

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100824

Docket: A-247-10

Citation: 2010 FCA 215

Present: SEXTON J.A.

BETWEEN:

WAYNE ANTHONY HILLARY

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 24, 2010.

REASONS FOR ORDER BY:

SEXTON J.A.

Federal Court
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REASONS FOR ORDER

SEXTON J.A.

[1] The appellant requested an order to include in the appeal book *inter alia* the appellant's memorandum of argument, respondent's memorandum of argument, appellant's reply, appellant's and respondent's submissions on certified question, all of which were filed before the Motions Judge. These do not qualify as "documents, exhibits or transcripts" within the meaning of Rule 343(1) of the *Federal Courts Rules*. Of course, in particular cases, they may be put before the appeal court where a valid argument to be made depends upon those submissions. No such argument has been made in the present case. Therefore, these documents should not be included in the appeal book.

[2] The respondent seeks to include the transcript of the proceedings before the Immigration Appeal Division in the appeal book. In my view it should not be included. The transcript was not put before the Motions Judge, nor is there any evidence that an effort was made to do so. The respondent argues that the question as certified raises a broader issue. However, this Court has held that a question should not be certified unless it arose in the Court below. (*Zazai v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 89 at paragraph 12). Thus, the issues to be addressed are those raised in the Court below. At that time it was apparently not thought to be necessary to include the transcript to deal with those issues. It would therefore not be necessary to have the transcript in the Court of Appeal.

[3] Furthermore, when a party makes a tactical decision not to introduce a piece of evidence in the Court below, the party will not have the opportunity to introduce that evidence on appeal.

Imperial Oil Ltd. v. Lubrizol Corp. (1995), 191 N.R. 244 (C.A.) at paragraph 5.

United Scottish Cultural Society v. Canada (Custom & Revenue Agency) 2004 FCA 324 at paragraph 5.

[4] Lastly, no affidavit was filed in support of the motion to introduce the transcript on appeal nor is there sufficient specificity as to what the respondent seeks to establish by inclusion of the transcript. Bare assertions are not sufficient to introduce fresh evidence on appeal.

Pfizer Ltd. v. Ratiopharm Inc. 2009 FCA 228 at paragraphs 6 and 7.

"J. Edgar Sexton"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-247-10

STYLE OF CAUSE: Wayne Anthony Hillary v. The
Minister of Citizenship and
Immigration

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Sexton J.A.

DATED: August 24, 2010

WRITTEN REPRESENTATIONS BY:

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