Federal Court  Cour fédérale

Date: 20190610

Docket: IMM-2521-18

Citation: 2019 FC 797

Ottawa, Ontario, June 10, 2019

PRESENT: Mr. Justice Gleeson

BETWEEN:

XUE LI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Xue Li, seeks judicial review of the Immigration Appeal Division's [IAD] decision to dismiss her applications for (1) a remedy for alleged abuse of process arising from conduct of the Minister of Public Safety and Emergency Preparedness [Minister] in prosecuting Ms. Li's admissibility case, and (2) disclosure of certain documents pertaining to her abuse of process application.

[2] Ms. Li submits that this application for judicial review is not premature, that the IAD erred in finding that there was no abuse of process, and that it did not have jurisdiction to grant relief for the alleged abuse of process.

[3] The Minister submits that this application is premature and that the IAD did not err in finding no abuse of process.

[4] For the reasons that follow, I am dismissing the application on the basis that it is premature.

II. Background

[5] Ms. Li; her husband, Mr. Shan Gao; and their daughter acquired permanent resident status in Canada in 2004. In January 2005, a warrant was issued in China for Mr. Gao's arrest. It was alleged that he had engaged in fraud against his former employer, the Bank of China. Neither Ms. Li nor Mr. Gao disclosed Mr. Gao's prior employment with the Bank in their application for permanent residence.

[6] All three family members were referred to the Immigration Division [ID] for admissibility hearings on the basis of the misrepresentation. In April 2008, the family sought refugee protection, which suspended the ID hearing.

[7] On September 15, 2011, Mr. Gao's lawyer contacted the Canada Border Services Agency [CBSA] and advised that Mr. Gao would not return to China unless the CBSA agreed to suspend

removal proceedings against his wife and daughter. On September 20, 2011, the CBSA advised Mr. Gao's lawyer by email that "should your clients' circumstances change, such as withdrawal of their refugee claims and/or Mr. Gao's voluntary return to China, CBSA will consider further submissions by counsel, and put those submissions and any other evidence held by CBSA before the decision-maker … for a decision on whether or not to withdraw the referral."

[8] In May 2012, Mr. Gao and his representatives met with CBSA officials. CBSA once again told Mr. Gao that it would be prepared to receive submissions regarding the status of his wife and daughter in the event of Mr. Gao's departure. It is reported that as Mr. Gao was leaving the meeting, a CBSA official put his hand on Mr. Gao's shoulder and said "your wife and daughter will be OK. Don't worry."

[9] All three family members withdrew their refugee protection claims on June 22, 2012. Mr. Gao returned to China on August 8, 2012. Ms. Li's counsel provided the Minister with submissions on behalf of Ms. Li and her daughter on August 31, 2012. In October 2012, Ms. Li was notified that the ID referral against her daughter had been withdrawn, but the referral against Ms. Li had not.

[10] In May 2014, the ID found Ms. Li inadmissible due to misrepresentation and issued an exclusion order against her. The IAD allowed Ms. Li's appeal on humanitarian and compassionate grounds in February 2017. The Crown successfully sought judicial review of that decision. The matter was sent back to the IAD for redetermination.

[11] In December 2017, Ms. Li brought two pre-hearing applications before the IAD. The first alleged abuse of process by the Minister. The second sought disclosure of all documentation contained in the CBSA file, as well as communications between CBSA officials and between CBSA officials and Chinese officials in relation to Mr. Gao's return to China. It is the IAD's decision in respect of these two applications that is now before the Court.

III. The Decision under Review

[12] Ms. Li's abuse of process application was based on four claims.

[13] First, she claimed that the CBSA dishonoured its agreement to withdraw the referral against her in return for Mr. Gao's voluntary return to China. This issue arises in the context of the CBSA official's comment to Mr. Gao that "your wife and daughter will be OK." The IAD found that this statement did not amount to a promise to withdraw the referral against Ms. Li.

[14] Second, Ms. Li claimed that the CBSA used Mr. Gao's return to China and the family's withdrawal of their refugee claims—conduct the CBSA helped induce—to impugn Ms. Li's credibility. The IAD concluded that the CBSA was not a party to the negotiations and therefore did not induce the conduct that it used to impugn her credibility. The IAD also concluded it was not unfair for the Minister's counsel to have cross-examined Ms. Li on prior statements and actions that were inconsistent with her testimony before the IAD. Further, it was open to Ms. Li's counsel to re-examine on these points if clarification was required. The IAD also noted that the Minister's submissions relating to perceived inconsistencies were not evidence and that Ms.

Li's counsel had been given an opportunity to address those submissions. The IAD concluded that the conduct complained of simply reflected the nature of an adversarial process.

[15] Third, Ms. Li claimed that the Minister's counsel made inaccurate representations to the IAD, attempting to portray Mr. Gao's return to China as voluntary. The IAD disagreed, finding that (1) there was no suggestion that "voluntary" meant Mr. Gao returned to China to face a lengthy jail term out of pure altruism, and (2) it was clear from the record that many factors were at play.

[16] Fourth, Ms. Li claimed that the CBSA worked with Chinese government officials to undermine her refugee claim by encouraging Chinese officials to issue her a new passport. The IAD found that the issuing of the new passport was not initiated by Chinese authorities or the CBSA; Mr. Gao was the one who approached Chinese authorities to request it.

[17] The IAD found no abuse of process had occurred. On the issue of jurisdiction, the IAD noted that had the application related only to the purported promise to withdraw the referral, it would have found it did not have jurisdiction. It found that had there been an abuse of process, it should have been dealt with by way of an application for leave for judicial review before this Court in 2012 when the alleged breach of promise occurred.

[18] With regard to the disclosure application, the IAD noted that Ms. Li had the burden of satisfying it that the documents sought may be relevant to the issues in her appeal and found that she had failed to do so.

IV. Issues

[19] The application raises the following issues:

A. Is the application for judicial review premature?

B. What is the appropriate standard of review?

C. Did the IAD have jurisdiction to grant a remedy for abuse of process?

D. Did the IAD err in denying the abuse of process and disclosure applications?

[20] In my view, the prematurity issue is determinative. I will not address the other issues raised.

V. Analysis

[21] The Minister submits the application for judicial review of the IAD's interlocutory decision is premature. The general principle is that ongoing administrative processes should not be interfered with on judicial review, with a narrow "exceptional circumstances" exception. The Minister submits the threshold for this exception is high: concerns about procedural fairness, bias, jurisdictional error, or the presence of an important or legal constitutional issue do not meet this threshold, as long as the process allows the issues to be raised and an effective remedy to be granted: *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 33.

[22] The Minister submits that whether an effective alternative remedy is available depends on the circumstances of the particular case. In this respect, the Minister notes that Ms. Li's failure to pursue what she now alleges was an abuse of process in 2012, when she was first notified that her referral to the ID would not be withdrawn, militates against her submission that this matter must be addressed at this stage of the IAD's proceeding. The IAD may conclude that Ms. Li is not inadmissible, rendering the application irrelevant, and Ms. Li can always challenge the IAD's final decision. The Minister argues that the test is not whether the alternative remedy is better, but whether it is adequate. Further, interference in this matter will lead to unnecessary delay, fragmentation, and waste.

[23] Ms. Li relies on the decisions of this Court in *Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 [*Ching*], and *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 [*Shen*], to argue that an allegation of abuse of process is a recognized exception to the principle of non-interference in ongoing tribunal proceedings. Ms. Li submits that the Court's failure to interfere in the case of an alleged abuse of process would have the effect of insulating abusive state conduct from judicial scrutiny where an applicant is ultimately successful before the tribunal. She further submits that interference in this case would not cause any delay as there is no stay in effect; the IAD has simply not scheduled a hearing.

[24] On the facts and circumstances of this matter, I am of the opinion that the application is premature.

[25] In *Shen*, the Minister relied on documents from the Chinese Public Security Bureau [PSB] to support the position that there were serious reasons to believe the applicant had committed fraud in China. The applicant argued before the Refugee Protection Division [RPD] that the documentation was incomplete. In turn, counsel for the Crown advised the tribunal that "the Crown is not aware of any exculpatory evidence in the information from the PSB."

[26] The RPD found in *Shen* that the applicant was excluded from refugee protection on the basis of his alleged criminality. An application for leave and judicial review of the decision was granted on consent, the Crown having conceded there had been insufficient disclosure to the applicant. This Court subsequently ordered the Crown to provide full disclosure of all documents received from the PSB. The applicant found much of the newly disclosed information was relevant and some was exculpatory.

[27] The applicant then brought a preliminary motion seeking to exclude the Crown from intervening in the redetermination hearing before the RPD on the ground that the Crown had breached its duty of candour in the first hearing, which amounted to an abuse of process. The Crown acknowledged that not all documents had been disclosed in the first hearing but did not explain the statement that no exculpatory information had been withheld. The RPD dismissed the applicant's motion.

[28] On judicial review of that decision, Justice Simon Fothergill concluded that "in the unusual circumstances" of the case before him, allowing the proceedings to continue without an

enquiry may bring harm to the integrity of the RPD's process and bring the administration of justice into disrepute.

[29] These are not the facts as disclosed in this matter. One of the alleged grounds of abuse of process was a failure to withdraw a referral to the ID as allegedly promised. This information was made available to Ms. Li and her counsel as early as October 2012, yet the alleged abuse of process was not raised or pursued until late 2017. I also note that in *Shen*, the Crown had made admissions that were at least consistent with the alleged breach of candour and abuse of process. No such admissions arise on the facts before me. The alleged breaches relating to the conduct of cross-examination and the oral submissions of counsel are not allegations that on their face call into question the integrity of the proceedings or the repute of the administration of justice. The high threshold for intervention has not been established on these facts.

[30] Six factors should be considered in determining whether to dismiss an application for prematurity: (1) hardship to the applicant, (2) waste, (3) delay, (4) fragmentation, (5) strength of the case, and (6) the statutory context (*Shen* at para 25; *Ching* at para 48).

[31] Considering the first factor, it is unclear what, if any, additional hardship Ms. Li may experience if consideration of the interlocutory decision is delayed until the matter has been finally dealt with by the IAD. This factor is neutral.

[32] The next two factors, waste and delay, weigh against denying relief on the basis of prematurity. A hearing has not been scheduled, and it is not apparent that tribunal time has been or will be wasted if the interlocutory decision were to be reviewed.

[33] Next, considerations of fragmentation and the statutory context weigh against interference on an interlocutory basis. The *Immigration and Refugee Protection Act*, SC 2001 c 27, has granted the IAD the mandate to efficiently determine questions relating to inadmissibility and the authority to control its own process in fulfilling that mandate. Early intervention results in the possibility of fragmentation.

[34] Finally, the factor relating to the strength of the case is, at best, neutral. In *Shen*, the circumstances disclosed a real risk of harm to the integrity of the process. The Crown had made admissions that were consistent with the alleged misconduct, and this factor appears to have been determininative. The evidence underpinning the alleged breach of candour and abuse of process in this case does not rise to that level. Admissions similar to those in *Shen* have not been made, nor are there other factors that provide a similar degree of support to Ms. Li's allegations. This factor, even if assessed in a positive light, is neutral at best.

[35] Although the absence of delay and waste may weigh against denying relief, these factors are insufficient to outweigh the other considerations, including the strength of the case advanced. An adequate alternative remedy in the form of judicial review at the conclusion of the IAD's proceedings is available. A review of the IAD's abuse of process decision is premature.

[36] Ms. Li has not advanced any arguments specific to the IAD's decision to refuse the disclosure application. I am satisfied that review of that decision is also premature on the basis of my reasoning above.

VI. Conclusion

[37] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-2521-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2521-18
STYLE OF CAUSE:	XUE LI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 6, 2018
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JUNE 6, 2019

APPEARANCES:

Mr. Lorne Waldman	FOR THE APPLICANT
Ms. Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lorne Waldman Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT