

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170602

Docket: 17-A-15

Citation: 2017 FCA 117

Present: STRATAS J.A.

BETWEEN:

NADER PHILIPOS

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 2, 2017.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR ORDER

STRATAS J.A.

[1] In 2015, the Minister of Transportation cancelled Mr. Philipos' security clearance because he had exported certain guns to Sudan, contrary to the *Export and Import Permits Act*, R.S.C. 1985, c. E-19 and the *United Nations Sudan Regulations*, SOR/2004-197.

[2] Mr. Philipos applied to the Federal Court for judicial review, seeking an order quashing that decision. The Federal Court dismissed his application. It found that the Minister's decision to cancel the security clearance was reasonable, based as it was on a violation of law.

[3] Mr. Philipos appealed the Federal Court's decision to this Court. Mr. Philipos later filed a notice of discontinuance. As a result, his appeal was discontinued.

[4] Some time later, Mr. Philipos brought a motion in this Court seeking leave to resurrect his appeal and continue it. This Court dismissed the motion: *Philipos v. Canada (Attorney General)*, 2016 FCA 79.

[5] Mr. Philipos again now seeks to resurrect his discontinued appeal. He does so by bringing a motion for an extension of time to appeal the Federal Court's judgment.

[6] Mr. Philipos has sworn an affidavit in support of this motion. He points to new evidence: the guns he exported have now arrived back in Canada.

[7] This new evidence does not allow Mr. Philipos to resurrect his discontinued appeal. In *Philipos*, after a detailed review of the law of other jurisdictions and a careful consideration of the nature of a discontinuance, this Court identified the bases upon which a discontinued proceeding may be resurrected (at paras. 20-23):

[20] Only some fundamental event that strikes at the root of the decision to discontinue can warrant the resurrection and continuation of a discontinued

proceeding. Examples include the procurement of discontinuance by fraud, mental incapacity of the party at the time of discontinuance, or repudiation of a settlement agreement that required a proceeding to be discontinued.

[21] Even where a fundamental event of that sort has happened, we must be satisfied that the discontinued proceedings sought to be resurrected have some reasonable prospect of success. There is neither sense nor judicial economy in resurrecting a discontinued proceeding destined to fail. Twice we have refused to allow a discontinued proceeding to be resurrected because it did not have a reasonable prospect of success: *Teodorescu v. Canada*, [1993] F.C.J. No. 1124, 47 A.C.W.S. (3d) 389 at para. 14 (C.A.); *Ahmed v. Canada (Minister of Employment & Immigration)*, 1990 CarswellNat 1242, 19 A.C.W.S. (3d) 910 at para. 2 (F.C.A.). This requirement is akin to our insistence that a party seeking an extension of time to bring an appeal demonstrate that it has some reasonable prospect of success: *Canada (A.G.) v. Hennelly* (1999), 244 N.R. 399, 167 F.T.R. 158 (C.A.).

[22] Further, we must also consider the prejudice that may result if a discontinued proceeding is resurrected. For example, someone might have taken significant steps relying on a discontinuance, such as carrying out obligations under a trial judgment after the appeal from that judgment has been discontinued: *Warford v. Zyweck*, 2002 BCCA 221, 1 B.C.L.R. (4th) 41 at para. 7. Prejudice can also result from the destruction of files, the cessation of evidence collection or the disappearance of witnesses: *Williams v. Personal Insurance Co. of Canada*, 2004 NSSC 73, 222 N.S.R. (2d) 270 at paras. 15-20. In the case of applications for judicial reviews and appeals therefrom, the public interest requires prompt prosecution and determination: *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at paras. 86-89; *Federal Courts Act*, above, s. 18.4. The categories of prejudice are not closed: other types of prejudice may cause the Court to exercise its discretion against allowing a party to resurrect a discontinued proceeding.

[23] I do not foreclose the possibility that other considerations might foreclose resurrection of a discontinued proceeding. The Federal Courts have a plenary power to manage their practices and procedures, police the conduct of proceedings, and prevent abuses of their processes. That power stands ready to be exercised judicially whenever called for.

[8] The new evidence does not disclose a “fundamental event that strikes at the root of the decision to discontinue”: *Philipos* at para. 20.

[9] Even with the new evidence, Mr. Philipos' appeal does not have any prospect of success. The factual basis for the Minister's decision, upheld as reasonable by the Federal Court, was the fact that Mr. Philipos had exported the guns from Canada contrary to law. The guns have arrived back in Canada. But that takes nothing away from the fact that the guns were exported in the first place, contrary to law. Mr. Philipos' appeal remains doomed to fail.

[10] Thus, I will dismiss this motion. Quite fairly, the Attorney General does not seek its costs of the motion and so none will be granted. Nothing in these reasons prevents Mr. Philipos from seeking a new security clearance from the Minister, if one is available to him.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 17-A-15

STYLE OF CAUSE: NADER PHILIPOS v. THE
ATTORNEY GENERAL OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JUNE 1, 2017

WRITTEN REPRESENTATIONS BY:

Nader Philipos ON HIS OWN BEHALF

James Elford FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada