Federal Court  Cour fédérale

Date: 20250206

Docket: **IMM-4058-22**

Citation: 2025 FC 214

Ottawa, Ontario, February 6, 2025

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MARIO RAUL RODAS TEJEDA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by a delegate of the Minister of Public Safety and Emergency Preparedness [the Minister], pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], to refer the Applicant to the Immigration Division [ID] for an admissibility hearing 12 years after he entered Canada and

disclosed the potential basis for inadmissibility. The Applicant asserts that, as a result of that delay, the decision under review represents an abuse of process and the resulting proceedings before the ID should be stayed.

[2] As explained in further detail below, this application is dismissed, because it is premature for the Applicant to seek a stay from the Court when he has recourse to an adequate alternative remedy by seeking a stay from the ID.

II. Background

[3] The Applicant is a 48-year-old citizen of Guatemala. He entered Canada on or about September 28, 2009, and initiated a refugee claim.

[4] On December 22, 2010, in the context of his Refugee Protection Division [RPD] hearing, the Applicant submitted a Personal Information Form Amendment [PIF], in which he identified his involvement in Guatemala in drug trafficking and the exchange of US dollars into Guatemalan currency for persons he believed were engaged in illegal activities. The Minister intervened, asserting that the Applicant was excluded from refugee protection under article 1F(b) of the *Refugee Convention*, for engaging in serious non-political criminal activity in Guatemala. The Applicant's refugee hearing was held in January 2011. On January 21, 2011, the RPD denied his refugee claim on the basis that he was excluded under article 1F(b).

[5] In 2012, the Applicant applied for permanent residence on humanitarian and compassionate grounds and applied for a Pre-Removal Risk Assessment [the Applications]. The

Applications were denied in November 2013. In both decisions, the Applicant's involvement in criminal activities in Guatemala was considered.

[6] The Applicant applied for judicial review of the decisions on the Applications, and the Federal Court ordered a stay of removal. By consent, the Applications were returned for redetermination. To date, no decisions have been made on these redeterminations, despite multiple requests by the Applicant.

[7] On November 21, 2019, an officer of the Canada Border Services Agency [CBSA], which operates under the auspices of the Minister, exercised their discretion to prepare a report pursuant to subsection 44(1) of IRPA [the Section 44 Report]. That report concluded that the Applicant was involved in the drug trade in Guatemala, based on disclosures made in the Applicant's PIF, including: deciding to enter into the business of selling illegal drugs in 2007; exchanging large amounts of currency through his father's currency exchange business for a man whom he suspected of drug dealing; and selling cocaine and a drug called Sudolor for that man. On this basis, the Section 44 Report concluded that there were reasonable grounds to believe the Applicant is inadmissible to Canada for organized criminality pursuant to paragraph 37(1)(a) of IRPA and recommended that the Applicant be referred to an admissibility hearing.

[8] A delegate of the Minister, acting pursuant to subsection 44(2) of IRPA, concluded on February 24, 2020, that the Section 44 Report was well-founded, and on March 9, 2022, the Section 44 Report was referred to the ID for an admissibility hearing [the Minister's Decision]. On April 25, 2022, the Applicant applied for judicial review of the Minister's Decision, arguing

that it represents an abuse of process due to the delay in making the referral in relation to facts that were known to the Minister since the time of the RPD proceedings many years before.

[9] The inadmissibility allegations in the Section 44 Report are currently before the ID. The Applicant applied to the ID to stay the admissibility proceedings, advancing abuse of process allegations similar to those in the case at hand, due to delay in the referral of the Section 44 Report to the ID. The ID dismissed that application on July 7, 2023 [the ID Decision]. The Applicant has applied for judicial review of the ID Decision, in Court File No. IMM-9472-23 [the ID JR], which application was argued at the same time as the present application for judicial review of the Minister's Decision. My decision in the ID JR (*Rodas Tejeda v Canada (Public Safety and Emergency Preparedness*), [2025 FC 215]) is being released contemporaneously with the present decision.

III. Issues and Standard of Review

[10] Together, the parties' submissions raise the following issues for the Court's determination:

A. Is this application for judicial review premature, because the Applicant has recourse to an adequate alternative remedy in the administrative process before the ID?

B. If this application is not premature, does the Minister's Decision represent an abuse of process?

[11] The question of whether there has been an abuse of process is a question of procedural fairness (*Pardo v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1769 at para

17). Often described as applying the correctness standard of review, strictly speaking the task of the Court in considering issues of procedural fairness is to assess whether an administrative procedure was fair having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Analysis

A. *Is this application for judicial review premature, because the Applicant has recourse to an adequate alternative remedy in the administrative process before the ID?*

[12] The Respondent takes the position that the Court should not adjudicate the merits of this application for judicial review, because it offends the prematurity principle. Also referred to as the doctrine of adequate alternative remedies, this principle usually precludes access to the courts to judicially review administrative decision-making when there is an adequate remedy available to the applicant through the administrative process. In the case at hand, the Respondent argues that the position the Applicant advances (that the admissibility process initiated by the Section 44 Report and its subsequent referral to the ID should be stayed because of delay in the initiation of the process) can be raised before the relevant administrative decision-maker, the ID. Indeed, the Applicant has raised that position before the ID, resulting in the ID Decision under review in the ID JR.

[13] In *Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 119 [*Oberlander*] at paragraphs 22 to 27, this Court had an opportunity to canvass the prematurity principle as follows (referencing an earlier related decision in *Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 86):

22. *Oberlander* addressed the prematurity principle and the Applicant's arguments as to why his application should not be struck based on that principle. While I need not duplicate the analysis in *Oberlander* in the same level of detail in this decision, I will repeat some portions of that analysis that bear on the issue now before the Court.

23. This principle of administrative law was explained as follows by Justice David Stratas in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] at para 31:

> 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.

24. The prematurity principle was subsequently endorsed by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35-36.

25. However, there are decisions of this Court post-dating *CB Powell*, in which applications for judicial review of interlocutory administrative decisions, including applications based on arguments of abuse of process in the immigration context, have been allowed to proceed on the merits notwithstanding the prematurity principle. For instance, in *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002, Justice Richard

Mosley dismissed a motion to strike such an application, as he was not satisfied that the applicant had an adequate alternative remedy available to him. The Court concluded that there were exceptional circumstances pointing to an abuse of process that met the "clear and obvious" standard required to warrant early judicial intervention (at para 60).

26. Similarly, in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70, Justice Simon Fothergill addressed on its merits an application for judicial review of a decision by the Refugee Protection Division to dismiss two preliminary motions brought by the Applicant. While the Court considered the prematurity principle, it was not satisfied that, in the circumstances of that case, the possibility of judicial review of the RPD's final decision provided an effective remedy (at para 27).

27. Consistent with these cases, as identified in *CB Powell* (at para 31), the prematurity principle is not absolute. It applies in the absence of exceptional circumstances. Justice Stratas described this exception as follows (at para 33):

> 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: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. 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: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[14] Some of the above explanation discusses the prematurity principle in the context of efforts to seek judicial review of interlocutory administrative decisions, before the process before the administrative decision-maker has run its course to a decision on the merits of the matter. In my decision on the ID JR, I address such a situation, where the Applicant challenges the interlocutory ID Decision (which considered but rejected the Applicant's abuse of process arguments) and the Respondent argues that such challenge is premature, because the process before the ID has not yet run its course to a decision on the Applicant's admissibility.

[15] The prematurity principle applies similarly in the case at hand, where the Applicant seeks the intervention of the Court, wishing to stay the administrative proceeding for abuse of process, rather than letting the proceeding unfold before the ID. As identified in *Oberlander*, the prematurity principle is not absolute, and there have been cases (notably in the immigration context) where the Court has found an abuse of process to give rise to exceptional circumstances warranting early intervention by the Court. As expressed in those authorities, if recourse to the administrative process does not represent an adequate remedy as an alternative to seeking a stay from the Court, then the Court may find an available exception.

[16] In the case at hand, the Applicant argues that recourse to the ID is not an adequate remedy, because the ID has found in the ID Decision that, while it has the jurisdiction to consider abuse of process arguments based on delay and potentially to stay the proceeding before it, that jurisdiction is restricted to considering delay following the decision to prepare the Section 44 Report. In the ID Decision, the ID identified that delay as only 28 months of the overall 12 years of delay that the Applicant advances. Applying the test for considering whether delay results in an abuse of process, the ID found that the Applicant had not established prejudice resulting from the delay during that 28-month period.

[17] The parties agree that no such restriction applies to the Court's jurisdiction to consider delay. That is, the Court can consider the entire period of delay advanced by the Applicant. For instance, in *Beltran v Canada (Citizenship and Immigration)*, 2011 FC 516 [*Beltran*], Justice Sean Harrington found that it was an abuse of process to allow an admissibility proceeding to proceed where the Minister had been aware of all relevant information for 22 years (at para 1). Although the report under subsection 44(1) of IRPA was prepared only in February 2009 (at para 29), which was just a little over 2 years before *Beltran* was decided, Justice Harrington's abuse of process analysis relied on the entire 22-year period (at para 54).

[18] Therefore, the Applicant submits that, as a result of the temporally limited jurisdiction of the ID as identified in the ID Decision, in comparison to the jurisdiction of the Court, the administrative process does not afford an alternative remedy that can be considered adequate.

[19] The Applicant's argument would be compelling, but for the conclusion I have reached in the ID JR, that the ID erred in finding that its jurisdiction was limited to examining the time period following CBSA's decision to prepare the Section 44 Report. Given that conclusion, recourse to the ID does represent an adequate alternative remedy. Moreover, it is a remedy that the Applicant has pursued, having already advanced his abuse of process arguments before the ID and having obtained the ID Decision that adjudicated those arguments. I recognize that the ID Decision rejected those arguments and that I have found in the ID JR that it erred in doing do. However, my decision in the ID JR has quashed the ID Decision and returned it to the ID for redetermination in accordance with the Court's reasons. In keeping with the prematurity principle, that process should be permitted to run its course, and the Court should not adjudicate the same abuse of process arguments in the matter at hand.

[20] This result is consistent with another decision in the Oberlander litigation (*Oberlander v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 294, in which Justice Denis Gascon applied the prematurity principle in dismissing a motion seeking a permanent stay of the applicant's ongoing admissibility proceedings before the ID (at paras 66-67, 87).

[21] I am conscious that this result differs from that in *Beltran*, an authority upon which the Applicant relies. In that case, Justice Harrington briefly considered and rejected a prematurity argument advanced by the respondent (at paras 30-33). However, that authority is significantly distinguishable from the case at hand, as there is no reference to the applicant having raised abuse of process arguments before the ID, or indeed any reference to the respondent arguing that

the ID or any other relevant administrative decision-maker had the jurisdiction to entertain such arguments.

[22] In conclusion, I find that this application for judicial review is premature and should be dismissed.

B. *If this application is not premature, does the Minister's Decision represent an abuse of process?*

[23] Based on the above finding, the Court will not adjudicate the parties' abuse of process arguments.

V. Certified Question

[24] The Applicant asks that the Court certify a question for appeal in this matter, related to the application of the prematurity principle. Edited slightly, including to reflect the Applicant's explanation of this question at the hearing, the question reads as follows:

> Is an application for judicial review of the referral of an admissibility report to the Immigration Division [ID] of the Immigration and Refugee Board pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (seeking a stay of proceedings on the basis that the referral amounts to an abuse of process based on Canada Border Services Agency delays) premature where the ID does not have jurisdiction to consider the full delay period or where the ID does have jurisdiction concurrent with that of the Court to consider the full delay period?

[25] In order for the Court to certify a question for appeal under paragraph 74(d) of IRPA, the question must be dispositive of the appeal, transcend the interests of the parties, and raise an

issue of broad significance or general importance. The question must have been dealt with by the Court and arise from the case itself, rather than the way in which the Court may have disposed of the case (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36). The Respondent argues that the proposed question is not certifiable, because it is not a question of general importance, as the law surrounding the prematurity principle is well established.

[26] I agree with the Respondent. The parties have not argued any differing positions on the law related to the prematurity principle. Rather, their dispute surrounds the application of that law to the particular facts of this matter, and my decision to dismiss this application turns on those facts, including the context of the specific administrative regime within which the dispute arises and the steps the parties have taken within that regime.

[27] That said, the Applicant also proposed, and I agreed to certify, the following question in the ID JR:

> Does the Immigration Division of the Immigration and Refugee Board have the jurisdiction to grant a stay of proceedings upon finding an abuse of process taking into account delays by the Canada Border Services Agency before making a decision to prepare a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

[28] As explained in my decision in the ID JR, it is my conclusion in that matter that this is a question of general importance that would be determinative of an appeal in that matter. It is a question of general importance, in that its answer would guide the ID and litigants in other

matters that raise abuse of process arguments surrounding administrative delay. As explained below, this question would also be determinative of an appeal in the present matter.

[29] My decision that the present application is premature turns on the conclusion in the ID JR that the ID erred in finding that its jurisdiction was limited to examining delay in the time period following the CBSA decision to prepare the Section 44 Report. As it is that conclusion with which the certified question in the ID JR engages, the question should be certified in the present application as well. As a result, in the event that an appeal on that question were to be successful, the Court's decisions in both the ID JR and in the present application can be reviewed on appeal.

[30] My Judgment will therefore certify that question.

JUDGMENT IN IMM-4058-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The following question is certified for appeal:

> Does the Immigration Division of the Immigration and Refugee Board have the jurisdiction to grant a stay of proceedings upon finding an abuse of process taking into account delays by the Canada Border Services Agency before making a decision to prepare a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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