Date: 20061219

Docket: A-383-06

Citation: 2006 FCA 414

Present: NOËL J.A.

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

XIAN JIANG CHEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 19, 2006.

REASONS FOR ORDER BY:
NOËL J.A.

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REASONS FOR ORDER

NOËL J.A.

[1] By this motion the appellant seeks to introduce into evidence the following documents which were not before the Judge of first instance:

1) Notice of Rights conferred by the Vienna Convention and to the Right to be Represented by Counsel at an Admissibility Hearing;

2) Property Receipt – Citizenship and Immigration Canada (CIC) – Vancouver International Airport; and

3) CIC Report to File.

[2] The respondent asserted in his written and oral submission in the Court below that he had not been afforded his s. 10 Charter rights during his detention at the Vancouver International Airport. O'Reilly J. after noting that there was no evidence indicating that the respondent had been informed of his right to counsel, upheld his judicial review application concerning a decision by the Refugee Protection Division rejecting his claim for asylum.

[3] Subsequently, the appellant became aware of the above described documents which suggest that the respondent had been afforded his right to counsel when

detained at the port of entry. The appellant has conceded that the three documents were in its possession at all material times.

[4] The test for the admission of new evidence sets out four criteria (*Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775) as follows:

- the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484];

- the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

- the evidence must be credible in the sense that it is reasonably capable of belief, and

- it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

All four criteria must be met in order for the new evidence to be allowed.

[5] It is apparent on the facts of this application that the first criteria has not been met, and this is sufficient to dispose of the matter.

[6] However, the appellant argued relying on the decisions of this Court in *BC Tel v. Seabird Island Indian Band*, 2002 FCA 288 (*BC Tel*) and *Glaxo Wellcome PLC v. Canada (Minister of National Revenue)*, [1998] F.C.J. No. 358 (*Glaxo*), that the Court retains the discretion to admit new evidence even where the above quoted test is not met. I note that the passages relied upon by the appellant in BC Tel (paras. 30 and 31) appear to be obiter given that the Court had concluded earlier that the above quoted test had been met (see para. 28). I also note that *Glaxo* case appears to deal with the question whether remedy by way of a bill of discovery is available in this Court (*Glaxo*, para. 10).

[7] That said, even if the Court does retain the discretion to admit new evidence, it is not a discretion that I would exercise in favour of the appellant on the facts of this application.

[8] The application will be dismissed.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-383-06
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION and XIAN JIANG CHEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	NOËL J.A.
DATED:	DECEMBER 19, 2006

WRITTEN REPRESENTATIONS BY:

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Shelley Levine	FOR THE RESPONDENT

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