Federal Court Cour fédérale

Date: 20220622

Docket: IMM-3887-21

Citation: 2022 FC 933

Ottawa, Ontario, June 22, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

EDSON MERIA VALDEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision dated May 5, 2021. In that decision, the Minister's delegate issued a referral to the Immigration Division ("ID") of the Immigration and Refugee Board ("IRB") for an admissibility hearing pursuant to s. 44(2) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [*IRPA*].

II. Analysis

[2] The Respondent raised a prematurity argument stemming from the Federal Court of Appeal ("FCA") decision of *Lin v MPSEP,* 2021 FCA 81 [*Lin*]. The Respondent argues that this Application should be dismissed on the ground of prematurity.

[3] The Applicant argued that this case is distinguishable from *Lin* and is not premature, and is more inline with *XY v MPSEP,* 2021 FC 831 [*XY*]. On these facts, because the Applicant's 15-month sentence is over the 6-month bar, he is not entitled to go to the Immigration Appeal Division ("IAD") and would only be entitled to go to the ID. Further argument was that in *Lin*, the Court was dealing with a misrepresentation, so the Applicant had the opportunity to present evidence and argue their personal circumstances at both the ID and IAD. Unlike *Lin* the Applicant said in this case there is serious criminality involved, and so at the ID, the Applicant's personal circumstances cannot be looked at – as it is either the conviction occurred or not and a removal order will be issued, and Humanitarian and Compassionate ("H&C") factors will not be considered. For support, the Applicant relies on *XY* (at paras 37-48) which concerns a s. 37 matter, where *Lin* was distinguished and the judicial review application was found not to be premature.

[4] The Respondent disagreed, and submitted that the Applicant has available the administrative step of advancing to the ID and that this step should be taken before they come to this Court with a Judicial Review application. They acknowledge, however, that unlike in *Lin*, the IAD is not available to this Applicant (pursuant to s. 64 of the *IRPA*). As well, the

Respondent noted that the Applicant could also bring a standalone H&C application to have his personal circumstances considered. Thus, the Respondent argued that this case is not distinguishable from *Lin* and should be dismissed as premature.

[5] I find that this judicial review application is premature and not distinguishable from *Lin*. For the reasons that follow, I will dismiss this application for prematurity given there is an adequate alternative remedy that must be exhausted before coming to this Court.

[6] Of course, factually there are differences between this case and *Lin*. However, a careful review of *Lin* yields that the principle that if the ability to go to the ID is available, then it must be exhausted before coming to the Federal Court.

[7] The Applicant has the opportunity to adduce evidence and make arguments at the admissibility hearing of the ID. While I do understand the Applicant's argument that it may not give him the opportunity to receive the relief he seeks, that is not the exceptional circumstance that Justice Stratas discussed in *Lin*.

[8] Prematurity arises for applicants that seek judicial review of decision issued pursuant to s. 44 of the *IRPA*, and are required to exhaust their administrative remedies at the ID, and if available to them, the IAD. As stated in *Lin*, "The general rule is that judicial review should not be brought until all available and adequate administrative recourses are pursued …" The FCA stated that permanent residents are required to exhaust other administrative remedies available them after receiving s. 44(1) and s. 44(2) decisions from Canada Border Services Agency, rather

than seeking judicial review. The FCA relied on *Strickland v Canada (AG)*, 2015 SCC 37, and held that the ID and IAD are both adequate and available. The FCA does not distinguish the underlying basis, just if the ID is available.

[9] Consider the statement in *Lin* at paragraph 5, "… 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."

[10] However, as noted, there are very limited exceptions to this general principle, in my review of the facts none of the exceptional circumstances necessary to meet them apply on these facts. Indeed, the FCA intended for these to be a high bar, going so far to as to refer to "… 'very rare' exception[s] [which] set at a high threshold akin to the threshold for prohibition" (*Lin* at para 6). They further reminded us 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 …" (*Lin* at para 6).

[11] None of the exceptions are met in this case, as the ID is available and the FCA has said that: "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 exception circumstances" (*Lin* at para 7). I find that issues of jurisdiction and procedural fairness are at least as important issues as the Applicant arguing that they are not able to have his

personal circumstances reviewed at the ID level. As a result, this issue does not fit into the exceptions on these facts.

[12] Thus, I am of the view that the Applicant should in this case exhaust his adequate available remedy before coming to the Federal Court, making this application premature.

[13] The Application is dismissed.

JUDGMENT IN IMM-3887-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed as being premature without any prejudice to any proper judicial review application that may be brought to the Federal Court after all adequate alternative remedies have been exhausted.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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