Federal Court  Cour fédérale

**Date: 20170713**

**Docket: IMM-50-17**

**Citation: 2017 FC 683**

**Toronto, Ontario, July 13, 2017**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**SUKHVINDER SINGH**

**Applicant**

**and**

**THE MINISTER OF SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Background

[1] This is an application for judicial review under subsection 72(1) of *the Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA or the Act] of an Immigration Division [ID or the Board] September 12, 2016 interlocutory decision [Decision]. The Decision under review dismissed an interlocutory proceeding that rejected a *res judicata* argument on the basis of cause of action estoppel The effect of this interlocutory proceeding, if successful, would be to halt the

ID's inadmissibility hearing which resulted from a referral under subsection 44(2) of the Act. After considering the able arguments of counsel on both sides, I am dismissing this judicial review for the reasons explained below.

[2] The Applicant has a complicated and rather lengthy history, which is also summarized in part at *Singh v Canada (Citizenship and Immigration)*, 2016 FC 826 [*Singh 2016*] .The facts pertinent to the ID's Decision under review are summarized below.

[3] In 1994, the Applicant was convicted by Swiss authorities for falsifying identity documents, related to the attempted kidnapping and assassination of a police official and Indian diplomat. This conviction was expunged one year later.

[4] In 1998, he arrived in Canada and made a refugee claim. One year later, after marrying a Canadian citizen, he applied for permanent residence under the family class (as a spouse) based on humanitarian and compassionate grounds [H&C]. He indicated on his application that he had been a member of the International Sikh Youth Federation [ISYF] from April 1989 to July 1990.

[5] At the beginning of 2000, an inadmissibility hearing was held due to the Applicant's past conviction in Switzerland, and he was found inadmissible for serious criminality per subparagraph 19(1)(c.1)(i) of the former legislation, now paragraph 36(1)(b) of IRPA. A conditional deportation order was issued; the Respondent opted not to deport the Applicant at the time. This decision was not challenged before this Court.

[6] In October 2000, the Applicant was deemed to be a Convention refugee, in spite of his inadmissibility. He thereafter re-applied for permanent residence, this time under the convention refugee class.

[7] On June 18, 2003, the ISYF was listed by Canada as a terrorist entity under the *Anti-terrorism Act*, SC 2001, c 41. He has since been interviewed by the Canadian Security Intelligence Services, Immigration, Refugees and Citizenship Canada, and the Canada Border Services Agency, namely with respect to his involvement with ISYF and to his potential inadmissibility under paragraphs 34(1)(c) and (f) of IRPA.

[8] In January 2007, the Applicant's permanent residence application under the convention refugee class was rejected per paragraph 36(1)(b) of IRPA (serious criminality), while the application under the family class was never processed. The officer's failure to process the family class application became the subject of litigation before this Court, at the end of which Justice Simpson ordered that a decision be rendered by the officer by November 26, 2013.

[9] The resulting officer's decision found that the Applicant was not inadmissible for serious criminality because his 1994 Swiss crime had been expunged, but that paragraph 34(1)(f) had been triggered due to his involvement with ISYF, rendering him inadmissible on security grounds. This decision was challenged before this Court and sent back for re-determination because the officer failed to consider an H&C exemption.

[10] Upon redetermination in March 2015, the officer found that the Applicant was a member of ISYF and therefore inadmissible, but that H&C considerations merited a review by the Case Management Branch in Ottawa for final determination. That decision was also challenged before this Court, but the Court found the officer's decision to be reasonable in the circumstances. The Respondent advises that no decision has yet been made with respect to the Applicant's permanent residence application under the family class.

[11] Meanwhile, in 2009, a decision was made to make and refer an inadmissibility (section 44) report to the ID on security grounds. As a preliminary matter before the ID in 2015, the Applicant filed an application asking the panel to order a permanent stay of proceedings for abuse of process, based on the delays it took for the Minister's Delegate to refer the report to the ID. The ID held that it had no jurisdiction to grant the remedy sought by the Applicant. That decision has been challenged by way of judicial review before this Court in file IMM-1156-17, for which leave has been granted.

[12] The Applicant brought a second preliminary application before the ID, arguing that the Respondent was estopped from carrying the litigation forward per cause of action estoppel, a branch of the *res judicata* doctrine. *Res judicata*, a Latin term, literally means "a matter [already] adjudged"; a thing judicially acted upon or decided (Black's Law Dictionary, 6th Edition).

[13] This *res judicata* application was the subject of the Decision under review. A brief overview of the Applicant's arguments is helpful and a summary of the Decision is then provided below.

[14] First, the Applicant argued that the inadmissibility process constituted a re-litigation of the immigration officer's 2015 finding, upheld by this Court upon judicial review, on the Applicant's inadmissibility per paragraphs 34(1)(c) and (f). Since the matter had already been litigated in the Applicant's view, the ID proceedings violated the principle of *res judicata*, on the basis of "cause of action estoppel".

[15] Second, the Applicant argued before the ID that since the information about his involvement with ISYF was available to the Respondent back in 2000 (when he was found inadmissible on the basis of serious criminality), the Minister should now be barred from using the same evidence before the ID to argue his inadmissibility on security grounds. The Applicant argued that to rule otherwise would offend the principle of *res judicata*, under the cause of action estoppel doctrine.

[16] The Board rejected both *res judicata* arguments, holding that the doctrine was not applicable to the Applicant's case, as briefly summarized next.

## II. Decision under Review

[17] The ID started by considering the legal principles of *res judicata* and more specifically cause of action estoppel, citing case law. Relying on *Al Yamani v Canada (Citizenship and Immigration)*, 2003 FCA 482 at para 11, the ID held that the first requirement of cause of action estoppel was the existence of a prior decision in the action between the same parties as now appearing.

[18] The ID held that this first prong of the test had not been satisfied because no prior decision was rendered with respect to the current cause of action – namely the admissibility hearing process premised on security and inadmissibility pursuant to paragraphs 34(1)(c) and (f) of IRPA, due to the Applicant's membership in the ISYF organization.

[19] The ID also found that this Court's ruling in *Singh 2016* upholding the senior officer's H&C decision was not a final decision. Rather, the final decision, as far as the ID was concerned, "is to determine whether or not the PC is inadmissible on the ground of security and the finality [sought] by the Minister is the issuance of a Deportation Order […]" (Decision at para 27).

[20] The Board found that the only final decision that had been rendered to date with respect to inadmissibility that could ultimately lead to the Applicant's removal, was the inadmissibility finding made by the Board in 2000 with respect to serious criminality (not security). Specifically, the ID wrote at paras 28-30 of its Decision:

> Furthermore, I find that the issue that has been argued and for which a final decision was rendered, is the one concerning the PC's [the Applicant's] inadmissibility on criminality in relation to his conviction in Switzerland. That cause of action undertaken in February 2000 is however different than the cause of action subject to the current admissibility hearing, which consists in determining whether or not the PC is inadmissible on the ground of security, due to his membership in the ISYF.
>
> The fact that the Minister may have potentially contemplated seeking a Deportation Order on the ground of security back in 1999, but chose not to, is the prerogative of the Minister. I am not aware of any ground on which the Minister would or could be "forced" to pursue an allegation if they believe not to be ready to do so.
>
> Even if I agree with counsel that membership of the PC in the ISYF was known to the Minister at least three months before pursuing the inadmissibility for criminality, as well as the potential

> terrorist nature of the organization as of August 12, 1999, six months prior to the admissibility hearing on the criminality ground, if the Minister believed that more time was required to gather additional evidence for a better preparation, is his prerogative.

[21] The ID went on to note that ISYF was only listed as a terrorist organization by the United Kingdom in March 2001; the United States in June 2002; and, as mentioned above, Canada in June 2003.

[22] The ID also noted that while delays may have been long, the task before the Board was to assess the principles flowing from the *res judicata* – cause of action estoppel doctrine. As such, the Board dismissed these arguments.

## III. Issues, Preliminary Observations and Standard of Review

[23] The Applicant argues that (i) his application is not premature and (ii) that the ID erred in dismissing his *res judicata*, issue estoppel and abuse of process arguments.

[24] I note that this application for judicial review was made following the ID's interlocutory dismissal of the Respondent's *res judicata* arguments, and not the abuse of process arguments.

[25] Abuse of process arguments formed the basis of a separate interlocutory decision within the same ID inadmissibility hearing, which (as also mentioned above) is subject of a separate application before this Court (IMM-1156-17).

[26] As such, I am not going to consider abuse of process arguments within the confines of this judicial review. Those arguments are better left for the judicial review that squarely deals with that issue, and which were squarely before the ID. While the issues may be related in certain respects, they were brought before both the ID and this Court separately, and so to confuse them now at this stage would, in my view, be inappropriate.

## IV. Analysis

[27] The Respondent relies on several cases from this and higher courts to argue that this judicial review should be dismissed on the basis of prematurity. I agree. As I am of the view that this Application is premature for the reasons set out below, there is no need to address or resolve the standard of review differences between the two parties.

[28] Our Courts have historically warned against judicially reviewing interlocutory administrative decisions. In *Rogan v Canada (Citizenship and Immigration)*, 2010 FC 532 at para 5 [*Rogan*], Justice Pinard had this to say about the issue:

> 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 […]
>
> 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. […]

[29] Justice Pinard went on to note that save for exceptional circumstances, the Court should not entertain an application for judicial review that challenges an interlocutory decision made by the ID. Justice Pinard also highlighted that the "exceptional circumstances" exception will generally only apply when the tribunal's jurisdiction (or lack thereof) is challenged upon judicial review (*Rogan* at paras 8-11).

[30] Likewise, in *Zundel v Canada (Human Rights Commission)*, [2000] 4 FCR 255 (FCA) at para 10 [*Zundel*], Justice Sexton wrote for a unanimous Court that "[a]s a general rule, absent jurisdictional issues, rulings made during the course of a tribunal's proceeding should not be challenged until the tribunal's proceedings have been completed." The Court of Appeal held that to allow judicial reviews of interlocutory decisions without restraint would make for more delays and increased costs.

[31] Here, the Applicant is not challenging the ID's jurisdiction *per se*, but the question remains: has the Applicant met the required threshold so as to trigger the exceptional circumstances exception?

[32] In a recent case also in the immigration context before a division of the Immigration and Refugee Board, this Court held that *res judicata* – along with the related grounds of issue

estoppel and abuse of process raised here – are not exceptions to the general principle that all administrative avenues be exhausted before seeking redress before this Court by way of judicial review. In *Mangat v Canada (Citizenship and Immigration)*, 2016 FC 1336 [Mangat], Justice Elliot relied on the Federal Court of Appeal's decision in *Canada (Border Service Agency) v CB Powell Ltd*, 2010 FCA 61 at paras 30-32 [*CB Powell*], where Justice Stratas wrote:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point […]
>
> 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 review 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.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway […]
>
> [Emphasis added]

[33] Indeed, Justice Statas went on note at paragraph 33 of *CB Powell* that courts should demonstrate restraint when considering whether "exceptional circumstances" exist:

> 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 […] 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 […]
>
> [Emphasis added]

[34] And, as noted by Justice de Montigny in *Black v Advisory Council for the Order of Canada*, 2012 FC 1234 at para 35, aff'd 2013 FCA 267 [*Black*], "the Supreme Court [*in Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*], explicitly endorsed the restraint shown by reviewing courts in refusing to short-circuit the decision-making role of a tribunal, referring with approval to the Federal Court of Appeal's decision in *CB Powell*." Indeed, in *Halifax*, Justice Cromwell observed at paragraphs 35- 36 that:

> […] courts, while recognizing that they have a discretion to intervene, have shown restraint in doing so […]
>
> While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint […] Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference;

> encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes.[…] Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision […]
>
> [Emphasis added]

[35] As stated by Justice Stratas in *CB Powell*, the fact that an important legal issue is at stake does not allow the Court to expand the exception to the rule against the judicial review of interlocutory administrative decisions. Moreover, the Applicant in this case could have followed the administrative process through to its end and may very well not have been (and may still not be) found inadmissible by the ID.

[36] Furthermore, echoing Justice Pinard's reasoning in *Rogan* at para 10, even if the Applicant is found inadmissible, he will be able to judicially review that decision before this Court, at which time the Court will have the benefit of reviewing a full record. Indeed, when considering exceptions to the rule against interlocutory judicial reviews, the Court may be more compelled to intervene if the applicant has no alternative remedy, including judicial review, which was the case in *Black* (see paras 37 and 42), but clearly not the case here.

[37] Finally, I note that the failure to show restraint in judicially reviewing interlocutory decisions rendered before the ID may have the unintentional yet adverse effect of offending IRPA's legislative scheme and purpose attributed to the ID, which is to "hold an admissibility hearing quickly, and if it finds the person inadmissible, it must make a removal order" (*Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 22; see also: *Kazzi v Canada*

*(Citizenship and Immigration)*, 2017 FC 153 at para 53; IRPA, section 45). In light of principles developed in the jurisprudence, these factors do not support the Applicant's arguments.

[38] The only case on which the Applicant appeared to rely on to counter the Respondent's position on prematurity, was *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516 at para 39 [*Beltran*]. However, *Beltran* is of no assistance to the Applicant for two main reasons. First, *Beltran* was rendered within the context of abuse of process arguments for unreasonable delays, and did not have anything to do with the issues raised here of interlocutory reviews. Second, the prematurity of the application was not at issue before Justice Harrington.

[39] Considering the case law discussed above, I cannot find that in these circumstances, the *res judicata* arguments merit a departure from the jurisprudence established by the Federal and Supreme Courts, namely in the immigration context. In my view, the application is premature and must accordingly be dismissed.

[40] This conclusion has been reached in spite of the Applicant's able counsel. I too share a certain sympathy for the Applicant – as was already noted in paras 67-68 of *Singh 2016* – and as indeed the ID reflected when commenting on the significant length of the delay (Decision at paras 32-33).

## V. Conclusion

[41] This application for judicial review is dismissed in light of the prematurity of a judicial review of the interlocutory decision made during the ID's inadmissibility proceedings.

**JUDGMENT in IMM-50-17**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.

2. Counsel presented no questions for certification, nor do any arise.

3. Now costs will be ordered.

"Alan S. Diner"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-50-17 |
| **STYLE OF CAUSE:** | SUKHVINDER SINGH v THE MINISTER OF SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
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