Federal Court Cour fédérale

Date: 20210205

Docket: IMM-6692-20

Citation: 2021 FC 124

Ottawa, Ontario, February 5, 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 Applicant has brought a motion, filed on January 20, 2021, seeking an Order staying the commencement of his admissibility hearing before the Immigration Division [ID] of the Immigration and Refugee Board of Canada, currently scheduled for February 8 and 11, 2021, until such time as the application for leave and for judicial review in this matter is determined. The underlying application challenges a decision of the ID, dated December 11, 2020, denying

the Applicant's request to postpone the scheduling of his admissibility hearing [the Scheduling Decision].

[2] The Applicant has also brought a similar stay motion in a related matter (Court Docket: IMM-5658-20), in which he has filed an application for leave and for judicial review challenging another decision of the ID, dated October 20, 2020. That decision determined that the ID had jurisdiction to conduct an admissibility hearing in relation to the Applicant and that consideration of the Respondent's assertions in support of the Applicant's inadmissibility to Canada was not barred by the principles of *res judicata*, issue estoppel, or abuse of process [the Jurisdiction Decision]. That stay motion is addressed in a separate decision of this Court.

[3] In the present motion, the Applicant seeks to stay the commencement of the upcoming admissibility hearing on the basis that his application raises serious issues with respect to the Scheduling Decision, that he will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours granting the stay. The Respondent argues that the Applicant cannot succeed in any of those assertions.

[4] With respect to the demonstration of serious issues, the Respondent submits that the application fails to raise serious issues both on the merits of its challenge to the Scheduling Decision and in overcoming the prematurity principle. The prematurity principle is a principle of administrative law that prohibits judicial review of an interlocutory administrative decision before the administrative process has run its course, in the absence of exceptional circumstances.

[5] The Applicant raises the following as irreparable harm which would result if neither stay motion is allowed and the admissibility hearing proceeds:

A. If the admissibility hearing is commenced before the application for leave and for judicial review of the Scheduling Decision is decided, that application will be rendered moot;

B. The stress of having to attend an ID hearing could cause the Applicant severe debilitating health consequences;

C. Due to the Applicant's hearing disability and the effects of the COVID-19 pandemic, he cannot be adequately prepared for or fully understand the questions to be posed at the ID hearing, raising the risk of the provision of evidence that may not be what he intended;

D. In the application for leave and for judicial review of the Scheduling Decision, the Applicant seeks prohibition to protect *Charter* rights alleged to be in jeopardy. He asserts that this claim raises irreparable harm if the stay is not granted, as a breach of *Charter* rights may not be compensable in damages; and

E. The continuation of the ID's admissibility proceeding would be an abuse of process, representing harm to the Applicant and to the public interest that cannot be repaired.

[6] As explained in greater detail below, the motion is granted in part, because the Applicant has met the elevated threshold applicable to demonstrating that his application raises a serious

issue, has established irreparable harm in relation to the fairness of the hearing process if it were to proceed as presently scheduled, and has established that the balance of convenience favours granting a stay. However, the Court is not prepared to grant a stay extending to the time of determination of the application for judicial review, as the evidence indicates there are potential solutions that may be able to address the concern about hearing fairness in the meantime. My Order will grant a stay to March 19, 2021, with leave to move for a further stay beyond that date.

II. **Background**

[7] The Applicant, Mr. Helmut Oberlander, has a long history of proceedings involving immigration authorities and the Canadian courts. For the purpose of addressing the present motion, I will set out only the recent history.

[8] In 2017, the Governor in Council revoked the Applicant's Canadian citizenship 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.

[9] 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.

[10] 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.

[11] On November 4, 2020, the Applicant filed an application for leave and for judicial review, in Court Docket: IMM-5658-20, seeking to challenge the Jurisdiction Decision by the ID. On November 19, 2020, the Respondent, the Minister of Public Safety and Emergency Preparedness, filed a motion in writing, seeking to strike the application on the basis of prematurity, because of the interlocutory nature of the Jurisdiction Decision. (That motion was ultimately dismissed by the Court on January 26, 2021 (see *Oberlander v Canada (MPSEP)*, 2021 FC 86)).

[12] 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 admissibility 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, at

which point the circumstances surrounding the pandemic and its effect upon the Applicant could be re-assessed.

[13] The ID denied the Applicant’s request and, in the Scheduling Decision now under review in this matter, provided written reasons for that denial. The Respondent has summarized 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.

[14] The ID decided that the admissibility 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, following which the hearing was set for February 8 and 11, 2021.

[15] On December 24, 2020, the Applicant filed the application for leave and for judicial review in this matter, seeking to challenge the Scheduling Decision. The Applicant challenges the reasonableness and fairness of the Scheduling Decision, including raising *Charter* arguments surrounding his right to a fair hearing and seeking 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.

[16] On January 8, 2021, the Respondent filed a motion in writing, seeking to strike the present application on the basis of prematurity, because of the interlocutory nature of the Scheduling Decision. (That motion was ultimately dismissed by the Court on January 26, 2021 (see *Oberlander v Canada (MPSEP)*, 2021 FC 87 [*Oberlander*]).

[17] On January 20, 2021, the Applicant filed the present stay motion, as well as a similar stay motion in Court Docket: IMM-5658-20. The Respondent has filed a record in response, and the parties argued both motions, by videoconference employing the Zoom platform, on February 2, 2021.

III. **Issues**

[18] The sole issue in this motion is whether the Applicant has satisfied the test for a stay of the ID proceedings.

IV. **Analysis**

A. *The Test Applicable to a Motion for a Stay*

[19] The parties agree that there is a tripartite test for an injunction or stay, as articulated by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. That test is conjunctive in that, to be entitled to a stay, an applicant must satisfy all three elements of the test. These elements are the establishment of a serious issue raised by the underlying application for judicial review, irreparable harm that would result if the stay is not granted, and the balance of convenience favouring granting the stay.

B. *Serious Issue*

[20] As explained in *RJR-MacDonald*, the usual standard for meeting the first element, showing that the underlying application raises a serious issue, is a low one, requiring the applicant to satisfy the Court only that the application is not frivolous or vexatious. However, *RJR-MacDonald* also recognizes that there are circumstances where an elevated standard or threshold applies, requiring the Court to engage in a more extensive review of the merits of the application. In *Wang v Canada (Minister of Employment and Immigration)*, 2001 FCT 148 (FCTD), Justice Dennis Pelletier explained that the elevated threshold applies in circumstances where granting the relief sought through the stay motion grants the applicant the remedy which is the object of the application for judicial review. The judge hearing the stay motion must then closely examine the merits of the underlying application (at paras 8-10).

[21] The Respondent argues that the elevated standard applies to the present motion. The Applicant disagrees. I agree with the Respondent that this is a clear case where the objects of the stay motion and the application for judicial review are the same. The application seeks a remedy preventing the scheduling of the admissibility hearing at this time, arguing that the Applicant's medical conditions and resulting communication difficulties compounded by the COVID-19 pandemic preclude his effective preparation for and participation in the hearing. The stay motion seeks to achieve that same result. Therefore, it is appropriate that the Court examine closely the merits of the underlying application. This extends to the merits of both the Applicant's arguments challenging the Scheduling Decision and the Applicant's arguments as to why this case raises exceptional circumstances warranting departure from the prematurity principle.

(1) Prematurity Principle

[22] Focusing first upon the prematurity principle, I note that *Oberlander* addressed in some detail that principle and the Applicant's arguments as to why it should not result in his application being struck. While I need not duplicate the analysis in *Oberlander* in the same level of detail in this decision, I will repeat some portions of that analysis that bear on the issue now before the Court.

[23] This principle of administrative law was explained as follows by Justice David 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.

[24] 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 at paras 35-36.

[25] However, there are 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 [*Almrei*], Justice Richard 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).

[26] Similarly, in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 [*Shen*], Justice Simon 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).

[27] 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.

[28] 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.
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> 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.
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> 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.

[29] 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.
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> 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.

[30] In opposing the Respondent's recent motion to strike, the Applicant argued that 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 constitute exceptional circumstances warranting departure from the prematurity principle. The Applicant noted 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."

[31] The Applicant's motion record opposing the motion to strike also included 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 had attempted to communicate with him over the telephone, but this had 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.

[32] In her affidavit filed in response to the motion to strike, 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 emphasized that she does not have the knowledge necessary to answer questions about the Applicant's wartime history.

[33] My decision in *Oberlander*, dismissing the Respondent's motion to strike, applied the test applicable to such a motion, under which 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 (see *JP Morgan Asset Management (Canada) Inc. v Minister of National Revenue,* 2013 FCA 250 at para 47). I found as follows (at paras 30-31):

> 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.
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> 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.

[34] Against that backdrop, I return to the motion at hand. The Applicant's evidence now includes a further affidavit filed by the DR in support of the stay motion, which is consistent with her earlier evidence, although elaborating somewhat on her explanation how the complications created by the COVID-19 pandemic make communicating with the Applicant extremely difficult and sometimes impossible.

[35] In responding to the Applicant's arguments, the Respondent notes that the *Immigration Division Rules*, SOR/2002-229, s 18, expressly contemplates the possibility that the subject of a proceeding before the ID may be unable to appreciate the nature of the proceeding, in which case a DR can be appointed. Indeed, s 167(2) of IRPA requires the ID to appoint a DR in such circumstances. As the Federal Court of Appeal has affirmed, the purpose of this provision is to provide a reasonable opportunity, through the assistance of a DR, for a person unable to appreciate the nature of the proceedings to participate in them and to have their interests adequately protected (see *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51 at para 32). The Respondent cites multiple examples of proceedings conducted by the ID, involving older individuals or those who are otherwise unfit to appear and/or testify because of physical or mental impediments.

[36] The Respondent also argues that, while the DR cannot testify to what the Applicant did or did not do during the war, the record before the ID contains the Applicant's sworn testimony and evidence, given in prior proceedings, about his wartime service with the Ek10a. The Respondent cites authority in support of its position that the ID may rely on this evidence.

[37] Consistent with the factors considered by the ID in arriving at the Scheduling Decision, the Respondent also submits that the Applicant's health issues preceded the pandemic and will continue, that the hearing and related communication can be conducted remotely without endangering the Applicant, that the Applicant has had ample notice of the hearing and time to prepare, and that the hearing has already been delayed to almost four months after the ID held it had jurisdiction to proceed.

[38] The immediate question under consideration is whether the Applicant has raised as a serious issue that this case presents exceptional circumstances warranting judicial review of the interlocutory Scheduling Decision. Consideration of this question must take into account the evidence before the Court, the parties' respective arguments, and the high threshold for overcoming the prematurity principle. I must apply an elevated threshold in examining the merits of the Applicant's position on this issue.

[39] I agree with the Respondent that holding the admissibility hearing remotely is an acceptable process. Therefore, proceeding with the hearing during the pandemic does not place the Applicant at risk of contracting COVID-19. However, the evidence is convincing that the pandemic has compromised communication with the Applicant, because his hearing difficulty requires that a person speaking with him be in close proximity and that the Applicant be able to see that person's lips. Physical distancing and masking as a consequence of the pandemic prevent effective communication. This affects the ability of his counsel to prepare him for the hearing and his ability to meaningfully participate in the hearing itself.

[40] I find little merit to the Respondent's arguments that the Applicant and his counsel should have prepared sooner. I appreciate that the s 44 reports were issued in June 2017. However, it was not unreasonable for the Applicant's counsel to delay preparation for a hearing on the merits of the Applicant's admissibility while it was challenging the ID's jurisdiction. The Jurisdiction Decision was not released until October 2020, by which time Canada was in the midst of the pandemic that creates the communication difficulties.

[41] I also find little merit to the argument that the Applicant can simply rely on the record of his evidence from earlier proceedings. The parties present diverging positions on whether that record addresses the same issues as the present admissibility proceedings and therefore contains evidence relevant thereto. I do not have before me the record necessary to resolve that question. Regardless, I would not consider the existence of a record with relevant evidence to be basis to deprive the Applicant of the opportunity to prepare for and participate in the present proceeding, including presenting evidence to the extent his medical conditions permit.

[42] In that regard, I have considered the Respondent's argument that the Applicant's communication difficulties were already present before the pandemic and that there is no evidence to suggest his ability to communicate will improve in the future. I note that the medical evidence before the Court includes a report from an audiologist dated September 10, 2019, which states that recent speech in noise testing confirms the applicant's inability to communicate effectively under any circumstances. The audiologist opines that, due to his extremely poor word comprehension and the difficulty he has hearing, the Applicant is unable to participate in legal

proceedings or any functions that require him to hear, especially if background noise is present or if the speech is being directed at him from a distance.

[43] While this report confirms that the Applicant's hearing difficulty precedes the pandemic, I do not read it as stating that he is unable to communicate. The explanation of his "inability to communicate effectively under any circumstances" is expressed in the context of what is described as "speech in noise testing," and the opinion as to the Applicant's inability to participate in legal proceedings is similarly described as exacerbated in the context of background noise or speech from a distance. This report is consistent with the explanations in the DR's affidavit evidence that communication with the Applicant requires the speaker to be close to him and that it is made more difficult by other noise or distractions.

[44] I also recognize that the medical evidence indicates the Applicant to have not only hearing deficits but cognitive deficits. However, I do not read the evidence surrounding the cognitive deficits to preclude the possibility of the Applicant's meaningful participation in the admissibility hearing.

[45] In my view, the evidence supports the Applicant's position that his case raises exceptional circumstances where it is appropriate that judicial review of an interlocutory decision be entertained. While I stated in *Oberlander* that it would be a rare case in which a scheduling decision raises exceptional circumstances warranting departure from the prematurity principle, I consider this to be such a case. I agree with the Applicant that being required to proceed with the hearing as currently scheduled, without preparation and effective communication during the

hearing, both compromises procedural fairness and presents substantial risk of generating unreliable evidence. Consistent with the reasoning in *Almrei* and *Shen*, I am not satisfied that, in the circumstances of this case, the possibility of judicial review of the ID's final decision would provide an effective remedy for such risk.

[46] I therefore find that the Applicant has raised a serious issue in asserting that this case presents exceptional circumstances warranting departure from the prematurity principle.

(2) Merits of Application for Judicial Review

[47] Independent of the prematurity principle. I must also consider, again applying the elevated standard, whether the application for judicial review raises a serious issue on the merits of its arguments challenging the Scheduling Decision. The Respondent raises various arguments as to why the Applicant's efforts to invoke the *Charter* in this application are ill-founded. The Respondent disputes that the sections of the *Charter* relied on by the Applicant support his arguments. The Respondent also submits that the Applicant did not raise *Charter* issues before the ID and therefore invokes the principle that a party must put all its arguments, including constitutional ones, to the administrative decision-maker in order to be able to raise those arguments in subsequent judicial review of the decision (see, e.g., *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2017 FCA 241 [*Alexion*]).

[48] The Applicant disputes that this principle applies where a party is asserting a breach of the *Charter* by the administrative decision-maker itself. The Applicant also notes that, even if not framed as *Charter* issues at the time, the facts he now relies on in support of his *Charter*

arguments (related to the effect of scheduling the admissibility hearing upon his participatory rights) were all raised with the ID.

[49] In my view, the Respondent's submissions related to the Applicant's *Charter* arguments do not detract from the Applicant's ability to demonstrate a serious issue on this application. Independent of his *Charter* arguments, his Application for Leave and for Judicial Review challenges the reasonableness and fairness of the Scheduling Decision. As the Applicant submits, the facts underlying that challenge were squarely raised in his arguments before the ID. To the extent framed as arguments going to the reasonableness and fairness of the decision, the administrative law principle discussed in *Alexion* represents no impediment to the Applicant raising a serious issue through those arguments.

[50] As to the merits of those arguments, and whether they raise a serious issue on the elevated standard, I adopt essentially the same analysis as set out above in these Reasons in assessing whether those arguments demonstrate exceptional circumstances warranting departure from the prematurity principle. I find that the Applicant has raised a serious issue that the Scheduling Decision, by proceeding with the hearing as currently scheduled and thereby precluding his preparation and effective communication during the hearing, compromises hearing fairness and is unreasonable.

[51] I therefore move on to consideration of the Applicant's arguments on irreparable harm.

C. *Irreparable Harm*

(1) Risk to the Applicant's Health

[52] The Applicant submits that the stress of having to attend an ID hearing could cause him severe debilitating health consequences. In support of that position, he relies principally on a medical report, dated January 16, 2021, prepared by his geriatrician, Dr. George Heckman, who examined the Applicant on January 13, 2021.

[53] Dr. Heckman explains the Applicant's frailty, which he describes as moderately severe. Dr. Heckman indicates that the Applicant has a "CHESS score" of 4, which he describes as suggesting significant health instability. He notes that, in home care clients with a similar health profile, such a score is associated with a 50% risk of an adverse health event in the next 3 months.

[54] Dr. Heckman also explains that frailty is associated with an increased risk of adverse health outcomes, particularly when an individual is faced with a "stressor", such as a concurrent illness, the side effects of treatment, or environmental hazards. That is, the interaction of a stressor with frailty can increase the risk of an adverse health event. Applying that risk to the Applicant, Dr. Heckman opines as follows:

> The stress related to the upcoming hearing and concurrently being experienced by Mr. Oberlander can be considered a "stressor". At this time, we are seeing evidence that this is contributing to his elevated blood pressure and to his increasing health instability, as reflected by his CHESS score (driven by declining cognition and function, decreased food intake, weight loss, sarcopenia). In the case of Mr. Oberlander, the most likely short term to medium term

> health consequences would be an injurious fall (potentially including fracture) or a cardiovascular event (transient ischemic attack or stroke, or cardiac event). Given Mr. Oberlander's current moderately severe frailty, these events would most likely result in accelerated loss of physical function and cognitive function, or death. Should he survive, he could ultimately require placement in a long-term case home. The longer he is exposed to the stress related to legal proceedings, the more his health will become unstable and the more likely he will be to experience an adverse health event.

[55] The Respondent submits that this evidence does not demonstrate that participating in the hearing would cause the Applicant harm. The Respondent notes that, to establish irreparable harm requires evidence at a convincing level of particularity that demonstrates a real probability that such harm will result (see *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 [*Glooscap*] at para 31). The Respondent submits that Dr. Heckman's evidence as to the effect of the upcoming hearing as a stressor falls short of meeting that test.

[56] I accept Dr. Heckman's evidence that the stress associated with the upcoming hearing can be considered a stressor and that the interaction of a stressor with frailty can increase the risk of an adverse health event. I also accept the Applicant's position that Dr. Heckman cannot be expected to opine with certainty as to an adverse future outcome. However, his opinion raises no more than the possibility of such an outcome. While Dr. Heckman describes the most likely short to medium term health consequences as an injurious fall or a cardiovascular event, I do not read this as an opinion that these results are likely. Rather, he is explaining that, should the Applicant experience an adverse event, it is most likely to be in one of these categories.

[57] Moreover, Dr. Heckman concludes his report by opining that, the longer the Applicant is exposed to the stress related to legal proceedings, the more his health will become unstable and the more likely he will be to experience an adverse health event. This opinion raises the possibility that the Applicant's health may be best served by proceeding to the ID hearing as quickly as possible, with a view to concluding the administrative proceeding and all related legal proceedings at the earlier opportunity.

[58] This point also highlights the fact that, in asserting risks to his health in proceeding to the ID hearing, the Applicant is attempting to rely on alleged risks that would be present regardless of when the hearing is held. The application for judicial review challenges the decision to hold the hearing at this juncture, because of the effects of the current pandemic. It does not seek to delay the hearing indefinitely. Therefore, there is little logic in basing the request for a stay on allegations of a risk that would be faced eventually and, according to Dr. Heckman's opinion, potentially increased as a result of the delay.

[59] Taking into account the evidentiary standard explained in *Glooscap*, I find that this argument does not establish the irreparable harm necessary to support a stay.

(2) Mootness of Application for Judicial Review

[60] The Applicant asserts that, if the admissibility hearing is commenced before the application for judicial review of the Scheduling Decision is decided, that application will be rendered moot. He cites authorities for the proposition that these circumstances amount to

irreparable harm that would result if the stay is not granted (see, e.g., *Suresh v Canada*, [1999] 4 FC 206 (FCA)).

[61] I agree with the Respondent's position that mootness of the application, if the stay is not granted, is insufficient to establish irreparable harm. As explained by the Federal Court of Appeal in *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42, in some cases the fact that an underlying proceeding will be rendered nugatory or moot, if a stay is not granted, will amount to irreparable harm. However, in other cases it will not, and the Court should not be deprived of the discretion to decide irreparable harm on the facts of each case (at para 8). Consistent with that reasoning, I will decide that question based on other arguments advanced by the Applicant that are based on this matter's specific facts.

(3) Breach of *Charter* Rights

[62] The Applicant relies on his allegations that the Scheduling Decision breaches his *Charter* rights and refers the Court to authority to the effect that the breach of a *Charter* right may not be compensable in damages and may therefore constitute irreparable harm (see, e.g., *Allard v Canada*, 2014 FC 280 [*Allard*] at 96).

[63] I again agree with the Respondent that this argument is insufficient to establish irreparable harm in the present case. Particularly given the challenge that the Applicant may face in advancing *Charter* arguments that were not presented to the ID, I am not prepared to find irreparable harm based only on the fact that the Applicant has advanced *Charter* arguments in

this application and the authority of *Allard* that Charter breaches may give rise to irreparable harm.

[64] Moreover, while I accept that allegations of *Charter* breaches may in certain cases be a basis for a finding of irreparable harm, I note that the analysis to that effect in *Allard* took into account the financial impact upon the applicants if the stay was not granted and the jurisprudential impediments to obtaining damages in constitutional cases. The circumstances of the present case bear little similarity to those in *Allard*.

(4) Abuse of Process

[65] Relying on *John Doe v Canada (Citizenship and Immigration)*, 2007 FC 327 [*John Doe*], the Applicant submits that continuing the ID's admissibility proceedings would be an abuse of process, representing harm both to the Applicant and to the public interest in the integrity of the legal process that cannot be repaired. The Respondent argues that the circumstances of the present case cannot be characterized as an abuse of process, as they simply represent the ID discharging its statutory mandate to hold an admissibility hearing without delay.

[66] I note that *John Doe* involved a motion to stay a proceeding before the Immigration and Refugee Board in the context of a judicial review of an interlocutory decision. Consistent with my decision to apply an elevated threshold to the first element of the *RJR-MacDonald* test in the case at hand, Justice Michael Phelan stated that, in considering the first branch of the stay test, where the request is to stay an on-going hearing, the threshold must be examined more closely than in most other stay applications (at para 8). Justice Phelan commented that abuse of process

is an easy allegation to make, but more difficult to establish. However, he was satisfied that, in the unique circumstances of that case, the burden of establishing the allegation on a threshold beyond the "not frivolous and vexatious" standard had been met (at paras 9-10).

[67] In my view, *John Doe* must be read in the context of the Court's close examination of the merits of the applicant's allegations. The conclusion that the applicant had established irreparable harm is linked to those particular allegations and the Court's close examination thereof. In other words, satisfying the irreparable harm element of the test turns not on the fact that an abuse of process is argued but rather the nature of the argument and its apparent merit.

[68] The remaining argument advanced by the Applicant in support of irreparable harm is related to the effect of the Scheduling Decision upon his participatory rights. He submits that, due to the communication difficulties resulting from the combined effects of his hearing disability and the COVID-19 pandemic, he cannot be adequately prepared for the ID hearing and he will not be able to fully understand the questions posed at the ID hearing. This raises the risk that he will provide evidence that may not be what he intended. Like in *John Doe*, the argument in support of irreparable harm is effectively the same as the position advanced in challenging the decision under judicial review. I have previously considered this argument in assessing whether the Applicant has raised a serious issue in this application. However, I will now return to this argument, in support of the element of irreparable harm.

(5) Effect upon the Applicant's Participatory Rights

[69] As noted above, I have previously analyzed the Applicant's evidence and arguments, surrounding the combined effects of his disability and the COVID-19 pandemic upon his participatory rights, in the context of the prematurity principle and the merits of this application for judicial review. In assessing whether those arguments support a finding of irreparable harm, I see no reason to depart from that analysis, with the exception of two significant points.

[70] These points, which I will explain below, are significant because the examination of irreparable harm on a stay motion relates to the period between when the stay is being considered and when the underlying application for judicial review is determined. I accept that the adverse effect upon the Applicant's participatory rights, if the admissibility hearing were to commence on February 8, 2021, would represent irreparable harm. However, there is evidence before the Court suggesting that solutions to those adverse effects might be implemented before, and potentially well before, this application is heard and decided.

[71] First, the DR explains in her affidavit that, when Dr. Heckman visited the Applicant in his home on January 13, 2021, he used a hearing amplifier headset to communicate with the Applicant. Dr. Heckman states in his report that this device worked well enough to facilitate communication and allow the Applicant to actively participate in his assessment. The DR explains that she had not previously seen or been aware of this device and that "we" (which I presume to be a reference to the Applicant, the DR and the Applicant's counsel) were now looking to order such a device for use in the admissibility hearing.

[72] The DR states that, although the hearing amplifier headset allowed Dr. Heckman to conduct his examination with simple, straightforward questions, it was still a difficult process. She states the process was time consuming and the Applicant often asked the doctor to repeat questions or looked to the DR for answers. However, she indicated that they would still make efforts to obtain this device. While there is no further evidence before the Court on the results of these efforts, counsel for both parties agreed at the hearing that it was appropriate that the Applicant's counsel speak to this. Effectively, the update was that efforts are ongoing.

[73] The second point relates to the potential that the availability of a vaccine against COVID-19 could eliminate the effect of the pandemic upon the Applicant's communication challenges. The DR states in her affidavit that, as the vaccine is now in Canada, they are asking only that this case be delayed until the vaccine can be safely administered and the Applicant's risk diminished so that his lawyers can meet with him to prepare him for the hearing.

[74] There is no evidence before the Court as to vaccine timelines, and the Respondent's counsel took the position at the hearing that it would be unwise to speculate on this point. I agree with this position. However, like the availability of a hearing amplifier headset, a vaccine once available has the potential to resolve the communication challenges underlying this application and this stay motion. As such, the irreparable harm associated with now commencing the admissibility proceeding may cease if and when one or both of these solutions are available. I will next explain my analysis of the balance of convenience and how these points factor into my decision.

D. *Balance of Convenience*

[75] In many stay motions, the balance of convenience, while always a distinct element of the test, tends to flow from the outcome on the other two elements. However, both parties argue that, in this matter, the balance of convenience assumes more importance than is sometimes the case. The Applicant argues that, as this matter involves participatory fairness including *Charter* rights, both the Applicant's interest and the public interest favour granting the stay.

[76] The Respondent submits that the balance of convenience favours denying the stay, because of the public interest in allowing the admissibility hearing to proceed without delay as mandated by statute. The Respondent also relies on authority identifying the compelling public interest in deciding issues of inadmissibility in the context of allegations of crimes against humanity (see, e.g., *Ratnasingam v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1096 at para 32).

[77] In noting that the circumstances underlying these proceedings involve the Applicant's wartime service with the Ek10a, the Respondent refers the Court to the recent decision in *Canada (Citizenship and Immigration) v Kljajic*, 2020 FC 570 at para 2, in which Chief Justice Crampton stated that "[t]he light of the law must be allowed to shine on all of the circumstances surrounding dark deeds that may later be discovered, so that the role of those who may have been involved can be scrutinized for what it was and was not."

[78] I find the Respondent's submissions compelling. While the outcome of the admissibility proceeding is of course unknown, that proceeding should be progressed and brought to a conclusion as quickly as possible. However, it must be progressed in a manner that also respects the Applicant's right to meaningfully participate to the extent reasonably achievable. The balance of convenience favours granting a stay, but only for a short period of time, to permit the Applicant, his counsel, and the DR to pursue a solution to the present communication challenges, with leave to seek a further stay if the Applicant subsequently considers that circumstances warrant.

[79] There is no obvious basis on which to select the duration of the stay. However, when the Applicant's counsel appeared before the ID at the CMC on November 25, 2020, they requested that another CMC be convened 30 days later, so that the current circumstances surrounding the pandemic and its effect upon the Applicant could be re-assessed. This strikes me as an appropriate time frame to afford the Applicant to pursue the identified solutions to the Applicant's communication challenges or (recognizing that he cannot control timing of the availability of a vaccine) updated information thereon.

[80] With the benefit of such time and information, even if resolution of the communication difficulties is not achieved within 30 days, the parties and their counsel working co-operatively with the ID may then be able to schedule the admissibility hearing on a date that is as soon as possible (taking into account hearing preparation time) following when such resolution is anticipated. In that case, the parties will not need further recourse to the Court on this issue. However, in contemplation of the possibility that further recourse to the Court may be required,

the 30 day period to pursue resolution will be accompanied by a short opportunity thereafter to seek a further stay. My Order will therefore stay the commencement of the ID hearing for six weeks from the date of this decision, i.e. to March 19, 2021.

ORDER IN IMM-6692-20

THIS COURT ORDERS that:

1. The Applicant's motion for a stay is granted in part.

2. The commencement of hearings before the Immigration Division of the Immigration and Refugee Board of Canada in relation to the Applicant's admissibility, currently scheduled for February 8 and 11, 2021, is stayed to and including March 19, 2021.

3. The Applicant may move for a further stay beyond March 19, 2021, upon notice to the Respondent in accordance with the *Federal Courts Rules,* SOR/98-106.

"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 BY VIDEOCONFERENCE ON FEBRUARY 2, 2021 VIA TORONTO

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	FEBRUARY 5, 2021

APPEARANCES:

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