Federal Court  Cour fédérale

Date: 20191018

Dockets: IMM-4898-18
IMM-4899-18

Citation: 2019 FC 1310

Ottawa, Ontario, October 18, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

IVICA DRAGICEVIC
MARINA DRAGICEVIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This hearing arises from applications for judicial review of two decisions of the Refugee Protection Division of the Immigration and Refugee Board [the RPD] arising from a hearing that took place on September 20, 2018.

[2] The RPD rejected an interlocutory motion for a decision without a hearing pursuant to paragraph 170(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] brought by the Applicants, Ivica and Marina Dragicevic. The RPD also found that the Applicants abandoned their claim for refugee protection, pursuant to subsection 168(1) of the IRPA.

II. Background

[3] The Applicants are nationals of Bosnia-Herzegovina and Croatia who filed for refugee protection on April 5, 2012. They were referred for a hearing on April 7, 2012 and filed their Personal Information Forms [PIFs] on May 4, 2012. The Applicants filed addendums to their PIFs on July 8, 2013.

[4] On December 15, 2012, legislative amendments to the IRPA made under the *Balanced Refugee Reform Act,* SC 2010, c 8, came into force. These amendments imposed time limits for decisions on new applications received on or after December 15, 2012. Due to limited resources, applications received before these amendments came into force –including that of the Applicants— were deprioritized, as decisions on these applications were not subject to the IRPA's new statutory time limits. Such applications became known as a "Legacy Claims."

[5] On May 8, 2017, the Immigration and Refugee Board launched the dedicated Legacy Task Force to address the outstanding backlog of Legacy Claim applications. The Board invited outstanding claimants to file Notices of Intention to Proceed with their claims. The Applicants filed Notices of Intention to Proceed on June 6, 2018. They received notice of their upcoming hearing on August 13, 2018.

[6] On August 14, 2018, counsel for the Applicants submitted an interlocutory motion requesting a decision without a hearing pursuant to paragraph 170(f) of the IRPA. The Applicants claimed that the RPD's significant delay in holding a refugee hearing was contrary to sections 7 and 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]. The Applicants argued that the legislative amendments left them in legal limbo for over six years, which caused them and their new Canadian child daily fear. The Applicants requested the RPD award refugee protection as a remedy.

III. Impugned Decision

[7] The RPD hearing was held on September 20, 2018.

[8] Due to an administrative error, the RPD did not review the motion for a decision without a hearing prior to the hearing date, but did so at the hearing itself. The RPD rejected the motion, noting it had discretion to do so under paragraph 170(f) of the IRPA. The RPD found section 11 of the *Charter*did not apply to an adjudicative tribunal. The RPD found administrative delay does not *per se* constitute an abuse of process that violates section 7 of the *Charter*. Instead, the Applicants must demonstrate prejudice arising from the delay. Pointing to the Applicants' Intention to Proceed (2 June 2018) and the Notice to Appeal (13 August 2018), the RPD found the prejudice described was insufficient and the delay they had suffered in having their claims adjudicated did not breach procedural fairness nor amount to a denial of natural justice.

[9] The Applicants requested a postponement of their hearing to allow them to judicially review the RPD's denial of their interlocutory motion. The RPD declined this request, and explicitly warned the Applicants that failing to proceed with the hearing would lead to their claims being deemed abandoned. The Applicants still opted to not proceed with the hearing. The RPD declared their refugee claim abandoned.

IV. Issues

[10] The Applicant frames the issues as follows:

(1) Did the RPD breach the duty of procedural fairness?

(2) Did the RPD fetter its discretion in concluding that it did not have jurisdiction to grant the motion for a decision without a hearing?

(3) Did the RPD err in concluding that the Applicants' *Charter* rights were not violated by the delay?

(4) Was the RPD's decision to declare the Applicants' application abandoned reasonable?

V. Standard of Review

[11] Alleged breaches of procedural fairness, including the right to an oral hearing, are reviewable on the correctness standard (*Canada (MCI) v Khosa*, 2009 SCC 12 at para 43).

[12] Fettering discretion is reviewable on a reasonableness standard, with the understanding that any fettering is *per se* unreasonable (*Bernataviciute v Canada (MCI)*, 2019 FC 95 at para 18 [*Bernataviciute*]; *Guo v Canada (MCI)*, 2018 FC 15 at paras 13-14).

[13] The Applicants submit that the delay in processing their application constitutes a breach of procedural fairness. However, the RPD considered the Applicants' submissions on this matter, and applied the relevant test for granting relief on the basis of delay in processing the claim. Before this Court, consideration of the RPD's decision on this matter is a question of mixed fact and law, reviewable on a standard of reasonableness.

[14] Therefore, issue (1) is reviewable on a correctness standard and all other issues are reviewable on a reasonableness standard.

VI. Analysis

Preliminary Issue: Admissibility of Affidavit

[15] The Applicants filed an affidavit with each application for leave and judicial review. The affidavit seeks to introduce evidence on the record, and to clarify the background of these proceedings. As such, they fall within a recognized exception to the general rule against the Court receiving evidence in an application for judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

(1) Did the RPD breach the duty of procedural fairness?

[16] The Applicants submit the RPD breached the duty of procedural fairness by failing to consider their submissions on the application to allow the claim without conducting an oral hearing. They cite no case law to support this position.

[17] The Applicants acknowledge the RPD correctly identified the leading test for administrative delay, and conducted a reasonable assessment of the length and cause. However, they submit the RPD erred by focusing only on the impact of delay in itself, and failing to consider the specific prejudice factors they raised. These prejudice factors include whether the length of delay brought the administration of justice into disrepute, and Mr. Dragicevic's testimony that he suffered anxiety as a result of living in legal limbo and worrying about his Canadian-born son. They argue this is akin to not considering their submissions, which is a breach of procedural fairness reviewable on a correctness standard (*Baker v Canada (MCI)*, 1999 SCR 817 at para 22)

[18] The RPD does not have jurisdiction to consider requests from refugee claimants pursuant to section 170(f) of the IRPA. Accordingly, applicants have no right to bring a motion disposing of a refugee claim without a hearing pursuant to paragraph 170(f) of the IRPA (*Bernataviciute* at para 26). As the IRPA does not provide applicants with such a right, the RPD's decision to decline to provide an opportunity for an oral hearing on this point does not breach the duty of procedural fairness.

(2) Did the RPD fetter its discretion in concluding that it did not have jurisdiction to grant the motion for a decision without a hearing?

[19] The Applicants submit the RPD fettered its discretion by implying that allowing the Applicants' motion was contrary to the IRPA. The Applicants submit that the IRPA permits their claim to be granted without a hearing, and therefore the RPD's decision that granting the application would not be appropriate because it would relinquish the RPD's statutory role was fundamentally unreasonable.

[20] Justice Annis recently discussed the rationale behind paragraph 170(f) of the IRPA in *Bernataviciute* at paragraphs 22-23:

> [22] Parliament never intended section 170(f) of the IRPA to provide a mechanism by which refugee claimants could claim the right to obtain refugee status without a hearing. Section 170(f) was intended to facilitate the Board's processing of refugee claims. The provision reflects the fact that the RPD must deal with a large number of refugee claims. In such circumstances, and in reliance upon its expertise in these matters, the Board should be given a wide discretion in the administration of its legislation to determine cases where it is plain to see that the refugee claimant will be granted refugee status without the necessity of a hearing.
>
> [23] Conversely, it would never have been Parliament's intention to allow a refugee claimant to proclaim a right pursuant to section 170(f) to require the RPD to exercise its discretion in their favour without a hearing. Forcing the RPD to provide a decision pursuant to section 170(f), would result in yet another decision, with yet another judicial review application for its review, and yet more delay in processing the refugee application.

[21] Justice Annis found that the RPD did not have jurisdiction to entertain a motion for refugee determination without a hearing pursuant to paragraph 170(f) of the IRPA, and dismissed the application.

[22] The facts in this case are essentially the same. While paragraph 170(f) allows the RPD to adjudicate a refugee claim without a hearing, this is a discretionary power which must be

exercised reasonably in the circumstances. The RPD found that it would not be appropriate for the Board to not hold a hearing in the circumstances, and that a hearing was required to gather facts required to make an informed decision. The RPD was not under the impression it could not hold a hearing, rather it believed it was inappropriate not to hold a hearing in the circumstances. This was a reasonable conclusion.

[23] The RPD is not required to exercise its discretion to grant refugee status without a hearing on request by the refugee applicant (*Bernataviciute* at para 26). The RPD did not fetter its discretion, and its conclusion was reasonable.

(3) Did the RPD err in concluding that the Applicants' *Charter* rights were not violated by the delay?

[24] The Applicant made no submissions with respect to the Charter arguments at the hearing.

[25] Section 11 of the *Charter* only applies to a "person charged with an offence" (*Blencoe v British Columbia (HRC),* 2000 SCC 44 at para 88 [*Blencoe*]). Given that a refugee claimant does not fall under this definition, the RPD reasonably concluded section 11 of the *Charter* is not engaged.

[26] Further, under section 7 of the *Charter*, applicants must show a deprivation of their life, liberty, or security of the person and prove sufficient casual connection between state-caused delay and any serious or profound effects (*Blencoe,* above at paras 57, 59-60, 81, and 83). Stress

and anxiety are unfortunately a part of the refugee process, and section 7 does not protect applicants from ordinary stresses and anxieties.

[27] Moreover, *Charter* decisions cannot be made in a factual vacuum, and vague statements of living in "legal limbo" and "delay having a profound impact" do not approach the factual requirements necessary to ground a section 7 *Charter* claim (*Bernataviciute* at para 29).

[28] Finally, delay does not amount to an abuse of process *per se*. Rather, applicants must demonstrate that the delay was unacceptable to the point of being oppressive (*Blencoe* at para 121). The Federal Court of Appeal has stated that in refugee claims, delay will "rarely, if ever, be successfully accepted as a ground of review" (*Bernataviciute* at para 30, citing *Akthar v Canada (MEI)*, [1991] 3 FC 32 (FCA)). The applicant has the onus of demonstrating that delay resulted in a *Charter* breach, and in this case, the Applicants have failed to do so.

[29] The Applicants blur the lines between their procedural fairness arguments and reasonableness arguments. Their submissions on this issue amount to further argument that the RPD failed to consider their submissions on the delay they suffered. The RPD is presumed to have reviewed all materials before them, unless demonstrated otherwise (*Florea v Canada (MEI)*, 1993 CarswellNat 3983 (FCA) at para 1).

[30] The RPD engaged with the Applicants' submissions, and the only evidence of prejudice advanced in support of the section 7 claim was Mr. Dragicevic's one-line allegation in his affidavit. It was reasonable for the RPD to dismiss the claim.

(4) Was the RPD's decision to declare the Applicants' application abandoned reasonable?

[31] The Applicants submit the RPD failed to consider their clear intention to diligently proceed prior to declaring their claim abandoned. They argue the RPD was required to consider multiple factors, including the following (*Ahamad v Canada, (MCI)*, [2000] 3 FC 109 at para 36):

- Whether a PIF was filed
- Whether counsel was retained in a timely manner
- Length of time for which the adjournment was sought
- Impact of the delay on the immigration system
- Fault for delay

[32] The Applicants submit that an inflexible application of abandonment procedures is capricious and violates the principles of natural justice (*Matondo v Canada (MCI)*, 2005 FC 416).

[33] The Applicants assert they had expressed a clear intention to pursue their claim in general, and explain they did not proceed on the day as scheduled due to their belief that proceeding with the hearing prior to the judicial review would frustrate the whole purpose of their interlocutory injunction and rob them of their desired remedy. The Applicants assert that by focusing solely on their refusal to proceed with their claim on that day, the RPD overlooked other indicia of their intention to proceed, including filing all applications in a timely manner and arriving at the hearing despite previously filing a motion for disposition without a hearing.

[34] The key consideration with respect to abandonment proceedings is whether or not the claimant's conduct amounts to an expression of "intention to diligently prosecute his or her claim" (*Csikos v Canada (MCI)*, 2013 FC 632 at para 25).

[35] The RPD provided the Applicants with an opportunity to explain why the hearing should not be declared abandoned, and that it was their choice to not continue. The Applicants had the option to proceed that day after the RPD denied their motion, and then challenge both decisions before this Court if their claim failed.

[36] Justice Annis, addressing what appear to be the exact same arguments made by the same counsel in *Bernataviciute*, concluded it was reasonable for the RPD to find a claim abandoned where the applicants refuse to testify at the hearing (*Bernataviciute* at para 43). I agree.

[37] Finally, the Applicants allege the RPD failed to provide them with an opportunity to present arguments about why their applications should not be abandoned. I disagree. Although the RPD warned them that not proceeding would lead to their application being declared abandoned, it nevertheless provided the Applicants with three distinct opportunities to proceed or otherwise explain why they could not.

JUDGMENT in IMM-4898-18 and IMM-4899-19

THIS COURT'S JUDGMENT is that

1. The Applications are dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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