Federal Court  Cour fédérale

Date: 20180222

Docket: IMM-28-18

Citation: 2018 FC 202

Ottawa, Ontario, February 22, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ABDOULKADER ABDI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] In a decision dated January 3, 2018, a delegate of the Minister of Public Safety and Emergency Preparedness determined under subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], that a report concerning the Applicant's serious criminality was well-founded and, consequently, referred the report to the Immigration Division [ID] of the Immigration and Refugee Board [IRB] for an admissibility hearing to determine whether the Applicant is a person described in paragraph 36(1)(a) of the *IRPA*. On January 4,

2018, the Applicant commenced an application for leave and judicial review of the decision made by the Minister's delegate. That application has yet to be perfected and the issue of whether leave for judicial review will be granted remains to be determined.

[2] On January 17, 2018, the Applicant requested that the Minister temporarily withdraw the request for an admissibility hearing under Rule 5 of the *Immigration Division Rules,* SOR/2002-229, as amended. That request was refused on February 5, 2018, and two days later the ID scheduled an admissibility hearing for March 7, 2018. The Applicant has brought the present motion for an order to stay the pending admissibility hearing before the ID until this Court has resolved his application for leave and for judicial review of the referral decision made by the Minister's delegate under subsection 44(2) of the *IRPA.*

I. Background

[3] Mr. Abdi was born on September 17, 1993. He arrived in Canada with his two aunts and his sister on August 3, 2000, as sponsored refugees fleeing Somalia; they became permanent residents upon their arrival in Canada. When he was 8 years old, Mr. Abdi and his sister were apprehended by the Nova Scotia Department of Community Services. He was never adopted and spent most of his childhood in various foster family and group home placements as a ward of the state, and while he was eligible for Canadian citizenship, the Nova Scotia Department of Community Services did not apply for Canadian citizenship on his behalf.

[4] In July 2014, the Applicant pleaded guilty to aggravated assault and to assault of a peace officer with a weapon; he received a custodial sentence of four years and six months for the

former offence and a one year concurrent sentence for the latter. As a result of these convictions, an Inland Enforcement Officer with the Canada Border Services Agency initiated admissibility proceedings against the Applicant pursuant to section 44 of the *IRPA*. This officer prepared a report dated July 8, 2016, pursuant to subsection 44(1) of the *IRPA*, finding that there were reasonable grounds to believe Mr. Abdi was inadmissible to Canada for serious criminality pursuant to paragraph 36(1)(a) of the *IRPA*. The delegate of the Minister who reviewed this report determined pursuant to subsection 44(2) of the *IRPA* that the report was well-founded and referred the matter to the ID for an admissibility hearing.

[5] The Applicant applied for judicial review of this referral decision by the Minister's delegate in Court file IMM-5238-16. The Applicant also filed a separate application for leave and for judicial review, seeking injunctive relief to prevent an admissibility hearing before the ID, but that application (Court file IMM-1959-17) was dismissed on consent of the parties; whereupon the Applicant brought an adjournment request, which the Respondent did not oppose, and the ID did not schedule an admissibility hearing. The application for judicial review of the decision by the Minister's delegate dated July 11, 2016, to refer the matter to the ID for an admissibility hearing was allowed in *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 950, on the basis that the Respondent had unreasonably used protected youth records in violation of the *Youth Criminal Justice Act*, SC 2002 c 1, and the matter was returned to a different delegate of the Minister for redetermination.

[6] Upon redetermination, a different delegate of the Minister determined in a decision dated January 3, 2018, that the July 8, 2016 report concerning the Applicant's serious criminality was

well-founded and, consequently, the report was again referred to the ID for an admissibility hearing to determine if the Applicant is a person described in paragraph 36(1)(a) of the *IRPA*. On January 4, 2018, the Applicant commenced an application for leave and for judicial review of this second referral decision, and it is that application which underlies the current motion.

II. Issues

[7] The parties agree that this motion raises one central issue: has the Applicant satisfied the tripartite test for interim injunctive relief to order a stay of the pending admissibility hearing?

III. Analysis

[8] In *Toth v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 587 at para 6, 11 ACWS (3d) 440 [*Toth*], the Federal Court of Appeal, in the context of application for an order staying the execution of a deportation order, stated as follows:

> This Court, as well as other appellate Courts have adopted the test for an interim injunction enunciated by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504 (U.K. H.L.). As stated by Kerans J.A. in the *Black* case *supra*:
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> > The tri-partite sequential test of *Cyanamid* requires, for the granting of such an order, that the applicant demonstrate, firstly, that he has raised a serious issue to be tried; secondly that he would suffer irreparable harm if no order was granted; and thirdly that the balance of convenience, considering the total situation of both parties, favours the order.

[9] These three factors are conjunctive: an applicant's failure to satisfy any one factor will lead to denial of an interlocutory injunction (see: *Canada (Public Works and Government*

Services) v Musqueam First Nation, 2008 FCA 214 at para 3, 297 DLR (4th) 349). An applicant for an interlocutory injunction bears the onus to satisfy each factor (see: *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)*, [1998] FCJ No 1690 at para 4, 84 ACWS (3d) 625). Moreover, it should be noted that a decision to grant or deny an interlocutory injunction is a discretionary one (see: *Bellegarde v. Canada (Attorney General)*, 2004 FCA 34 at para 4, 235 DLR (4th) 763).

A. *Is there a serious issue to be tried?*

[10] The Applicant contends that there is a serious issue to be tried; namely, whether the referral decision made by the Minister's delegate breached the duty of fairness, ignored international law and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and was otherwise unreasonable. The Applicant notes that the first stage of the test established in *Toth* is a low threshold which is typically met unless the matter is frivolous or vexatious, or unless the requested order will result in a final determination, answer a pure question of law, or will constitute a mandatory injunction. In the Applicant's view, the successful judicial review of the first referral decision demonstrates that this matter is neither frivolous nor vexatious, and the second referral decision which is the subject matter of the underlying application for leave and for judicial review is unfair and raises a reasonable apprehension of bias.

[11] According to the Applicant, Correctional Services Canada [CSC] officials had determined that he posed no threat to society, such that he could safely serve the remainder of his sentence in the community; whereas the Minister's delegate, in contrast, concluded based on

similar evidence that the Applicant should be referred to an admissibility hearing due to the serious and violent nature of his crimes and his low potential for reintegration. The Applicant argues that the Minister's delegate unreasonably failed to (i) explain why she preferred her own conclusions to those of a more expert body, the CSC, (ii) consider country conditions in Somalia, and (iii) assess the Applicant's degree of establishment.

[12] The Respondent maintains that there is no serious issue for several reasons. First, the current motion is improperly constituted; not only is the ID not a respondent to the underlying application for leave and for judicial review but, also, the Applicant challenges an interlocutory decision to schedule an admissibility hearing before the ID has even considered whether a removal order should be issued. Second, no action has been taken by the ID beyond scheduling the admissibility hearing and, in the Respondent's view, this motion amounts to an attempt to pre-empt the ID's jurisdiction to determine how cases proceed before it, contrary to its statutory mandate to deal with all proceedings as informally and quickly as the circumstances and the consideration of fairness and natural justice permit. In view of *James v Canada (Minister of Employment and Immigration)*, 45 FTR 139, [1991] FCJ No 465 [*James*], the Respondent says this motion should be dismissed for prematurity because a hearing has yet to occur and the ordinary administrative process ought to be followed, rather than this Court pre-empting the ID's jurisdiction by way of interlocutory relief.

[13] The Respondent further maintains that there are no exceptional circumstances warranting interference with an on-going administrative process, citing *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332, leave to appeal to SCC refused, 2011

SCCA No 267 [*CB Powell*]. According to the Respondent, interlocutory judicial review is normally prohibited in order to preserve the integrity of the administrative process and avoids fragmentation of proceedings and unnecessary costs. In this case, the Respondent argues, there are no exceptional circumstances to justify interference where the Applicant's admissibility hearing has not been held and a removal order has not been issued, and where an appropriate remedy would exist at the end of the proceedings. The Respondent notes that it is conceivable the ID could conclude that the Applicant is not inadmissible, rendering the Applicant's current arguments irrelevant; and, conversely, issuance of a removal order would be subject to judicial review and trigger the availability of other elements under the *IRPA* such as an humanitarian and compassionate application or a request for a danger opinion. In the Respondent's view, the Applicant's previous successful judicial review of the first referral decision has no bearing on the second referral decision and, further, no reasonable apprehension of bias is substantiated by the record and the reasons of the Minister's delegate are transparent and thorough.

[14] The principle of judicial non-interference with on-going administrative proceedings in the absence of "exceptional circumstances" is well established. The rationale for this principle was aptly summarized in *CB Powell*:

> [30] 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…
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> [31] 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 reviews 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.

[32] 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… Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience… Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge…

[33] 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… the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts. [Citations omitted]

[15] This principle of judicial restraint in the context of an on-going or pending administrative proceeding was endorsed by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364, where Justice Cromwell (speaking for the Court) stated that:

> [36] …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… [Citations omitted]

[16] Absent exceptional circumstances, therefore, this Court should not interfere with the on-going administrative process involving the Applicant before the ID until after that process has been completed or until any available, effective remedies under the *IRPA* have been exhausted.

[17] At the hearing of this motion, the Applicant advanced three reasons why there were exceptional circumstances such that the Court's intervention is required to stay the pending admissibility hearing; namely, (i) the unique circumstances surrounding the Applicant and the failure to obtain citizenship for him while a ward of the state; (ii) the legislative scheme in *IRPA* and, in particular subsection 64(1) which provides that: "No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality";

and (iii) the *Charter* and international law issues raised by the Applicant's application for leave and for judicial review cannot be considered by the ID.

[18] In my view, none of these reasons advanced by the Applicant persuades or compels the Court in this case to order a stay of the pending admissibility hearing before the ID. The Applicant's concerns about procedural fairness or bias and the claimed inability to raise important legal or constitutional issues before the ID are not exceptional circumstances to bypass the administrative process now pending before the ID. Moreover, the fact that subsection 64(1) of the *IRPA* may preclude an appeal by the Applicant to the Immigration Appeal Division of the IRB in respect of the ID's decision, that does not preclude the Applicant from commencing an application for leave and for judicial review of the ID's decision, whatever it may turn out to be; nor does that preclude the Applicant from continuing on with the pending application for leave and for judicial review of the decision made by the Minister's delegate. Moreover, it remains open to the Applicant to request that the ID adjourn the pending admissibility hearing until such time as the underlying application for leave and for judicial review is resolved.

[19] I am reinforced in concluding the Applicant's motion should be dismissed by the Court's decision in *James*, a case where the applicant sought an interlocutory injunction to prevent the respondent from proceeding with a credible basis hearing. In dismissing the application for the injunction, Justice Rouleau found:

> [14] Although the questions raised by the applicant are not entirely frivolous, in the sense that there is at least an arguable case to proceed to trial, I am satisfied that no injunction should issue when one considers the other aspects of the test: irreparable harm and the balance of convenience.

> [15] This entire application is premature. No action has yet been taken that can be complained of; no credible basis hearing has been held, no ruling has been made on the constitutional questions by the adjudicator, and no deportation order has issued. It is conceivable that the applicant may succeed at her hearing, and the entire question will then become moot; if she is unsuccessful, recourse may be had through the provisions of the Act allowing for review. I am satisfied that administrative process should not be disrupted and delayed pending the applicant's challenge. The public interest in having these hearings continue must outweigh any interest of the applicants in having an injunction issue at this stage, particularly when its effect would be to delay the process even further. The statutory scheme, which has not been challenged *per se*, ought to be enforced until and unless it is held to be invalid. The procedure as set out in the *Immigration Act* has not yet been exhausted; once the hearing has been held, then any complaints which arise can be the subject of an application for judicial review.

[20] To similar effect is the Court's decision in *Rogan v Canada (Citizenship and Immigration)*, 2010 FC 532, [2010] FCJ No 660 [*Rogan*], a case where the applicant sought an interim order prohibiting the resumption of his admissibility hearing until such time as his application for leave and judicial review of an interlocutory decision of the ID, dismissing his application for disclosure of documents, had been dealt with. In denying the request for interim relief, Justice Pinard stated:

> [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).
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> [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:
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> > . . . 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. […]
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> …
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> [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.

[21] More recently, in *Singh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 683, 281 ACWS (3d) 830, Justice Diner dismissed an application for judicial review of an interlocutory ID decision which had 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 have been to halt the ID's inadmissibility hearing. In finding the application premature, Justice Diner remarked:

> [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.
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> [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.
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> [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).

[22] In view of the foregoing, even if it can be said that the Applicant's application for leave and for judicial review of the referral decision raises a serious issue or issues, it is unnecessary to consider the other two aspects of the tripartite test for a stay because the Applicant's motion should be dismissed for prematurity since an admissibility hearing has yet to occur and the ordinary administrative process before the ID ought to be followed.

IV. Conclusion

[23] For the reasons stated above, the Applicant's motion - for an order to stay the pending admissibility hearing before the ID until this Court has resolved his application for leave and for judicial review of the referral decision made by the Minister's delegate under subsection 44(2) of the *IRPA* - is dismissed. There are no exceptional circumstances warranting interference by the Court with the administrative process now pending before the ID. Whether the Applicant's application for leave and for judicial review raises a serious issue or establishes a fairly arguable case will be determined when leave is granted or denied in respect of the application for judicial review.

[24] At the conclusion of the hearing of this motion, the Court invited the parties to make brief written submissions on costs. Both parties submit, and I agree, that although Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, as amended, speaks only with reference to costs "in respect of an application for leave, an application for judicial review or an appeal under these Rules" and makes no mention of interlocutory proceedings such as the present motion, Rule 22 does apply because the motion took place in the context of a file that came into being under the *IRPA* (see: *Wong v Canada (Citizenship and Immigration)*, 2016 FCA 229 at para 11, 487 NR 294, leave to appeal to SCC refused, Docket No 37275). This being so, costs in respect of this motion can only be awarded if the Court, "for special reasons, so orders". In my view, there are no special reasons to make an award of costs in the context of this motion. The threshold for an award of costs for special reasons is a high one (see: *Balepo v Canada (Citizenship and Immigration)*, 2017 FC 1104 at paras 35-40, 286 ACWS (3d) 535), and the circumstances of this motion are not such that an award of costs is warranted or necessary; so, no such award will be made.

ORDER in IMM-28-18

THIS COURT ORDERS that: the Applicant's motion for an order to stay the admissibility hearing before the Immigration Division of the Immigration and Refugee Board, until this Court has resolved the Applicant's application for leave and for judicial review of the referral decision dated January 3, 2018, made by a delegate of the Minister of Public Safety and Emergency Preparedness, is dismissed; and that there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-28-18
STYLE OF CAUSE:	ABDOULKADER ABDI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	FEBRUARY 15, 2018
ORDER AND REASONS:	BOSWELL J.
DATED:	FEBRUARY 22, 2018

APPEARANCES:

Benjamin Perryman	FOR THE APPLICANT
Heidi Collicutt Patricia MacPhee	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Benjamin Perryman Barrister and Solicitor Halifax, Nova Scotia	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT