C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° C.A. 500-09-
S.C. 500-17-087520-154

C O U R T O F A P P E A L

RANIA EL-ALLOUL
Appellant

v.

ATTORNEY GENERAL OF QUEBEC
and
COURT OF QUEBEC
Respondents

-and-

CONSEIL DE LA MAGISTRATURE DU QUÉBEC
and
SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE DU QUÉBEC

Mis en cause

NOTICE OF APPEAL
(Art. 352 CCP)

1. The Appellant, Ms. Rania El-Alloul, is appealing the judgment of the Superior Court rendered on October 3, 2016 by the Honourable Wilbrod Claude Décarie (the "**Judgment**"), a copy of which is attached hereto as **Exhibit 1**. The Judgment, which was notified to the parties on October 11, 2016, denied Ms. El-Alloul's application for a declaratory judgment.

2. The trial was held on September 22, 2016 and only involved affidavit evidence and exhibits, testimony filled by consent and oral pleadings.

3. At the heart of this case is a decision rendered by Justice Marengo of the Court of Quebec (the "**Marengo Decision**") on February 24, 2015, in which she refused to hear the Appellant on the sole basis that she was wearing a hijab.[1]

4. The Judgment correctly concluded that the Marengo decision was wrong in law:

> *[17] En effet, la thèse adoptée par la juge Marengo selon laquelle une salle d'audience est un espace séculier où les convictions religieuses d'une personne n'ont pas droit de cité, n'a pas force de loi au Canada. Bien au contraire, cette approche a été rejetée par le plus haut tribunal du pays dans l'affaire R. c. N.S. Madame la juge en chef McLachlin s'exprime ainsi: [...]*
>
> *[18] De plus, cet arrêt établit clairement qu'une femme peut porter le voile intégral (le niqab) lors de son témoignage si elle est en mesure d'établir que sa volonté de le porter est fondée sur une croyance religieuse sincère et que cela ne porte pas atteinte, d'une façon injustifiée, au droit d'une personne à un procès juste et équitable. À plus forte raison lorsqu'il s'agit d'un hijab qui ne cache pas le visage. L'on peut donc conclure que la décision de la juge Marengo, là encore, va à l'encontre des principes énoncés dans l'arrêt R. c. N.S.*

5. Nevertheless, the Court found that it could not issue the declarations sought because: (a) the conditions of a declaratory judgment were not met, and (b) judicial review was not an available recourse. The consequence of this Judgment is that the Appellant is left with no remedy for a clear breach of her *Charter* rights.

A. FACTS

6. As a result of her son's arrest on February 11, 2015, Ms. El-Alloul's car was seized for a period of 30 days. Upon filing a request for release of seizure pursuant to section 209.11 of the *Highway Safety Code*[2], she appeared in front of Justice Marengo on February 24, 2015.[3]

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[1] Judgment, para 1.
[2] RLRQ, c. C-24.2.
[3] Judgment, paras 5-7.

7. Immediately after being sworn in, Ms. El-Alloul was asked by Justice Marengo why she was "wearing a scarf". Ms. El-Alloul advised Justice Marengo that it was because she is a Muslim.[4]

8. After suspending the hearing for twenty-seven minutes, Justice Marengo informed the Appellant that the courtroom is a secular place and that, by wearing a religious symbol, she was not suitably dressed, as required by section 13 of the *Regulation of the Court of Québec*.[5] Justice Marengo told Ms. El-Alloul that she would not hear her unless she took off her hijab, which Ms. El-Alloul declined to do because of her religion.[6] After offering Appellant time to consult with a lawyer, which Ms. El-Alloul advised she could not do for financial reasons, Justice Marengo postponed the hearing *sine die*.[7]

9. Ms. El-Alloul's car was returned to her on March 14, 2015 when the thirty-day delay[8] set out by the *Highway Safety Code* expired.[9] On March 27, 2015, she filed an application for declaratory judgment.[10]

10. She also filed a complaint with the *Conseil de la magistrature du Québec* ("**CMQ**"). Thirty-seven others also filed complaints against Justice Marengo.[11] On February 6, 2016, the CMQ dismissed Appellant's complaint along with eight others on the basis that they either failed to mention any breach of professional ethics, strictly related facts reported by the media or failed to formulate accusations against the Judge. The remaining twenty-eight complaints are still being investigated.[12]

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[4] Judgment, para 8.
[5] Formerly RLRQ, c. C-25, r. 4, now replaced by CQLR c. C-25.01, r. 9 (art. 22).
[6] Judgment, paras 9-10.
[7] Judgment, para 10.
[8] Art. 209.1, RLRQ, c. C-24.2.
[9] Judgment, para 11.
[10] Judgment, para 12.
[11] Judgment, para 13.
[12] Judgment, paras 14-15.

B. THE JUDGE ERRED IN FINDING THE DECLARATORY CONCLUSIONS COULD NOT BE GRANTED

11. In Appellant's submission, the Judgment leads to an unacceptable result: after accepting that Ms. El-Alloul's *Charter* rights were violated and that this violation had no justification in law, the Court found that no remedy was available. This outcome flies in the face of a fundamental principle of our civil procedure: that it must serve substantive rights rather than interfere with them.[13]

12. Both the Canadian[14] and Quebec[15] *Charters* protect litigants from such an unacceptable outcome by providing that where there is a violation of a right, there must always be a remedy.[16] Instead of upholding this long-standing principle, the Judge erroneously adopted a narrow view of declaratory motions in contradiction of the broad interpretation long commanded by the Courts.[17]

(i) Appellant's first conclusion was not "*irrecevable*"[18]

13. The Judge first assessed the declaratory conclusion sought regarding the Marengo Judgment.[19] He concluded that it was an attack on a judicial decision, and that the only way to do that was to bring an appeal or a request for judicial review. Since the Appellant had done neither, the request was dismissed.

14. This is an error of law. Declaratory judgments are available to declare the state of the law[20] or as a form of judicial review.[21] While declaratory motions cannot be

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[13] *Hamel* v. *Brunelle*, EYB 1975-183205 (S.C.C.) ; *Studer* v. *Gagné,* REJB 1998-08778 (C.A.) ; *Cosoltec inc.* v. *Structure Laferté inc.*, EYB 2010-178906 (C.A.)
[14] *Charter of human rights and freedoms*, R.S.Q., c. C-12
[15] *Charte des droits et libertés de la personne*, RLRQ, c. C-12.
[16] Section 24 *Canadian Charter*; Section 23 of the *Quebec Charter.*
[17] *Duquet* v. *Ville de St-Agathe des Monts,* [1977] 2 S.C.R. 1132 ; *9296-2422 Québec inc. (Gestions Netzone)* v. *Comité paritaire de l'entretien d'édifices publics, région de Montréal*, 2016 QCCS 3380, paras 25-26.
[18] Judgment, para 30.
[19] Judgment, paras 26 to 30. The declaration sought was: "**DECLARE** that Plaintiff's right to freedom of religion as protected by articles 2(a) of the *Canadian Charter* and 3 of the *Quebec Charter*, was breached by the decision of Justice Marengo of February 24th, 2015, in Court of Quebec. (sic) Case 500-80-030259-155."
[20] *Libman* v. *A.Q. Quebec*, [1997] 3 S.C.R. 712.
[21] *Vachon* v. *A.G. Quebec*, [1979] 1 S.C.R. 553.

used to circumvent privative clauses where exclusive jurisdiction has been specifically granted to a board or tribunal, where such jurisdiction has not been granted, declaratory judgments clearly remain an appropriate and proportional choice of procedure.

15. Furthermore, the decision cited by the Court in support of its conclusion simply stands for the fact that parties cannot seek an interpretation of a judgment or a modification of a judgment's conclusion through a declaratory judgment, which is not what the Appellant was attempting to do.[22] Appellant is not a frustrated litigant seeking a disguised appeal on the merits of her case; her rights were violated *as a result of* a judgment and that is the declaration she was seeking.

(ii) Appellant's genuine problem does not have to result from a juridical act

16. The Judge then found, with respect to the second conclusion sought[23], that since the source of the Appellant's problem was the Marengo Decision[24], she could not seek declaratory relief because a decision does not constitute a "juridical act" under art. 142 CCP.

17. Article 142 CCP provides that a declaratory judgment can be issued, to "*solutionner une difficulté réelle*" regarding "*l'état du demandeur*" or "*un droit*", "*un pouvoir*" or "*une obligation lui résultant d'une acte juridique*".[25] The Judge read these requirements as cumulative, finding that the Appellant's request had to find its source in a juridical act.[26] This is an error of law.

18. Regardless, the right the Appellant was seeking to have determined is conferred on her through federal and provincial laws, which were explicitly cited as an available source of a "right to be determined" under the old code – art. 453 CCP.

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[22] [1996] R.D.J. 53 (C.A.); *Droit de la famille — 1521*, 2015 QCCS 49.
[23] That conclusion was: "**DECLARE** that Rania El-Alloul has the right to be heard in the Court of Quebec wearing her hijab or her other religious attire under the *Canadian Charter* and the *Quebec Charter*."
[24] Judgment, para 35.
[25] *Hammerschimid & Associés* v. *Patti*, EYB 2010-177311 (C.S.).
[26] Judgment, paras 35-36.

The Minister's comments state that the entire enumeration formerly contained at art. 453 CCP is now substituted by the reference to "juridical act".[27] The Appellant's situation clearly met this requirement.

19. Moreover, it is always and exclusively the Superior Court which, in the absence of a privative clause and narrow, specialized jurisdiction, has the power to declare the state of law.[28] The fact that the issue which has given rise to the need for a declaratory judgment stems from a judgment does not change that fact.

(iii) Appellant does face a genuine problem

20. The Judge then made a mixed error of fact and law when he found that there was no genuine problem to be resolved based on the fact that :

a. The initial litigation—the quashing of the seizure—did not involve the Court of Quebec and the Attorney General of Quebec (the "**AGQ**");[29] and

b. The Appellant's fears that she might face the same denial of access to justice as a result of wearing a hijab were purely hypothetical.[30]

21. Firstly, the fact that the Court of Quebec and the AGQ were not parties to Appellant's appearance in front of judge Marengo is irrelevant to whether a genuine problem exists for the Appellant.

22. Furthermore, it was a judge of the Court of Quebec that issued the Marengo Decision. A genuine problem exists between Ms. El-Alloul and that Court because one of its representatives held that its rules of practice denied her access to Court while wearing a hijab. The Court of Quebec has not denounced

[27] Judgment, para 36.
[28] *Adoption – 111*, [2011] QCCA 38.
[29] Judgment, para 40.
[30] Judgment, paras 41-47.

the Marengo Decision, or clarified that its rules permit the wearing of a hijab. In fact, it contested the issuance of that very conclusion in this case.

23. In addition, the AGQ is a party in this case because litigants are required to notify the AGQ when they raise constitutional issues.[31] This procedural requirement cannot be a bar to issuing a declaratory judgment. Furthermore, while professing to be a mere "amicus curiae", the AGQ also took the position that the declaratory conclusions asked for in this case could not be issued.

24. Secondly, the Judge's conclusion that Ms. El-Alloul's fears are hypothetical disregards the facts as admitted. Nobody contested that the situation feared by Ms. El-Alloul *actually* happened to her on February 24, 2015. How can something that occurred—and which the Court in which it occurred has refused to denounce—be considered hypothetical?

25. Furthermore, there is no requirement that an Appellant's fear be "objective" in order for a genuine problem to exist. Her fear is inevitably "subjective" in nature as it is anchored in her lived experience. That does not make it hypothetical.

26. The Judge further erred in requiring that Appellant prove an endemic problem, implicitly finding that an actual violation of her right was insufficient to warrant the Court's intervention.[32] To ask a litigant to prove systematic violations from the same source to invoke a right is inconsistent with the *Charter* jurisprudence and contrary to the *Charter*'s very purpose. Yet, the Judgment suggests a threshold of violations must be met before parties can turn to the Court for help.

27. The adoption of such a rule would create a procedural obstacle to relief in virtually every case. For instance, does one have to show how many Sikh children were denied access to school wearing a Kirpan[33], or how many

[31] Art. 76 CCP.
[32] Judgment, para 45.
[33] *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256.

condominiums prevented construction of a Succoth on balconies[34] before obtaining declaratory relief? The answer is clearly no.

(iv) The Declaration sought does not affect the Court of Québec's jurisdiction

28. The Judge erred in finding that issuing the second declaration sought would infringe on the "*compétence constitutionnelle de la Cour du Québec*",[35] because each case in the future would have to be decided on a case-by-case basis.[36] With respect, this finding ignores the fact that the Court of Québec is always subject to acting in accordance with the Canadian and Quebec *Charters*.

29. In so concluding, the Judge also erroneously took the Supreme Court's findings in *R.* v. *N.S.* to mean that litigants have to demonstrate their true religious belief in order to wear a religious symbol in Court, even where no limitation to their right is argued. This scenario was explicitly rejected by the Supreme Court.[37]

30. Freedom of religion is a positive right; litigants do not have to prove their faith in in order to exercise it. Rather, it is the burden of the person seeking to restrict it to show that restriction is justified. It is only then that the well-known analysis referred to by the Judge, which does indeed place an initial burden on the person invoking freedom of religion to prove their sincere religious belief, is triggered.

31. If such a case-by-case approach was necessary, that would mean that whether a litigant can wear a religious symbol in Court is not "settled law in Canada", which is a direct contradiction of what the Judge (correctly) found.[38] Following the case-by-case logic also means a Judge or a party would be free to conduct a *voir dire* into a party's religious beliefs at any time. This has frightening potential

[34] *Syndicat Northcrest* v. *Amselem*, [2004] 2 SCR 551.
[35] Judgment, para 48.
[36] Judgment, paras 47 & ff.
[37] *R.* v. *N.S.*, [2012] 3 SCR 726, para 51.
[38] Judgment, para 17.

consequences and is a perfect illustration of why the Court has the power to declare the law for the future.[39]

32. The Judge was also wary of protecting a discretion that is not affected by the declarations sought. Appellant clearly admitted that in circumstances in which a religious symbol would be "unsuitable" for independent reasons, judges would retain discretion to ensure decorum in their courtrooms.

33. This is akin to a situation in which the Court declares that a litigant has the right to possession of an immoveable. That declaration would clearly not have the effect of removing the Courts' power to order the litigant to leave in a special case, for instance, because of the application of fire regulations or if expropriation occurred.

C. JUDICIAL REVIEW

34. The Appellant was asking for the first conclusion, on a subsidiary basis, through judicial review. The Judge concluded that this remedy was not available since the appropriate procedure had not been taken.[40]

35. However, the proceedings clearly set out the alternative to grant a remedy by way of judicial review if the Court were to conclude that a declaratory judgment was unavailable.[41] With respect, the Judge erred in finding that he was bound by the conclusions as drafted.[42] His reasoning once again allowed procedure to triumph over substance where violation of a fundamental right is at stake.

36. Additionally, all the relevant parties to a request for judicial review are present in the case and were heard on the possibility of granting a conclusion provided for by art. 529 CCP.

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[39] *Multani*, para 82.
[40] Judgment, paras 52-58.
[41] Amended Motion for Declaratory Judgment, paras 12(a), 12(b) & 12(c).
[42] *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821.

37. The Judge then found that even if the Appellant had asked for judicial review, the issue was moot.[43] The issue of the seizure may be moot, but the breach of Appellant's constitutional rights certainly is not and it constitutes a separate issue which is of great importance for the legal system. Given the precedential value of this decision, which held that the Court of Quebec rules could be interpreted as prohibiting a hijab—or other religious head coverings—and its inevitable repercussions on perceived access to justice, how could it possibly become "*sans objet*" by mere virtue of Appellant regaining her car?

38. Finally, the Appellant is not estopped from seeking a determination of her rights because she did not appeal the Marengo Decision. As admitted by the Respondent's, Justice Marengo's decision was only appealable with leave. Accordingly, she was not under any obligation to exhaust her recourses before seeking judicial review.[44]

FOR THESE REASONS, THE APPELLANT RESPECTFULLY ASKS THIS HONOURABLE COURT TO:

ALLOW the appeal;

REVERSE the judgment at first instance;

DECLARE that Plaintiff's right to freedom of religion as protected by articles 2(a) of the *Canadian Charter* and 3 of the *Quebec Charter*, was breached by the decision of Judge Marengo of February 24th, 2015, in Court of Quebec Case 500-80-030259-155;

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[43] Judgment, para 29.

[44] *Mondesir* v. *Asprakis*, EYB 2010-180007 (C.A.) ; *Compagnie Wal-Mart du Canada* v. *Commission des relations du travail*, 2006 QCCA 422, para. 28; *Gagnon* v. *Lortie*, EYB 2007-118756 (C.S.) ; *Québec (Tribunal administratif du Québec)* v. *Institut Philippe-Pinel de Montréal*, EYB 2010-175604 (C.S.).

DECLARE that Rania El-Alloul has the right to be heard in the Court of Quebec wearing her hijab or her other religion attire under the *Canadian Charter* and the *Quebec Charter*;

THE WHOLE with costs in first instance and in appeal.

MONTREAL, November 2, 2016

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