Federal Court  Cour fédérale

Date: 20170717

Docket: IMM-5055-16

Citation: 2017 FC 690

Ottawa, Ontario, July 17, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

YANG WANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review challenging a decision of the Immigration Appeal Division [IAD] dated November 2, 2016, compelling the Applicant, Mr. Yang Wang, to testify at a hearing before the IAD.

[2] For the reasons that follow, the application for judicial review is dismissed as it is premature.

I. Background

[3] The Applicant is a citizen of China. He came to Canada as a student in 1998 and became a permanent resident in 2006.

[4] In August 2014, the Canada Border Services Agency issued a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] against the Applicant on the basis that there were reasonable grounds to believe that he is inadmissible to Canada pursuant to paragraphs 34(1)(*a*) and 34(1)(*f*) of the IRPA. The section 44 report alleged that the Applicant had worked for specified foreign intelligence and security agencies while residing in Canada.

[5] The section 44 report was referred to the Immigration Division [ID]. After considering the evidence submitted, the ID concluded on August 24, 2015 that the Applicant was not inadmissible to Canada under paragraphs 34(1)(*a*) and 34(1)(*f*) of the IRPA.

[6] The Respondent appealed the ID's decision to the IAD. At the hearing, the Respondent sought to call the Applicant as a witness. As the Applicant declined to testify, the matter was adjourned so that the parties could provide submissions on an application for a summons. The application for a summons was granted by the IAD in November 2016 and the Applicant was ordered to appear and testify at the appeal hearing before the IAD.

[7] The IAD noted that it derives its authority to issue a summons from subsection 174(2) of the IRPA and from section 38 of the *Immigration Appeal Division Rules*, SOR/2002-230 [IAD Rules]. Pursuant to subsection 174(2) of the IRPA, the IAD has all the powers of a superior court of record necessary for the exercise of its jurisdiction, including the swearing and examination of witnesses, the production and inspection of documents and the enforcement of its orders. Section 38 of the IAD Rules sets out the process for requesting a summons and a non-exhaustive list of factors to be considered by the IAD in determining whether to issue a summons.

[8] The IAD then found that the Applicant's testimony was necessary to ensure a full and fair hearing as the credibility of the Applicant was at the heart of the appeal. Relying on the decision of this Court in *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 [*Castellon Viera*] at paragraph 11, the IAD stated that it had a duty to independently determine whether the Applicant was in fact inadmissible and not simply whether the ID made the right decision based on the evidence before it. Since the decision of the ID was based on evidence which included the Applicant's testimony, the IAD considered that an oral hearing was necessary so it could render its decision independently of the ID (*Castellon Viera* at paras 11-12).

[9] After considering the case law finding that the ID has jurisdiction to compel testimony, the more expansive legislated authority of the IAD pursuant to subsection 174(2) of the IRPA, the objectives of the IRPA which include the protection of the safety and security of Canada, the offence created under section 127(c) of the IRPA for refusing to answer questions at proceedings held under the IRPA, as well as the penalty for doing so under section 128 of the IRPA and the

decision of this Court in *Jaballah (Re)*, 2010 FC 224, the IAD concluded that it possessed the authority to compel testimony. The IAD also found that a finding of inadmissibility did not engage the Applicant's rights under sections 7 and 13 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] or the right against self-incrimination under section 5 of the *Canada Evidence Act*, RSC, 1985, c C-5.

[10] The Applicant sought and was granted leave to bring an application for judicial review of the IAD's interlocutory order compelling him to testify. The Applicant contends that compelling him to testify engages his right to liberty under section 7 of the *Charter*. Where this testimony is used to impeach his credibility and to impose sanctions against him, the requirements of fundamental justice are not met and section 7 of the *Charter* is breached.

II. Analysis

[11] In my view, the determinative issue in this matter is the prematurity of the application for judicial review as the decision of the IAD is interlocutory.

[12] It is trite law that absent exceptional circumstances, the courts will not interfere with interlocutory decisions until the ongoing administrative processes have been completed and until all other available effective remedies have been exhausted. The underlying purpose of the rule is to prevent fragmentation of the administrative process, to reduce the large costs and delays associated with premature court challenges, particularly where the party may ultimately be

successful at the conclusion of the administrative process (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at paras 4, 28, 30-32 [*C.B. Powell*]).

[13] The restrictive approach in interpreting the principle of judicial non-interference with ongoing administrative processes has been endorsed by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraphs 35 to 38.

[14] The Applicant argues that while the Federal Court of Appeal did not identify what it considered to be "exceptional circumstances", the circumstances of this case are distinguishable from those in *C.B. Powell*. In this case there is no available appeal process for the Applicant to challenge the decision of the IAD to issue a summons. In that sense, the IAD's decision is a final decision on a substantive right, the right to not be compelled to testify.

[15] The Applicant argues that if he is compelled to testify for the purpose of testing his credibility before the IAD, the damage will already be done and cannot afterwards be corrected, as he will already have testified. If his credibility is impugned through testimony, the IAD may decide that he is not credible and this finding may not be subject to correction on judicial review as there is no guarantee that he will be successful in obtaining leave. Moreover, in the event he is successful on judicial review, the transcripts of his testimony may still be used against him in other proceedings.

[16] While I agree with the Applicant that the Federal Court of Appeal did not identify what would consist of "exceptional circumstances", it did adopt a very restrictive approach to the exception against interlocutory judicial reviews. The Federal Court of Appeal noted that very few circumstances qualify as exceptional and that the threshold for exceptionality is high. It found that 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 the parties to bypass an administrative process and to seek judicial review of an interlocutory decision, as long as that process allows the issues to be raised and an effective remedy to be granted (*C.B. Powell* at para 33).

[17] The Federal Court of Appeal and this Court have also held that rulings made on the admissibility or compellability of evidence should not be subject to judicial review applications until the administrative proceedings are completed (*Bell Canada v Canadian Telephone Employees Association*, 2001 FCA 139 at para 5; *Zundel v Canada (Human Rights Commission)*, [2000] FCJ No 678 (QL) at para 15; *Szczecka v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 934 (QL) at para 4; *Temahagali v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 2041 (QL)).

[18] The Applicant relies on the decision of this Court in *Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000 [*Kahlon*] to support his argument that if he is compelled to testify, the damage will already be done by the time he can avail himself of judicial review. In *Kahlon*, Madam Justice Danièle Tremblay-Lamer held that the damage to the privacy of the witness and her desire to keep her immigration information private constituted

special circumstances which warranted the Court's intervention on the interlocutory decision to issue a witness a summons.

[19] In my view, this decision is distinguishable from the case at hand as the scope of permissible "exceptional circumstances" has been extremely narrowed since the decision of the Federal Court of Appeal in *C.B. Powell*. Also, the compelled witness in *Kahlon* was not a party to the proceedings and had no other means of seeking redress, unlike the Applicant in this case who can seek judicial review if he is unsuccessful and declared inadmissible by the IAD. More importantly, the Applicant has already given testimony in this case. He testified over a period of two (2) days before the ID during which he communicated extensive details of his life and spoke to his alleged involvement with the foreign intelligence and security agencies. This is not a case in which once the evidence is disclosed, it cannot be taken back. The Applicant has failed to persuade me that any potential damage that could result from him testifying before the IAD would be such that it would be so fundamentally unfair to the Applicant not to decide the issue of his compellability at this stage of the IAD's proceedings.

[20] The Applicant further suggested that a distinction be drawn between testimony adduced before the ID and the IAD. Hearings before the IAD are public and as such, there would be no effective remedy for the Applicant as a judicial review would not be able to prevent the transcripts of his proceedings being used against him in other proceedings. I do not find this argument persuasive. Section 49 of the IAD Rules provides that a party may request that a proceeding be held in private or ask that other measures be taken to ensure the confidentiality of the proceedings. These measures could include having the original transcripts of his testimony or

the entire record sealed and could go as far as including any future proceedings before the IAD in the event the Applicant was successful on a future application for judicial review on the issue of compellability.

[21] I agree that there may be situations where compelling someone to testify may constitute "exceptional circumstances" which would require an immediate review of the decision despite its interlocutory nature. However, the circumstances of this case do not warrant an exception to the general rule. Accordingly, I find this application for judicial review to be premature.

[22] This application for judicial review is dismissed without prejudice to the Applicant raising the same arguments upon any future judicial review after the IAD renders a final determination.

[23] The Applicant proposed the following questions for certification under section 74(d) of the IRPA:

> Does the issuance of a summons compelling a Respondent in a Minister's appeal to the Immigration Appeal Division (IAD) engage the liberty interests in section 7 of the Charter of Rights and Freedoms?
>
> If yes, does compelling a Respondent to testify in a Minister's appeal to the IAD breach principles of fundamental justice in the Charter of Rights and Freedoms where the purpose of compelling him to testify is to test and possibly impugn his credibility?

[24] Given my conclusion that the application for judicial review is premature, I will not certify the proposed questions as they have not been answered by this Court (*Mudrak v Canada*

(Citizenship and Immigration), 2016 FCA 178 at paras 15-19; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12).

[25] Lastly, the proper Respondent in these proceedings is the Minister of Public Safety and Emergency Preparedness and thus, the style of cause shall be amended accordingly.

JUDGMENT in IMM-5055-16

THIS COURT'S JUDGMENT is that:

1) The application for judicial review is dismissed;
2) The style of cause is amended to replace the Minister of Citizenship and Immigration with the Minister of Public Safety and Emergency Preparedness as Respondent;
3) No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5055-16
STYLE OF CAUSE:	YANG WANG v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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