

Date: 20090917

Docket: A-616-08

Citation: 2009 FCA 268

**CORAM: LÉTOURNEAU J.A.
SEXTON J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

ZSOLT SOMODI

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on September 17, 2009.

Order delivered from the Bench at Toronto, Ontario, on September 17, 2009.

REASONS FOR ORDER OF THE COURT BY:

LAYDEN-STEVENSON J.A.

Date: 20090917

Docket: A-616-08

Citation: 2009 FCA 268

**CORAM: LÉTOURNEAU J.A.
SEXTON J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

ZSOLT SOMODI

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER OF THE COURT

(Delivered from the Bench at Toronto, Ontario on September 17, 2009)

LAYDEN-STEVENSON J.A.

[1] Insofar as the constitutional challenge to paragraph 72(2)(a), subsection 63(1) and sections 72 and 74 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA) and sections 18, 18.1 and 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 is based on alleged breaches of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms, 1982* (the Charter), the argument will not be entertained.

[2] In *Coca-Cola Ltd. v. Parnham (c.o.b. Universal Exporters)*, 2007 FCA 11, leave to appeal dismissed, [1999] S.C.C.A. No. 338, this Court held that it would not entertain Charter arguments that were not raised before the Federal Court because to do so would deprive this Court of the benefit of the application judge's reasoning and analysis on the arguments.

[3] Further, by raising the issues for the first time at the appellate level, the appellant will have deprived the respondent of any opportunity to lead evidence relating to the alleged breaches.

[4] Finally, no factual foundation to support a breach of either section 7 or section 15 of the Charter has been made out.

[5] The Supreme Court of Canada has repeatedly emphasized the necessity of a proper evidentiary foundation to support allegations of Charter breaches. This Court, in *Bekker v. Canada*, 2004 FCA 186, at paragraph 12 stated as follows:

It is a serious matter to invoke the Charter to challenge the validity of legislation enacted by Parliament. Such challenges normally require an evidential foundation. Constitutional issues cannot and should not be decided in a factual vacuum. As Cory J. said in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at pages 361-362:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues... Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[6] Consequently, the respondent's objection will be allowed and we will not entertain a constitutional challenge that is founded on alleged breaches of sections 7 and 15 of the Charter.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-616-08

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MANDAMIN
DATED DECEMBER 5, 2008, IN DOCKET NO. IMM-3145-07**

STYLE OF CAUSE: ZSOLT SOMODI v. THE
MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 17, 2009

**REASONS FOR ORDER
OF THE COURT BY:** (LÉTOURNEAU, SEXTON &
LAYDEN-STEVENSON J.J.A.)

**DELIVERED
FROM THE BENCH BY:** LÉTOURNEAU J.A.

APPEARANCES:

Rocco Galati FOR THE APPELLANT

Gordon Lee FOR THE RESPONDENT
Nicole Rahaman

SOLICITORS OF RECORD:

Rocco Galati Law Firm FOR THE APPELLANT
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario