CANADA / JUDGMENT

Graham v. Canada (Minister of Justice)

2020 BCCA 347

COURT
British Columbia Court of Appeal

DECIDED
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2020 BCCA 347 Graham v. Canada (Minister of Justice) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Graham v. Canada (Minister of Justice), 2020 BCCA 347 Date: 20201119 Docket: CA46408 Between: John Graham Applicant And Canada (Minister of Justice) Respondent FILE SEALED IN PART Before: The Honourable Mr. Justice Willcock The Honourable Madam Justice Fenlon The Honourable Madam Justice Griffin On judicial review from: A decision consenting to waiver of specialty (Extradition Act, S.C. 1999, c. 18) issued by Canada (Minister of Justice), dated February 2, 2010. Oral Reasons for Judgment Counsel for the Applicant (via videoconference): M.E. Sandford, Q.C. A. Tolliday Counsel for the Respondent (via videoconference): D.J. Strachan, Q.C. K.M. Tanner Place and Date of Hearing: Vancouver, British Columbia November 19, 2020 Place and Date of Judgment: Vancouver, British Columbia November 19, 2020 Summary: The applicant seeks disclosure of a legal statement relied on in a submission to the administrative decision maker and additional disclosure of a document redacted under a claim of solicitor/client privilege. The materials are requested in connection to judicial review of the Minister of Justice's consent to waiver of specialty to permit prosecution of the applicant in the United States. Held: Matter adjourned. To assess the request for disclosure, the Court requires submissions by the parties, with appointment of amicus curiae to argue the applicant's position during any in camera proceedings.

[1] WILLCOCK J.A.: By petition filed in September 2019, the applicant sought judicial review of the February 10, 2010 decision of the Minister of Justice consenting to waiver of specialty to permit prosecution of the applicant in the United States.

[2] By motion filed February 21, 2020, the applicant sought an order for disclosure of documents, including the record considered by the Minister in relation to the waiver of surrender. There has since been substantial disclosure and the motion has been amended to reflect that disclosure.

[3] When the matter came on for hearing before us today, there remained only two outstanding questions with respect to disclosure:

1) Whether a memorandum submitted to the Minister on January 29, 2010, and produced to the applicant in redacted form had been appropriately redacted to protect from disclosure information for which a claim of solicitor/client privilege may be properly advanced; and

2) Whether the respondent should be required to make disclosure of a legal statement in support of the waiver prepared by the State of South Dakota and referred to in the memorandum to the Minister but not produced to the Minister when the impugned decision was made.

[4] Counsel for the applicant advises us that the argument in support of the disclosure now sought is found primarily in the reply filed by the applicant on October 21, 2020, to which there is no response.

[5] The applicant says the redaction of the January 29, 2010 memorandum is apparently excessive, the Court should review an unredacted version of the document and the Court should determine whether there should be further disclosure, after hearing submissions from the respondent, in camera, if necessary.

[6] In any event, the applicant says any privilege that might attach to the advice in the memorandum has been waived.

[7] Counsel for the applicant says the legal statement may be said to be a document by which the waiver of surrender proceeding was commenced, forming part of the record, as defined by s. 1 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], which provisions she says are applicable pursuant to s. 57(10) of the Extradition Act, S.C. 1999, c. 18.

[8] Counsel for the respondent Minister, says the redactions to the January 29, 2010 memorandum are appropriate.

[9] She says the legal statement did not form part of the record considered by the Minister. That is not disputed. She takes no position on the question whether the legal statement might properly be considered to be an initiating document as defined by the JRPA, not having considered the applicability of that provision to extradition proceedings. Finally, she says, a claim for solicitor/client privilege is also advanced in respect of the legal statement. That argument was not fully developed before us.

[10] Counsel for the Minister agreed, on reflection, that the Court should review unredacted versions of both documents in order to assess the privilege claims.

[11] We are of the view that review of the documents alone, without the benefit of submissions, will not be adequate to address the issues that have been raised today. The applicant's position may not be fully developed for the division weighing the privilege claim unless the division has the benefit of amicus curiae to speak to the applicant's interests.

[12] For that reason, we make the following orders:

1) We will adjourn the disclosure application and direct that it be set down for hearing before a division of this Court;

2) We order the respondent to produce to the Court under seal unredacted copies of the January 29, 2010 memorandum to the Minister of Justice, and the legal statement referred to on page 16 of the memorandum;

3) We order the appointment of amicus curiae to assist the Court by advancing those arguments for disclosure that cannot be made by the applicant's counsel in the event the division hears all or part of the Minister's submissions in camera;

4) We direct the parties to set the disclosure application for hearing without delay after the appointment of amicus;

5) We refer these proceedings to case management, in particular for directions with respect to the filing of new memoranda of argument and the filing of any material that may be necessary to supplement the record on the application for the purpose of addressing the questions of privilege and identifying what may be said to be the initiating documents and the record of the case;

6) Our direction with respect to filing of additional memoranda is intended to address the insufficiency of the materials before the division, in particular the absence of any argument or evidence with respect to the initiation of proceedings and the claim to privilege for the legal statement; and

[13] If counsel are prepared to agree on the appointment of an individual to act as amicus suitable to both parties, they should so advise the Registrar of the Court of Appeal. "The Honourable Mr. Justice Willcock" "The Honourable Madam Justice Fenlon" "The Honourable Madam Justice Griffin"

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