Federal Court  Cour fédérale

Date: 20190211

Docket: IMM-2019-18

Citation: 2019 FC 171

Ottawa, Ontario, February 11, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

TANVEER AKRAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On April 11, 2018, the Refugee Protection Division of the Immigration and Refugee Board (the "Vacate Panel") determined that the Applicant had previously obtained refugee status in 2007 by misrepresenting or withholding material facts. Consequently, the Vacate Panel vacated the Applicant's refugee status under subsections 109(1) and (2) of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 (the "IRPA"). His refugee protection is now statutorily nullified under section 109(3) of the IRPA.

[2] On April 30, 2018, the Applicant applied for judicial review. For the reasons that follow, I am granting the application.

II. **Facts**

A. *The 2007 Refugee Hearing*

[3] Mr. Tanveer Akram (the "Applicant") alleges to be a citizen of Pakistan. The Applicant's refugee hearing with the Refugee Protection Division (the "Original Panel") took place on October 31, 2007, and he obtained Convention refugee status in Canada on November 6, 2007. Other than the decision letter granting refugee status as well as the certified tribunal record (the "CTR"), there is no evidence from the 2007 refugee hearing. To be clear, there is no transcript, no audio recording, and no reasons for that positive decision.

[4] Within the CTR is a Personal Information Form (the "PIF") signed by the Applicant on January 15, 2007. The PIF contains one small handwritten note about a correction made during the refugee hearing. The PIF is otherwise unaltered.

[5] The Applicant's PIF describes his politically active life in Pakistan. For example, the Applicant joined the Pakistan People's Party (the "PPP") on August 14, 1988, he was active in the 1993 elections, by January 1997 he became the PPP president of Ward 12 for two years, and in 1999 he was promoted to the position of PPP Wazirabad City President.

[6] In the PIF the Applicant also alleges that he was arrested and detained in 2002 after speaking at a PPP rally. His further allegations are that the police refused to take any action when he was threatened, assaulted by opposition members, or when his home and family were attacked. The PIF also states that he spoke at a September 20, 2006 rally in Wazirabad. After this, he says the police and gangsters attacked the crowd using Lathi charge and tear gas, but he fled to a friend's house. Over the following days, the police repeatedly attended the Applicant's home looking to arrest him.

[7] Also according to the PIF, on October 8, 2006 the Applicant left Pakistan and came to Canada using a fake passport. In Canada, the Applicant asked for refugee protection and he was later interviewed by the Canada Border Services Agency ("CBSA"). The CTR contains the CBSA interview notes dated January 11, 2007. According to these notes, the Applicant told the interviewer that his ID card is authentic. We now know that a CBSA Officer (the "Officer") determined that the Applicant's ID card is likely altered. The Applicant's refugee hearing was not until October 31, 2007. For unknown reasons, no one told the Original Panel about the Officer's ID card authenticity concerns, despite this finding being made ten months before the refugee hearing.

[8] The Original Panel's Notice of Decision dated November 6, 2007 was made without the benefit of the Officer's inauthenticity finding and granted the Applicant's refugee claim.

[9] On November 26, 2007 the Applicant applied for permanent resident status in Canada. According to the Applicant's memo in this judicial review, this application was denied.

According to the Vacate Panel's reasons, the application was suspended. The CTR does not contain other documents relevant to that application.

[10] After the Applicant was accepted as a Convention refugee, the Minister of Citizenship and Immigration (the "Minister") investigated him for ten years. This was a long investigation with unexplained gaps in activity. The outcome of the investigation resulted in evidence that the Applicant's original refugee claim is based on misrepresentations and withheld material facts.

B. *The Notice of Application to Vacate*

[11] Based on the investigation's results, in September 2016 the Minister filed a Notice of Application to Vacate the Applicant's Convention refugee status under section 109 of the IRPA. Section 109 of the IRPA states:

Applications to Vacate Vacation of refugee protection 109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. Rejection of application (2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	Annulation par la Section de la protection des réfugiés Demande d'annulation 109 (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait. Rejet de la demande (2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.

Allowance of application	Effet de la décision
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[12] The evidence submitted by the Minister is extensive. It includes facial recognition and fingerprint analysis indicating that the Applicant is known in the U.S.A. under a number of other names. According to the documents submitted by the Minister, the Applicant is also known as: Tanveir A. Cheema, Tanveer Cheema, Tanveir Akram, Mohammad Shoukat, Tanveir Choudhry, and Tanveer A. Choudhry.

[13] The Minster also submitted evidence that the Applicant has an immigration history in the U.S.A. For example, there is evidence that he already applied for asylum in the U.S.A. on August 26, 1994. This earlier claim was apparently based on religious beliefs. The evidence indicates that the Applicant was allowed to re-enter the U.S.A. in 1996 as well as 1997 for humanitarian reasons and while in the U.S.A. was convicted of some offences. He also previously applied for permanent residency in the U.S.A. on the basis that he is a spouse of an American citizen.

[14] Further evidence was submitted by the Minister to show that the Applicant also has a prior Canadian immigration history. For example, he already had three Canadian visas.

[15] A copy of the Notice of Application to Vacate was sent to the Applicant. After receiving the notice, the Applicant tried to summon the Officer who made the 2007 ID card authenticity

finding. The reasons the Applicant did so included obtaining the names of other officers and details which may reveal a bad faith investigation. However, the Officer opposed the summons, saying that his role was limited to the ID card, and that he had no further knowledge about the background, circumstances, or timeline. The Applicant further submitted that the delayed investigation amounted to an abuse of process.

C. *Pre-Hearing Conference*

[16] A pre-hearing conference took place the day of the vacate hearing to rule on the Applicant's summons request. The Vacate Panel reviewed Rule 45 of the *RPD Rules*, SOR 2012-256, which states that it must consider all the relevant factors when deciding whether to issue a summons:

Requesting summons 45 (1) A party who wants the Division to order a person to testify at a hearing must make a request to the Division for a summons, either orally at a proceeding or in writing. Factors (2) In deciding whether to issue a summons, the Division must consider any relevant factors, including (a) the necessity of the testimony to a full and proper hearing; (b) the person's ability to give that testimony; and (c) whether the person has agreed to be summoned as a witness.	Demande de citation à comparaître 45 (1) La partie qui veut que la Section ordonne à une personne de témoigner à l'audience lui demande, soit oralement lors d'une procédure, soit par écrit, de délivrer une citation à comparaître. Éléments à considérer (2) Pour décider si elle délivre une citation à comparaître, la Section prend en considération tout élément pertinent, notamment : a) la nécessité du témoignage pour l'instruction approfondie de l'affaire; b) la capacité de la personne de présenter ce témoignage; c) la question de savoir si la

personne a accepté d'être citée
à comparaître.

[17] After considering the factors in Rule 45, the Vacate Panel rejected the summons. The Vacate Panel did so because it determined that the Officer's own role was isolated and limited, and it was unlikely that the Officer was involved with the subsequent ten year investigation. The Vacate Panel also explained that, since the ID card authenticity determination was made more than half a year prior to the refugee hearing, the Officer's role ended before a vacation application could have been contemplated. Accordingly, the Vacate Panel rejected the Applicant's summons request and continued to hear the vacate proceeding.

D. *The Vacate Hearing*

(1) The Delay

[18] The Vacate Panel began by explaining that the test for abuse of process was set out by the Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] as follows: "1) whether the delay is unacceptable or inordinate, and, if so, 2) whether significant prejudice resulted from the delay."

[19] Upon considering the first step of the test, the Vacate Panel determined it is reasonable to proceed cautiously before vacating refugee status under section 109 of the IRPA. But in this case, the Vacate Panel noted that the Minister provided no explanation about the delay and long gaps while investigating. In addition, the Vacate Panel reasoned that the vacate hearing could have proceeded in 2011 based on the fingerprint evidence. As a result, the Vacate Panel found "there was an inordinate delay in bringing forth the vacation application."

[20] The Vacate Panel then considered the second step of the test, and determined the argument failed because the Applicant did not provide any evidence of prejudice. One element of prejudice argued by the Applicant was the lack of written reasons and transcript or audio (which he argued had been destroyed due to expiry of the retention period), but the Vacate Panel found any destruction of documents was speculative, especially as the remainder of the CTR was intact. Moreover, the Vacate Panel explained that in 2007 written reasons were not routinely issued, and in its decision provided the example of *Chahil v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1214. The Vacate Panel also reasoned that if the Original Panel noted a minor change on the PIF during the original refugee hearing, it was reasonable to expect it would have made notes if the Applicant disclosed his identity misrepresentations as well.

[21] Another example of prejudice argued by the Applicant was the denial of his permanent residency application, which he said would have affected his life choices. However, the Vacate Panel pointed out that the file contained evidence of two wives—an American wife and a Pakistani wife and children—and there was nothing before the Vacate Panel about which family he wanted to be reunited with, nor was there evidence about where his family is today. The Vacate Panel explained that the onus is on the Applicant to establish prejudice, but he chose not to testify or submit any evidence. Having failed to establish prejudice, the Vacate Panel rejected the Applicant's argument on abuse of process.

(2) The Merits

[22] The Vacate Panel next considered the merits of the vacate proceeding. It reviewed the Applicant's refugee claim which stated that his name was Tanveer Akram, and that he had provided an ID card to support his identity. The Vacate Panel then considered the Minister's

evidence that the ID card is likely altered, as well as the fingerprint and facial recognition evidence that the Applicant has other identities. The Vacate Panel noted that none of the information was disclosed on the Applicant's refugee claim forms. The Vacate Panel then pointed out that the Applicant did not submit evidence to support an argument that he had ever disclosed the misrepresentations or disclosed the withheld material facts to the Original Panel.

[23] As required under section 109(2) of the IRPA, the Vacate Panel then considered the identity evidence remaining before the Original Panel: a marriage certificate and a school certificate. The Vacate Panel decided that these documents did not establish his identity.

[24] Having failed to establish identity, the Vacate Panel allowed the application to vacate the Applicant's refugee protection. As a result, the Applicant's status became nullified by section 109(3) of the IRPA. On May 2, 2018 the Applicant applied for judicial review of this decision.

III. **Issue**

[25] The primary issue on this judicial review is whether the Vacate Panel's decision to refuse the Applicant's application to summon the CBSA Officer is reasonable?

IV. **Analysis**

A. *Whether the Vacate Panel's decision to refuse the Applicant's application to summon the CBSA Officer is reasonable?*

[26] The Applicant submits that his right to procedural fairness was breached because the Vacate Panel rejected his summons. In particular, he says the Vacate Panel erred by only considering whether the Officer would have personal knowledge of the matter, but failed to

address the other reasons why he submitted the summons. Namely, he says the Vacate Panel did not consider whether the Officer could provide details of the *other* individuals involved in the matter.

[27] The Respondent submits that the Vacate Panel correctly determined that a regional intelligence officer tasked with ascertaining the validity of documents is not the appropriate person to cross examine for the reasons in the summons, and that this summons is a fishing expedition. The Respondent also argues the standard of review is reasonableness, but under either standard says the Vacate Panel was not unreasonable or incorrect to dismiss the summons request on this basis.

[28] In regards to the Respondent's argument that the summons request is a fishing expedition, at the judicial review hearing the Respondent pointed out that the Vacate Panel's reasons do not indicate that it believed the Applicant's request to be a fishing expedition. Rather, it considered the summons in light of the factors under Rule 45 of the *RPD Rules.*

[29] As the Vacate Panel's decision in this case is a discretionary one, involving the application of the factors under Rule 45 of the *RPD Rules*, I agree with the Respondent that the proper standard of review is reasonableness. Discretionary decisions of the Minister are reviewed by this Court with deference (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53).

[30] I find that the Vacate Panel exercised its discretion unreasonably in this case because it failed to consider section 45 of the *RPD Rules* with regards to the reason for the Applicant's summons request. The Applicant requested to summon the Officer, not because he was involved

in the investigation, but to obtain his information about *other* Officers who were involved with the investigation. But the Vacate Panel failed to consider the purpose of the summons, and instead rejecting the request on the basis that the Officer himself did not take part in the investigation:

> [25]…I accept that as an intelligence officer, as opposed to a hearings officer for example, he was not likely involved in the vacation investigation, and therefore could not likely testify about any investigation after he examined the identity card in January 2007.The officer examined the identity card nine months before the RPD accepted the [Applicant's] claim. Thus, his role ended before a vacation application could even be contemplated. There is no evidence of his involvement thereafter, and indeed, he denies this was the case. It was not clearly established how this officer could uncover evidence of bad faith given his isolated role.
>
> …
>
> Overall, the officer's testimony is not necessary for proper hearing of this case and he would not have the ability to address the issues beyond his conclusions about the identity card.

[31] The Respondent argues that the Applicant could have "attempted to summons other officers involved in the vacate application but he chose not to do so." But attempting to summons other officers is exactly what the Applicant was trying to do. This is why the Applicant also advised the Vacate Panel he might need to make further summons requests. In his submissions to this Court the Applicant explained the impact of this unreasonable decision on his hearing:

> The fact is that the RPD Member's decision to block the Applicant from examining the Officer prevented the Applicant from obtaining information that would allow him to make out his case. Again, had the RPD Member allowed the Applicant to examine the Officer, his testimony could have allowed the Applicant to summon further individuals who would have knowledge of the timeframes regarding the investigation, and information pertaining to whether bad faith was involved in bringing forth the vacate

> application. Accordingly, the RPD Member's decision violated the Applicant's right to procedural fairness, which warrants the decision being overturned.

[32] I agree with the Applicant that the Vacate Panel did not consider whether the Officer had the ability to provide information about *other* individuals involved in the investigation. Accordingly, the Vacate Panel failed to reasonably exercise its discretion.

[33] A vacate hearing must be a full and proper hearing. While the Officer's inauthenticity finding was never provided to the Original Panel, and by all accounts this was a serious failure, so too is a decision to nullify a person's Convention refugee status without considering the reasons for the summons request. On these facts, the Vacate Panel unreasonably exercised its discretion in refusing to grant the Applicant's summons request, and the decision must be set aside.

V. **Certification**

[34] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VI. **Conclusion**

[35] The Vacate Panel failed to reasonably exercise its discretion when it refused to allow the Applicant's summons request. Accordingly, I am granting the application for judicial review.

JUDGMENT in IMM-2019-18

THIS COURT'S JUDGMENT is that:

1. The vacate decision is set aside and the matter is referred back for redetermination by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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