Federal Court of Appeal | Cour d'appel fédérale

Date: 20210421

Dockets: A-279-19
A-414-19

Citation: 2021 FCA 81

CORAM: **STRATAS J.A.**
LASKIN J.A.
MACTAVISH J.A.

Docket: A-279-19

BETWEEN:

CHAO YUAN LIN, XIANG ZHOU and HUA REN

Appellants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: A-414-19

AND BETWEEN:

YONG CHENG

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard by online video conference hosted by the Registry on April 21, 2021.
Judgment delivered from the Bench at Ottawa, Ontario, on April 21, 2021.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on April 21, 2021).

STRATAS J.A.

[1] The appellants appeal from judgments of the Federal Court (*per* Barnes and Heneghan JJ.): 2019 FC 862 and 2019 FC 1318, respectively. In each, the Federal Court dismissed the appellants' applications for judicial review of decisions by delegates of the Minister. The delegates referred the appellants to inadmissibility hearings before the Immigration Division under section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[2] The Minister submits that the applications for judicial review in the Federal Court and, thus, the appeals in this Court, are premature. For this reason, it submits that this Court should dismiss the appeals.

[3] We agree. The appeals will be dismissed. These reasons for judgment shall be filed in file A-279-19 and a copy shall be placed in file A-414-19.

[4] In the present cases, the delegates of the Minister, acting under section 44, expressed evidence-based beliefs that the circumstances are sufficient to warrant a more formal inquiry and an adjudicated decision on inadmissibility by the Immigration Division and, if necessary, the Immigration Appeal Division. The process is akin to a screening exercise in that there is no finding of inadmissibility, nor alteration of status. The appellants will have a full opportunity to adduce evidence and advance their factual and legal arguments and concerns regarding the

relevant issues in the Immigration Division and the Immigration Appeal Division. This includes any procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed. It also includes whether there were any misrepresentations giving rise to the grant of permanent residence, the relevant knowledge of the appellants, and any humanitarian and compassionate considerations. Thus, in the present cases, proceedings before the Immigration Division and the Immigration Appeal Division are both available and adequate: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 at para. 42.

[5] The general rule is that judicial review should not be brought until all available and adequate administrative recourses are pursued: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 84; *Dugré v. Canada (Attorney General)*, 2021 FCA 8; and in the immigration context, see *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 260, 19 Imm. L.R. (3d) 113, cited with approval in *Somodi v. Canada (Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 F.C.R. 26 at para. 19. Buttressing this is the prohibition in para. 72(2)(*a*) of the *Immigration and Refugee Protection Act* that forbids judicial review until all administrative appeals are exhausted.

[6] The general rule will not apply where there are exceptional circumstances. This is a "very rare" exception set at a high threshold akin to the threshold for prohibition: *C.B. Powell* at paras. 33; *Dugré* at paras. 35-36; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467 at para. 33, rev'd on a different point, 2016 SCC 29, [2016] 1 S.C.R. 770. The

threshold makes the bar as close to absolute as possible so that judicial reviews do not disrupt the orderly and efficient course of administrative proceedings: *C.B. Powell* at para. 32; *Dugré* at para. 37. As well, it must be remembered that legislators have entrusted the merits of decision-making to administrators, not the courts, and so, absent exceptional circumstances or legislation providing to the contrary, reviewing courts should not interfere until the administrators have completed their tasks: *C.B. Powell* at para. 32. Here, the appellants do not argue that they meet the high threshold, nor on this record could they do so. The appellants in file A-279-19 point to the importance of the issues they raise and issues of jurisdiction and procedural fairness, but, as *C.B. Powell* tells us, these alone do not constitute exceptional circumstances.

[7] The appellants submit that the Minister did not object to their applications for judicial review in the Federal Court and so it is now too late for the Minister do so. We disagree. For the reasons expressed in the preceding paragraph and in accordance with the jurisprudence of this Court, the bar against premature judicial reviews can be asserted for the first time on appeal: *Dugré* at paras. 19-25; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283. Indeed, all courts, including appeal courts, can raise the bar on their own motion, preferably as early as possible using Rule 74 or its plenary powers, and receive submissions on the matter: *Dugré* at paras. 29-32, 38; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at para. 22; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2017 FCA 241, 154 C.P.R. (4th) 165 at paras. 47 to 56. A judicial review or an onward appeal that is doomed to fail wastes resources and should be nipped in the bud: *Wilson* at para. 32; *Hébert v. Wenham*, 2020 FCA 186 at para. 8; *Lee v. Canada (Correctional Service)*, 2017 FCA 228 at para. 15.

[8] In oral argument, the appellants in file A-279-19 submitted that prematurity cannot now be raised because they received leave to appeal to bring an application for judicial review. We reject the submission. Despite the granting of leave to appeal, any well-founded objections to the hearing or granting of relief on judicial review may later be asserted.

[9] In the present cases, if the Minister or the Federal Court itself had raised the bar at the earliest opportunity in the Federal Court, considerable time, expense and judicial resources would have been saved.

[10] A number of appellants originally named in the style of cause have discontinued their appeal. The Minister asks us to remove them from the style of cause. We will so order.

[11] Therefore, we will dismiss the appeals. This dismissal will be without prejudice to any later, proper judicial review applications that may be brought in the Federal Court at the appropriate time based on any relevant grounds impeaching the administrative process and administrative decision-making. The certified questions will not be answered.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-279-19 AND A-414-19

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE HENEGHAN DATED OCTOBER 21, 2019, DOCKET NO. IMM-1915-19

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BARNES, DATED JUNE 26, 2019, DOCKET NOS. IMM-1061-18, IMM-2023-18, IMM-3358-18 AND IMM-3629-18

DOCKET:	A-279-19
STYLE OF CAUSE:	CHAO YUAN LIN *et al.* v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	A-414-19
STYLE OF CAUSE:	YONG CHENG v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	APRIL 21, 2021
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. LASKIN J.A. MACTAVISH J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

APPEARANCES:

Lawrence Wong Wennie Lee	FOR THE APPELLANTS IN A-279-19, CHAO YUAN LIN, XIANG ZHOU, HUA REN

Robert Leong	FOR THE APPELLANT IN A-414-19
Kristina Dragaitis David Joseph	FOR THE RESPONDENT IN A-279-19
Helen Park Daniel Nunez	FOR THE RESPONDENT IN A-414-19

SOLICITORS OF RECORD:

Lawrence Wong & Associates Vancouver, British Columbia	FOR THE APPELLANTS IN A-279-19, CHAO YUAN LIN, XIANG ZHOU, HUA REN
Lowe and Company Vancouver, British Columbia	FOR THE APPELLANT IN A-414-19
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT IN A-414-19 AND A-279-19