Federal Court  Cour fédérale

Date: 20100416

Docket: IMM-4423-09

Citation: 2010 FC 407

Ottawa, Ontario, this 16th day of April 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BRANDON CARL HUNTLEY

Respondent

REASONS FOR ORDER AND ORDER

[1] Counsel for the respondent filed a Notice of Motion on March 31, 2010, returnable on Wednesday, April 7, 2010 at 9:30 a.m., which is the same day the underlying application for judicial review had been set to be heard for a maximum duration of two hours.

[2] The respondent's motion contained a supporting affidavit of Stefanie Gude, sworn March 30, 2010, attesting to the absence of evidence in the record regarding the reasons for the

Minister to seek leave to commence a judicial review application. The affiant also asserts that the Minister, the applicant, has claimed privilege over "the reasons or motives for the Applicant's decision in commencing judicial review" and that this is indicated by the applicant's Reply Memorandum, filed November 12, 2009.

[3] The respondent is seeking four remedies by this motion:

a) An order that this matter be converted from an application to an action;

In the alternative to (a)

b) An order compelling the applicant to forward its reasons for commencing judicial review to the respondent;

In the alternative to (a) and (b)

c) An order fixing the date for a hearing to determine whether the privilege claimed over documents that the applicant used to base its decision is reasonable; and

d) An order for costs of this motion.

[4] At the outset, the respondent requests that the Court convert the return date of the judicial review into a preliminary motion to determine the relief requested.

[5] The applicant has submitted a letter in reply, at the request of the Court registrar to provide a response to the motion by end of day, April 1, 2010. The letter is dated March 31, 2010 and was not intended to be complete formal submissions. The applicant subsequently filed an "Applicant's Motion Record" containing further submissions on April 6, 2010.

[6] The Court has the discretion to direct that the application proceed by way of action. The conversion of applications for judicial review to actions is governed by the provisions of section 18.4 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, which provides that:

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.	**18.4** (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.
(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

[7] For the Court to order this application to proceed by way of action, it must find procedural or remedial inadequacies with the process of the underlying application (*Hinton v. Canada (M.C.I.)*, 2008 FCA 215, [2009] 1 F.C.R. 476, at paragraph 49). The underlying application by the Minister is for review of Board Member William Davis' decision, dated August 27, 2009, wherein he granted Brandon Carl Huntley, the respondent, refugee status pursuant to section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA").

[8] In *MacInnis v. Canada (Attorney General)*, [1994] 2 F.C. 464, the Federal Court of Appeal had its first opportunity to pronounce on the application of subsection 18.4(2). The key parts of its analysis are as follows at pages 469 to 471:

> Any attempt to interpret subsection 18.4(2) has to begin with the following statement by Muldoon J. with respect to the approach to be taken when applying it (*Potato Board (P.E.I.) v. Canada (Minister of Agriculture)* (1992), 56 F.T.R. 150 (F.C.T.D.), at p. 152:

Section 18.4 of the *Federal Court Act* makes it clear that, as a general rule, an application for judicial review or a reference to the Trial Division shall be proceeded with as a motion. The section dictates that such matters be heard and determined "without delay and in a summary way". As an exception to the general rule, provision is made in s. 18.4(2) for an application for judicial review to be proceeded with as an action. The new and preferred course of procedure, however, is by way of motion and that course should not be departed from except in the clearest of circumstances.

Of interest, also, is the reminder by Reed, J. that (*Derrickson et al. v. Canada (Minister of Indian Affairs and Northern Development)* (1993), 63 F.T.R. 292 (F.C.T.D.), at p. 298):

… on judicial review the role of the court is to review the decision made by the decision-maker but not to supplant that decision-making process.

and the following comments by Strayer J. (*Vancouver Island Peace Society v. Canada*, [1992] 3 F.C. 42 (T.D.), at p. 51):

For these reasons I am unsympathetic to the arguments of the respondents that there are difficult technical factual determinations to be made which will require pleadings and a trial and the cross-examination *viva voce* of experts and others. It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the *Federal Court Act* [R.S.C., 1985, c. F-7].

I am therefore not going to direct that this matter be tried by way of an action. I think many of the concerns of the respondents can be met if the parties focus on the real issues.

It is, in general, only where facts of whatever nature cannot be satisfactorily established or weighed through affidavit evidence that consideration should be given to using subsection 18.4(2) of the Act. One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible. The "clearest of

> circumstances", to use the words of Muldoon J., where that subsection may be used, is where there is a need for *viva voce* evidence, either to assess demeanour and credibility of witnesses or to allow the Court to have a full grasp of the whole of the evidence whenever it feels the case cries out for the full panoply of a trial. […] The decision of this Court in *Bayer AG and Miles Canada Inc. v. Minister of National Health and Welfare and Apotex Inc.* (25 October 1993), A-389-93, 163 N.R. 183, where Mahoney J.A. to some extent commented adversely on a decision made by Rouleau J. in the same file ((1993), 66 F.T.R. 137 (F.C.T.D.)), is a recent illustration of the reluctance of the Court to proceed by way of an action rather than by way of an application.

[9] As an illustration of the circumstances in which the Court has directed that a matter proceed by way of action is *Barlow et al. v. Canada* (2000), 186 F.T.R. 194. In *Barlow*, Deputy Justice Max M. Teitelbaum converted an application into an action because the application raised complex legal issues requiring oral history evidence relating to aboriginal traditions, expert history evidence, expert biological evidence respecting conservation issues and public policy issues relating to the historical participation of non natives in the lobster fishery as well as issues relating to the Burnt Church crises.

[10] In *Drapeau v. Canada (Minister of National Defence)* (1995), 179 N.R. 398, the Federal Court of Appeal revisited *MacInnis, supra*, clarifying Justice Robert Décary's statements about when conversion may be allowed. Although the Court held that subsection 18.4(2) does not place any limits on the considerations that may properly be taken into account in deciding whether or not to allow a judicial review application to be "converted" into an action, it should not be taken as permitting a motion without a legitimate basis to proceed.

[11] In the case at bar, the respondent believes that this judicial review forum is inadequate because he thinks there is some information "out there" which supports his contention that this application was commenced due to pressure from the South African government and therefore constitutes abuse of process. The respondent appears to believe the information would only come out if allowed to proceed in an action which would permit him to presumably question the Minister or his representatives. I agree with the applicant that this qualifies as speculation, and as my colleague Justice James Russell noted in *Chen v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 82, cannot be a basis for such a conversion motion:

> . . . In the same vein, speculation that hidden evidence will come to light is not a basis for ordering a trial. A judge might be justified in holding otherwise if there were good grounds for believing that such evidence would only come to light in a trial, but the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

[12] It is worth remembering that it is on the reasonableness and/or the legality of the various findings of the Board with which the Minister takes issue. I agree with the Minister's position, in response to the respondent's claim that "various evidentiary gaps, inconsistencies and factual issues which cannot be weighed by way of affidavit evidence" justify the relief sought, that the Certified Tribunal Record contains all the needed factual and background materials on the Board's decision and its reasons for reaching the conclusion it did. The Court has as well the parties' written submissions setting out their respective positions on the legality of the Board's decision. In other words, the Court has all it needs to decide this application.

[13] As an additional reason in support of his motion, the respondent submits that the entire application is constitutionally invalid and amounts to abuse of process at common law and under section 7 of the *Canadian Charter of Rights and Freedoms*.

[14] Abuse of process requires the moving party to meet a strict requirement: a process must be tainted to such a degree that it must only be invoked in the "clearest of cases". The Supreme Court of Canada, in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraph 120, set out the test as follows:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.
>
> (Emphasis added.)

[15] This test was affirmed and applied by Justice Richard G. Mosley in *Almrei (Re)*, 2009 FC 1263, at paragraph 482 in considering whether to stay the security certificate proceeding.

[16] The source of the "taint" to this procedure is the alleged "political" motives of the Minister to seek leave to commence an application for judicial review of the Board Member Davis' decision.

[17] Applications for judicial review in immigration matters are not only governed by sections 18 and following of the *Federal Courts Act*, but also, and more particularly, by sections 72 and following of the IRPA.

[18] The Attorney General of Canada as the legal representative of the government has the statutory right to seek leave to commence a judicial review as provided by subsection 18.1(1) of the *Federal Courts Act*:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[19] This statutory right is a right of access to the Court. Where the Court exercises its discretion to grant leave, the Court has accepted that it has jurisdiction to hear the matter.

[20] The Court, upon receipt of an application for leave to commence judicial review, "shall dispose of the application in a summary way" and, unless otherwise directed, without personal appearance (paragraph 72(2)(*d*) of the IRPA). Reasons are typically not provided and the decision cannot be appealed (*Hinton v. Canada (M.C.I.)*, 2008 FC 1007, 333 F.T.R. 288, paragraph 15).

[21] As enunciated in subsection 72(1) of the IRPA, judicial review commences when leave is granted. The only test to consider is whether the applicant raised a "fairly arguable case" on a serious question to be determined (*Bains v. Canada (Minister of Employment and Immigration)*,

109 N.R. 239, paragraph 1 (F.C.A.)). The motives of a party for seeking judicial review of a Board's decision are irrelevant.

[22] On the respondent's contention that the Court must compel the Minister to "disclose reasons and motives for commencing the judicial review", the Minister's position is that the reasons are set forth in the Notice of Application and in the Minister's written submissions which are before the Court, and that the respondent must not be allowed to turn this hearing into a "fishing expedition", in the hope of uncovering evidence that confirms his suspicions.

[23] In that regard, neither the IRPA nor case law require that an applicant on judicial review inform the opposing party of his or her reasons for asking for the Court's intervention. It suffices that an applicant demonstrates to the Court's satisfaction that the proposed application raises an arguable issue, which in this case was accepted by Justice François Lemieux granting leave to apply for judicial review on January 8, 2010. To the extent that the Minister is required to provide reasons then I find that the alleged flaws in the Board's decision, addressed in his Memorandum of Argument, and Further Memorandum of Argument, constitute the reasons for seeking this Court's intervention.

[24] For all the above reasons, the respondent's motion is dismissed. As counsel for the parties have indicated at the hearing that they were no longer seeking costs, none are adjudicated.

[25] Accordingly, the underlying application for judicial review, which was adjourned *sine die* pending disposition of this motion, will be heard by a Judge of this Court on an urgent basis at a time, date and place to be set by, or on behalf of, the Chief Justice of the Court.

ORDER

[26] The respondent's motion is dismissed. As counsel for the parties are no longer seeking costs, none are adjudicated.

[27] The underlying application for judicial review, which was adjourned *sine die* pending disposition of this motion, will be heard by a Judge of this Court on an urgent basis at a time, date and place to be set by, or on behalf of, the Chief Justice of the Court.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4423-09
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. BRANDON CARL HUNTLEY
PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

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