Federal Court  Cour fédérale

Date: 20220217

Docket: IMM-5977-19

Citation: 2022 FC 210

Ottawa, Ontario, February 17, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SALEEM AHMED KHAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board which vacated a 1998 decision of the former Convention Refugee Determination Division (CCRD) and deemed his claim for refugee protection to be denied.

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] The Applicant, a 74-year-old citizen of Pakistan, entered Canada in 1997 with a fraudulent passport and visa. He claimed and was granted refugee status by the CRDD. In due course, the Applicant applied for and was granted permanent residence and citizenship.

[4] The Respondent Minister subsequently learned that, prior to entering Canada, the Applicant had been convicted of drug offences in the United States. He had been sentenced to imprisonment and ultimately deported. While in Canada, the Applicant committed and was sentenced to imprisonment for other crimes.

[5] On October 7, 2013, the Respondent Minister applied to the RPD to vacate the 1998 determination pursuant to section 109 of the *Immigration and Refugee Protection Act* SC 2001, c 27 (*IRPA*) and Rule 64 of the *Refugee Protection Division Rules,* SOR/2012-26 (RPD *Rules*). The Applicant was served in person with the application on March 20, 2014, through his parole officer, and again on July 2, 2019, at his home address. He then applied to dismiss the Minister's application on the grounds of delay and abuse of process.

[6] In reasons and decision issued on September 18, 2019, the RPD allowed the Minister's application. The claim for refugee protection was deemed to be rejected and the CCRD decision was nullified.

III. **Decision under Review**

[7] The Certified Tribunal Record in this matter is slim. According to the RPD Panel's reasons, the CRDD file is no longer available having been "disposed of under the Retention and Disposition Authority [RDA] 96/037".

[8] The RPD Panel's reasons are extensive. The Panel first summarized the relevant facts including the Applicant's USA Immigration File which noted his conviction for selling high-grade heroin to an undercover agent and sentence to a five-year term of imprisonment and subsequent deportation in 1984. The Panel noted that during his testimony, the Applicant indicated that he was convicted again in the USA in 1991 for the importation of heroin for which he received a further term of imprisonment. However, as the Minister had not included the subsequent conviction in the Respondent's disclosure in support of the application, it was not taken into consideration.

[9] The Panel next addressed the arguments advanced by the Applicant, notably that in the absence of the original file, it is unknown what evidence was before the CRDD panel such as to make a finding of misrepresentation and/or withholding of material facts on the part of the Applicant. In the absence of the file, the panel could not now assess whether the crime in question was serious in nature in accordance with section 98 of the *IRPA* and Article 1 F(b) of the Convention. Further, the Applicant argued, the delay in the making of the Minister's application was material and caused prejudice to the Applicant in his ability to make answer to the allegations therein.

[10] In denying the Applicant's application to dismiss the application to vacate for delay and abuse of process, the Panel relied on the decision of the Supreme Court of Canada in *Blencoe v British Colombia (Human Rights Commission),* 2000 SCC 44 [*Blencoe*]. The Panel found that the Applicant's right to a fair hearing or his ability to respond to the Minister's application had not been compromised for the following reasons:

> a) The Applicant voluntarily conceded the misrepresentations and withholding of material facts before the CRDD. On a balance of probabilities, the CRDD panel did not have any document related to the Applicant's criminal history and thus, the destruction of the CRDD file had no adverse consequences for the Applicant in making answer to the Minister's application;
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> b) The Applicant admitted that he failed to disclose his criminal history to the CRDD panel and did so because he knew he would not have been given status;
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> c) The Applicant was not found to be credible as to why he did not include the conviction in the claim forms. He also did not make the effort to make request for disclosure to the appropriate USA agency for any documentation that may have raised mitigating factors relating to the criminal history;
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> d) The Applicant alleged having memory loss. However, it is not corroborated by medical evidence; no diagnosis was made, nor any report suggests that he suffers from memory loss. Also, the panel was not convinced that he had memory loss, as he was able to recall that he omitted material information during his hearing;
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> e) There is no information provided to indicate if the memory loss had arisen at the material time. He also had ample opportunity to respond to the Minister's application before his medical encounter in 2016 (the Minister's application was served in 2014);

[11] Further, the Panel was not convinced that the Applicant had demonstrated that the delay had directly caused significant psychological harm to him or attached a stigma to his reputation,

such that the human rights system would be brought into disrepute, as discussed in *Blencoe* at para 115. Nor had the Applicant demonstrated that the damage to the public interest in the fairness of the administrative process, should the Minister's application proceed, would exceed the harm to the public interest in the enforcement of the legislation if it were halted.

[12] The Panel noted that, as stated in *Blencoe* at para 120, to constitute an abuse of process the proceedings must be unfair to the point that they are contrary to the interests of justice, which is not the case here. In fact, the Panel noted several circumstances contributed to the delay, such as the Applicant's "failure to make voluntary disclosure of the facts that were misrepresented and withheld", his use of fraudulent documents and the destruction of the CRDD file in 2011 in accordance with regulations and the Applicant's criminal proceedings in Canada.

[13] The Panel concluded that the Minister had met the burden to demonstrate with sufficient evidence that all the elements of s 109 of the *IRPA* were satisfied to vacate the application. In particular, the panel found that:

> a) There was a misrepresentation or withholding of material facts established by the documentary evidence presented by the Minister;
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> b) The material facts relate to a relevant matter, in the context of the *IRPA*, of the application of s 98 and Article 1F(b) as referenced in the definition of a "Convention refugee";
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> c) There is a casual connection between the misrepresenting and withholding of the material facts and the favourable result given by the CRDD panel. The Applicant testified that he knew he would not be granted a positive response if he declared his criminal history. As a result, the panel was unable to conduct an assessment of such history to assess whether Article 1F(b) of the Convention is determinative of the claim;

d) There was no other sufficient evidence that was considered at the time of the first determination to justify refugee protection. Since the panel was foreclosed an opportunity to determine the relevant matter of exclusion, there is no sufficient evidence remaining of the Applicant's alleged basis of claim to justify refugee protection.

IV. **Legislative Scheme**

[14] The following provisions of the *IRPA* are relevant:

Vacation of refugee protection	**Demande d'annulation**
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.	**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.
Rejection of application	**Rejet de la demande**
(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.	**(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.

[15] According to subsection 2(1) of the *IRPA*, the phrase "Refugee Convention" refers to the *United Nations Convention Relating to the Status of Refugees*, signed at Geneva on July 28, 1951. Article IF(b) of the Convention reads as follows:

Article 1	**Article 1**
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F**. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:
b) e has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme refugies;

[16] The following provisions of the RPD *Rules* are relevant:

Form of application	**Forme de la demande**
64 (1) An application to vacate or to cease refugee protection made by the Minister must be in writing and made in accordance with this rule.	**64 (1)** La demande d'annulation ou de constat de perte de l'asile que le ministre présente à la Section est faite par écrit conformément à la présente règle.
Content of application	**Contenu de la demande**
(2) In the application, the Minister must include	**(2)** Dans sa demande, le ministre inclut :
(a) the contact information of the protected person and of their counsel, if any;	**a)** les coordonnées de la personne protégée et de son conseil, le cas échéant;
(b) the identification number given by the Department of Citizenship	**b)** le numéro d'identification que le ministère de la

and Immigration to the protected person;

Citoyenneté et de l'Immigration a attribué à la personne protégée;

(c) the date and file number of any Division decision with respect to the protected person;

c) la date et le numéro de dossier de la décision de la Section touchant la personne protégée, le cas échéant;

(d) in the case of a person whose application for protection was allowed abroad, the person's file number, a copy of the decision and the location of the office;

d) dans le cas de la personne dont la demande de protection a été acceptée à l'étranger, son numéro du dossier, une copie de la décision et le lieu où se trouve le bureau qui l'a rendue;

e) the decision that the Minister wants the Division to make; and

e) la décision recherchée;

(f) the reasons why the Division should make that decision.

f) les motifs pour lesquels la Section devrait rendre cette décision.

Providing application to protected person and Division

Transmission de la demande à la personne protégée et à la Section

(3) The Minister must provide

(3) Le ministre transmet :

(a) a copy of the application to the protected person; and

a) une copie de la demande, à la personne protégée;

(b) the original of the application to the registry office that provided the notice of decision in the claim or to a registry office specified by the Division, together with a written statement indicating how and when a copy was provided to the protected person.

b) l'original de la demande accompagnée d'une déclaration écrite indiquant à quel moment et de quelle façon la copie de la demande a été transmise à la personne protégée, au greffe qui a transmis l'avis de décision concernant la demande d'asile ou au

greffe désigné par la Section.

V. **Issues and Standard of Review**

[17] The sole issue that arises on this application is whether the RPD's decision was reasonable.

[18] In a vacation proceeding pursuant to s 109 of *IRPA* and findings related to Article 1F(b) of the Convention, the applicable standard of review is reasonableness (*Frias v Canada (Citizenship and Immigration)*, 2014 FC 753 at para 9). As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[19] To determine whether the decision is reasonable, the reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

VI. **Analysis**

[20] The Applicant submits that the Minister's application to vacate was an abuse of process because the allegations of misrepresentations relating to his 1997 heroin conviction could not be proven by way of evidence since his refugee file had been destroyed. As a result, he could not provide reliable, lucid and cogent oral evidence as there was no means by which to refresh his memory. The proceeding was also unfair on account of prejudicial delay between the Minister's discovery of the US immigration history in 2013 and the hearing in August 2019.

[21] The Panel misapplied the *Blencoe* test, the Applicant contends, with regard to the nature of factual situations which may cause prejudice for delay. He argues that the destruction of the CRDD file seriously prejudiced his right to make full answer and defence at the 2019 hearing. The Panel ignored evidence about his memory problems. Had the Minister acted promptly in 2013, the Applicant submits, he would have been able to revisit the issues when his memory was fully intact.

[22] The memory issue stems from a visit the Applicant made to a General Practitioner in 2016, with complaints about congestion in his lungs and "memory loss". He was referred to a specialist for the lung issue and to a "Seniors Assessment Clinic for the memory". The doctor's hand-written notes on the referral indicated that "friends and family noticing poor short-term memory". It was not assessed as an urgent priority and no laboratory work was required. The Panel considered this evidence and noted that the Applicant had not followed through on the

referral. The Panel further observed that it was clear from the Applicant's testimony that he was able to recall that he had not disclosed the material facts in question in his CRDD testimony.

[23] The Panel's decision to give no weight to the 2016 medical referral report and related finding that it did not corroborate the Applicant's assertion that he was suffering from memory loss to the extent that it would prejudice his ability to answer the Minister's application was, in my view, reasonable. The Applicant had been made aware of the Minister's application at least as early as March 2014, and could have then provided a response should he have had grounds to dispute the allegations. He was also, at that time, subject to a process that removed his Canadian citizenship for these omissions. I agree with the Respondent that the Applicant has not met the test to establish an abuse of process. The destruction of the CRDD file is not determinative because the Applicant testified that he did not disclose his criminal conviction when he made his claim. He also testified when asked directly by the Panel that he was certain that he did not disclose this information and he testified that none of the forms required him to provide information about his criminal history, notwithstanding that it was required by the law in effect at the time. I note that, in his application for permanent residence in 1998 following the CRDD determination, the Applicant also denied having been convicted of criminal offences anywhere.

[24] The Applicant does not deny that his criminality falls within the exclusion of Article 1F(b), and thus his argument that there could have been an assessment under Article 1F(b) by the CRDD makes no sense. The CRDD would have had no reason to embark upon such an assessment in the absence of any information to the effect that the Applicant, as claimant, was subject to the exclusion but might have had grounds to request an exemption. Absent disclosure

by either the Applicant or the Minister of such information at the time of the CRDD proceedings, there was no basis for the RPD Panel to arrive at any other conclusion given the Applicant's fraudulent misrepresentation.

[25] In determining whether an abuse of process occurred as a result of delay, the fact of the delay alone is not determinative. There must be proof of significant prejudice resulting from an unacceptable delay: *Blencoe* at para 121; *Bernataviciute v Canada (Citizenship and Immigration)*, 2019 FC 953 at para 32 [*Bernataviciute*]; *Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 at para 81 [*Ching*].

[26] While a five-year delay between service of the Minister's initial application in 2013 and the initiation of the proceedings before the RPD in 2019 may appear, at first impression, significant, there is no evidence before the Court that the delay was inordinate in the sense of offending the community's sense of fairness; *Ching* at para 78; *Bernataviciute* at para 34. For part of that time, the Applicant was in prison serving a sentence. The decision was made in early 2019 to serve him again as the 2013 service had not been acknowledged. More importantly, the Applicant has failed to demonstrate that he had suffered prejudice, as he clearly knew, and admitted that he did not disclose his criminal history before the CRDD.

VII. **Conclusion**

[27] In the result, I see no reason to interfere with the RPD Panel's decision. The Applicant has failed to establish that it is unreasonable. In my view, it bears the hallmarks of

reasonableness – justification, transparency and intelligibility – and is thoroughly justified in relation to the relevant factual and legal constraints that bear on the decision.

[28] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-5977-19

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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