

[2] A separate application for the same relief was brought by the City in court file Crim. 92/10 where Majid Fasih was the Defendant and His Worship Justice of the Peace D. Dudar on January 12, 2010 stayed that proceeding against Mr. Fasih.

[3] The facts in both applications are similar. The applications were argued as one and these reasons apply to both applications.

Background in the Malik Application

[4] Ms. Malik was charged with disobeying a stop sign by failing to stop/ speeding and failure to provide an insurance certificate contrary to the *Highway Traffic Act* on September 21, 2009.

[5] On September 29, 2009, Ms. Malik completed a Notice of Intention to Appear, form 7, indicating her intention to enter a plea of not guilty and requested an Urdu language interpreter for the trial.

[6] Ms. Malik was given a trial date of January 7, 2010.

[7] The prosecutor and Ms. Malik attended on January 7, 2010. This was the first time this matter had come before the court. No interpreter was available on that date due to an administrative error in failing to order an interpreter.

[8] The prosecutor admitted it was the City's responsibility to arrange for the interpreter and requested an adjournment to facilitate this.

[9] The court sought a position from Ms. Malik but because of the language issue, no meaningful position could be obtained.

[10] Justice of the Peace Gunness refused the prosecutor's request for an adjournment because the failure to have an interpreter was that of the prosecution and he was not prepared to bring Ms. Malik back on some other date to deal with the charges.

[11] The result was the prosecutor was prepared to proceed to call evidence but the court would not permit this and stayed the charges. The Court stated:

"For the prosecution to merely come before the court and say the interpreter is not present, I need an adjournment, I think that's an abuse, Mr. Capizzano."

"I'll tell you what, it's your right to be tried in your language, one that you feel comfortable with, and I feel now that your rights have been infringed, therefore I am going to stay the proceedings. The proceeding will be marked stayed."

Background to the Fasih Application

[12] On September 22, 2009 Mr. Fasih was charged with speeding/failing to ensure toddler properly secured/failing to surrender a permit and failing to surrender insurance card contrary to the *Highway Traffic Act*.

[13] On September 25, 2009 Mr. Fasih completed the Notice of Intention to Appear, form 7, seeking a trial and requesting an Urdu interpreter for trial.

[14] The trial was scheduled for January 12, 2010. The prosecutor and Mr. Fasih attended on January 12, 2010. This was the first time this matter had come before the court. No interpreter was available on that date as it appeared to the prosecutor that, for some reason, an interpreter had not been ordered.

[15] The prosecutor admitted it was the City's responsibility to arrange for the interpreter and requested an adjournment to facilitate this.

[16] Justice of the Peace Dudar advised the prosecutor it was disinclined to grant the adjournment. The prosecutor responded the failure to have an interpreter was an administrative error.

[17] The Court advised:

"...the expectation of Provincial Offence matters is that they are going to be dealt with on the first, and typically only appearance in the court, and adjournment requests are highly, are the exception rather than the norm, and this court makes every effort to have matters dealt with on the first instance. Balancing all of the issues, the court is still disinclined to grant the adjournment request."

[18] The prosecutor sought to then proceed with the trial. The court refused to permit the prosecutor to call evidence and stated:

"Well, what the court's going to do is enter a judicial stay on these proceedings".

"The court is recognizing the application of the Charter in this situation, there is case law that amply indicates that the court has

authority to enter a judicial stay when a right to an interpreter has not been respected by the courts."

The Issues

[19] The City has raised several issues:

- I. Did the Justices of the Peace exceed their jurisdiction in failing to grant the adjournments;
- II. Did Justice of the Peace Gunness exceed his jurisdiction in staying the charges under the common law doctrine of abuse of process; and
- III. Did Justice of the Peace Dudar or Justice of the Peace Gunness exceed their jurisdiction to stay the charges under the *Charter*?

The Refusal to Grant the Adjournments and Resulting Stays

[20] Whether or not to grant an adjournment is in the discretion of the presiding judicial officer. Generally, decisions made in the exercise of this discretion are given considerable deference, provided they are made judicially.

[21] Judicial discretion is defined in Black's Law Dictionary, 8th edition, as "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law."

[22] Judicial discretion is nevertheless subject to review. See *Barrette v. The Queen* (1976), 29 C.C.C. (2d) 189 (S.C.C.)

[23] As judicial officers, sufficient reasons are required to permit a reviewing court to consider the basis on how the discretion was exercised. See *R. v. Sheppard*, [2002] 1 S.C.R. 869.

[24] In *Children's Aid Society of Toronto v. Katherine K.* (No.1), [2002] O.J. No. 5910 (Ont. S.C.), the trial judge refused to grant an adjournment of a child welfare matter. In allowing the appeal, Justice LaForme concluded as follows:

"When an adjournment is sought, I believe it is incumbent upon the hearing judge to make further inquiries to demonstrate that the request was fairly listened to and that due consideration was given to it. Reasons might be provided for denying an adjournment."

[25] Where the request for an adjournment is made, the judicial officer is bound to demonstrate that the request was fairly listened to and the judicial officer considered all relevant factors in deciding whether to grant the adjournment. This would include such factors as:

- a. The length of time between the date of the offence(s) and the court date the adjournment is being sought. The longer the period of time, the greater the likelihood the adjournment should not be granted as the likelihood of prejudice to the defence increases.
- b. The amount of time before the matter can be scheduled. Again, the longer the period of time before a new return date, the greater the likelihood the adjournment should not be granted.

- c. Whether this is the first time the matter has come up. If the matter has come before the court on several or numerous occasions before, it is more likely an adjournment should not be granted because of the increasing delay by one party or the other.
- d. What is the reason for the adjournment request? Is it bona fide? Is it because of an administrative error? Is it an attempt to delay the matter? Bona fide requests or administrative errors may strongly favour granting the adjournment. On the other hand, if it appears the party seeking the adjournment is attempting to delay the matter or is due to a systemic problem within the administration, this may strongly favour denying the adjournment.
- e. Will the party who has not sought the adjournment be prejudiced if the adjournment is granted? If so, are there any other ways in which the matter can be dealt with expeditiously or the prejudice lessened?
- f. What is the impact of not granting the adjournment? In this case, it was clear to the Justice of the Peace in both cases that the result would be the dismissal or stay of the charges. The impact on society's interest in having public safety charges heard on the merits is a factor to be considered as well.

[26] This is not intended to be an exhaustive list. Each situation is unique. The end goal is to ensure justice and fairness is done to both sides. I agree with the City's counsel: requests for adjournment may come from either the prosecutor or the defence. In either case, the application for an adjournment must be treated equally. See *R. v. Manji*, [2008] O.J. No. 5155 (O.C.J.).

[27] In order to determine whether this ultimate goal of fairness and justice would be furthered by granting or refusing an adjournment there must be some enquiry by the court and consideration of the relevant factors before deciding. This is particularly important where it is known to the court, as it was in these cases, that the result of refusing the adjournment will result in charges being dismissed or stayed.

[28] The difficulty in these cases arises from the fact the court had a difficulty in dealing with the defendants with respect to the prosecutor's adjournment request because of the language issue. While this is a factor the court must consider, the court will have to make a decision based on the circumstances of the case before it whether to:

- a. grant the adjournment even where the defendant doesn't appear to understand the process due to language issues because the circumstances are such that they overwhelmingly favour granting an adjournment;

- b. refuse the adjournment because the circumstances are such that they overwhelmingly favour refusing the adjournment; or
- c. adjourn the matter without prejudice to the defendant's right to raise any *Charter* or abuse issues when the matter is next before the court.

[29] In any of these scenarios, the court must explain why it has exercised its discretion in the manner in which it did. These reasons do not have to be extensive but should be sufficient for this court to determine whether the court exercised its discretion judicially or exceeded its jurisdiction.

Application to the Malik Matter

[30] Justice of the Peace Gunness appeared to have concluded that simply because it was the prosecutor's failure to have the interpreter present, the City's conduct was an abuse.

[31] There is nothing in Justice of the Peace Gunness' decision which even suggests that he fairly considered the request for an adjournment or gave due consideration to it. There is no suggestion that Justice of the Peace Gunness considered the relevant factors such as the time since the offence, the reason for the adjournment request and so on.

[32] As set out below, S. 49 of the *Provincial Offences Act* does provide when adjournments are not to be granted. This was not one of those enumerated grounds. On the other hand, s. 49 of the *Provincial Offences Act* does contemplate adjournments being granted by the court or even the clerk of the court in some situations.

[33] I am satisfied that as Justice of the Peace Gunness fettered his discretion by assuming that an administrative error was an "abuse", he thereby exceeded his jurisdiction.

[34] I make one further comment regarding Justice of the Peace Gunness' decision to stay this matter because of the "abuse". There is no doubt that in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the 'clearest of cases', i.e., conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. The evidence must be overwhelming that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. See *R. v. Power*, [1994] S.C. J. No.29 at paragraph 12.

[35] To suggest that the result of an administrative error in not having an interpreter present at the first appearance, less than four months after the offence, is an abuse of process, is clearly wrong, and resulted in Justice of the Peace Gunness exceeding his jurisdiction.

[36] As a result, an order will issue setting aside Justice of the Peace's decision staying this matter and ordering that a new trial be held.

Application to the Fasih Matter

[37] The only explanation given by Justice of the Peace Dudar appears to be that the defendant has a right to a trial on the first appearance and it is the court's expectation the trial will take place on the first appearance,

[38] While it may be a laudable goal to have all matters dealt with on their first and only appearance, courts should recognize that this is not always possible. Genuine and valid exceptions to that goal will no doubt occur through no fault of anyone and to no one's prejudice. S. 49 of the *Provincial Offences Act* makes it clear that adjournments will not be granted in certain circumstances. What occurred on these two matters does not fit within those prohibitions. Further, s. 49(5) of the *Provincial Offences Act* gives the clerk of the court power to adjourn the court in certain circumstances.

[39] The result that charges are dismissed or stayed because the prosecutor cannot proceed for any reason on the first attendance whatsoever is not supported by the *Provincial Offences Act*.

[40] Justice of the Peace Dudar failed to consider the other relevant factors in determining whether the adjournment should be granted. It is clear that Justice

of the Peace Dudar in the Fasih matter fettered his discretion and thereby exceeded his jurisdiction.

[41] As a result, an order will issue setting aside the Justice of the Peace's decision staying this matter and ordering that a new trial be held.

The Jurisdiction to raise the Charter

[42] While I appreciate that the City's counsel would prefer this court to go on to consider whether both Justices of the Peace exceeded their jurisdiction when they acted on their own to stay the proceedings under the *Charter*, it is not necessary for this court to decide that issue in light of its decision with respect to the stays. Accordingly, that issue will have to await another case.

L. Ricchetti, J.

DATE: April 20, 2010

CITATION: City of Mississauga v. Malik and Fasih, 2010 ONSC 2334
COURT FILE NO.: Crim. Mot. 91/10 and 92/10
DATE: 20100420

**SUPERIOR COURT OF JUSTICE -
ONTARIO**

RE: The City of Mississauga

and

Rukhsanna Malik

AND:

The City of Mississauga

and

Majid Fashi

BEFORE: Ricchetti J.

COUNSEL: C. Mariuz, for The Corporation
of the City of Mississauga

No one else appearing

ENDORSEMENT

Ricchetti J.

DATE: April 20, 2010