Federal Court  Cour fédérale

Date: 20190123

Docket: IMM-3411-18

Citation: 2019 FC 98

Vancouver, British Columbia, January 23, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MOHAMMAD TAGHI NAJAFI

Respondent

ORDER AND REASONS

[1] Mr. Najafi, the Respondent in a judicial review application launched by the Minister of Public Safety and Emergency Preparedness (MPSEP or the applicant), to be heard on February 4, 2019, brings a motion for paragraphs in an affidavit and the memorandum of fact and law filed in support of the judicial review application to be stricken. These documents are dated August 20 and August 16, 2018.

[2] The issue on judicial review is whether or not the decision of the Immigration Division (ID) and the Immigration Appeal Division (IAD) should stand. Both found that the inadmissibility hearing, which has not yet taken place, constituted an abuse of process. The initial inadmissibly report under subsection 44(1) of the *Immigration Refugee Protection Act* (IRPA) was made in April 2003.

[3] In this unusual motion, the Respondent seeks to strike from the record information he claims was brought into the record after the ID and IAD heard and decided the abuse of process argument. As already pointed out, the affidavit and the memorandum of fact and law were filed with the Court in August 2018, yet nothing was done to have some paragraphs removed from the leave application record. Leave was granted on the basis of these documents without any objection on the part of Mr. Najafi. In essence, the Respondent wants for this motion judge to substitute his view at this late stage to that of the application judge who would hear the judicial review application, including any preliminary matter that needs being resolved.

[4] The Respondent, the moving party on this motion, is right that there are two issues on this motion. First, should the matter be heard prior to the judicial review hearing? Second, should the motion to strike paragraphs (together with exhibits introduced by their paragraphs) be granted?

[5] In my view, the discretion to entertain the motion to strike should not be exercised to decide, one way or the other, whether all or some paragraphs ought to be stricken. This is an issue for the application judge who will have before her/him the complete record as part of the judicial review application.

[6] The Respondent claims that an advance ruling, by a judge who is not the application judge, will serve the purpose of assisting in proceeding in a more timely and orderly fashion, especially given that the result of the motion is relatively clear cut and obvious (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263). Unfortunately for the Respondent, this is not a point of view that I can share. I fail to see how the process will be more timely and orderly than if heard by the application judge who benefits from having the whole record. More importantly, the result of the motion to strike paragraphs is neither clear cut nor obvious.

[7] There is no advantage at this stage to having someone else determine if evidence, which was considered on the leave application, ought to be stricken; indeed the application judge will have the full record to make the appropriate ruling. As Stratas J.A. put it in *Bernard*, "(s)ome issues are best decided by the panel hearing the application, not by a motion judge dealing with issues on an interlocutory basis" (paragraph 9).

[8] Generally, judicial reviews should not be punctuated by interlocutory matters. As the Court of Appeal put it in *David Bull Laboratories v Pharmacia Inc.*, [1995] 1 FC 588, "objection to the originating notice can be dealt with promptly in the context of consideration of the merits of the case" (p. 598).That is certainly true of an affidavit and a factum already on the record, without any objection having been recorded. The rule is that bifurcations are not encouraged. Judicial review applications are to be "heard and determined without delay and in a summary way" (subsection 18.4(1) of the *Federal Courts Act* RSC 1985, c. F-7). It is only when clearly warranted that discretion is to be exercised to decide interlocutory issues (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22). As put quite colourfully by the Court in *Association of Universities*

and Colleges of Canada, "(t)hose embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive" (paragraph 11). One can surmise that the exercise of discretion is clearly warranted if the decision to make on an interlocutory motion is clear cut or obvious.

[9] As it appeared during the hearing of this motion, the decision to be made on this interlocutory motion is not clear cut or obvious. Put briefly it became quite evident that the issue has a measure of complexity. The Respondent relies on the rule that the evidence should be before the administrative tribunal instead of awaiting to be before the reviewing court in order to be presented (*Connolly v Canada (Attorney General)*, 2014 FCA 294). That is because the reviewing court's role is to rule on the legality of the decision made by the administrative tribunal (whether on a standard of review of correctness or reasonableness). All that is required to decide the case on its merits must be before the administrative tribunal.

[10] Here the issue is whether the ID and IAD have the jurisdiction to decide whether this process has been abused and, if so, whether it has been abused (on a standard of review to be determined). It is not whether the Respondent is inadmissible on one of the possible grounds of IRPA. The merits of the allegation of inadmissibly are not reached if there was an abuse of process. Would that allow for facts that are of a jurisdictional nature (i.e. how do we get to the issue of inadmissibly raised in April 2003 not to have been the subject of adjudication close to 16 years later) to be introduced only at the judicial review stage as, evidently, some or all may not have been before the ID or the IAD?

[11] The Minister argues that the whole record is needed to dispose of the judicial review application and that the determination of what can be properly before the Court requires an

understanding of the whole record. A motion judge is not equipped with such record. He does not have what transpired before the ID and the IAD. Without that full record, it is not possible to have the complete appreciation needed, appreciation that the application judge has. The outcome of the motion cannot be clear cut or obvious.

[12] The Minister claims that, at any rate, he can benefit from exceptions to the rule limiting new evidence if the rule applies to the circumstances. This is not a fact finding exercise to which the rule generally applies. The Minister says that there was no jurisdiction for the administrative tribunals to consider the issue; there was no need to explain in details how we got to where we are, but now the situation has changed somewhat and a better factual understanding is needed. Furthermore, some of the information summarized in the affidavit is in the nature of a summary of what has happened in the last sixteen years on the procedural front.

[13] In *Bernard* (*supra*), the Court of Appeal reviewed three exceptions to the rule:

a. the general background exception Quoting *from Delios v Canada (Attorney General)*, 2015, FCA, 117, one reads:

> The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule;

b. the complete absence of evidence on a certain subject matter;

> c. evidence relevant to an issue of natural justice, procedural fairness, improper purpose and fraud that could not have been placed before the administrative tribunal.

[14] The Court of Appeal stressed that the list of exceptions is not closed (paragraph 28).

[15] In his judicial review application, the Minister alleges that a full hearing was required before the administrative decision-maker; the abuse of process finding was based on false submissions to the ID and IAD, including that counsel for the Applicant (who is not the counsel of record before the Court) participated on the postponement of the admissibility hearing; the failure to hold a hearing violates procedural fairness. To put it differently, the Minister alleges that a fuller record is needed to address issues that are more complex than factual issues that go to the merit of regular judicial review applications. The complexity calls for a ruling to be made by the judge seized of the matter.

[16] In my estimation, the outcome is less than clear cut or obvious. I do not mean to suggest that the evidence, or part of it, ought to be excluded from this record. It remains unclear why some, or all of it, was not included before the administrative decision-maker. It is rather that it is unclear if it should be included in view of the particular circumstances. An appropriate knowledge and understanding of the full record appears to me to be required. There is no reason why the matter would be better addressed if heard on an interlocutory basis less than two weeks before being heard.

[17] As a result, the motion to strike paragraphs from the affidavit and the application for judicial review will be heard by the application judge when the matter of the judicial review is

heard on February 4, 2019. At this stage, seeking to decide the issue will not make the proceeding more timely or orderly, and the issue is not clear cut or obvious, far from it.

ORDER in IMM-3411-18

THIS COURT ORDERS that the motion to strike paragraphs from the affidavit and the memorandum of fact and law in support of the judicial review be dismissed on the basis that it would not be appropriate to exercise the limited discretion to decide interlocutory motions concerning judicial review applications. The Respondent is of course free to raise the matter before the application judge.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v MOHAMMAD TAGHI NAJAFI
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APPEARANCES:

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