SUPREME COURT OF CANADA

CITATION: Mugesera *v.* Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 91, 2005 SCC 39

DATE: 20050628
DOCKET: 30025

BETWEEN:

Minister of Citizenship and Immigration
Appellant/Respondent on motion
v.
Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho
Respondents/Applicants
- and -
League for Human Rights of B'nai Brith Canada, PAGE RWANDA, Canadian Centre for International Justice, Canadian Jewish Congress, University of Toronto, Faculty of Law – International Human Rights Clinic, and Human Rights Watch
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

MOTION FOR A PERMANENT STAY OF PROCEEDINGS JOINT REASONS FOR JUDGMENT:
(paras. 1 to 18)

McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

Mugesera *v*. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 91, 2005 SCC 39

Minister of Citizenship and Immigration *Appellant/Respondent on motion*

v.

Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho *Respondents/Applicants*

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Indexed as: Mugesera *v*. Canada (Minister of Citizenship and Immigration)

Neutral citation: 2005 SCC 39.

File No.: 30025.

Hearing and judgment: December 8, 2004.

Reasons delivered: June 28, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

motion for a permanent stay of proceedings

Practice — Abuse of process — Motion for permanent stay of proceedings — Motion alleging Minister's decision to appeal strongly influenced by certain organizations — Appointment to Supreme Court of Canada of judge whose spouse chaired committee of one of these organizations — Allegation of abuse of power in respect of this appointment — Whether permanent stay of proceedings should be granted owing to abuse of process.

Courts — Supreme Court of Canada — Bias — Voluntary recusal of judge whose spouse chaired committee of one of interveners — Whether fact that there ground for one of Court's members to recuse him or herself compromises impartiality of entire court.

Shortly before the hearing by this Court of an appeal from a decision setting aside an order to deport M and members of his family, counsel for M filed a motion for a permanent stay of proceedings. The motion was based on two grounds: an alleged abuse of power by the then Minister of Citizenship and Immigration and the current Minister of Justice, and an apprehension of bias on the part of this Court as a whole. It is alleged that, strongly influenced by Jewish individuals and organizations, the Ministers decided to appeal the Federal Court of Appeal's judgment and have M deported at all costs. To this end, the current Minister of Justice allegedly plotted to have one of the two new members of the Court appointed. Despite the voluntary recusal of the judge in question, it is also alleged that the mere presence on the Court of a judge whose spouse chaired the War Crimes Committee of the Canadian Jewish

Congress, an intervener in the case at bar, would impair the ability of the balance of its members to remain impartial.

Held: The motion should be dismissed.

The motion is unacceptable from every point of view. It constitutes an unqualified and abusive attack on the integrity of the judges of the Court and systematically refers to irresponsible innuendo. The only abuse of process from this motion lies at the feet of M and his counsel. The Minister availed himself of a recourse provided for by law in respect of a matter of public policy and was granted leave to appeal. This decision was made and endorsed by a succession of members of the federal cabinet at various stages in the proceedings. Bias on the Court's part has not been established either. None of the judges who were scheduled to hear and have now heard the appeal were involved in the case. If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. [14-16]

Cases Cited

Referred to: *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45; *Gillet v. Arthur*, [2005] R.J.Q. 42.

Statutes and Regulations Cited

Immigration Act, R.S.C. 1985, c. I-2.

MOTION for a permanent stay of proceedings. Motion dismissed.

Bernard Laprade, for the appellant/respondent on the motion.

Guy Bertrand and *Josianne Landry-Allard*, for the respondents/applicants.

Written submissions only by *Benjamin Zarnett*, *Francy Kussner* and *Daniel Cohen*, for the interveners the Canadian Jewish Congress, the University of Toronto, Faculty of Law — International Human Rights Clinic and Human Rights Watch.

English version of the judgment delivered by

1 THE CHIEF JUSTICE AND MAJOR, BASTARACHE, BINNIE, LEBEL, DESCHAMPS, FISH AND CHARRON JJ. — On December 8, 2004, we reserved judgment on an appeal of the Minister of Citizenship and Immigration from a decision of the Federal Court of Appeal setting aside a deportation order against the respondents, Léon Mugesera and his wife and children. Shortly before the date set for the hearing the respondents filed a motion seeking a permanent stay of all proceedings. After

hearing submissions by the respondents, the motion was dismissed as being devoid of merit and improper in advancing scandalous allegations.

I. Introduction

2 The respondent Mugesera and members of his family were admitted into Canada as permanent residents in 1993. In 1995, the Minister of Citizenship and Immigration decided to deport them pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2. In the Minister's opinion, Mugesera had been granted landing in Canada by reason of a misrepresentation of a material fact and had committed or incited others to commit murder, genocide or crimes against humanity in Rwanda in 1992. Mugesera and his family contested this decision, first before the Adjudication Division, and then before the Appeal Division, of the Immigration and Refugee Board ([1998] I.A.D.D. No. 1972 (QL)). These administrative appeals were unsuccessful.

3 On an application for judicial review, the Federal Court of Canada, Trial Division found that some of the grounds for deportation were invalid, but that the deportation order itself was not: [2001] 4 F.C. 421, 2001 FCT 460. In the trial judge's view, the order remained valid in part. However, the Federal Court of Appeal set aside the Appeal Division's decision in its entirety and found the grounds on which it was based to be invalid: [2004] 1 F.C.R. 3, 2003 FCA 325. The court accordingly referred the matter back to the Appeal Division for reconsideration on the basis of the principles enunciated by the court in its reasons. The Minister of Citizenship and Immigration was then granted leave to appeal that judgment: [2004] 1 S.C.R. xi. The appeal, on which we reserved judgment, is being released with these reasons on the Motion.

4 As we mentioned above, shortly before the hearing of the appeal, counsel for the respondents, Mr. Bertrand, filed a motion with affidavits signed by himself and his clients. The motion, entitled [TRANSLATION] "Motion for a Permanent Stay of Proceedings", essentially asked us to terminate all proceedings against the applicants, and more specifically the Minister's appeal. The principal relief sought was that we dismiss the Minister's appeal without considering the merits of the case. The judgment of the Federal Court of Appeal would then apply in its entirety, and the deportation proceedings against the respondents would accordingly be stayed.

II. Grounds for the Motion

5 The respondents' motion is based on two grounds. The first relates to an allegation of abuse of power and abuse of process by the then Minister of Citizenship and Immigration and the current Minister of Justice; the other relates to an apprehension of bias on the part of this Court as a whole.

6 We do not intend to reproduce all the allegations made in the motion, but we will briefly summarize its content. The particular focus of this proceeding is on the recent changes in the composition of our Court and the circumstances surrounding those changes, which, the respondents submit, support allegations of abuse of process and bias.

7 It is public knowledge that positions on this Court became vacant early in the summer of 2004 following the resignations of two judges, the Honourable Mr. Justice Frank Iacobucci and the Honourable Madam Justice Louise Arbour.

Following a process that included a parliamentary review, two new members joined the Court late in the summer of 2004, namely the Honourable Madam Justice Rosalie Abella and the Honourable Madam Justice Louise Charron, who had both served on the Ontario Court of Appeal for many years.

8 Within days of her appointment, upon reading the list of cases scheduled to be heard in December 2004, Abella J. recused herself of her own accord on September 16, 2004. Her husband, as chair of the War Crimes Committee of the Canadian Jewish Congress, a party to these proceedings, had conveyed representations about this case to the then Minister of Citizenship and Immigration, the Honourable Denis Coderre. The Registrar of this Court immediately informed the parties that Abella J. would not be taking part in this appeal.

9 Two months after they were informed of the voluntary recusal of Abella J., the respondents filed the above-mentioned motion. The motion alleges that an extensive Jewish conspiracy was hatched to ensure that the Minister's appeal would succeed and that the respondent Mugesera and his family would be deported.

10 The motion and the supporting affidavits state that the Minister of Citizenship and Immigration and the Minister of Justice and Attorney General of Canada were relentless and biased in their handling of the case. Strongly influenced by Jewish individuals and organizations, they are alleged to have decided to appeal the Federal Court of Appeal's decision and have Mr. Mugesera deported at all costs. To this end, the current Minister of Justice, the Honourable Irwin Cotler, allegedly plotted to have Justice Abella appointed to the Supreme Court of Canada, so she could sit on

this appeal. All the members of this Court were said to be "contaminated" by her appointment and incapable of being impartial toward the respondents.

11 In summary, Mr. Bertrand's arguments and his personal affidavit evidence alleged influential members of the Jewish community manipulated the Canadian political system and the country's highest court for the sole purpose of having Mugesera deported, and it would be impossible for the respondents to receive a fair hearing as a consequence. The only solution, the respondents submitted, would be for the Court to acknowledge its inability to act impartially because of its contamination, and to grant a permanent stay of proceedings.

III. Principles Governing a Review of Abuse of Process and the Application of Judicial Impartiality

12 The legal framework for stays of proceedings and the principles defining the tests for judicial independence and the impartiality requirement are well known. On the one hand, the stay of proceedings is a drastic remedy for an abuse of process. In the case at bar, the relief sought by the respondents would mean that the substantive arguments filed by the Minister in this appeal in support of the validity of Mr. Mugesera's deportation order would never be reviewed in a definitive manner by the Court. Nor would the public's interest in having this review take place be protected. However, this decision must be made in a legal context in which this Court has in past decisions ruled that the stay of proceedings is a remedy that must be limited to the most serious cases, such as in situations involving abuse by the prosecution (*R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at para. 53; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 59; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 59 and 68).

13 On the other hand, we recently considered the principles that define the nature of a judge's duty of impartiality and how this duty is applied in the review of an application to vacate a judgment of this Court (see *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45). The duty of impartiality requires that judges approach all cases with an open mind (see para. 58). There is a presumption of impartiality. The burden of proof is on the party alleging a real or apprehended breach of the duty of impartiality, who must establish actual bias or a reasonable apprehension of bias. In the case at bar, the situation must be considered in the context of the role and operating procedures of a collegial court consisting of nine judges serving as Canada's court of final resort.

IV. Application of the Principles

14 As stated, this motion is flagrantly without basis in fact or in law. First, the Minister of Citizenship and Immigration, in deciding to appeal, availed himself to a recourse provided for by law in respect of a matter of public policy and was granted leave to appeal. It should be noted that his decision to appeal was made and endorsed by a succession of members of the federal cabinet at various stages in the proceedings, including the application for leave to appeal. The Honourable Irwin Cotler, currently the Minister of Justice, was not in Cabinet at the time.

15 Next, none of the judges who were scheduled to hear and have now heard the appeal were in any way involved in this case. No reasonable person would think, after Abella J. voluntarily recused herself, that her mere presence on the Court would impair the ability of the balance of its members to remain impartial. If there is a duty

on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence. The Quebec Court of Appeal helpfully noted these principles in a recent decision dismissing a motion to stay proceedings in which bias was alleged against all the judges of the Quebec Superior Court (*Gillet v. Arthur*, [2005] R.J.Q. 42, *per* Robert C.J.Q. and Gendreau and Baudouin JJ.A.).

16 Although it is not our usual practice, the content of the motion and of its allegations compels us to point out that it is unprofessional and unacceptable. It constitutes an unqualified and abusive attack on the integrity of the Judges of this Court. In an attempt to establish the alleged Jewish conspiracy and abuse of process against the Mugeseras, this pleading systematically referred to irresponsible innuendo. In addition, it refers to exhibits that are irrelevant and whose content is entirely inappropriate and misleading. Thus, it is obvious from the motion and its supporting exhibits that it was drafted with little concern for the rigour, restraint and respect for the facts required of all lawyers involved in judicial proceedings as an officer of the court. We are compelled to say that none of the allegations in the motion, no portion of the affidavits filed in support of the motion, and none of the documents to which these affidavits refer justifies the motion with respect to members of this Court or to the appellant's decision to initiate and pursue this appeal. The only abuse of process from this motion lies at the feet of the respondent Mugesera and Mr. Bertrand.

17 Regretfully, we must also mention that the motion and the documents filed in support of it include anti-Semitic sentiment and views that most might have thought had disappeared from Canadian society, and even more so from legal debate in Canada. Our society is a diverse one, home to the widest variety of ethnic, linguistic and cultural groups. In this society, to resort to discourse and actions that profoundly contradict the principles of equality and mutual respect that are the foundations of our public life shows a lack of respect for the fundamental rules governing our public institutions and, more specifically, our courts and the justice system.

18 The motion is dismissed with costs.

Motion dismissed with costs.

Solicitor for the appellant/respondent on motion: Deputy Attorney General of Canada, Montréal.

Solicitors for the respondents/applicants: Guy Bertrand & Associés, Québec.

Solicitors for the interveners the Canadian Jewish Congress, the University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch: Goodmans, Toronto.