Date: 20100514

Docket: IMM-435-10

Citation: 2010 FC 532

Vancouver, British Columbia, this 14th day of May 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

PETER ROGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant is seeking an "interim order pursuant to s. 18.2 of the *Federal Courts Act*, or, alternatively, the Court's inherent jurisdiction, prohibiting the resumption of the Applicant's Admissibility Hearing, which is currently scheduled to take place over four days from June 8, 2010 to June 11, 2010 before the Immigration Division, until such time as the within Application for Leave and Judicial Review has been dealt with".

[2] In the underlying Application for Leave and for Judicial Review, the applicant challenges the interlocutory decision of the Immigration Division of the Immigration and Refugee Board (the

"Immigration Division") wherein it dismissed the applicant's application for disclosure of documents. In its reasons, the Immigration Division held that the documents were related to the alleged abusive conduct of the immigration officer in making the Report, under subsection 44(1) of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*") and/or the decision of the Minister's delegate to refer the matter to the Immigration Division pursuant to subsection 44(2) of the *IRPA*. Because the Immigration Division did not have the jurisdiction to review the validity of the section 44 decisions (Report and Referral), the applicant's allegations of the Canada Border Services Agency's abusive conduct in writing the Report and/or making the Referral were irrelevant. The documents sought where consequently irrelevant and the disclosure application denied.

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[3] The law governing the Court's exercise of discretion to grant interim relief is set out in *Toth v. Canada (M.E.I.)* (1988), 86 N.R. 302 (F.C.A.). The following elements of the test must be satisfied conjunctively:

a) the underlying Application for Leave and for Judicial Review of the Immigration Division's interlocutory ruling raises a serious issue to be tried;
b) the applicant will suffer irreparable harm if the stay is not granted; and
c) the balance of convenience favours the applicant.

[4] Upon reading the material filed and upon hearing counsel for the parties, I am of the opinion that the applicant fails to meet all three prongs of the *Toth* test.

Serious issue

[5] The practice of this Court is to not review interlocutory decisions because such review is, in the vast majority of cases, premature. The jurisprudence makes clear that only if there are special

circumstances, such as no appropriate remedy at the end of proceedings available to the applicant, should the Court exercise its jurisdiction to review the matter (*Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 (C.A.), at paragraph 10; *Szczecka v. Canada (M.E.I.)* (1993), 116 D.L.R. (4th) 333 (F.C.A.), at paragraph 4).

[6] The rationale for such restrictive access to judicial review is to avoid the unnecessary delays and expenses associated with breaking up a case on each and every opportunity for appeal, which would interfere with the sound administration of justice and ultimately bring it into disrepute (*Zündel*, and *Szczecka*, *supra*). The Federal Court of Appeal held in *Anti-dumping Act (In re) and in re Danmor Shoe Co. Ltd.*, [1974] 1 F.C. 22, at page 34:

> . . . a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal. […]

[7] In the case at bar, the applicant has failed to show that there is a serious issue to be tried as a result of the existence of special circumstances to justify an immediate review of this matter. Where the matter at issue is the Immigration Division's jurisdiction to determine constitutional questions or to make declaratory judgments, it goes to the very jurisdiction of the tribunal and constitutes special circumstances (*Zündel*, *supra*, at paragraph 15). The applicant submits that the evidentiary ruling made by the Immigration Division in this case engages similar jurisdictional concerns and further relies on *Minister of Citizenship and Immigration v. Fox*, 2009 FC 987, and *Pfeiffer v. Canada (Superintendent of Bankruptcy)*, [1996] 3 F.C. 584 (T.D.).

[8] What first distinguishes the facts of this case from the case-law cited by the applicant is that there is no question that it is within the Immigration Division's jurisdiction to make an interlocutory order regarding evidence (*IRPA*, subsection 162(1); *Immigration Division Rules*, SOR/2002-229, rules 3 and 20(2)). Madame Justice Danièle Tremblay-Lamer affirmed that the discretion provided by the legislative scheme ensures that the tribunal is the master of its own procedure (*Minister of Public Safety and Emergency Preparedness v. Kahlon*, 2005 FC 1000, at paragraph 24).

[9] In *Fox, supra*, the matter the Court was concerned with on judicial review was whether the tribunal had ordered an adjournment in admissibility proceedings for improper purposes, taking into account irrelevant considerations. Similarly, in *Pfeiffer*, the applicant had argued that the bankruptcy tribunal could not apply certain sections of the *Bankruptcy Act* to him because they should be struck under the *Constitutional Act*. The tribunal said it had no jurisdiction to strike legislation and thus applied the sections to the applicant. The issue for the Court on judicial review was whether the tribunal had done something that it had no jurisdiction to do.

[10] Finally, I note that there is an appropriate remedy at the end of the Immigration Division's proceedings as the applicant has a right to apply for leave and for judicial review from the decision which will eventually be made on the merits of admissibility. In *Fox, supra*, there was no appropriate remedy at the end of the hearing because the adjournment was the damage complained of by the applicant government.

[11] This is not a case where the Immigration Division is declining jurisdiction to consider a *Canadian Charter of Rights and Freedoms* argument, rather, it is finding that it has no jurisdiction

to order disclosure of documents because they relate to an irrelevant matter for the admissibility hearing. It is not contested that an interlocutory order denying the applicant disclosure of some documents is a permissible basis for an application for judicial review of the decision on the merits (*Seyoboka v. Minister of Citizenship and Immigration*, 2009 FC 104, 340 F.T.R. 105, at paragraph 48; and see generally, the principle that interlocutory orders may form the basis of an application for leave to judicially review the final decision of the tribunal (*Zündel*, at paragraph 17; *Szczecka*, at paragraph 6)).

[12] Therefore, the underlying application for judicial review being clearly premature, the requirement of showing the existence of a serious issue in this matter has not been met.

Irreparable harm

[13] The applicant submits that the Immigration Division's ruling may give rise to a breach of the *Charter* and that the Court must presume in such circumstances that irreparable harm will flow from the breach. The applicant cites *Ermineskin Cree Nation v. Canada*, 1999 ABQB 791 at paragraph 33, and *Southam Inc. v. Canada (Attorney General)*, [1991] 2 F.C. 292 (T.D.) at page 308, as support for the proposition that a hearing which is ultimately determined to be void for jurisdiction causes irreparable harm if it proceeds. The applicant also cites *R.J.R. - MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, at paragraphs 60 and 61 in support of the proposition that *Charter* breaches, even if compensable, are by their nature causative of irreparable harm.

[14] Given the circumstances of the present case, this Court cannot assume irreparable harm.

[15] Because no *Charter* rights are engaged in an admissibility hearing of a foreign national, who is not detained and is not a refugee claimant, the applicant's allegation of irreparable harm is irrelevant. First, this is a decision with respect to the applicant, not against him. His right to life, liberty and security of the person is not yet engaged, if ever applicable. Second, as a foreign national living in Canada who is not detained and has not claimed refugee protection, he has no *Charter* rights. In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, the Supreme Court of Canada determined that the section 7 right guaranteed by the *Charter* is not implicated by a deportation order made against a non-citizen:

> [46] The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.

[16] To the extent that the applicant asserts irreparable harm flowing from a breach of his common law rights, I note a decision of the British Columbia Supreme Court: *Doman v. British Columbia (Securities Commission)*, [1995] 10 W.W.R. 649 (B.C.S.C.) which is cited with approval by the Federal Court of Appeal in *Zündel, supra*. In *Doman*, Huddart J. (as she then was) considered whether there were circumstances to support the court's exercise of discretion to review interlocutory orders from an administrative board. She held that "[t]he fact that an evidentiary ruling may give rise to a breach of natural justice is not sufficient reason for a court to intervene in the hearing process" (at page 655).

[17] Furthermore, because the underlying issue is not whether or not the Immigration Division had the jurisdiction to make the order it did, or to proceed with an admissibility hearing, the comments of the Court of Queen's Bench of Alberta in *Ermineskin Cree Nation*, *supra*, and those of the Federal Court in *Southam*, *supra*, do not support the applicant's assertion of irreparable harm.

Balance of convenience

[18] In the circumstances of this case, public interest tips the balance of convenience in favour of the respondent. If the requested stay is granted, the admissibility hearing will be subject to further delays, and the substantive merits of the allegations against the applicant will not be determined on a timely basis, as required by section 162 and paragraph 173(3)(*b*) of the *IRPA*. Furthermore, the March 17, 2010 decision of the Immigration Division refusing the applicant's application to postpone the admissibility hearing pending his leave application will have been improperly circumvented.

[19] Therefore, further delay would not be in the interest of justice and runs contrary to the express intention of Parliament that admissibility hearings proceed in a timely way.

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[20] For all the above reasons, the requested interim relief is denied and the applicant's motion is dismissed.

ORDER

THIS COURT ORDERS that the requested interim relief is denied. The applicant's motion is hereby dismissed.

"Yvon Pinard"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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