

The Top Five - 2004

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



Bouzari v. Islamic Republic of Iran, 2004 CanLII 871 (Ont. C.A.)

<http://www.canlii.org/en/on/onca/doc/2004/2004canlii871/2004canlii871.html>

In June 1993 while Houshang Bouzari was on business in Tehran, agents of the state of Iran entered his apartment, robbed and abducted him at gunpoint. Mr. Bouzari, an Iranian citizen who had moved to Italy with his wife and children, was repeatedly subjected to brutal physical and psychological torture until his release in January 1994, when his family promised to pay the remaining \$2 million of the \$5 million ransom demanded by his captors. Mr. Bouzari was dumped on the streets of Tehran and, in July of 1994, he was able to flee the country to rejoin his family in Italy. During the years that followed, Mr. Bouzari's safety and that of his family was frequently threatened by Iranian state agents. In July 1998 Mr. Bouzari and his family emigrated to Canada.

In November 2000, Mr. Bouzari attempted to sue the Islamic Republic of Iran for compensation for his kidnapping, false imprisonment, assault, torture, and death threats, as well as a return of the paid ransom money. He also wanted the Court to award punitive damages (money awarded by a court when the defendant's malicious actions warrant punishment).

Before the start of the trial the Ontario Superior Court of Justice had to determine whether or not it had the authority ("jurisdiction") to hear the case because the defendant was a foreign country. The laws of Ontario prohibit a court from hearing a case unless the parties have a *real and substantial connection* to Ontario. Even where such a connection can be established, the court has the discretion to decline to hear the action if there is another more appropriate court in which to bring the action. Death threats against Mr. Bouzari made it impossible to bring the case before an Iranian court. The motion judge noted that there was no real and substantial connection between Mr. Bouzari and Ontario because he was not a citizen of Ontario at the time he was abducted, unlawfully confined and tortured. In the end, however, the judge did not apply the real and substantial connection analysis because she noted that in the future the laws might be modified to permit Ontario courts to hear a claim resulting from torture by a foreign state in that foreign country.

The judge instead found that the relevant legal principle was that of sovereign (or state) immunity. The Ontario Court of Appeal unanimously agreed with her. Under the federal *State Immunity Act (SIA)* a foreign country is exempt from being a defendant in a legal

proceeding started in a Canadian court, except in three circumstances: first, the Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings; second, immunity is not granted to a state in any proceedings related to any death or bodily injury or loss of property that occurs in Canada; and third, immunity does not apply to proceedings related to commercial activity. Mr. Bouzari argued that the facts of his case fit within these three exceptions. The Court of Appeal agreed with the motion judge who rejected Mr. Bouzari's arguments. Notably, the motion judge found that Mr. Bouzari was seeking punitive damages, which are only available in civil proceedings, not in criminal proceedings; that the injuries were inflicted on Mr. Bouzari in Iran, not in Canada; and that the torture to which Mr. Bouzari was subjected was not commercial in nature.

Mr. Bouzari also argued that Canada has signed treaties that create international law obligations and that there are customary international laws that it has agreed to follow. (One of these is a prohibition on torture.) The Court of Appeal affirmed the motion judge's reasoning saying that it struck a balance between condemning torture as a crime against humanity and the legal principle that countries must not be taken to court for not observing each others' laws.

Mr. Bouzari also argued that the *SIA*, which creates state immunity, violated his "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" under s. 7 of the *Canadian Charter of Rights and Freedoms (Charter)*. The motion judge found that Mr. Bouzari's life, liberty and security of the person was not threatened because the *Charter* applies to Canadian government activity and the Canadian government had nothing to do with Mr. Bouzari's detainment. Although the Court of Appeal noted this, the bench also noted that sometimes the *Charter* may apply to non-government activities, but only where there is a connection between the actions of the defendant and the Canadian government.

The Court of Appeal ultimately found the decision and reasons of the motion judge to be reasonable and erudite. The appeal was dismissed without an order for costs.

An interesting aspect of this case was that the Court of Appeal was troubled that the Superior Court lacked the authority to hear the case because the action was perpetrated by a foreign state in violation of international human rights. The Court of Appeal found that if Ontario did not take jurisdiction, no alternative existed for hearing the case. Like the motion judge, the Court of Appeal declined to decide the question of whether or not the case could be heard in an Ontario court on the basis of the *real and substantial connection test*, noting that the suitability of its application would have to be resolved in another case that could not be resolved on any other basis. This suggests that in the future it may be possible to sue a foreign country in Ontario for torture inflicted by agents of that foreign country within its own borders.