

e-document-é		A-156-23-ID 1	
F	FEDERAL COURT	D	
I	OF APPEAL	É	
L	COUR D'APPEL	P	
E	FÉDÉRALE	O	
D		S	
		É	
	June 14, 2023		
	14 juin 2023		
Court	File: A-		
	Elizabeth Silva		
	OTT		1

FEDERAL COURT OF APPEAL

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

-and-

COLIN JAMES EWEN

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard in Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the Appellant's solicitor, or where the Appellant is self-represented, on the Appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court, and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Dated: June 14, 2023

Issued by: _____
(Registry Officer)

Address of local office:

Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, Ontario K1A 0H9

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal pursuant to s. 27(1)(c) and s. 52(b) of the *Federal Courts Act*, R.S., 1985, c. F-7, and Rules 335(a) and 337 of the *Federal Courts Rules*, SOR/98-106, from an interlocutory order of the Honourable Justice Richard Bell of the Federal Court of Canada issued in Federal Court file IMM-6831-23 (*Colin James Ewen v. Minister of Public Safety and Emergency Preparedness*), in which the Court ordered an interim stay of the Respondent's removal from Canada pending receipt of the parties' written submissions on an issue raised by the Federal Court concerning section 15 of the *Canadian Charter of Rights and Freedoms (Charter)*.

THE APPELLANT ASKS FOR:

1. An order setting aside the Federal Court's interlocutory order of June 6, 2023;
2. In the alternative, an order declaring that the new constitutional issue raised by the motions Judge, concerning whether the Government of Canada breached the Respondent's rights under section 15 of the *Charter* through the use of the pronouns "they/their" in the Appellant's factum, is not properly before the Court and does not form part of the record in the motion for stay of removal or in the underlying application for judicial review; and,

3. In the further alternative, an order referring the matter back to the Federal Court for a new determination with such directions as this Court may deem appropriate; and
5. No costs in this appeal.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

Background

1. The Respondent, Colin James Ewen, is a citizen of the United Kingdom residing in Canada who was declared inadmissible to Canada on grounds of serious criminality on October 30, 2019. The Respondent is currently on probation until September 2023, for criminal charges in Canada that resulted in a conditional discharge with 18 months probation.
2. On account of the Respondent's inadmissibility to Canada, on May 10, 2023, officials of Canada Border Services Agency (CBSA) set the date of June 7, 2023 for the Respondent's removal from Canada to the United Kingdom.
3. On June 1, 2023, the Respondent filed a motion in the Federal Court for a stay of the removal. The stay motion was brought on an urgent basis and proceeded on an expedited timeline. The responding record of the Appellant, the Minister of Public Safety and Emergency Preparedness (MPSEP), including written submissions, was filed on June 5, 2023. The oral hearing of the stay commenced before the Federal Court on June 6, 2023.

4. At the start of the stay hearing, the Federal Court, of its own initiative and after confirming that the parties had no preliminary issues, raised a new legal argument that the Respondent's *Charter* section 15 equality rights may have been breached by the use of some gender-neutral or gender-inclusive pronouns in the Appellant's factum. The issue identified by the Court was that the Appellant's factum, in some instances, referred to the Respondent by the pronouns "they" and "their" when the Respondent used "he/him" pronouns when referring to himself in his record.

5. At the hearing, and subsequently confirmed through the written order of the Court, the Court directed the parties to provide written submissions by June 30, 2023, on the *Charter* section 15 issue that had been raised by the Court, specifically on the following three (3) questions:

(i) is gender identification a protected right under the *Charter of Rights and Freedoms*, specifically section 15;

(ii) if so, in the circumstances, has Mr. Ewen's [Respondent's] right to his gender identification been violated by the Government of Canada [Appellant] in its submissions on this judicial review application; and

(iii) if his [the Respondent's] right to gender identification has been violated, what is the appropriate remedy, if any, under section 24 under the *Charter of Rights and Freedoms*?

6. The Court did not hear submissions on any aspect of the stay motion other than questioning the parties about the section 15 issue raised by the Court.

7. In addition to ordering written submissions on the section 15 issue, the Court granted an interim stay of the Respondent's removal in order to receive the written submissions. The Court made no substantive determinations respecting the issues raised in the stay motion.

8. Gender identity was not an issue in the underlying proceeding, which is an application for judicial review of the decision to refuse the Respondent's request for a deferral of removal. The Respondent did not raise any section 15 *Charter* argument in his stay motion or concerns about gender identification by CBSA or the MPSEP in the course of his removal proceedings. The Respondent challenged the refusal of his deferral request under section 7 of the *Charter* based on an alleged infringement of liberty.

9. The Federal Court's order granted an interim stay, whereby the Respondent is not to be removed from Canada pending the final determination of the motion for a stay of removal at a future, undetermined date. As a result, the removal could not occur as scheduled on June 7, 2023. The Respondent's removal therefore had to be cancelled. Furthermore, the order is ambiguous as to whether the determination of the stay motion is dependent on the determination of the constitutional issues raised.

10. As the date of removal has passed, the stay motion is now moot. Any subsequent attempt to remove the Respondent will require a new removal process and a new date for removal, which would be subject to a fresh application for judicial review and stay motion, should the Respondent so decide.

Jurisdictional errors of the Federal Court

11. The Federal Court failed to exercise its jurisdiction to determine the motion for stay of removal. Instead, the Court adjourned the stay motion to an uncertain future date, thereby causing the removal to be cancelled and rendering the motion to stay that removal moot.

12. The Federal Court failed to exercise its jurisdiction to decide the stay motion as required and instead exceeded its jurisdiction by raising a new *Charter* issue that was not raised by the parties. The new issue does not arise from, and is unrelated to, the matters which were under review. It also has no factual foundation in the underlying matters before the Court, and is legally and factually distinct from the grounds of review raised by the Respondent. The Court went beyond the motion that was before it and instead addressed a different issue which was raised by the Court for the first time at the hearing.

13. Further, the Court opined on social science evidence that was not in the record.

14. In proceeding this way, the Federal Court failed to exercise its jurisdiction by going beyond the motion before it and raising a *Charter* challenge respecting the language in the MPSEP's pleadings. In doing so, the Federal Court acted as "a roving commission of inquiry" (*Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72).

Jurisdictional basis for appeal

15. Notwithstanding that the *Immigration and Refugee Protection Act* (s. 172(2)(e)) generally does not permit interlocutory appeals in immigration matters, this Court has found that appellate review is available in circumstances where the Federal Court fails to exercise its jurisdiction on a motion for a stay of removal from Canada (*Subhaschandran v. Canada (Solicitor General)*, 2005 FCA 27).

16. A remedy is available to a party where a judge refuses to decide a matter before the Court, and does so either permanently or by adjourning the matter to a time when the matter will be moot.

17. In the alternative, this Court has jurisdiction over appeals of interlocutory orders in cases that involve very fundamental matters or truly exceptional matters that strike right at the rule of law (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144).

Statutes and material relied on

18. The Minister of Public Safety and Emergency Preparedness will rely on the following:

Federal Courts Act, ss. 2, 18.1, 27(1)(c), 52(b);

Federal Courts Rules, Rules 3(a), 335, 337 and 351;

A transcript of the Federal Court hearing of June 6, 2023;

The affidavit of a CBSA official concerning the required cancellation of the Respondent's removal pursuant to the Federal Court's order granting an interim stay and the process for any future removal of the Respondent;

Such further and other grounds as counsel shall advise and this Honourable Court may permit.

19. The Appellant requests that this appeal be heard by the Court on an expedited basis.

DATED at Ottawa, this 14th day of June, 2023.



ATTORNEY GENERAL OF CANADA

Department of Justice Canada

Civil Litigation Section

50 O'Connor Street

Ottawa, ON, K1A 0H8

Fax: 613-954-1920

Per: Zoe Oxaal

Nathan Joyal

Tel: 613-670-6376

343-549-1026

Email: zoe.oxaal@justice.gc.ca

nathan.joyal@justice.gc.ca

Counsel for the Appellant

TO: Colin James Ewen
37 Church Street
Moose Creek ON K0C 1W0
Tel: 613-880-2529
Email: Cjdesigns77@gmail.com

Respondent (self-represented)

AND TO: The Registrar
Federal Court of Canada
Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, Ontario K1A 0H9

Tel: 613-992-4238

Fax: 613-947-2141