Date: 20070921

Docket: T-836-07

Citation: 2007 FC 949

BETWEEN:

LAWRENCE WONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

I. Introduction

[1] These reasons follow the hearing of an appeal under Rule 51 of the *Federal Courst Rules*[1] (the "Rules") of an order of Prothonotary Roger R. Lafrenière, dated August 8, 2007, by which Prothonotary Lafrenière dismissed the application for judicial review brought by the Applicant.

[2] Prothonotary Lafrenière's order, which incorporates his brief reasons, is attached as an annex to these reasons.

[1] SOR/98-106.

II. The Application for Judicial Review

[3] The Applicant sought *certiorari* and *mandamus* in respect of a decision of:

> "The registrar of Immigration and Refugee Board of Canada (the "Tribunal") continuing refusal to grant the Applicant access to view certain Immigration Appeal Division and Immigration Division files which form part of the public record of the Tribunal. The Immigration and Refugee Board of Canada is a "Federal Tribunal" within the meaning of that phrase in s.2 of the **Federal Court Act**. The Respondent Minister is the Minister responsible for the Tribunal."
>
> [reproduced as in the original]

The Application recites that it is brought under section 18.1 of the *Federal Courts Act*[2].

III. The Issues

[4] In his written representations before the Court, the Applicant, who is a lawyer practising in Vancouver, British Columbia, and who represented himself before the Court, and in his oral submissions, raised two issues on his appeal: first, whether Prothonotary Lafrenière had jurisdiction to dismiss his application for judicial review; and secondly, whether Prothonotary Lafrenière's decision was wrong in law because it was not supported by the evidence before him.

[5] At the opening of the hearing, the Court raised with counsel the issue of the standard of review on an appeal such as this. Although neither counsel raised the issue of standard of review in their written materials at hearing, there was no dispute between them as to the appropriate standard.

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[2] R.S.C. 1985, c. F-7.

IV. Analysis

A. *Standard of Review and Jurisdiction of Prothonotary Lafrenière*

[6] The jurisdiction of this Court to strike a proceeding before it, including an application for judicial review, is succinctly summarized in the first paragraph of Prothonotary Lafrenière's order following the recitals to that order. Prothonotary Lafrenière determined that it was "plain and obvious" that the underlying application for judicial review is without merit, because it was improperly constituted and that, as an improperly constituted proceeding, it was appropriate that it should be struck before proceeding to consideration of the application on the merits.

[7] The jurisdiction of a prothonotary in relation to motions such as the motion to strike that was before Prothonotary Lafrenière is elaborated in Rule 50(1) of the Rules and, more particularly for the purposes of this matter, might be restricted only in the manner described in paragraph 50(1)(a) of the Rules. For ease of reference, the opening words of Rule 50(1) and paragraph (a) of that Rule read as follows:

50. (1) A prothonotary may hear, and make any necessary orders relating to, any motion under these Rules other than a motion	**50.** (1) Le protonotaire peut entendre toute requête présentée en vertu des présentes règles — à l’exception des requêtes suivantes — et rendre les ordonnances nécessaires s’y rapportant :
(*a*) in respect of which these Rules or an Act of Parliament has expressly conferred jurisdiction on a judge;	*a*) une requête pour laquelle un juge a compétence expresse en vertu des présentes règles ou d’une loi fédérale;

[8] Neither counsel referred the Court to any provision of the Rules or of an Act of Parliament that expressly conferred jurisdiction on a judge or judges only on an application for judicial review, such as the one here at issue, brought under s. 18.1 of the *Federal Courts Act*.

[9] I am satisfied that the Court and, in particular, Prothonotary Lafrenière acting as the Court, had jurisdiction to consider and to dispose of the motion that was here before him.

[10] I will consider the subject matter of this appeal *de novo* as I am satisfied I must since Prothonotary Lafrenière's decision is clearly vital to the final issue of the case[3].

B. *Error of Law*

[11] Prothonotary Lafrenière determined that the underlying application for judicial review should have been brought under ss. 72(1) of the *Immigration and Refugee Protection Act* ("*IRPA*") rather than s. 18.1 of the *Federal Courts Act* since it constituted a judicial review by this Court with respect to a "matter under" *IRPA*. In the result, he determined that it should have been commenced by making an application for leave to the Court, and that as the application for judicial review at issue was not brought under *IRPA* and leave was therefore not sought, it was procedurally defective and therefore inevitably bound to fail regardless of its substantive merits.

[12] For ease of reference, ss. 72(1) of *IRPA* reads as follows:

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[3] See: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.).

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.

[13] Counsel for the Applicant urged that the substance of the application for judicial review was not a "matter under" *IRPA* since it was not a decision, determination or order made, or a measure taken or a question raised under that Act. I reject that argument. Whether or not the subject matter of the underlying application for judicial review is a decision, determination or order made, or measure taken or a question raised under *IRPA*, is, I am satisfied, not determinative. I find those words to be illustrative of the words "matter under" rather than definitional. The Registrar of the IRB, in rejecting the Applicant's request, derives his authority to so decide from *IRPA* notwithstanding that his authority may be proscribed by the *Access to Information Act*[4].

[14] I am satisfied that the subject matter of the underlying judicial review is a "matter under" *IRPA* and not a matter more directly related to the *Access to Information* Act or to the "open court" principle that the Applicant urges is in conflict with and should override the continuing series of decisions under review.

[4] R.S. 1985, c. A-1.

V. Conclusion

[15] For the brief foregoing reasons, exercising my discretion *de novo*, I reach the same conclusion as that reached by Prothonotary Lafrenière, for essentially the same reasons, and therefore, like Prothonotary Lafrenière, I would have granted the Respondent's motion to strike the underlying application for judicial review on the sole ground that it is procedurally improperly constituted and therefore could not possibly succeed.

[16] In the last paragraph of his reasons, attached, Prothonotary Lafrenière notes an argument on behalf of the Respondent regarding adequate alternative remedy. He notes, "I need not address this issue." He then goes on, very briefly, to suggest that there might well be an adequate alternative remedy that would constitute a bar to seeking relief directly from this Court. I agree with this comment by Prothonotary Lafrenière which is clearly not central to his decision. I will go no further on the issue of adequate alternative remedy.

[17] In the result, I will dismiss this appeal.

VI. Costs

[18] The Respondent seeks costs on this appeal and, in the normal course of things, costs would follow the event, which is to say that the Respondent would be entitled to costs.

[19] Counsel for the Applicant urges that there should be no order as to costs given that the underlying issue arising on the facts of this matter is an issue of public interest, that is to say a

conflict between the "open court principle" and the continuing refusal of the Registrar of the Immigration and Refugee Board to afford to the Applicant access to material in the possession of the Immigration and Refugee Board.

[20] This proceeding, to the point of my order herein, has turned on a procedural matter, what Prothonotary Lafrenière and this judge have determined to be a procedural error on the part of the Applicant in the manner in which the underlying conflict has been brought before the Court.

[21] In the circumstances, I find no basis that would justify a variation from the principle that costs follow the event. In the result, an order will go for costs in favour of the Respondent, against the Applicant.

"Frederick E. Gibson"
Judge

Vancouver, British Columbia
September 21, 2007

ANNEX

Date: 20070808

Docket: T-836-07

Vancouver, British Columbia, August 8, 2007

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

LAWRENCE WONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON MOTION in writing dated July 24, 2007 on behalf of the Respondent for an order to dismiss the Applicant's Application for Judicial Review;

AND UPON reading the motion records filed on behalf of the Respondent and the Applicant, and the Respondent's written representations in reply;

It is trite law that a pleading should not be struck and a proceeding should not be dismissed unless it is "plain and obvious" that it is wholly without merit: *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959. Furthermore, while the Court has the jurisdiction to dismiss an application which is bereft of any possibility of success, a respondent should, as a general rule, argue the point at the hearing of the application itself, rather than bring an interlocutory motion to strike: *David Bull Laboratories (Canada Inc.) v. Pharmacia*, [1995] 1 F.C. 588 (FCA). It remains that improperly constituted proceedings, particularly ones beyond this Court's jurisdiction, should be discouraged.

The Applicant is challenging a decision by the Registrar of the Immigration and Refugee Board (IRB) refusing to grant the Applicant access to certain Immigration Appeal Division and Immigration Division files. He seeks an order setting aside the decision and compelling the Respondent to grant access to all non-refugee files to the Applicant. The Respondent submits that this Court is without jurisdiction to entertain the application since the Applicant has not applied for leave to seek judicial review in accordance with section 72 of the *Immigration and Refugee Protection Act* (IRPA).

Subsection 72(1) of IRPA states that an application for leave must be sought to challenge any matter, defined broadly as "a decision, determination or order made, a measure taken or a question raised" under IRPA. Both jurisprudence and logic dictate that this Court has no jurisdiction to deal with the application absent leave to seek judicial review being first sought and then granted. Adopting the terminology used by Justice Mahoney of the Federal Court of Appeal in *Mahabir v. Canada (Minister of Employment and Immigration),* [1992] 1 F.C. 133, I conclude that the remedy

sought by the Applicant is “certainly about” IRPA since it relates to certain procedures of the IRB which derives its authority to make decisions or orders from that Act. It is simply not open to the Applicant to circumvent the leave requirement.

The Respondent also argues that, even if the Federal Court has the jurisdiction to consider the Applicant’s application for judicial review, it should decline to do so because the Applicant has an adequate alternative remedy for obtaining access to the information he is seeking by way of an application pursuant to the *Access to Information Act* (ATIA). Given my conclusion that this proceeding was not properly constituted, I need not address this issue. It appears, however, the statutory regime under the ATIA for dealing with access to records in the control of various federal bodies, including the IRB, constitutes a bar to seeking relief directly from this Court.

THIS COURT ORDERS that the application for judicial review is dismissed.

“Roger R. Lafrenière”
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-836-07
STYLE OF CAUSE:	LAWRENCE WONG v. MCI
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 17, 2007
REASONS FOR ORDER:	GIBSON J.
DATED:	September 21, 2007

APPEARANCES:

Mr. Lawrence Wong	FOR THE APPLICANT
Ms. Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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John H. Sims Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT