Federal Court  Cour fédérale

Date: 20100920

Docket: IMM-5074-10

Citation: 2010 FC 939

Toronto, Ontario, September 20, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KWOK FAI CHAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant brought a motion in this matter seeking an "order enjoining, *nunc pro tunc* to 16 August 2010, enforcement action, including a Pre-Removal Risk Assessment, from proceeding with respect to the July 21st deportation order being directly challenged in IMM-4440-10 and indirectly in IMM-4270-10." I dismissed that motion by Order dated September 14, 2010.

[2] Following the issuance of the Order, the Court received correspondence from counsel for the applicant submitting the following question for certification:

> Where the legality of a removal order is being challenged, may the respondent only be enjoined from seeking to execute it *after* the airplane ticket has been booked and the party being deported advised of the removal date or may an applicant seek to enjoin the respondent from proceeding with removal action prior to the eleventh hour?

[3] The reason why the motion for an injunction was brought was put as follows in correspondence from counsel for the applicant: "Because neither Mr. Chan nor I can fathom a proper public purpose for forcing us to lodge two more applications, we have filed this motion seeking to enjoin CBSA agents from striving to execute a patently unlawful deportation order and to avert two more court cases from clogging the Court's docket. Thus the question is whether this Honourable Court shares Ms. Christodoulides' preference to spawn litigation or Mr. Chan's desire for it to rule on the validity of removal order [*sic*] before CBSA is [*sic*] can position itself to execute it overnight."

[4] The motion was dismissed on the basis that the applicant had failed to establish that he would suffer any irreparable harm if it was not granted. The relevant portions of the endorsement read as follows:

> 4. Mr. Chan cannot presently be removed from Canada as he has been offered the opportunity to make a Pre-Removal Risk Assessment application (PRRA). He has until tomorrow to decide whether so to do. His counsel informed the Court that he will be filing his PRRA tomorrow. This will then result in there being a statutory stay of removal pursuant to section 232 of the Regulations. Accordingly, once the applicant files his PRRA, he will not be subject to removal and will not be liable to be removed until the PRRA decision is made and then only if it is a negative one.
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> 5. The applicant submits that the respondent's agents are hurrying the process and that it is likely that the PRRA decision will be negative and that they will then move quickly to remove him and

> then an urgent motion would have to be brought by him seeking a stay of the removal.
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> 6. Frankly, that is the usual and ordinary process in these matters. Urgent stay motions are brought on short notice regularly. In particular, in Toronto a Judge is assigned to be a duty Judge each week to hear such urgent motions. There is nothing that amounts to irreparable harm to the applicant if he has to follow the usual process. Having to engage a court, even numerous times, cannot be irreparable harm to a party, even if inconvenient. As there is no irreparable harm established, the motion for an injunction, as I indicated from the Bench, must be dismissed.

[5] In response to the request that the court certify a question, counsel for the respondent submitted that it was barred by subsection 72(2)(e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Section 72(1) and (2)(e) of the Act provide as follows:

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	**72.** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1): …	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation : …
(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.	*e*) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

[6] In reply, the applicant submits that the respondent's interpretation of subsection 72(2)(e) cannot be correct as it would likewise bar any review of the decision on the application itself, which is not the case, provided a question is certified. Accordingly, he submits, subsection 72(2)(e) must be read in conjunction with subsection 74(d) which provides that an appeal lies to the Federal Court of Appeal "if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question."

[7] I do not accept the applicant's interpretation of the relevant provisions of the Act. Subsection 72(2)(e) of the Act states that it applies to an application under subsection (1), that is to say, it refers and relates to "an application for leave" to judicially review the impugned decision, it does not refer and relate to the final judgment on the merits of a judicial review application, as suggested by the applicant. It thus provides that no appeal lies from a decision of this Court to grant or deny leave to judicially review a decision. It further provides that no appeal lies from an interlocutory decision under the Act. There are numerous decisions which have held that an interlocutory judgment in a judicial review application under the Act is not subject to appeal: See, for example, *Mabrouki v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1104, at para 21: "… the wording of paragraph 72(2)(e) seems quite clear that an interlocutory decision is not appealable"; *Froom v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 331, at para. 3: "… an appeal from an interlocutory judgment is barred by paragraph 72(2)(e) of the *Immigration and Refugee Protection Act* …"; and *Pancharatnam v. Canada (Solicitor General)*, 2004 FC 867, Order: **"**As this is an interlocutory order, no question can be certified as per section 72(2)(e) of the Act."

[8] The Federal Court of Appeal has held that it is only in exceptional circumstances that an appeal lies to it from an interlocutory judgment under the Act; however, it appears that the exceptional circumstance require that there be a refusal of this Court to exercise its jurisdiction. This was most recently stated in *Horne v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 55, at para. 4:

> The Court was disposed to hear the stay motion on an urgent basis. However, it was obvious that a question would arise as to the validity of the appeal, because the order sought to be appealed is an interlocutory judgment in a judicial review application relating to a decision under the IRPA. Paragraph 72(2)(e) of the IRPA states that no appeal lies from such a judgment. However, this Court has held that paragraph 72(2)(e) does not bar an appeal from an order that reflects a refusal by a judge to exercise his jurisdiction to determine a stay motion: *Subhaschandran v. Canada (Solicitor General (F.C.A.)*, [2005] 3 F.C.R. 255, 2005 FCA 27.

The Court found that the case before it bore no resemblance to *Subhaschandran* and dismissed the motion for a stay. In so doing the Court stated that "even if the Judge's disposition of the appellants' stay motion is based on one or more legal errors in formulating or applying the tripartite test - and we express no opinion on that point - paragraph 72(2)(e) precludes an appeal."

[9] Accordingly, I find that I have no jurisdiction to certify the question posed by the applicant. It is barred by virtue of subsection 72(2)(e) of the Act.

[10] Further, even if I had jurisdiction, I would not have certified the question posed by the applicant as the disposition of that question would not have been dispositive of an appeal from my

Order of September 14, 2010. The applicant's motion for a stay was dismissed as there was no irreparable harm; it was not dismissed on the basis that is implied in the question that is posed.

[11] For these reasons, the question posed by the applicant will not be certified.

ORDER

THIS COURT ORDERS that the request to certify the question set out in paragraph 2 is denied.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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