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COURT OF APPEAL FOR ONTARIO

FELDMAN J.A. (IN CHAMBERS)

B E T W E E N:	)	
	)	
MANSOUR AHANI	)	Barbara Jackman
	)	for the appellant
Applicant	)	
(Appellant)	)	
	)	
- and -	)	
	)	
	)	
HER MAJESTY THE QUEEN,	)	Donald MacIntosh and
ATTORNEY GENERAL OF CANADA,	)	Neeta Logsetty for the
THE MINISTER OF CITIZENSHIP AND	)	respondents
IMMIGRATION	)	
	)	
Respondents	)	
(Respondents in Appeal)	)	**HEARD: January 16, 2002**

FELDMAN J.A.:

[1] The appellant is a Convention refugee who is the subject of a deportation order. He has exhausted all of his rights of appeal, including to the Supreme Court of Canada, which dismissed his appeal on January 11, 2002. The Supreme Court of Canada confirmed in its ruling that there was no basis to interfere with the two findings of the Minister of Citizenship and Immigration: (1) that the appellant constitutes a danger to the security of Canada; and (2) that if deported to Iran, his country of origin, he faces only a minimal risk of torture. The court also concluded that "the process accorded to Ahani was consistent with the principles of fundamental justice."

[2] Faced with imminent deportation to Iran, the appellant initiated a proceeding in the Ontario Superior Court seeking an injunction to prevent the execution of the deportation order pending a determination of his petition to the United Nations Human Rights Committee as to whether Canada is in breach of its international obligations under the *International Covenant on Civil and Political Rights.* The injunction was sought pursuant to ss. 7 and 24(1) of the *Charter of Rights and Freedoms*. The petition to the U.N. Committee was filed on January 10, 2002 in anticipation of the receipt of the decision of the Supreme Court the following day, and the possibility (which did materialize), that the appellant would lose his appeal and be subject to imminent deportation from Canada.

[3] In the Superior Court the respondent submitted that the Superior Court and the Federal Court shared concurrent jurisdiction over constitutional issues raised in the context of the *Immigration Act*, but that the Superior Court should defer to the Federal Court expertise in such matters. Dambrot J. decided to assume jurisdiction in the matter, but dismissed the motion on the merits.

[4] The appellant filed a Notice of Appeal to this court and brought this motion on short notice, seeking an interim stay of the deportation order pending the hearing of the appeal. In order to accommodate the procedure, the respondent has undertaken that the appellant's deportation will be delayed until Saturday, January 19, 2002.

JURISDICTION TO ORDER A STAY

[5] The appellant concedes that the stay being sought is not a stay of the order appealed from under Rule 63.02 of the *Rules of Civil Procedure*. Rather, it is a stay of the deportation order itself. I am satisfied that the court has jurisdiction to issue such a stay pursuant to s. 134(2) of the *Courts of Justice Act*, if the criteria of the section are met. That subsection provides:

> s. 134(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

[6] As precedent, counsel pointed out that part of the procedural history of the case of *Reza v. The Queen*, [1994] 2 S.C.R. 394 at 399 was an order made by Galligan J.A.

staying the deportation order itself, pending the appeal from the order made by the General Division, which stayed Mr. Reza's *Charter* proceeding wherein he sought injunctive relief from execution of that deportation order.

THE TEST FOR A STAY

[7] In *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), this court held that the test to be applied on a stay motion is the three-fold test set out in the case of *RJR Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 which applies to both interlocutory injunctions as well as stays pending appeal: a serious issue to be tried, irreparable harm and balance of convenience.

BACKGROUND FACTS

[8] The background facts are set out in the Reasons of Dambrot J. and I reproduce them here:

> Mansour Ahani is a citizen of Iran. He arrived in Canada on October 14, 1991, and immediately claimed protection as a Convention refugee. On April 1, 1992, the Refugee Division of the Immigration and Refugee Board found him to be a Convention refugee.
>
> On June 17, 1993 a security certificate signed by the Solicitor General of Canada and the Minister of Citizenship and Immigration pursuant to s. 40.1 of the *Immigration Act* was filed in the Federal Court of Canada. In the certificate, the Ministers certified that they were of the opinion that the applicant was a member of an inadmissible class specified in the anti-terrorism provisions of the *Act*. In brief, it is alleged that Ahani is or was a member of the Iranian Security Service, which is a terrorist organization. The applicant was arrested pursuant to this certificate, and has been in custody ever since.

On April 17, 1998, Denault J. determined pursuant to s. 40.1 of the *Immigration Act* that the decision of the Ministers to issue the certificate was reasonable.

On April 28, 1998, an adjudicator determined that the applicant was a member of the inadmissible class alleged by the Ministers, and ordered him deported from Canada. He has remained in Canada since then as a result of injunctions preventing his removal while legal proceedings were pending.

On August 12, 1998, the Minister of Citizenship and Immigration issued her opinion, under s. 53(1)(b) of the *Act*, that the applicant constitutes a danger to the security of Canada, and that he faced only a minimal risk of torture in Iran. These findings enable the Minister to return the applicant, a Convention refugee, to the very country from which he sought refuge.

On June 15, 1999, an application for judicial review of the Minister's decision, and an action raising similar issues was dismissed by McGillis J.. On January 18, 2000, an appeal to the Federal Court of Appeal was dismissed. On January 11, 2002, a further appeal to the Supreme Court of Canada was dismissed.

In its judgment, the Supreme Court concluded that on any standard of review, even correctness, there was no basis to interfere with the Minister's findings. The Court also concluded that the procedural process accorded to Ahani was consistent with the principles of fundamental justice. In short the Supreme Court concluded that the deportation of the applicant to Iran will not violate his rights under s. 7 of the *Charter*.

… On January 10, 2002, the applicant forwarded a preliminary petition to the United Nations Human Rights Committee claiming that Canada is in violation of various articles of the *International Covenant on Civil and Political*

> *Rights* relating to the fairness of his trial, the right to be free from torture and arbitrary detention. The applicant asked the Committee to consider his petition under the *Optional Protocol to the International Covenant on Civil and Political Rights.* Accompanying this petition was a request to the Committee for "interim measures", specifically a request that the Committee in turn request of Canada that it not remove the applicant to Iran until the Committee has had an opportunity to consider his petition, should the appeal to the Supreme Court of Canada fail.
>
> On January 11, 2002, the Commission advised the applicant that Canada had been requested, in the event that the Supreme Court's decision expected to be delivered on January 11, 2002 were to allow the deportation of Ahani, to refrain from deporting Ahani until the Committee has an opportunity to consider the allegations, particularly those that relate to torture, other inhuman treatment or even death as a consequence of the deportation. Canada has advised the applicant, and this Court, that it does not propose to honour this request.

THE ISSUE

[9] The issue, as framed by Dambrot J. is, does the appellant have a constitutional right as a principle of fundamental justice guaranteed by s. 7 of the *Charter*, not to be removed from Canada until his petition to the United Nations Human Rights Committee has been considered and finally reported on. Dambrot J. held that there is no such right and therefore declined the injunction. At this level, in order to obtain a stay, the appellant need only show that there is a serious issue to be tried.

ANALYSIS

[10] It is agreed that Canada has ratified the *International Covenant on Civil and Political Rights* which recognizes certain rights of all peoples and obliges State Parties to in effect ensure that the rights are effective within those states. The *International Covenant* also establishes the Human Rights Committee. Canada has also acceded to the *Optional Protocol to the International Covenant on Civil and Political Rights* which

provides a process whereby persons who claim to be victims of violations of a right contained in the *Covenant* may seek the assistance of the Human Rights Committee after exhausting all available domestic remedies. The Committee's jurisdiction is to consider what it receives from the complainant and from the State Party, then: "The Committee shall forward its views to the State Party concerned and to the individual."

[11] The Committee operates with *Rules of Procedure*. Rule 86 gives the Committee the authority, upon the request of the complainant, to ask the State Party to take "interim measures" to protect the status quo pending the determination of the matter by the Committee. Rule 86 provides:

> The Committee may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication.

[12] The *Protocol* by its own terms, does not impose an obligation on a State Party either to accept or act on the views of the Committee or to accede to a request for interim measures pending the Committee's consideration of a matter submitted to it.

[13] It is a well-established rule that international treaties and conventions must be enacted by legislation in order to be binding and enforceable by domestic courts within Canada. Therefore, although Canada has ratified and acceded to the *Covenant* and *Protocol* respectively, because it has not enacted legislation implementing them as part of our law, they are not part of the law of Canada and are not binding in Canada: *Baker v. Canada*, [1999] 2 S.C.R. 817 at 861; *Suresh v. Canada*, 2002 SCC 1 at para. 60.

[14] The basis for the argument that nevertheless, constitutional rights have somehow been created by Canada's ratification and accession to these international conventions flows from a recent line of cases from the Judicial Committee of the Privy Council, beginning with *Thomas v. Baptiste,* [2000] 2 A.C. 1. That case was decided by the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago. Trinidad and Tobago had ratified the *Covenant* and acceded to the *Protocol*. Trinidad and Tobago had

also ratified the *American Convention on Human Rights 1969*, which established the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. By ratifying the *Convention*, the state recognized the Inter-American Commission's competence to entertain petitions from individuals claiming violations of the *American Convention* and to make reports and recommendations, and the compulsory jurisdiction of the Inter-American Court to give binding rulings on the interpretation and application of the *Convention*.

[15] The appellant Thomas had been convicted of murder and sentenced to death. He lodged a petition with the Inter-American Commission alleging violations of his rights. The Commission had not responded by the time the government's Advisory Committee on the Power of Pardon met to consider a reprieve. No reprieve was given. The Inter-American Court made an order requiring the government to refrain from carrying out the death sentence pending its determination of the petitions. The government was prepared to defy the order and proceed with the death sentence. The appellant's motion was for an order that it would be unlawful for the State to carry out his death sentence.

[16] The constitution of Trinidad and Tobago contains a "due process of law" clause. The Privy Council held that the clause gives constitutional protection to the concept of procedural fairness and includes "the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action." (para. 24) The contention of the appellant was that his constitutional right to due process would be infringed if he were executed before the petitions were ruled on and the rulings of the Inter-American Commission and the Inter-American Court considered by the government authorities.

[17] The Privy Council recognized that international conventions do not alter domestic law unless incorporated by legislation. However, it held that the appellant was not seeking to enforce a treaty which had not been incorporated into domestic law, but rather the due process clause of the constitution. The Privy Council concluded at paras. 26 and 29:

> By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system

> and thereby temporarily at least extended the scope of the due process clause in the Constitution.

And:

> The due process clause must therefore be broadly interpreted. It does not guarantee the particular forms of legal procedure existing when the Constitution came into force; the content of the clause is not immutably fixed at that date. But the right to be allowed to complete a current appellate or other legal process without having it rendered nugatory by executive action before it is completed is part of the fundamental concept of due process.

[18] The submission of the appellant in this case is that similarly, by ratifying the *Convention* and acceding to the *Protocol*, which provide for individual access to the United Nations Human Rights Committee, Canada has made access to the procedures under the *Protocol* and the right to complete those procedures before executive action (deportation) makes them nugatory, part of the s. 7 *Charter* right to fundamental justice. As a result, Canada is obliged under the *Charter* to accede to the request for interim measures that the appellant not be deported pending the report of the Committee.

[19] Dambrot J. rejected the Privy Council's legal analysis. In his view, it is tantamount to incorporating an international treaty into domestic law without legislation. Dambrot J. may be correct in his rejection of the Privy council's analysis. However, the fact that there is a line of cases (see *Briggs v. Baptiste*, [2000] 2 A.C. 40; *Higgs v. Minister of National Security*, [2000] 2 W.L.R. 1368; and *Lewis v. Jamaica (Attorney General)*, [2000] 3 W.L.R. 1785) which follows this analysis can certainly be the basis to establish that for the purpose of this motion there is a serious legal issue to be tried.

[20] Dambrot J., however, referred to a further reason for rejecting the concept that the procedure of petitioning the Human Rights Committee constitutes part of the *Charter* right to fundamental justice:

> I am grateful not to have to consider this issue in the context of the death penalty, but in my opinion, if there is a right protected by s. 7 of the *Charter* not to have the outcome of any pending appellate or other legal process preempted by executive action, it does not extend to an analogous process

> such as a petition to an international body whose advice is not binding domestically. (para. 21)

[21] This second issue identified by Dambrot J. also greatly concerned the Privy Council in *Thomas*. The Privy Council saw much force in the government's argument that because it was not bound to take account of the Inter-American Commission's report when considering a reprieve, there could be no legal right to complete a process which leads only to such a report. However, the Privy Council's answer was that the Commission could refer the petition to the Inter-American Court which could make binding rulings quashing the conviction or commuting the sentence. That aspect of the process therefore did create a constitutional right to due process.

[22] I agree with the concerns expressed by Dambrot J. and by the Privy Council as to how one can have a constitutional right to complete a process which does not provide for an enforceable remedy. Ms. Jackman submitted to the court that Canada has a record of complying with reports from the Committee if the process is completed.[1] Therefore although there is no enforceable remedy, one can be confident that Canada will accord a remedy voluntarily. Even if this is so, it is difficult to formulate an analysis which leads to the conclusion that Canada has created a constitutional right to a process which will result only in a purely voluntary remedy.

[23] Ms. Jackman also concedes that Canada sometimes accedes to the interim measures requests and sometimes it does not. As Dambrot J. found, there can be no legitimate expectation based on Canada's record, that there would be no deportation pending consideration of a petition by the Committee. This is also evidence that Canada did not ratify the *Covenant* and accede to the *Protocol* with the understanding that it was thereby creating any binding procedural processes associated with those instruments.

CONCLUSION ON THE "SERIOUS QUESTION TO BE TRIED" TEST

[24] On this motion, my role is not to finally decide the merits of the legal issue, but only whether there is a serious issue to be tried on the appeal. In *RJR Macdonald*, the

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[1] See W. Schabas, *International Human Rights Law and The Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996) at 71 – 76 for a discussion of the history of petitions from Canada to the Human Rights Committee.

[25] Supreme Court set a fairly low threshold for this test on a *Charter* claim. The court stated at p. 337:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra,* at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[26] The appellant raises an issue based on a line of cases from the Privy Council. It is questionable whether the principle, even if it is correct or applicable and acceptable in the Canadian context, extends to a situation such as the one before this court given that the so-called appeal process before the Human Rights Committee can lead only to a non-binding report to the government of Canada. However, I would not say, based on the materials placed before the court on the motion, that the application is frivolous or vexatious.

[27] Counsel for the respondent also suggested that the application amounts to a collateral attack on the recent decision of the Supreme Court of Canada. This appearance is created because of the clear overlap of the rights protected by the U.N. *Covenant* ratified by Canada and the rights enshrined in the *Charter of Rights and Freedoms*, and

the fact that the Supreme Court has ruled that the appellant has received the benefit of those rights. However, the application relates at this stage not to the underlying substantive rights, but to a procedure provided in the U.N. *Protocol*, which procedure could only be invoked after the appellant had exhausted his rights in the domestic courts. It is the status and extent of entitlement to the U.N. procedure that is the issue raised in the application.

[28] Without commenting on the ultimate success of the appeal, in my view the test of whether there is a serious issue to be tried has been met.

BALANCE OF CONVENIENCE AND IRREPARABLE HARM

[29] I am satisfied that because the appellant will be deported unless this court orders a stay, the balance of convenience favours the appellant. Counsel raised with the court the issue that the appellant remains a danger to Canada even though he is in jail because he (and Mr. Suresh) made phone calls out of the country from jail. I assume that if these calls were improper, measures have now been taken to ensure that no further calls will be made. The appellant has been in custody in Canada for over 8 years and will remain in custody. Both counsel have agreed to be ready to argue the appeal within the next two weeks, and the court will make arrangements to accommodate a hearing within that time frame. In those circumstances, I am satisfied that the balance of convenience favours the appellant.

[30] With respect to irreparable harm, the appellant says he fears torture and, his counsel says, even execution if he is deported. The decision of the Supreme Court confirms findings made in this country that his risk of being subjected to torture in Iran is minimal. I do not deal with irreparable harm on the basis of that issue.

[31] The issue is whether the appellant will suffer irreparable harm if he is deported before his appeal is heard by this court. Since the remedy sought by this proceeding is an injunction preventing the appellant from being deported pending receipt by the government of the report from the Human Rights Committee, his immediate deportation will in effect end this proceeding. In that sense, he will suffer irreparable consequences if he is deported.

CONCLUSION

[32] The appellant has met the three branches of the test for a stay of his deportation pending appeal. I am also satisfied that for the purposes of s. 134(2) of the *Courts of Justice Act*, it is appropriate to grant the stay as otherwise the appellant will suffer prejudice pending the hearing of the appeal. An order will therefore issue that the effect of the deportation order against the appellant is stayed pending the appeal of this matter to a panel of this court, which appeal is to be expedited and heard during the week of January 28, 2002. Counsel are requested to make arrangements to meet with me in order to fix a timetable for the exchange and delivery of materials for the appeal.

Signed: "K.N. Feldman J.A."

RELEASED: JANUARY 17, 2002