Federal Court  Cour fédérale

Date: 20190530

Docket: IMM-4687-18

Citation: 2019 FC 762

Ottawa, Ontario, May 30, 2019

PRESENT: Mr. Justice Barnes

BETWEEN:

NEVZAT ETIK

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] On this application, Nevzat Etik challenges a decision by the Refugee Appeal Division of the Immigration and Refugee Board [the RAD] by which his application to reopen an appeal was refused. In the result, the RAD's earlier decision denying Mr. Etik's appeal on the merits was left undisturbed. That decision is also the subject of an application before the Court in *Etik v Canada*, docket IMM-2869-18. Both matters were argued before me at the same time and both decisions were reserved. For the reasons that follow I am returning this matter to the RAD for a

redetermination. Pending that redetermination, I intend to hold the other application in abeyance in order to avoid the potential application of s 171.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. If the RAD now reopens Mr. Etik's appeal, the other matter will be moot. If not, I will deal with it on the merits.

[2] Mr. Etik has a complicated immigration history. He is a citizen of Turkey of Kurdish ethnicity. He has a criminal record in Turkey for a firearms offence. When he came to Canada from the United States in 2015, he falsely denied that he had ever been the subject of a criminal proceeding in another country (CTR p 536). In a refugee hearing before the Refugee Protection Division [RPD] held in 2016, Mr. Etik also failed to disclose his criminal history or any of the circumstances surrounding it. The RPD rejected Mr. Etik's claim on the basis of numerous adverse credibility findings mostly related to material changes and inconsistencies in his risk narrative.

[3] The RPD decision was taken on appeal to the RAD where, after an oral hearing, the appeal was dismissed. That decision turned on an exclusion finding based on Mr. Etik's Turkish criminal conviction. The RAD's decision was, in turn, set aside by a decision of this Court because of evidentiary concerns: see *Etik v Canada*, 2018 FC 175, 289 ACWS 3d 602. When the matter came back to the RAD, a notice was sent on March 5, 2018 to Mr. Etik's counsel informing him of the following:

> The Federal Court has ordered the Refugee Appeal Division (RAD) to redetermine your case.
>
> As the Federal Court has provided specific directions with respect to the composition of the panel, your case will be redetermined by a different panel.

> This practice of the RAD is to leave all the material pertaining to the previous hearing of your case on the file as part of the record for the redetermination unless the Federal Court has directed otherwise or has found a denial of natural justice. As the Federal Court has not indicated, explicitly or implicitly, that there had been a breach of natural justice or has not directed otherwise, the following material will remain on the file for the redetermination:
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> - Refugee Protection Division's (RPD) record;
> - appellant's record;
> - Minister's intervention record/respondent's record;
> - appellant's reply record;
> - the notice of decision and reasons for decision of the RAD;
> - the order and reasons for order (if any) of the Federal Court;
> - other evidence on the original file;
> - administrative documents (such as notice to appear);
> - the transcript of the previous hearing (if any);
> - CD of audio recording of previous hearing.
>
> Please be advised that any objections to the file content should be made in writing and provided to every party and to the registry within 30 days after this letter was sent to you for consideration by the Assistant Deputy Chair. The parties may also include additional submissions in response to the Federal Court decision.

[4] Mr. Etik's counsel assumed that the RAD would ultimately set a date for another oral hearing. This assumption is borne out by a letter from counsel to the Immigration Division dated June 4, 2018 which stated that Mr. Etik was waiting for the RAD to set a hearing date. On the same day, a call was made by counsel to a case management officer at the RAD. Counsel was then told that Mr. Etik's appeal would be dealt with in writing and a decision on the merits was imminent. Counsel immediately wrote to the RAD seeking a two-week extension to file supplemental submissions. That application was returned on June 5, 2018 because the RAD's decision had been rendered the day before.

[5] Mr. Etik then brought an application under Rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], to reopen his appeal. That application was supported by three affidavits and a 20-page submission. The asserted grounds for relief included complaints about the RAD's notification procedures, inadequate legal representation, the failure to hold a second oral hearing in accordance with the requirements of ss 110(6) of the IRPA, and the inadequacy the interpretation afforded during the first RAD hearing. Included with the application were several new documents providing details about Mr. Etik's Turkish criminal trial and its outcome and some evidence suggesting a possible political/ethnic motive in relation to the circumstances of that case. After considering the content of Rule 49, the RAD dismissed the application to reopen for the following reasons:

> [12] The RAD finds that there was no breach of natural justice when the appeal was dismissed by the decision of June 4, 2018. The letter, sent to the Applicant with respect to additional submissions as a result of the Federal Court decision of February 14, 2018, is clear that this is the point at which the Applicant is to make additional submissions if they wish to do so. While it may be unfortunate for the Applicant that his counsel did not read the letter thoroughly and made a false assumption that a Notice to attend an oral hearing would be forthcoming, the dismissal of the appeal absent further submissions does not amount to a breach of natural justice. Counsel had a full three months to put in additional submissions and failed to do so. Also it is clear in the *Regulations* amending the *Immigration and Refugee Protection Regulations* at paragraph 159.92 that the RAD has 90 days to make a decision after the day on which the appeal is perfected. The fact that an application for extension of time to submit was made on June 4, 2018, was too little too late. Furthermore, it was erroneous for Counsel to assume that there would be an oral hearing. The RAD is primarily a paper review tribunal with very specific legislative requirements to hold an oral hearing.

[6] The authority of the RAD to reopen an appeal is governed by Rule 49(6) of the RAD Rules. That provision allows relief only where it is established that a failure to observe a

principle of natural justice has occurred. In many cases including this one, the application of Rule 49(6) requires the RAD to determine an issue of mixed fact and law. Judicial review of that determination must, therefore, be carried out on the basis of the deferential standard of review of reasonableness: see *Khakpour v Canada*, 2016 FC 25, 262 ACWS 3d 1014, and *Atim v Canada*, 2018 FC 695 at paras 30-31, 295 ACWS 3d 136.

[7] In my view, the RAD's reasons for denying relief were unreasonable in the sense that they fail to fully address the requirements of Rule 49. It was not enough to consider only the role of counsel in failing to protect Mr. Etik's interests (although it was Mr. Etik's interests that were in jeopardy and not those of his counsel). What the RAD was also required to consider was the timeliness of the application to reopen and potential importance of the evidence that Mr. Etik wished to rely upon in answer to the Minister's argument that Mr. Etik was excluded because of the commission of a firearms offence. The right to natural justice is, after all, primarily concerned with the ability of a party to meaningfully participate in the adjudicative process including the right to present relevant evidence. As Professor David Mullan points out in his text *Administrative Law* (Irwin Law, 2001) at p 233 "what this involves is a very context-sensitive inquiry": also see *Huseen v Canada*, 2015 FC 845, [2015] FCJ No 956, and *Brown v Canada*, 2018 FC 1103, 298 ACWS 3d 828.

[8] It is worth noting that the RAD decision on the merits dealt with a number of issues that could have been influenced by the evidence Mr. Etik proposed to introduce. In particular, the RAD expressed some reservations about the evidence bearing on Mr. Etik's criminal history. Those concerns may have been mitigated by Mr. Etik's proposed new evidence particularly with

respect to an argument that Mr. Etik was acting in self-defence when he fired his weapon. The RAD also doubted Mr. Etik's evidence about being the victim of an assault at the hands of his father-in-law based on his Kurdish ethnicity. Included within the proposed new evidence was information that may have bolstered Mr. Etik's testimony about that event.

[9] What the RAD was required to consider was whether there was a miscarriage of justice in the sense that, but for counsel's failings, there was a reasonable probability that the result of the hearing on the merits would have been different: see *Nizar v Canada*, 2009 FC 557, 179 ACWS 3d 176. This required careful consideration of the quality and materiality of the evidence that Mr. Etik wished to present. Furthermore, beyond the bare statement that counsel's application for an extension of time to file supplementary evidence was "too little, too late" and that the RAD is required to make a decision within 90 days of the perfection of an appeal, no apparent consideration was given to the fact that the extension request was made a mere one day late and that the RAD has some discretion under Regulation 159.92(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 to exceed the 90-day decision limit.

[10] For all of these reasons, this application is allowed. The matter is to be redetermined on the merits by a different decision-maker.

[11] Having regard to this disposition, the Applicant's proposed questions for certification are moot.

JUDGMENT in IMM-4687-18

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4687-18
STYLE OF CAUSE:	NEVZAT ETIK v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 18, 2019
JUDGMENT AND REASONS:	BARNES J.
DATED:	MAY 30, 2019

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