Date: 20060925

Docket: T-498-06

Citation: 2006 FC 1132

Ottawa, Ontario, the 25th day of September 2006

Present: Mr. Justice Blais

BETWEEN:

SKANDER TOURKI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the respondent Minister of Public Safety and Emergency Preparedness to appeal the order of Prothonotary Richard Morneau, dated June 28, 2006, allowing the applicant an extension of time in which to file some documents in support of his affidavits.

[2] The respondent generally submits that the documents requested to be filed are clearly inadmissible in a judicial review since they were not before the administrative decision-maker.

[3] It is true that the documents in question result from examinations that occurred subsequent to March 10, 2004, in another proceeding. However, it must be conceded that this proceeding is directly related to the matter now before this Court.

[4] In fact, Prothonotary Morneau did not rule on whether or not the documents in question were admissible, but instead deferred his decision to the judge on the merits, given the circumstances. It is obvious from this case that the respondent preferred to base his argument on the admissibility of the documents in question instead of reviewing the decision of Prothonotary Morneau in light of the conditions that might warrant setting aside a decision of a prothonotary on appeal.

[5] The reasons for setting aside a prothonotary's decision on appeal were clearly laid down in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, paragraphs 94-95, (1993) 149 N.R. 273:

> I also agree with the Chief Justice in part as to the standard of review to be applied by a motions judge to a discretionary decision of a prothonotary. Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourcière J.A. in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (b) they raise questions vital to the final issue of the case. . . .
>
> Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

[6] In my opinion, this case involves an interlocutory decision by the Prothonotary that cannot be characterized as clearly wrong, since the documents in question are fully relevant to this case and relate to the same facts. The relevant question is whether they might possibly be admissible in Court since they constitute testimony subsequent to the decision that is the subject of the application for judicial review.

[7] It is also clear that the statements of the persons who were examined are in relation to the facts that occurred prior to the decision made by the decision-maker. Persons who were examined could be examined *de novo* on the application for judicial review, and might possibly be confronted with their prior statements on the same matter, even after the decision that is being judicially reviewed. Such a request is quite plausible for the purpose of verifying the credibility of the persons involved.

[8] In my opinion, it was not unreasonable or wrong on the part of the Prothonotary to find that the relevance and admissibility of these documents, which are essentially the transcript of examinations, will be determined by the judge in the course of the hearing.

[9] As to whether the Prothonotary's decision bears on a question that is vital to the final issue of this case, that is clearly not the case since deferring the final decision on the admissibility of the documents to the judge who will hear the application for judicial review clearly indicates that it will be the trial judge and not the Prothonotary who will have to decide whether the documents are admissible during the hearing on the application for judicial review.

[10] I conclude, therefore, that the moving party has failed to provide sufficiently persuasive evidence that would warrant this Court to intervene *de novo* in this case and set aside the decision of the Prothonotary.

[11] Accordingly, the Court dismisses the respondent's motion, with costs.

ORDER

THE COURT ORDERS:

1. The respondent's motion is dismissed; and

2. Costs to the applicant.

"Pierre Blais"

Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-498-06
STYLE OF CAUSE:	SKANDER TOURKI v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal
DATE OF HEARING:	August 14, 2006
REASONS FOR ORDER AND ORDER BY:	Mr. Justice Blais
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