Date: 20100601

Docket: IMM-5042-09

Citation: 2010 FC 569

Ottawa, Ontario, June 1, 2010

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

Kok Hung WONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision, dated July 21, 2009, of a pre-removal risk assessment officer (the officer) under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27 (the Act), by Kok Hung Wong (the applicant). The officer rejected the applicant's application for permission to apply for permanent resident status from within Canada on humanitarian and compassionate grounds (''H&C application'').

[2] The applicant is a citizen of Malaysia. He entered Canada as a visitor in 1998. In 2000, he claimed refugee protection. This claim was rejected in 2001, on the ground that the applicant was

not credible. Following the rejection of an H&C application and of an application for a pre-removal risk assessment, he left Canada on January 22, 2002.

[3] He returned to Canada on April 30 of that year and immediately claimed refugee protection. This new claim for refugee protection was rejected in June 2003, once again on the ground that the applicant was not credible. An application for leave and judicial review of that decision was also dismissed. On March 31, 2008, the applicant submitted an H&C application, the refusal of which is the subject of his current application for judicial review.

[4] That H&C application was based on his establishment in Canada and on the risk he claims he would face if he were to return to Malaysia because of his homosexuality.

[5] After the officer rendered a negative decision with regard to his H&C application, and following the rejection of an application for a pre-removal risk assessment that had been submitted at the same time, the applicant met with an immigration officer who gave him until November 30, 2009, to leave Canada.

[6] On October 13, 2009, a notice to appear at a meeting with immigration authorities on October 20 was personally given to the applicant. The applicant did not attend this meeting. Several telephone calls went unanswered.

[7] On November 6, 2009, a warrant for the applicant's arrest was issued. At the time of the hearing before me, the applicant had yet to appear and the warrant was still outstanding.

[8] The respondent submits that the applicant, having excluded himself from the Canadian immigration system, does not have clean hands and that the Court should refuse to help him and dismiss his application outright without considering its merits.

[9] Counsel for the applicant responded that, in a judicial review, the situation should be assessed at the time the application was submitted and that events that occurred after the decision under review ought not be taken into account. On the date of the decision as well as the date on which the current application for judicial review was submitted, the applicant's hands were clean.

[10] I agree with the respondent. The Court, in a similar case, dismissed the application for judicial review in *E.L.D. v. The Minister of Citizenship and Immigration*, 2005 FC 1475. Recalling the old adage ''he who has committed Iniquity ... shall not have Equity'' (*Jones v. Lenthal* (1669) 1 Ch. Ca. 154), Justice Max M. Teitelbaum opined, at paragraph 56, that ''[s]ince the applicant is adamantly seeking judicial review, her conduct is relevant and must be beyond reproach''. When a person who is applying for judicial review of an administrative decision does not have clean hands, ''this in itself warrants the dismissal of the application for judicial review''. There is nothing in Justice Teitelbaum's reasons that would lead one to believe that the applicant in that case had gone into hiding before the decision for which she was seeking judicial review was rendered.

[11] In fact, the applicant's conduct must be assessed in light of the clean hands doctrine at the moment when the application for judicial review is before the Court. The application of the doctrine flows from the Court's discretionary power, and not from that of an administrative decision-maker. In *Canadian Pacific Ltd v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at paragraph 30, Chief Justice Lamer explained that when a person submits an application for judicial review, it

> does not mean, however, that they have a right to require the court to undertake judicial review. There is a long-standing general principle that the relief which a court may grant by way of judicial review is, in essence, discretionary. This principle flows from the fact that the prerogative writs are extraordinary remedies. The extraordinary and discretionary nature of the prerogative writs has been subsumed within the provisions for judicial review set out in s. 18.1 of the *Federal Court Act*. . . .

[12] The Court's decision regarding whether or not to undertake judicial review, and any decision made as a result of having undertaken judicial review, are therefore distinct. It would be absurd if, when exercising its discretionary power and *deciding whether or not to undertake judicial review*, a court could not consider all of the relevant facts, including, as in this case, the applicant's conduct between the date of the administrative decision and that of the judicial review. However, having decided to undertake judicial review, the Court must confine itself to the facts on which the administrative decision was made – except in cases where either the decision-maker's jurisdiction or the fairness of the administrative procedure is called into question.

[13] Therefore, I find that the applicant does not have clean hands and, consequently, his application must be dismissed.

[14] For all of the foregoing reasons, the application for judicial review is dismissed.

[15] The applicant proposes the following question for certification:

> [TRANSLATION]
>
> When an application for leave is duly authorized by a Federal Court judge with regard to a specific decision, and no new facts are raised between the granting of leave and the judicial review, in light of the mandatory provisions of section 74 of the IRPA and the provisions of the *Federal Courts Act*, does the Federal Court judge hearing the case have the authority to refuse to hear the case by claiming the existence of the clean hands doctrine applicable in common law?
>
> If so, would the situation remain the same if the setting aside of the decision under review rendered null and void the allegations against the applicant that would justify the application of the clean hands doctrine and would the applicant then have the right to challenge the allegations made against him before the judgment is delivered?

[16] In my view, this is not a serious question of general importance or one that would be determinative of the appeal. The requested certification is therefore refused. In so doing, I am adopting the line of reasoning expressed by counsel for the respondent in her letter to the Court, dated May 13, 2010, in response to the proposed question for certification submitted by the applicant's counsel. This line of reasoning is correctly based on the following Federal Court of Appeal decisions: *Varela v. Canada (M.C.I.)* (2009), 391 N.R. 366; *Liyanagamage v. Canada (M.C.I.)* (1994), 176 N.R. 4; *Thanabalasingham v. Canada (M.C.I.)* (2006), 345 N.R. 388, and *Deng Estate v. The Minister of Public Safety and Emergency Preparedness*, 2009 FCA 59.

[17] The question proposed by the applicant is therefore not certified.

JUDGMENT

The application for judicial review of the decision, dated July 21, 2009, of a pre-removal risk assessment officer rejecting the application for permission to apply for permanent resident status from within Canada on humanitarian and compassionate grounds is dismissed.

''Yvon Pinard''

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5042-09
STYLE OF CAUSE:	Kok Hung WONG v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 21, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	June 1, 2010

APPEARANCES:

Michel Le Brun	FOR THE APPLICANT
Mireille-Anne Rainville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michel Le Brun Lasalle, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT