

Al-Munzir Es-Sayyid (appellant) v. The Minister of Public Safety and Emergency Preparedness
(respondent)
(A-483-11; 2012 FCA 59)

Indexed As: Es-Sayyid v. Canada (Minister of Public Safety and Emergency Preparedness)

Federal Court of Appeal
Layden-Stevenson, Gauthier and Stratas, JJ.A.
February 20, 2012.

Summary:

The applicant, a citizen of Egypt, was found inadmissible for serious criminality and a delegate of the Minister of Citizenship and Immigration concluded the applicant posed a danger to the public in Canada. A removal order was issued. The applicant filed an application for leave and judicial review of the danger opinion, and moved for a stay of the removal order.

The Federal Court, in a decision reported [2011] F.T.R. Uned. 947, refused to grant a stay. The applicant appealed, raising bias issues. An interim stay was granted pending appeal.

The Federal Court of Appeal dismissed the appeal. The court delayed its judgment from coming into force for three weeks to allow the applicant time to commence proceedings in the Supreme Court of Canada.

Aliens - Topic 1565

Exclusion and expulsion - Power to detain and deport - Reasons for decisions - An applications judge refused to stay a removal order - The applicant appealed, arguing that the judge: (1) was unconsciously biased in criminality cases; and (2) created a reasonable apprehension of bias by almost verbatim copying the Minister's written submissions without attribution - The Federal Court of Appeal dismissed the appeal - There was no admissible evidence to support the first ground - As to the second ground, after considering the judge's reasons in context, the court found no bias or reasonable apprehension of bias in this case - However, the court reiterated its warning in *Janssen-Ortho Inc. v. Apotex Inc.* (FCA 2009) against the practice of copying a substantial part of a party's written submissions without acknowledgement - See paragraphs 51 to 63.

Aliens - Topic 1800

Exclusion and expulsion - Deportation and exclusion of persons in Canada - Deportation or removal order - Stay of (incl. termination of stay) - An applications judge refused to stay a removal order - The applicant appealed, arguing, that the judge created a reasonable apprehension of bias by delving far too deeply into the merits - The Federal Court of Appeal stated that, based on the written reasons, the judge engaged in a microscopic examination of the merits of the matter under the arguable case branch of the test - That approach was contrary to the *Toth* (FCA 1988) test and, in future cases, the judge's approach should be avoided - However, the court stated the issue raised by the applicant was not a submission about bias, but rather smacked of a submission about the merits of the judge's decision-making, a matter that was not subject to appeal - See

paragraphs 31 to 33.

Aliens - Topic 1800

Exclusion and expulsion - Deportation and exclusion of persons in Canada - Deportation or removal order - Stay of (incl. termination of stay) - [See **Aliens - Topic 1565**].

Courts - Topic 583

Judges - Duties - Re reasons for decisions - The Federal Court of Appeal stated that "We reiterate the warning in Janssen-Ortho [FCA 2009] 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 ... 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" - See paragraphs 60 to 63.

Courts - Topic 686

Judges - Disqualification - Bias - By trial or applications judge - [See **Aliens - Topic 1565**].

Courts - Topic 691

Judges - Disqualification - Bias - Reasonable apprehension of bias - [See **Aliens - Topic 1565** and first **Aliens - Topic 1800**].

Courts - Topic 692

Judges - Disqualification - Bias - Arising out of expressed opinions on legal issues - [See **Aliens - Topic 1565** and **Evidence - Topic 7000.4**].

Courts - Topic 4082

Federal Court of Canada - Jurisdiction - Federal Court of Appeal - Appeals from judgments of Federal Court - An applications judge refused to stay a removal order, after refusing the applicant's request that he recuse himself for bias - The applicant appealed, arguing that the judge: (1) was unconsciously biased in criminality cases; (2) created a reasonable apprehension of bias by unattributed copying of the Minister's written submissions; and (3) created a reasonable apprehension of bias by delving far too deeply into the merits of the matter under the arguable case branch of the stay test - The Federal Court of Appeal discussed the jurisdictional considerations - The court found that it had jurisdiction to hear the applicant's appeal based on grounds (1) and (2) which dealt with issues of bias, but not on ground (3) which dealt with the merits of the case - See paragraphs 26 to 34.

Evidence - Topic 7002

Opinion evidence - Expert evidence - General - Acceptance, rejection and weight to be

given to expert opinion - [See **Evidence - Topic 7000.4**].

Evidence - Topic 7000.4

Opinion evidence - Expert evidence - General - Admissibility - General - An applications judge refused to stay a removal order - The applicant appealed, arguing that the judge was unconsciously biased in criminality cases - In support, the applicant presented a law professor's opinion, which analysed 54 of the judge's decisions in this area - The Federal Court of Appeal held that the opinion was inadmissible - The opinion failed the necessity test, rule 52.2 of the Federal Court Rules respecting admission of expert evidence had not been followed, there were grave concerns about the objectivity and independence of the opinion, and the opinion was an unsigned draft - In any event, the opinion could not be afforded any weight because of the lack of acceptable methodology and intellectual rigour and several obvious errors - See paragraphs 36 to 46.

Cases Noticed:

Toth v. Minister of Employment and Immigration (1988), 86 N.R. 302 (F.C.A.), refd to. [para. 6].

RJR-MacDonald Inc. et Imperial Tobacco Ltd. v. Canada (Procureur général), [1994] 1 S.C.R. 311; 164 N.R. 1; 60 Q.A.C. 241, refd to. [para. 6].

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.), refd to. [para. 6].

Subhaschandran v. Canada (Solicitor General) et al., [2005] 3 F.C.R. 255; 331 N.R. 182; 2005 FCA 27, refd to. [para. 28].

Zündel, Re (2004), 331 N.R. 180; 2004 FCA 394, refd to. [para. 28].

Mahjoub, Re (2011), 426 N.R. 49; 2011 FCA 294, refd to. [para. 28].

Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369; 9 N.R. 115, refd to. [para. 35].

R. v. R.D.S., [1997] 3 S.C.R. 484; 218 N.R. 1; 161 N.S.R.(2d) 241; 477 A.P.R. 241, refd to. [para. 38].

R. v. Teskey (L.M.), [2007] 2 S.C.R. 267; 364 N.R. 164; 412 A.R. 361; 404 W.A.C. 361; 2007 SCC 25, refd to. [para. 39].

Wewayakum Indian Band v. Canada and Wewayakai Indian Band, [2003] 2 S.C.R. 259; 309 N.R. 201; 2003 SCC 45, refd to. [para. 39].

R. v. Mohan, [1994] 2 S.C.R. 9; 166 N.R. 245; 71 O.A.C. 241, refd to. [para. 41].

R. v. Abbey, [1982] 2 S.C.R. 24; 43 N.R. 30; 68 C.C.C.(2d) 394, refd to. [para. 41].

National Justice Compania Riviera S.A. v. Prudential Assurance Co.; Ship Ikarian Reefer, Re, [1993] 2 Lloyd's Rep. 68 (Q.B.), refd to. [para. 43].

Janssen-Ortho Inc. et al. v. Apotex Inc. et al. (2009), 392 N.R. 71; 75 C.P.R.(4th) 411; 2009 FCA 212, refd to. [para. 61].

Counsel:

Barbara Jackman and Sarah L. Boyd, for the appellant;
Ian Hicks, for the respondent.

Solicitors of Record:

Jackman & Associates, Toronto, Ontario, for the appellant;
Myles J. Kirvan, Deputy Attorney General of Canada, Ottawa, Ontario, for the

respondent.

This appeal was heard in Toronto, Ontario, on February 16, 2012, before Layden-Stevenson, Gauthier and Stratas, J.J.A., of the Federal Court of Appeal. The following judgment was delivered by the court, in Ottawa, Ontario, on February 20, 2012.

Appeal dismissed.

Editor: Elizabeth M.A. Turgeon

Aliens - Topic 1800

Exclusion and expulsion - Deportation and exclusion of persons in Canada - Deportation or removal order - Stay of (incl. termination of stay) - An applications judge refused to stay a removal order - The applicant appealed, arguing that the judge: (1) was unconsciously biased in criminality cases; and (2) created a reasonable apprehension of bias by almost verbatim copying the Minister's written submissions without attribution - The Federal Court of Appeal dismissed the appeal - There was no admissible evidence to support the first ground - As to the second ground, after considering the judge's reasons in context, the court found no bias or reasonable apprehension of bias in this case - However, the court reiterated its warning in *Janssen-Ortho Inc. v. Apotex Inc.* (FCA 2009) against the practice of copying a substantial part of a party's written submissions without acknowledgement - See paragraphs 51 to 63.

Courts - Topic 686

Judges - Disqualification - Bias - By trial or applications judge - An applications judge refused to stay a removal order - The applicant appealed, arguing that the judge: (1) was unconsciously biased in criminality cases; and (2) created a reasonable apprehension of bias by almost verbatim copying the Minister's written submissions without attribution - The Federal Court of Appeal dismissed the appeal - There was no admissible evidence to support the first ground - As to the second ground, after considering the judge's reasons in context, the court found no bias or reasonable apprehension of bias in this case - However, the court reiterated its warning in *Janssen-Ortho Inc. v. Apotex Inc.* (FCA 2009) against the practice of copying a substantial part of a party's written submissions without acknowledgement - See paragraphs 51 to 63.

Courts - Topic 691

Judges - Disqualification - Bias - Reasonable apprehension of bias - An applications judge refused to stay a removal order - The applicant appealed, arguing that the judge: (1) was unconsciously biased in criminality cases; and (2) created a reasonable apprehension of bias by almost verbatim copying the Minister's written submissions without attribution - The Federal Court of Appeal dismissed the appeal - There was no admissible evidence to support the first ground - As to the second ground, after considering the judge's reasons in context, the court found no bias or reasonable apprehension of bias in this case - However, the court reiterated its warning in *Janssen-Ortho Inc. v. Apotex Inc.* (FCA 2009) against the practice of copying a substantial part of a party's written submissions

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Judges - Disqualification - Bias - Arising out of expressed opinions on legal issues - An applications judge refused to stay a removal order - The applicant appealed, arguing that the judge: (1) was unconsciously biased in criminality cases; and (2) created a reasonable apprehension of bias by almost verbatim copying the Minister's written submissions without attribution - The Federal Court of Appeal dismissed the appeal - There was no admissible evidence to support the first ground - As to the second ground, after considering the judge's reasons in context, the court found no bias or reasonable apprehension of bias in this case - However, the court reiterated its warning in *Janssen-Ortho Inc. v. Apotex Inc.* (FCA 2009) against the practice of copying a substantial part of a party's written submissions without acknowledgement - See paragraphs 51 to 63.

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Evidence - Topic 7002

Opinion evidence - Expert evidence - General - Acceptance, rejection and weight to be given to expert opinion - An applications judge refused to stay a removal order - The applicant appealed, arguing that the judge was unconsciously biased in criminality cases - In support, the applicant presented a law professor's opinion, which analysed 54 of the judge's decisions in this area - The Federal Court of Appeal held that the opinion was inadmissible - The opinion failed the necessity test, rule 52.2 of the Federal Court Rules respecting admission of expert evidence had not been followed, there were grave

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