Federal Court Cour fédérale

Date: 20210126

Docket: IMM-6692-20

Citation: 2021 FC 87

Ottawa, Ontario, January 26, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HELMUT OBERLANDER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Respondent, the Minister of Public Safety and Emergency Preparedness, has bought a motion in writing, filed on January 8, 2021, seeking to strike out the Applicant's application for leave and for judicial review.

[2] The application challenges a decision of the Immigration Division of the Immigration and Refugee Board of Canada [the ID], dated December 11, 2020, denying the Applicant's request to postpone the scheduling of an admissibility hearing in relation to the Applicant [the Scheduling Decision]. The Respondent's motion seeks to strike this application on the basis that the impugned Scheduling Decision is of an interlocutory nature and that it is premature to seek judicial review of an interlocutory administrative decision.

[3] As explained in greater detail below, the Respondent's motion is dismissed, because I cannot conclude, based on the Respondent's prematurity arguments, that the Applicant's application is bereft of any possibility of success.

II. **Background**

[4] The Applicant, Mr. Helmut Oberlander, has a long history of proceedings involving immigration authorities and the Canadian courts. For purpose of addressing the present motion, I need not set out that history in significant detail.

[5] In 2017, the Applicant's Canadian citizenship was revoked by the Governor in Council, on the basis of misrepresentations made to Canadian immigration officials about his wartime service with the Ek10a, a Nazi killing squad. Efforts to challenge that decision before the Federal Courts were unsuccessful.

[6] In June 2019, two reports were made under s 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], reporting that, as a foreign national, the Applicant was

inadmissible to Canada pursuant to ss 35(1)(a) and 40(1)(d)(i) of IRPA, for the commission of crimes against humanity and for misrepresentation. As a result, in August 2019, a request was made for the ID to hold an admissibility hearing.

[7] In November 2019, the Applicant brought an application to challenge the ID's jurisdiction to consider the s 44 reports, on the basis that he allegedly still retained Canadian domicile and based on assertions of *res judicata*, issue estoppel, and abuse of process. On October 20, 2020, the ID denied that application, finding that it does have the required jurisdiction and that the principles of *res judicata*, issue estoppel and abuse of process did not preclude proceeding with an admissibility hearing [the Jurisdiction Decision].

[8] On November 4, 2020, the Applicant filed an application for leave and judicial review (in Court file no. IMM-5658-20), seeking to challenge the Jurisdiction Decision by the ID. On November 19, 2020, the Respondent filed a motion in writing in IMM-5658-20, seeking to strike that application on the basis of prematurity, because of the interlocutory nature of the Jurisdiction Decision. That motion is addressed in an Order and Reasons in IMM-5658-20, which I have issued on the same date as these Reasons.

[9] Following issuance of the Jurisdiction Decision, the ID held a case management conference [CMC] on November 25, 2020, to discuss procedural matters including the scheduling of the admissibility hearing. At the CMC, the Applicant requested that the admissibly hearing not yet be scheduled. In support of this request, the Applicant's counsel cited, among other things, inability to prepare the Applicant for the hearing and difficulty for the Applicant in

comprehending and participating in the hearing, due to his advanced age (96 years old) and medical conditions and resulting communication difficulties compounded by the COVID-19 pandemic. The Applicant requested that another CMC be convened 30 days later, when the current circumstances surrounding the pandemic and its effect upon the Applicant could be re-assessed.

[10] The ID denied the Applicant’s request and, in the Scheduling Decision now under review, provided written reasons for that denial. The Respondent summarizes the factors considered by the ID, in arriving at the Decision, as including the following:

A. The Minister’s disclosure package is not new;

B. There had been more than adequate time to prepare for the hearing;

C. The Applicant has a designated representative and a new or additional representative may be appointed if necessary;

D. The difficulties in communicating with the Applicant were already present before COVID-19;

E. There is no evidence to suggest that, given the Applicant’s physical and mental condition, his ability to communicate would improve after the pandemic; and

F. There had already been delays in proceeding with the admissibility hearing, and a further delay would unreasonably delay the proceedings.

[11] The ID decided that the admissibly hearing would be held in January 2021, and the parties were contacted to set a hearing date based on their earliest availability. On December 23, 2020, the parties exchanged dates of availability, follow which the hearing was set for February 8 and 11, 2021.

[12] On December 24, 2020, the Applicant filed the within application for leave and judicial review, seeking to challenge the Scheduling Decision by the ID denying the Applicant's request to postpone the scheduling of the admissibility hearing. The Applicant raises *Charter* arguments surrounding his right to a fair hearing and seeks an order in the nature of *certiorari* quashing the Scheduling Decision and an order prohibiting the ID from proceeding with the admissibility hearing at this time. On January 8, 2021, the Respondent filed this motion in writing, seeking to strike the within application on the basis of prematurity, because of the interlocutory nature of the Scheduling Decision. The Applicant opposes the motion and has filed a motion record in support of his opposition. The Respondent has also filed written representations in reply.

III. **Issues**

[13] The Respondent raises, as the sole issue in this motion, the question whether this motion to strike should be granted, because the Applicant's application for leave and judicial review is premature and cannot succeed.

IV. **Analysis**

[14] The administrative law principle, upon which the Respondent relies in advancing this motion, was explained as follows by Justice Stratas in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] at para 31:

> 31. Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[15] The Respondent submits that this rule, which I will refer to as the prematurity principle, was subsequently endorsed by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission),* 2012 SCC 10 [*Halifax*] at paras 35-36.

[16] The Applicant argues that *CB Powell* has limited application to the present case, because *CB Powell* involved circumstances where the applicant chose to apply for judicial review notwithstanding that he had access to a statutory right of appeal. While I agree with the Applicant's explanation of the factual matrix in which *CB Powell* was decided, in my view it does not limit the application of that jurisprudence to the present matter. The explanation by Justice Stratas of the prematurity principle emphasizes the underlying concept that parties cannot proceed to the court system until the administrative process has run its course. The principle

clearly applies to prohibit judicial review of interlocutory administrative decisions and is not dependent on the existence of a statutory right of appeal.

[17] The Applicant also argues that *Halifax* implicitly recognized the availability of judicial review of an interlocutory decision based on a challenge to a tribunal's jurisdiction. He notes that the Supreme Court of Canada concluded both that the first instance judge should have applied the reasonableness standard of review, not correctness, in considering the tribunal's jurisdiction, and that the judge should have showed restraint in considering early judicial intervention. The Applicant submits that, by addressing the appeal based on the standard of review, the Supreme Court countenanced the interlocutory judicial review based on jurisdiction.

[18] Again, I disagree with the Applicant's interpretation of the jurisprudence. While *Halifax* found errors in various aspects of the approach taken by the first instance judge, one such error was the failure to exercise the restraint warranted by the prematurity principle. The Supreme Court clearly endorsed *CB Powell* and the authorities upon which it relied and rejected the earlier authority of *Bell v Ontario (Human Rights Commission)*, [1971] SCR 756 (SCC), which had favoured early judicial intervention.

[19] However, the Applicant has identified decisions of this Court post-dating *CB Powell*, in which applications for judicial review of interlocutory administrative decisions, including applications based on arguments of abuse of process in the immigration context, have been allowed to proceed on the merits notwithstanding the prematurity principle. For instance, in *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002, Justice Mosley dismissed a

motion to strike such an application, as he was not satisfied that the applicant had an adequate alternative remedy available to him. The Court concluded that there were exceptional circumstances pointing to an abuse of process that met the "clear and obvious" standard required to warrant early judicial intervention (at para 60).

[20] Similarly, in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70, Justice Fothergill addressed on its merits an application for judicial review of a decision by the Refugee Protection Division to dismiss two preliminary motions brought by the Applicant. While the Court considered the prematurity principle, it was not satisfied that, in the circumstances of that case, the possibility of judicial review of the RPD's final decision provided an effective remedy (at para 27).

[21] Consistent with these cases, as identified in *CB Powell* (at para 31), the prematurity principle is not absolute. It applies in the absence of exceptional circumstances. Justice Stratas described this exception as follows (at para 33):

> 33. Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or

> bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[22] While this passage notes that the arguments before the Court in *CB Powell* did not require detailed consideration of the nature of exceptional circumstances, Justice Stratas provided further guidance on this subject in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paras 31 to 33:

> 31. The general rule against premature judicial reviews reflects at least two public law values. One is good administration – encouraging cost savings, efficiencies, promptness and allowing administrative expertise and specialization to be fully brought to bear on the problem before reviewing courts are involved. Another is democracy – elected legislators have vested the primary responsibility of decision-making in adjudicators, not the judiciary.
>
> 32. The weighty nature of these public law values explains the force and pervasiveness of the general rule against premature judicial reviews. Indeed, in appropriate cases, the general rule can form the basis of a preliminary motion to strike: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] D.T.C. 5001 at paragraphs 66 (motion to strike available), 51-53 (general rule against supporting affidavits) and 82-89 (discussion of prematurity in the context of motions to strike). Such motions serve to nip in the bud premature judicial reviews that corrode these values.
>
> 33. The force and pervasiveness of the general rule against premature judicial reviews and the need to discourage premature forays to reviewing courts means that the exceptions to the general rule are most rare and preliminary motions to strike are regularly entertained. As *C.B. Powell*, *supra* explained, the recognized exceptions reflect particular constellations of fact found in the

> decided cases. They are rare cases where the public law values do not sound loudly in the particular circumstances, the public law values are offset by competing public law values, or both. For example, there are rare cases where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court's concern about the rule of law is aroused: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-30. In these cases – often cases where prohibition is available – the values underlying the general rule against premature judicial reviews take on less importance.

[23] In its recent decision in *Thielmann v The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8 [*Thielmann*], the Manitoba Court of Appeal considered the question of what constitutes the exceptional circumstances that may warrant early judicial intervention in a tribunal's process. The Court concluded that there are no hard and fast rules, but it identified factors that had been considered relevant in applicable jurisprudence (see paras 36 to 50), summarizing its analysis as follows:

> 49. In conclusion, the courts have not provided a definition of "exceptional circumstances" with respect to the prematurity principle. The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. The list of factors to be considered is not closed and courts will not have to apply every factor, but only those that are relevant.
>
> 50. Among the factors that might be considered are: (i) hardship/prejudice (including irreparable harm, urgency, and excessive delay); (ii) waste of resources if judicial review is not proceeded with; (iii) delays if judicial review proceeds; (iv) fragmentation of proceedings; (v) strength of the case, including whether there is a clear abuse of process or proceedings that are so deeply flawed that it is clear and obvious that judicial review will be successful; and (vi) the statutory context, including whether there is an adequate alternative remedy. Furthermore, weight should always be given to the overarching consideration that an administrative tribunal should be given the opportunity to determine the issue first, and to provide reasons that can be considered by the court on any eventual review.

[24] In opposing the Respondent's motion to strike, the Applicant relies upon his advanced age and medical conditions, the effect of the COVID-19 pandemic, and the fact his application for judicial review seeks an order of prohibition and asserts *Charter* arguments related to the fairness of the admissibility hearing process. The Applicant notes that, in the Jurisdiction Decision in the context of the Applicant's successful request for appointment of a designated representative [DR], the ID summarized the medical evidence it reviewed as follows:

> 162. According to the medical documents submitted with his application, Mr. Oberlander's vision precludes him from visual recognition of people or defined objects. He is unable to attend any functions that require visual input. His audiologist notes that he is unable to communicate effectively under any circumstances. Mr. Oberlander was referred for a memory assessment and the psychologist who prepared the subsequent report noted that while aspects of his memory functioning are age-appropriate, his ability to recall verbally presented information following even a brief time delay is very limited. The psychologist concluded that "his variable orientation to time and place, coupled with his cognitive slowing, further impairs his ability to fully appreciate and comprehend verbal instructions and the ensuing result of action taken based on that instruction.

[25] The Applicant's motion record includes an affidavit of his daughter, whom the ID appointed as his DR, which attaches a transcript of the November 25, 2020 hearing before the ID that resulted in the Scheduling Decision. At the hearing, the Applicant's counsel explained to the ID that, because of the COVID-19 lockdown and the Applicant's vulnerability, counsel could not meet with him in person. Rather, they have attempted to communicate with him over the telephone, but this has been extremely difficult because of his hearing impairment. Counsel also explained that the DR is not in a position to speak for the Applicant on some of the issues counsel wishes to identify.

[26] In her affidavit, the DR also describes counsel's attempts to communicate with the Applicant through her. When she meets with the Applicant, she wears a mask and face shield and sits over 6 feet away from him, because of concerns about COVID-19. She states that, because the Applicant cannot read her lips and she cannot stand in close proximity to him, his ability to hear and understand her is greatly diminished. The DR also emphasizes that she does not have the knowledge necessary to answer questions about the Applicant's wartime history.

[27] The Applicant also submits that he has not yet had the opportunity to fully put forward his evidence as to why his case raises exceptional circumstances, which may include further evidence to be submitted in his application record for consideration by the judge deciding the leave application. He explains that, because of the risks he faces from COVID-19, he has been unable to see medical professionals other than his family doctor and geriatric specialist. However, he states that the evidence to be submitted in support of his leave application may include additional documentation concerning his deteriorating health conditions and how these conditions make participation in a hearing process practically implausible and possibly dangerous to his health.

[28] Overall, the Applicant argues that his communication deficits, compounded by the effects of the COVID-19 pandemic, mean he will not have the ability to meaningfully prepare for or participate in a hearing on the dates currently scheduled. Therefore, he asserts that proceeding with a hearing as scheduled, in the context of the current state of the pandemic, would deprive him of his participatory rights and therefore a fair process.

[29] Turning to the test applicable to a motion such as this one, seeking to strike a notice of application, both parties rely on *JP Morgan Asset Management (Canada) Inc. v Minister of National Revenue,* 2013 FCA 250 [*JP Morgan*] at para 47, in which the Federal Court of Appeal explained that a notice of application for judicial review should be struck only where it is so clearly improper as to be bereft of any possibility of success. There must be a “show stopper” or a “knockout punch” – an obvious, fatal flaw that strikes at the root of the Court’s power to entertain the application.

[30] Clearly, the prematurity principle is a substantial hurdle that the Applicant must overcome both in seeking leave and, if leave is granted, in advancing his application challenging the Decision. The Respondent has cited several decisions of this Court in which interlocutory challenges to ID decisions related to the scheduling of admissibility hearings were held to be premature (see, e.g., *Jaser v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 368; *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 202; *Rogan v Canada (Citizenship and Immigration)*, 2010 FC 532). The threshold for exceptionality is high, and I accept that it would be a rare case in which a scheduling decision raises exceptional circumstances warranting departure from the prematurity principle.

[31] However, applying the *JP Morgan* test, I am unable to conclude that the application for leave and for judicial review in this particular case has no possibility of success. It is possible that, under the hardship/prejudice factor identified in *Thielmann,* the Applicant’s arguments about the effects of proceeding to a hearing next month upon his participatory rights and therefore hearing fairness, due to his advanced age and medical conditions and the impact of the

current state of the COVID-19 pandemic, could constitute exceptional circumstances warranting early judicial intervention.

[32] The judge deciding the leave application and, if leave is granted, the judge hearing the resulting judicial review will have to consider (against the applicable standards) whether the Applicant's evidence and arguments give rise to exceptional circumstances warranting departure from the prematurity principle. I will therefore offer no comment on the likelihood of the Applicant succeeding in demonstrating the required exceptional circumstances, other than that it is not impossible that the Applicant could succeed. As such, the Respondent's motion to strike must be dismissed.

[33] I note that, in arriving at this conclusion, I have also considered the Respondent's argument that the application for judicial review is moot because, following issuance of the Scheduling Decision, the February 2021 dates for the admissibility hearing were chosen to conform with the Applicant's counsel's schedule. In response, the Applicant submits that his counsel agreed to those dates to comply with the law and avoid the hearing proceeding at a time when they were unavailable to assist him. I will make no further comment on this argument, other than to say that it does not convince me that the application for judicial review stands no chance of success.

[34] The Respondent has requested, in the event this motion is denied, that the Applicant have 30 days from this Court's Order to perfect his application for leave, with the Respondent then to have 30 days from service of the Applicant's Record to respond to the application for leave. In

his own written representations, the Applicant proposes the same deadlines. My Order will therefore so provide.

[35] Finally, while the Respondent did not seek costs in this motion, I note that the Applicant does ask that costs be awarded in the event the motion is dismissed. Pursuant to section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the Court may for special reasons order costs in respect of an application for leave and for judicial review under IRPA. However, I find no special reasons for such an award in this case.

ORDER IN IMM-6692-20

THIS COURT ORDERS that:

1. The Respondent's motion to strike the Applicant's application for leave and judicial review is dismissed.

2. The Applicant is granted 30 days from the date of this Order to serve and file the Applicant's Record, and the Respondent shall have 30 days from service of the Applicant's Record to respond.

3. There is no order as to costs.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6692-20
STYLE OF CAUSE:	HELMUT OBERLANDER V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION HEARD IN WRITING UNDER RULE 369

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JANUARY 26, 2021

APPEARANCES:

Ron Poulton Barbara Jackman	FOR THE APPLICANT
Angela Marinos Meva Motvani	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Poulton Law Office Toronto, Ontario	FOR THE APPLICANT
Jackman & Associates Toronto, Ontario	
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT