1987 CarswellNat 103
Federal Court of Canada — Trial Division

Southam Inc. v. Canada (Minister of Employment & Immigration)

1987 CarswellNat 103, 1987 CarswellNat 861, [1987] 3 F.C. 329, 13 F.T.R. 138, 33 C.R.R. 376, 3 Imm. L.R. (2d) 226, 6 A.C.W.S. (3d) 11

SOUTHAM INC. et al. v. MINISTER OF EMPLOYMENT & IMMIGRATION

Rouleau J.

Judgment: July 27, 1987
Docket: No. T-1588-87

Counsel: *R. Dearden*, and *A. Reid*, Q.C., for applicants.
B. Evernden, for respondents.
P. Jacobsen, for intervenor.

Subject: Immigration
Related Abridgment Classifications
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.vi Miscellaneous
Immigration and citizenship
I Constitutional issues
I.3 Charter of Rights and Freedoms
I.3.b Visitors and immigrants
I.3.b.v Arrest and detention
Immigration and citizenship
V Enforcement
V.2 Arrest and detention
V.2.e Detention review
V.2.e.iii Procedure
Headnote
Aliens, Immigration and Citizenship --- Immigration — Detention
Detention — Detention review hearing — Public's right of access — 174 refugee claimants arriving from India by boat — Chief adjudicator ordering that media not allowed access to hearings unless particular migrant consented — Public having right of access to detention review hearings.
This was an application seeking an order directing that the respondent conduct the proceedings under s. 104(6) of the *Immigration Act* (Canada) concerning the continued detention of persons, allegedly being Indian migrants transported on board the M.V. Amelie, in a manner consistent with s. 2(*b*) of the *Charter of Rights and Freedoms* thereby permitting the applicants and members of the public to be present at all proceedings brought pursuant to s. 104(6). In the alternative, the applicant sought

an order directing the respondent to conduct the aforesaid proceedings in a manner consistent with s. 2(*b*) of the Charter by allowing the applicants to make submissions on a case-by-case basis in support of their application to have access to and report on the proceedings. This was also an application for an order in the nature of prohibition preventing the respondents from conducting a detention review hearing until he had extended to the applicants the right to be present at such proceedings or, in the alternative, the right to be heard before being excluded from those proceedings. This was also an application for an order in the nature of mandamus directing the respondent to exercise his duty under the *Immigration Act* to consider in each case when exercising his authority under s. 104(6) of the Act, the merits of excluding the applicants from the aforementioned proceedings.

Held:

The application was allowed in part.

With respect to the first two orders sought, declarations may be sought only by way of an action unless the respondent expressly consents, which the respondent did not. Therefore, the Court could not order the declarations as sought.

With respect to the other orders sought, the detention review hearing in this case involved a statutory body exercising its functions and it was necessary to determine if the hearings were judicial or quasi-judicial in nature and, by implication, subject to accessibility. The Court was satisfied that the hearings were judicial or quasi-judicial in nature and therefore the applicants had a prima facie right of access to the detention review proceedings. This right was not absolute, however. It might be limited when it came into conflict with other competing rights and interests, such as the right, contained in s. 7 of the Charter, to life, liberty, or security of person, which could be jeopardized by the publication of the migrant's identity. This right could also be limited, for example, by the public's interest in national security in accordance with s. 1 of the Charter and s. 119 of the *Immigration Act*. Orders of prohibition and mandamus were made prohibiting the adjudicator from conducting the detention review hearings in the absence of the applicants unless the applicants' right of access was outweighed or limited in any given case by the aforementioned counter-balancing rights or interests. If any objections to the public's access were raised, then the applicants had to be given an opportunity to present submissions.

Table of Authorities

Cases considered:

Groupe des Éleveurs de Volailles and Cdn. Chicken Marketing Agency, Re, [1985] 1 F.C. 280, 14 D.L.R. (4th) 151 (Fed. T.D.) — *referred to*

Lussier v. Collin, [1985] 1 F.C. 124, 22 C.C.C. (3d) 124 (Fed. C.A.) — *referred to*

Millward v. Public Service Commission, [1974] 2 F.C. 530 (Fed. T.D.) — *referred to*

M.N.R. v. Coopers & Lybrand, [1979] 1 S.C.R. 495, [1978] C.T.C. 829, 92 D.L.R. (3d) 1, 78 D.T.C. 6258 (S.C.C.) — *applied*

Pacific Salmon Industries Inc. v. R., [1985] 1 F.C. 504, 3 C.P.R. (3d) 289 (Fed. T.D.) — *referred to*

St. Louis c. Conseil Du Trésor, [1983] 2 F.C. 332, (sub nom. *St. Louis v. Treasury Bd.)* 52 N.R. 36, [1983] R.D.J. 185 (Fed. C.A.) — *referred to*

Southam Inc. and R. (No. 1), Re (1983), 41 O.R. (2d) 113, 34 C.R. (3d) 27, (sub nom. *R. v. Southam Inc.)* 33 R.F.L. (2d) 279, 3 C.C.C. (3d) 515 (Ont. C.A.) — *considered*

Southam Inc. and R. (No. 2), Re (1986), 53 O.R. (2d) 663, 50 C.R. (3d) 241, 25 C.C.C. (3d) 119, 20 C.R.R. 7, 26 D.L.R. (4th) 479, 12 O.A.C. 394 (Ont. C.A.), affirming (1984), 48 O.R. (2d) 678, 42 C.R. (3d) 336, 16 C.C.C. (3d) 262, 12 C.R.R. 212 (Ont. H.C.) [leave to appeal to the Supreme Court of Canada refused (1986), 50 C.R. (3d) xxv(n), 25 C.C.C. (3d) 119n, 50 C.R.R. 70n, 26 D.L.R. (4th) 479n, 68 N.R. 398n, 16 O.A.C. 80n (S.C.C.)] — *referred to*

Wilson v. Minister of Justice, [1985] 1 F.C. 586, 13 Admin. L.R. 1, (sub nom. *Wilson v. Minister of Justice of Can.)* 46 C.R. (3d) 91, 20 C.C.C. (3d) 206, 6 C.P.R. (3d) 283, 16 C.R.R. 271, 60 N.R. 194 (Fed. C.A.) — *referred to*

Statutes considered:

Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.), c. 11. s. 1] — Pt. I (Canadian Charter of Rights and Freedoms),

s. 1*considered*

s. 2(b)*considered*

s. 7*considered*

s. 24(1)*considered*

Immigration Act, S.C. 1976-77, c. 52 —

s. 29(3)*referred to*

s. 104(6)*referred to*

s. 119*referred to*

Words and phrases considered:

FREEDOM OF EXPRESSION

Sub-section 2(b) of the *Charter* guarantees everyone the freedom of "expression, including freedom of the press and other media of communication." Courts that have had to interpret this constitutional provision have held that freedom of the press encompasses a right of access to judicial proceedings (*R. v. Southam Inc.* (1983), 6 C.R.R. 1 (Ont. C.A.)) . . .

FREEDOM OF THE PRESS

Courts . . . have held that freedom of the press [in the *Charter*, s. 2(b)] encompasses a right of access to judicial proceedings . . .

JUDICIAL OR QUASI-JUDICIAL PROCEEDING

Mr. Justice Dickson . . . in *M.N.R. v. Coopers & Lybrand*, [1979] 1 S.C.R. 495 . . . determined that a proceeding can be found to be judicial or quasi-judicial if it met certain tests and he wrote as follows at p. 504 [:]

(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than . . . in a broad sense?

APPLICATION for prohibition and mandamus preventing adjudicator from proceeding with detention review hearings in absence of applicants and directing adjudicator to consider in each case merits of excluding applicants from hearings.

***Rouleau J.*:**

1 The applicants seek, by way of originating motion, a number of orders. In essence their motion concerns freedom of the press and the public's right of access to immigration detention review hearings presently being pursued in Halifax, Nova Scotia.

2 The facts in this case have not been made entirely clear, but those that are germane to the ultimate underlying issue in dispute are sufficiently clear. They are set out in point form as follows:

— On July 12, 1987, 174 passengers on the M.V. "Amelie" arrived in Nova Scotia and claimed to be refugees from India. (The passengers hereinafter shall be referred to as "migrants".)

— On July 15, 1987, the migrants were ordered detained, pursuant to the *Immigration Act, 1976*, S.C. 1976-77, c. 52 in the gymnasium building at the Canadian Armed Forces Base Stradacona in Halifax.

— On July 20, 1987, immigration adjudicators began conducting inquiries. Pursuant to subs. 29(3) of the Act, an adjudicator allowed an application by the Canadian Broadcasting Corporation that an inquiry be conducted in public.

— On July 21, 1987 three similar applications, in respect of three other inquiries, were allowed by three more adjudicators.

— Pursuant to subs. 104(6) of the Act, the continued detention of a migrant must be reviewed by an adjudicator at least once during each 7-day period. Since these migrants had been detained as of July 15, 1987, their continued detention had to be reviewed by July 22, 1987. As a result of the deadline approaching, during the evening of July 21, 1987, the adjudicators ceased conducting inquiries and began conducting detention review hearings. The Chief Adjudicator ordered that the media not be allowed access to these hearings unless the particular migrant consented; no submissions respecting the media's access were presented by their counsel (whether there was a specific request to be heard and a specific denial by the Chief of Adjudicators is not clear from the evidence).

— The *Immigration Act, 1976* is silent on the point of whether detention review hearings are to be held in public or in camera.

— During the evening of July 21, 1987 and throughout July 22, 1987, the adjudicators conducted detention review hearings.

— In response to the Chief of Adjudicators' decision that the detentions be reviewed in camera, the applicants moved in this Court for several orders. The four major ones, which comprise the substantive issues of this case, are the following:

(1) an Order pursuant to section 24 of the *Canadian Charter of Rights and Freedoms* directing that the Respondent, MICHEL MEUNIER conduct the proceedings under section 104(6) of the *Immigration Act, 1976*, the continued detention of persons, allegedly being Indian migrants transported on board the M.V. Amelie, in a manner consistent with section 2(b) of the *Charter*, thereby permitting the Applicants and members of the public to exercise the fundamental freedom to be present at all proceedings brought pursuant to section 104(6) of the *Immigration Act, 1976*;

(2) in the alternative, an order pursuant to section 24 of the *Canadian Charter of Rights and Freedoms* directing that the Respondent, MICHEL MEUNIER conduct the aforesaid proceedings in a manner consistent with section 2(b) of the said *Charter* by allowing the said Applicants to make submissions on a case by case basis in support of its application to have access to and report on the proceedings pursuant to section 104(6) of the *Immigration Act, 1976*;

(3) an order in the nature of prohibition to prevent the Respondent, MICHEL MEUNIER from conducting a review pursuant to section 104(6) of the *Immigration Act, 1976* in the aforesaid proceedings until he has extended to the Applicants the right to be present at such proceedings, or, in the alternative, the right to be heard before being excluded from those proceedings;

(4) an order in the nature of *mandamus* directing the Respondent MICHEL MEUNIER to exercise his duty under the *Immigration Act, 1976* to consider in each case, when exercising his authority under section 104(6) of the said Act, the merits of excluding the Applicants from the aforementioned proceedings.

3 It will be convenient to deal with the first two together and the last two as another section.

I. Re: Charter, Subsection 24(1) Declarations:

4 This requested relief can be considered quite summarily because of a technical procedural problem. The applicants seek these two declarations by way of an originating motion. This Court has consistently held, however, that declarations may be sought only by way of an action unless the respondent expressly consents, and not merely acquiesces with no objection [*Wilson v. Minister of Justice*, [1985] 1 F.C. 586, 13 Admin. L.R. 1, *(*sub nom. *Wilson v. Minister of Justice of Can.)* 46 C.R. (3d) 91, 20 C.C.C. (3d) 206, 6 C.P.R. (3d) 283, 16 C.R.R. 271, 60 N.R. 194 (Fed. C.A.); *Lussier v. Collin*, [1985] 1 F.C. 124, 22 C.C.C. (3d) 124 (Fed. C.A.); *Groupe des Éleveurs de Volailles and Cdn. Chicken Marketing Agency, Re*, [1985] 1 F.C. 280, 14 D.L.R. (4th) 151 (Fed. T.D.); *Pacific Salmon Industries Inc. v. R.*, [1985] 1 F.C. 504, 3 C.P.R. (3d) 289 (Fed. T.D.)]. This rule serves to ensure that the Court will not have to issue declaratory judgments in a factual vacuum. Here the respondent did not expressly consent to this form of proceedings, and indeed some facts were in dispute, or at least uncertain. Consequently, no declarations, pursuant to subs. 24(1) of the Charter, can issue. This, though, does not end the discussion of the Charter in this case; it still must be considered in the alternative prayers for relief in the context of administrative law.

II. Re: Prerogative Writs of Prohibition and Mandamus:

5 In requesting these two orders, the applicants, in effect, seek an order prohibiting the adjudicators from conducting the detention review hearings in camera, or at least requiring the adjudicators in each case to hear submissions from the applicants on the issue of their access to the hearings.

6 The adjudicators exercise the authority and powers conferred upon them by the *Immigration Act, 1976*. This Act is silent with respect to the procedural point of public access to the detention review hearings. Where the enabling legislation is silent on a point of procedure, a statutory decision-maker is the master of his own proceedings and may determine the procedure to be followed [*Millward v. Public Service Commission*, [1974] 2 F.C. 530 (Fed. T.D.) and *St. Louis c. Conseil Du Trésor*, [1983] 2 F.C. 332, *(*sub nom. *St. Louis v. Treasury Bd.)* 52 N.R. 36, [1983] R.D.J. 185 (Fed. C.A.)]. Thus, on the surface, the adjudicators appear to have acted within their jurisdictional limits in ordering that the detention review hearings be held in camera.

7 However, superimposed upon that general rule of administrative law is the *Charter of Rights and Freedoms*. Subsection 2(*b*) of the Charter guarantees everyone the freedom of "expression, including freedom of the press and other media of communication". Courts that have had to interpret this constitutional provision have held that freedom of the press encompasses a right of access to judicial proceedings [*Re Southam Inc. and R. (No. 1)* (1983), 41 O.R. (2d) 113, 34 C.R. (3d) 27, *(*sub nom. *R. v. Southam Inc.)* 33 R.F.L. (2d) 279, 3 C.C.C. (3d) 515 (Ont. C.A.), which was reaffirmed by the same Court in *Re Southam Inc. and R. (No. 2)* (1986), 53 O.R. (2d) 663, 50 C.R. (3d) 241, 25 C.C.C. (3d) 119, 20 C.R.R. 7, 26 D.L.R. (4th) 479, 12 O.A.C. 394 (Ont. C.A.), adopting the trial judgment of J. Holland J. (1984), 48 O.R. (2d) 678, 42 C.R. (3d) 336, 16 C.C.C. (3d) 262, 12 C.R.R. 212 (Ont. H.C.) [leave to appeal to the Supreme Court of Canada refused (1986), 50 C.R. (3d) xxv(n), 25 C.C.C. (3d) 119n, 50 C.R.R. 70n, 26 D.L.R. (4th) 479n, 68 N.R. 398n, 16 O.A.C. 80n (S.C.C.)]]. Some comments of MacKinnon A.C.J.O. from *Re Southam (No. 1)* are germane to the case at Bar. At p. 521 [C.C.C.], he wrote the following:

> There can be no doubt that the openness of the courts to the public is one of the hallmarks of a democratic society. Public accessibility to the courts was and is a felt necessity; it is a restraint on arbitrary action by those who govern and by the powerful.

Then, at p. 525 he continued:

> It is true, as argued, that free access to the courts is not specifically enumerated under the heading of fundamental freedoms but, in my view, such access, having regard to its historic origin and necessary purpose already recited at length, is an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression which, in terms, includes freedom of the press. However the rule may have had its origin, as Mr. Justice Dickson pointed out, the 'openness' rule fosters the necessary public confidence in the integrity of the court system and an understanding of the administration of justice.

8 That decision arose in the context of a Court proceeding. The detention review hearing in this case involves a statutory body exercising its functions and it is to be determined if they are judicial or quasi-judicial in nature and by implication subject to accessibility; does the openness rule apply to their proceedings. Mr. Justice Dickson, as he then was, in *Minister of National Revenue v. Coopers & Lybrand*, [1979] 1 S.C.R. 495, [1978] C.T.C. 829, 92 D.L.R. (3d) 1, 78 D.T.C. 6258 (S.C.C.), determined that a proceeding can be found to be judicial or quasi-judicial if it met certain tests and he wrote as follows at p. 504 [S.C.R.]:

> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

9 I am satisfied that these tests in the case at Bar have been met and it is not at all unreasonable to extend to proceedings of such decision-makers the application of this principle of public accessibility. After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.

10 I am of the view that the applicants have a prima facie right of access to the detention review proceedings. This right, like all rights, is not absolute, however. That is to say, it may be limited when it comes into conflict with other competing rights and interests. For example, in the context of a detention review proceeding, a conflicting right could be a migrant's s. 7 rights to life, liberty or security of the person which could be jeopardized by the publication of his/her identity. Or, as another example, the public's interest in national security could, in some situations, constitute a s. 1 reasonable limit to the openness of the hearing (e.g. s. 119 of the *Immigration Act, 1976* prescribes a limit upon public access to security or criminal intelligence evidence presented by the Minister and Solicitor General).

11 In accordance with the foregoing, orders of prohibition and mandamus shall issue. The adjudicators are prohibited from conducting the detention review hearings in the absence of the applicants unless the applicants' right of access is outweighed or limited in any given case by counterbalancing rights or interests; if any objections to the public's access is raised, the applicants must be given an opportunity to present submissions on this point.

Application allowed in part.

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