluded that their interests in life, liberty, and/or security of the person were not engaged on these facts. She held that her findings on causation precluded a finding that the appellants were subjected to "serious, state-imposed psychological stress" as contemplated in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307. Since she had already found that the delay did not cause the alleged harm, any psychological stress could not possibly be state-imposed (at par. 293). She suggested that, in any event, the interests engaged on these facts were not as crucial as those in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, or *R. v. Morgentaler*, [1998] 1 S.C.R. 30, where psychological stress was intimately linked to physical suffering (at par. 294).

[13] Justice Layden-Stevenson disposed of the questions concerning the validity of paragraph 34(1)(*f*) of the IRPA primarily on the basis that they were settled by prior cases. She found that the Supreme Court of Canada's decision in *Suresh v. Canada (Minister of Citizenship and*

Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3, was dispositive of the section 2 claims. She relied on Justice Snider's conclusion in *Al Yamani v. Canada (Minister of Citizenship and Immigration)* (2006), 2006 FC 1457, 304 F.T.R. 222, that paragraph 34(1)(*f*) also does not violate section 15.

[14] Finally, Justice Layden-Stevenson found that the Supreme Court of Canada's decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, was a complete answer to the argument that the discretion vested in the Minister under subsection 34(2) of the IRPA was illusory. If Ms. Haj Khalil ultimately received a negative decision with respect to ministerial relief, she could challenge that decision on judicial review (at paras. 345-346). The trial judge was not prepared to strike down the legislation simply because it might be applied in an unconstitutional manner (at para. 344).

[15] The issue of costs was reserved. In separate reasons, Justice Layden-Stevenson awarded costs of $305, 000 against the appellants. She rejected their arguments that they should be spared costs because they were public interest litigants, or because junior counsel was acting on a *pro bono* basis. The litigation took the form of an action seeking over $3 million in damages, and the Crown prevailed on most issues. Accordingly, the trial judge saw no reason to depart from the ordinary rule that costs follow the event.

[16] We are of the view that the appeal should be dismissed and that there is very little that needs to be added to the thoughtful reasons of the learned judge.

[17] With respect to negligence, the appellants focus on the trial judge's analysis regarding the aspect of proximity in the duty of care analysis claiming that she inappropriately balanced policy interests. The appellants allege that duties under the IRPA are to facilitate the reunion of families in Canada and the settlement of Convention refugees, and to protect the general public, but that these duties are not irreconcilable. In fact, the appellants allege the conflict between a new duty of care and the protection of the health, safety and security of the Canadian public is speculative.

[18] Counsel relies extensively on the decision of the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, which was issued after the impugned decision. The relationship at issue in *Hill* was between police officers and individual suspects. The Supreme Court of Canada expressly cautioned at paragraph 27 against extending the impact of its decision to other contexts. Any harm caused to the appellants by the delay is not in the same range of severity as the harm caused in *Hill* to the wrongfully convicted. In *Hill*, the harm included ongoing investigation and criminal prosecution, wrongful conviction and incarceration for 20 months. And in contrast to *Hill*, the appellants were not left without recourse; they have open to them a remedy that is more expedient, inexpensive and responsive, namely *mandamus*.

[19] The appellants argue that the factor of alternative remedy – in this case *mandamus* – should not be considered at the time the Court is considering whether there is proximity. They also argue that *mandamus* is not an adequate alternative remedy as it does not give the Court the power to

grant damages and should, rather, be examined when the Court addresses the issue of mitigation of damages.

[20] These arguments fly in the face of the rulings of the Supreme Court of Canada in *Syl Apps* and *Hill*. In both cases the Supreme Court of Canada examined the alternative remedy factor at the time it was examining the issue of proximity (*Syl Apps* at para. 59; *Hill* at para. 35). In *Hill* the Supreme Court of Canada had stated, at para. 31, that there could be overlaps between stage one and stage two considerations, "the important thing [being] that in deciding whether a duty of care lies, all relevant concerns should be considered".

[21] Also, in *Syl Apps*, the alternative remedy considered by the Court was the opportunity, unrelated to compensation, given to a parent of a child to make an application for review of a child's status every six months (at para. 59). When the alleged novel duty of care is grounded on delay on the part of the state, it seems clear to us that the possibility of seeking an order of *mandamus* is a factor that must be considered at either stage of the examination.

[22] We are also of the view that the trial judge committed no palpable or overriding error in finding that there was a lack of causal connection between the delay in the processing of Ms. Haj Khalil's application and the damages she and her children claimed. Nor do we find that she erred in law or in fact and law when she found that there was no infringement of the appellants' section 7 rights under the Charter.

[23] With respect to the constitutional validity of section 34 of the IRPA, we find no basis for determining that Justice Layden-Stevenson was wrong in applying the Supreme Court of Canada's decision in *Suresh*. Nor can we agree with the appellants that the finding in *Little Sisters* is not a complete answer to the argument that the discretion in subsection 34(2) does not save paragraph 34(1)(*f*) from being applied in an unconstitutional manner, as the Supreme Court of Canada held that it did in *Suresh*.

[24] With respect to costs, the trial judge did not commit any reviewable error when she exercised her discretion.

[25] We would dismiss the appeal with costs.

"Robert Décary"
J.A.

"J. Edgar Sexton"
J.A.

"Pierre Blais"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-469-07
APPEAL FROM REASONS FOR JUDGMENT AND JUDGMENT RENDERED BY THE HONOURABLE LAYDEN-STEVENSON OF THE FEDERAL COURT, DATED SEPTEMBER 18, 2007, DOCKET NO. T-2066-03	
STYLE OF CAUSE:	Nawal Haj Khalil, Anmar El Hassen, Acil El Hassen v. Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 4, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(DÉCARY, SEXTON, BLAIS JJ.A.)
DATED:	March 6, 2009

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