Federal Court  Cour fédérale

Date: 20180619

Docket: IMM-5127-17

Citation: 2018 FC 636

Vancouver, British Columbia, June 19, 2018

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SHIYUAN SHEN

Respondent

JUDGMENT AND REASONS

[1] Shiyuan Shen is a Chinese national who seeks refugee protection in Canada. He claims to fear persecution in the People's Republic of China, alleging that Chinese authorities have targeted him for political reasons. The Minister of Public Safety and Emergency Preparedness intervened in Mr. Shen's refugee claim, asserting that he was excluded from the protection of the *Refugee Convention* as there were serious reasons for considering that he had committed a serious, non-political crime outside of Canada.

[2] The Refugee Protection Division of the Immigration and Refugee Board found that in failing to disclose relevant and exculpatory evidence to Mr. Shen, the Minister breached the duty of candour, and that this constituted an abuse of process. By way of remedy, the Board ordered that certain evidence be excluded from Mr. Shen's refugee hearing.

[3] The Minister seeks judicial review of the Board's decision, asserting that its refusal to issue a summons for one of the Minister's representatives resulted in a breach of procedural fairness, as it denied the Minister the opportunity to provide an explanation for the failure to disclose relevant and exculpatory evidence.

[4] The Minister further argues that the Board's decision was unreasonable, and that it applied the wrong test in concluding that the Minister's conduct amounted to an abuse of process. Finally, the Minister asserts that he was denied procedural fairness in relation to the remedy imposed by the Board, and that the Board erred in law in crafting a remedy.

[5] Given that the Minister is seeking judicial review of interlocutory decisions of the Board, Mr. Shen asserts that the Minister's application should be summarily dismissed on the basis that it is premature. For the reasons that follow, I agree with Mr. Shen that this application is premature, and I have not been persuaded that I should exercise my discretion to deal with this matter at this stage of the proceeding. Consequently, the Minister's application will be dismissed.

I. Background

[6] In order to situate the issues raised by this application in their context, it is necessary to have an understanding of the lengthy and somewhat convoluted history of this matter.

[7] Mr. Shen is 46 years old. He was involved in the steel trade in China, and was the directing mind of two companies based in Shanghai. Mr. Shen left China in 2002, moving to New York City. Shortly thereafter, Chinese authorities charged him with contract fraud.

[8] Mr. Shen left the United States and came to Canada in 2007, ultimately settling in Vancouver, where he married a Canadian citizen and started a successful kitchen cabinet business. He subsequently applied for permanent residence as a member of the Spouse or Common-Law Partner in Canada Class. Following his application for permanent residence, the Canada Border Services Agency arrested him for suspected involvement in illegal activities in China.

[9] In 2011, Mr. Shen applied for refugee protection in Canada. He maintains that he never participated in any illegal activities in China, and that the charges brought against him in that country were politically motivated.

[10] The Minister intervened in Mr. Shen's hearing before the RPD, asserting that Mr. Shen should be excluded from refugee protection pursuant to Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, Can TS 1969 No. 6 and section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as there were "serious reasons for considering" that he had committed a serious, non-political crime outside of Canada prior to his admission to this country. In support of this assertion, the Minister adduced evidence obtained from the Chinese Public Security Bureau [PSB].

[11] The RPD determined in 2013 that Mr. Shen was indeed inadmissible to Canada. However, this finding was overturned by this Court the following year, on the basis that the

Minister had failed to fully comply with his disclosure obligations. In granting Mr. Shen's application for judicial review, Justice Beaudry ordered that the Minister provide Mr. Shen with full disclosure of all of the evidence in the Minister's possession relating to Mr. Shen's case, including, in particular, all documents that had been received from the PSB relating to the charges against him.

[12] After Mr. Shen's case was returned to the RPD for redetermination, he was provided with hundreds of pages of previously undisclosed documents. Mr. Shen was of the view that many of the documents were highly relevant to his refugee claim, and that at least some of them were exculpatory in nature.

[13] Included in these documents were records of an interrogation of Mr. Shen's sister that had been carried out by the PSB, which, Mr. Shen says, demonstrated that her evidence was obtained through the use of torture. Consequently, Mr. Shen brought a motion before the Board asking that the Minister's intervention in his refugee claim be stayed because of the Minister's breach of the duty of candour, which had rendered the proceeding an abuse of process. Mr. Shen also sought to have all of the evidence emanating from Chinese authorities excluded on the ground that it was obtained through the use of torture.

[14] In a 2015 decision, the Board dismissed both of Mr. Shen's motions. In refusing to exclude evidence on the ground that it had been obtained through the use of torture, the Board found that while Mr. Shen had established a *prima facie* connection between the evidence and the use of torture, the Minister had been able to rebut the presumption that torture had been used in this case. Insofar as the disclosure issue was concerned, although the Board was satisfied that the Minister had breached his duty of disclosure and that this amounted to a breach of the

principles of natural justice, it was nevertheless not persuaded that the Minister's conduct amounted to an abuse of process.

[15] On judicial review, Justice Fothergill concluded that it was premature to review the RPD's refusal to exclude the Chinese evidence on the ground that it may have been obtained by torture. He was, however, satisfied that it was appropriate to deal with Mr. Shen's application insofar as it related to the alleged breach of the Minister's duty of candour and the abuse of process.

[16] Justice Fothergill was further satisfied that the Board had erred in its assessment of whether the Minister had breached his duty of candour, and whether this constituted an abuse of process, as the Board's analysis of this issue "was internally inconsistent and legally incorrect": *Shen v. Canada (Citizenship and Immigration)*, 2016 FC 70 at para. 4, [2016] F.C.J. No. 93 (*Shen* #1). The case was therefore remitted to the same Board member for re-determination with the specific direction that the Board had to determine whether the Minister had breached his duty of candour, and, if so, whether this amounted to an abuse of process.

[17] In carrying out this task, Justice Fothergill further directed that the Minister be given a clear opportunity to provide an explanation for his failure to disclose relevant and exculpatory evidence to Mr. Shen, following which the Board would then have to consider the adequacy of the Minister's explanation: *Shen* #1, above at paras. 38-39.

[18] If no explanation was forthcoming from the Minister, Justice Fothergill stated that the Board could draw an adverse inference from this, but that it would have to state clearly what that inference was. If the evidence established (or an inference was drawn) that the Crown's

withholding of relevant and exculpatory documents was deliberate, Justice Fothergill stated that this would amount to a breach of the duty of candour, and the Board would then have to consider whether it also constituted an abuse of process. If it found that there had been an abuse of process, the Board would then have to determine the appropriate remedy for the breach, keeping in mind that a stay of proceedings or equivalent remedy will only be justified "in the clearest of cases": *Shen* #1, above at paras. 38-39.

[19] After Justice Fothergill rendered his decision, the Minister provided Mr. Shen with still more previously undisclosed documents – these related to the admissibility to Canada of a PSB officer who was to be called as a witness at Mr. Shen's 2012 refugee hearing. The documents noted that the PSB's human rights record had attracted criticism from reputable sources in publicly-available reports, and one of the documents concluded that it was possible, although not probable, that the evidence to be offered by the officer had been obtained through the use of torture.

[20] The disclosure of this additional evidence led Mr. Shen to bring a motion before Justice Fothergill asking him to reconsider his earlier decision. Mr. Shen argued that the recently-disclosed documents left no doubt that the Minister had breached his duty of candour, that this conduct amounted to an abuse of process, the appropriate remedy for which was to prohibit the Minister's further intervention in Mr. Shen's refugee proceeding.

[21] Justice Fothergill dismissed Mr. Shen's motion for reconsideration: *Shen v. Canada (Citizenship and Immigration)*, 2017 FC 115, [2017] F.C.J. No. 146 (*Shen* #2). While he was satisfied that the documents likely could not have been discovered sooner with reasonable diligence, Justice Fothergill concluded that the documents nevertheless had limited probative

value as they essentially repeated observations found in publicly-available reports of governmental and non-governmental agencies: *Shen* #2, above at para. 22. As a consequence, Justice Fothergill was unable to conclude that the newly-disclosed documents would have had a determining influence on his earlier judgment, and Mr. Shen's motion for reconsideration was dismissed: *Shen* #2, above at para. 23.

II. The Subsequent Proceedings before the RPD

[22] Following Justice Fothergill's decision in *Shen* #2, the RPD reconvened Mr. Shen's refugee hearing to provide the Minister with an opportunity to explain why relevant and exculpatory evidence had not been disclosed in the earlier proceeding.

[23] Over the course of the next year, there was a series of teleconferences and exchanges between the parties regarding the availability to testify of B.C. and R.W. They were the hearing officers who had represented the Minister in the earlier proceedings before the Board, who the Minister intended to call to explain the failure to disclose relevant and exculpatory documents.

[24] In June of 2016, before the hearing could resume, Ms. C. was appointed to the RPD. While she was prepared to testify before the Board, her employer required that a summons be issued to compel her attendance. Consequently, the Minister applied to have the Board issue a summons for Ms. C.

[25] Mr. Shen opposed the issuance of a summons for Ms. C. He asserted that a reasonable apprehension of bias arose with respect to her testimony as she would be testifying before a colleague at the RPD, who would have to assess both her credibility and her professional integrity. Because of this, Mr. Shen asserted that Ms. W. should instead be called to testify.

[26] The Board directed the Minister to call Ms. W., reserving its determination as to whether it would be necessary to hear from Ms. C. until after Ms. W. had testified.

[27] In the meantime, Ms. W. had accepted a temporary position at the Canadian Embassy in Germany. The Minister became aware that she was unable to recall specific information regarding this matter, and she indicated that she had suffered a head injury that had affected her memory. After various attempts by the Board and the parties to accommodate Ms. W., she ultimately declined to testify either in person or by videoconference. She did, however, provide the Board with medical certificates indicating that she would be able to testify in writing, although the medical certificates did not identify any functional limitations on the part of Ms. W. that would require this form of accommodation.

[28] Mr. Shen was not prepared to proceed on this basis, as he would be denied the opportunity to properly cross-examine Ms. W. He also took issue with the adequacy of the medical evidence produced by the Minister to support Ms. W.'s alleged need for accommodation. Consequently, Mr. Shen asked the Board to issue a summons to compel Ms. W.'s attendance to testify. Mr. Shen also sought an order compelling further disclosure from the Minister.

[29] The Board then held an oral hearing to address the various outstanding issues.

III. The Board's Decision

[30] On August 4, 2017, the Board issued a decision finding the Minister to be in breach of his duty of candour, which breach constituted an abuse of process.

[31] The Board found as a fact that the Minister had not made sufficient efforts to produce Ms. W. as a witness. In coming to this conclusion, the Board noted that she was currently working for the Minister in a high stress job, and that she appeared to be fully capable of performing the duties associated with that position without any form of accommodation. Moreover, the medical notes presented by Ms. W. were entirely bereft of any information as to why she was unable to provide oral testimony in this matter.

[32] From this, the Board determined that a reasonable inference could be drawn that Ms. W. simply did not want to testify, and that she was "hiding behind insufficient and inadequate medical notes and an unclear accommodation of duties given to her by her employer".

[33] The Board further observed that because Ms. W. was outside of Canada, issuing a summons for her was a "non-starter", as there would be no way to enforce any such order. The Board also refused to issue a summons for Ms. C., on the basis that the Minister had not established that she was a necessary witness.

[34] In reaching this conclusion, the Board noted that Ms. C.'s current position with the Board raised concerns as to potential bias. Given that Ms. W.'s testimony would be based on the same information, without raising bias concerns, the Board had determined that it was reasonable to hear from her first. However, as the Minister had failed to produce Ms. W., the Board found that it had not been established that Ms. C. was a necessary witness.

[35] The Minister's lack of diligence and effort in calling a witness who could explain the failure to disclose relevant and exculpatory evidence led the Board to draw an adverse inference

against the Minister. This led it to find that the Minister was in breach of his duty of candour, and that this breach had resulted in an abuse of process.

[36] The Board then invited submissions from the parties with respect to the appropriate remedy. Following receipt of the parties' submissions, the Board issued a further decision in which it rejected Mr. Shen's assertion that the abuse of process in this case was sufficiently serious that the Minister's intervention in his refugee claim should be stayed. It determined, however, that certain evidence should be excluded from the proceeding on the basis that it was "tainted" by the abuse of process. The Board further ordered that Mr. Shen's refugee claim should be heard *de novo*, by a different Board member.

[37] In the present application the Minister challenges both the Board's initial decision finding there to have been an abuse of process, and its remedial decision ordering the exclusion of "tainted" evidence.

IV. Issues

[38] As noted earlier, the Minister asserts that he was denied procedural fairness in the process leading up to the Board's first decision as a result of its refusal to issue a summons for Ms. C. to allow her to provide an explanation for the failure of the Minister to disclose relevant and exculpatory evidence to Mr. Shen. The Minister further argues that the Board's decision was unreasonable, and that it applied the wrong test in concluding that the Minister's conduct amounted to an abuse of process. Finally, the Minister asserts that he was denied procedural fairness in relation to the remedy imposed by the Board, and that the Board erred in law in crafting a remedy.

[39] I have, however, determined that it is unnecessary to address the Minister's arguments in detail. As will be explained below, I am satisfied that the application is indeed premature, and that this finding is dispositive of this application.

V. The Parties' Submissions on the Prematurity Issue

[40] Although the two decisions made by the Board put an end to the hearing before the presiding member, I understand the parties to agree that the decisions were nevertheless interlocutory in nature, as the merits of the Minister's intervention and Mr. Shen's refugee claim remain to be determined.

[41] Given that what are in issue are interlocutory decisions of the Board, Mr. Shen submits that this application is premature, and that the Minister has not established exceptional circumstances that would justify the Court's intervention at this time. He submits that the final outcome of his refugee claim is uncertain, and that the Minister may, in due course, prevail in the intervention. It would therefore be a waste of judicial resources and would disrupt the RPD's process if the Court were to intervene now.

[42] The Minister accepts that, as a general rule, courts should not interfere with ongoing administrative processes until after they are completed, absent exceptional circumstances: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras. 30-33, [2011] 2 F.C.R. 332). The Minister nevertheless asserts that this case presents exceptional circumstances that warrant the Court's intervention at this stage in the process.

[43] The Minister submits that the Board's decision to exclude evidence is fundamental to his ability to participate in this case, and that the exclusion of the evidence in question "effectively

restricts or stays" the Minister's intervention in Mr. Shen's refugee claim. The Minister further submits that continuing the proceeding would result in an injustice – namely the unreasonable abuse finding and exclusion of evidence – that could not be remedied later. As such, the application presents exceptional circumstances.

[44] The Minister further points out that Mr. Shen himself sought judicial review of the RPD's earlier interlocutory decision relating to the abuse of process issue, and that Justice Fothergill was prepared to intervene at that time. According to the Minister, this means that this Court has previously recognized abuse of process as an exceptional circumstance warranting intervention.

[45] Mr. Shen acknowledges that he had previously sought judicial review of an interlocutory decision of the Board dealing with the issue of abuse of process and that Justice Fothergill was prepared to deal with the issue. Mr. Shen submits, however, that the facts of the current situation are distinguishable from those before Justice Fothergill.

[46] In particular, Mr. Shen argues that Justice Fothergill was required to intervene in the Board's interlocutory decision in order to prevent the abuse of process from continuing. There were, moreover, factors that militated in favour of intervening at the interlocutory stage that are not present in the current application. For example, while recognizing that hardship to an applicant was not a determinative factor, Justice Fothergill nevertheless accepted that Mr. Shen had suffered "great emotional and financial" strain during the first RPD hearing: at para. 26. In contrast, it cannot be said in the present application that the Minister would suffer emotional or financial strain if the case was simply allowed to proceed before the Board.

[47] Mr. Shen further points out that he was the applicant in the case before Justice Fothergill, and that he was not the one responsible for any potential waste, delay or fragmentation of the Board proceedings that might result from the Court's intervention. In contrast, the Minister is the applicant in this case, and it is the Minister's own conduct that has given rise to the abuse of process concerns.

[48] Mr. Shen asserts that allowing his refugee hearing to conclude prior to seeking judicial review will not harm the integrity of the RPD's process. There is, moreover, adequate recourse available to the Minister at the end of the refugee process. The errors attributed to the Board include an alleged breach of procedural fairness, and the assertion that the decision is unreasonable and legally flawed. These are issues that are commonly addressed in the judicial review of final decisions, which would provide the Minister with an adequate remedy for any errors that may have been made by the Board.

VI. Analysis

[49] As the Federal Court of Appeal has observed, there is a substantial body of case law forbidding this Court from hearing premature matters on judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75. The Court went on in *Forest Ethics* to state that Courts "can and almost always should refuse to hear a premature judicial review on its own motion in the public interest – specifically, the interests of sound administration and respect for the jurisdiction of an administrative decision-maker": at para. 22. See also *C.B. Powell*, above at para. 30.

[50] There are a number of reasons why courts are reluctant to intervene in interlocutory rulings made by administrative tribunals, including the potential fragmentation of the

administrative process, and the accompanying costs and delays. There is, moreover, always the possibility that the Board may end up modifying its original ruling as the hearing unfolds, or that the issue may ultimately be overtaken or become moot if the applicant for judicial review succeeds at the end of the administrative process: *C.B. Powell*, above at para. 32; *Mcdowell v. Automatic Princess Holdings, LLC*, 2017 FCA 126 at para. 26, [2017] F.C.J. No. 621.

[51] Moreover, as the Federal Court of Appeal observed in *C.B. Powell*, it is only at the end of an administrative process that a reviewing court will have all of the administrative decision-maker's findings, conclusions that "may be suffused with expertise, legitimate policy judgments and valuable regulatory experience": above at para. 32. Refusing to intervene prior to there being a final decision in a given case is, moreover, consistent with the concept of judicial respect for administrative decision-makers who have decision-making responsibilities to discharge: *C.B. Powell*, above at para. 32, citing *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 48, [2008] 1 S.C.R. 190.

[52] I do not accept the Minister's submission that there are exceptional circumstances in this case that would warrant this Court deviating from the general rule of non-intervention at the interlocutory stages of a proceeding.

[53] As the Minister argued before Justice Fothergill, the threshold for establishing exceptional circumstances is high: *Shen* #1, above at para. 21. The existence of exceptional circumstances must, moreover, be "clear and obvious": *Air Canada v. Lorenz*, [2000] 1 FC 494 at para. 32, 175 F.T.R. 211.

[54] Even where there are concerns about procedural fairness, bias, or important constitutional issues at play, this does not allow the parties to bypass the administrative process where issues may be raised and an effective remedy may be granted: *Shen* #1, above at para. 21. See also *C.B. Powell*, above at para. 33; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364.

[55] Justice Evans identified six factors in *Lorenz*, above, that should be considered in determining whether the Court should refuse relief on the ground of prematurity. These are: (1) hardship to the applicant, (2) waste, (3) delay, (4) fragmentation, (5) strength of the case and (6) the statutory context.

[56] The issues of fragmentation, waste and delay are a real concern in this case. Mr. Shen's refugee claim has been outstanding since 2011. There have been lengthy hearings in relation to his claim, as well as repeated trips to this Court and the Federal Court of Appeal. The final resolution of Mr. Shen's claim is nevertheless still a long way away.

[57] I am also not persuaded that any hardship that might accrue to the Minister as a result of the Court dismissing his application for judicial review would outweigh the hardship that would accrue to Mr. Shen if his refugee proceeding is further delayed. As was noted earlier, Justice Fothergill has already found that these proceedings have led to Mr. Shen suffering "great emotional and financial strain": *Shen* #1, at para. 26. There is no suggestion that the Minister will suffer either financial or emotional strain if the finding of an abuse of process is permitted to stand for now and Mr. Shen's refugee case is allowed to proceed.

[58] The Minister has identified cases where the Courts have been willing to intervene at an interlocutory stage where issues arise as to an alleged abuse of process: see, for example, *John Doe v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 327, 61 Imm.L.R. (3d) 134; *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1002, 466 F.T.R. 159; *Beltran v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 516, 234 C.R.R. (2d) 145. It is, however, apparent from a review of these decisions that Courts have generally elected to intervene at an interlocutory stage where it is necessary to do so in order to prevent an abuse of process from taking place or continuing. That is not what the Court is being asked to do here.

[59] Moreover, as the Federal Court of Appeal observed in *Canada (Minister of National Revenue) v. J.P. Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para. 89, [2014] 2 F.C.R. 557, premature intervention by way of judicial review is not warranted, even if an abuse of process is present, as long as an adequate alternative remedy is available to the applicant. In the event that the Minister is unsuccessful in his intervention before the Board in this case, he will have the opportunity to raise all of his concerns with respect to the abuse of process decisions in the context of an application for judicial review of the Board's final decision with respect to the exclusion issue.

VII. Conclusion

[60] For these reasons, the application for judicial review is dismissed on the basis that it is premature. I agree with the parties that the case is highly fact-specific, and that it does not raise a question that is suitable for certification.

JUDGMENT IN IMM-5127-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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