Federal Court  Cour fédérale

Date: 20240821

Docket: IMM-6591-23

Citation: 2024 FC 1294

Ottawa, Ontario, August 21, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

NORIA NAIMI
SARA KAZIMI
HANIA KAZIMI
BATOUL KAZIMI
ALI AHSAN KAZIMI
SULTAN KAZIMI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] This judicial review application arises out of a decision of the Refugee Protection Division [RPD] dated May 8, 2023, granting the Minister of Public Safety and Emergency Preparedness'

[Minister] application to vacate the Applicants' refugee status, pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], on the basis that they had misrepresented their true identities as Swedish citizens.

[2] The Applicants had claimed to be citizens of Afghanistan, and no other countries, when they entered Canada. The mother and children entered Canada together in June 2011, made an asylum claim in August 2011, and were granted refugee protection in December 2011. The father subsequently came to Canada in February or March 2012, made an asylum claim in September 2012, and was granted refugee protection in August 2014.

[3] Before the RPD, the Applicants alleged an abuse of process, arguing that they suffered significant prejudice due to the Minister's delay in seeking to vacate their refugee status. In addition, they argued that the Minister breached his duty of disclosure by failing to produce the immigration officer's notes. The Applicants argued that, consequently, the vacation proceedings should be stayed.

[4] The RPD rejected both these arguments, concluding that it may only consider an argument for an abuse of process due to delay as it relates to the RPD proceedings. It held that the Minister's delay in investigating and initiating the vacation application was not relevant to the assessment and further found that the Minister's failure to disclose the immigration officer's notes was equally irrelevant. Ultimately, the RPD allowed the Minister's application and the Applicants' refugee claims were deemed rejected.

[5] I am allowing the application for judicial review. The RPD's refusal to consider the Applicants' abuse of process arguments based on the Minister's delay in seeking to vacate their refugee status is inconsistent with recent Federal Court jurisprudence. Similarly, the RPD erred in failing to consider whether the Minister had breached his disclosure obligations by failing to produce the immigration officer's notes regarding when the issue of the Applicants' misrepresentation of their citizenship first arose.

[6] Relying on the Supreme Court of Canada's decision in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*], this Court has held that in the context of a vacation proceeding under the *IRPA*, delay in the Minister's investigation is indeed relevant in determining whether there has been an abuse of process: *Ganeswaran v Canada (Citizenship and Immigration)*, 2022 FC 1797 at paras 37-43 [*Ganeswaran*].

II. Issues and Standard of Review

[7] As a preliminary matter, I raised the issue of the named respondent to this application with the parties. Since the issuance of the Governor in Council's *Ministerial Responsibilities Under the Immigration and Refugee Protection Act Order*, SI/2015-52, the Minister of Public Safety and Emergency Preparedness is responsible for vacation proceedings under subsection 109(1) of the *IRPA*: *Omar v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1334 at paras 11-14. On this basis, I have amended the style of cause to name the Minister of Public Safety and Emergency Preparedness as the Respondent.

[8] I note that there is a divergence in this Court's jurisprudence with respect to the appropriate standard of review for the question of abuse of process for delay in bringing a vacation application. This Court has reviewed it against the reasonableness standard, framing the issue as whether the RPD reasonably interpreted or applied the test for delay: *Khan v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 210 at para 18; *Akram v Canada (Citizenship and Immigration)*, 2021 FC 1024 at para 17. This Court has also reviewed it against the correctness standard, framing the issue as whether the RPD brought the administration of justice into disrepute by proceeding with the delayed vacation application: *Hassan v Canada (Citizenship and Immigration)*, 2023 FC 1422 at paras 20, 23; *Ganeswaran* at para 25.

[9] In this case, the one overarching issue for determination is whether the RPD erred in finding that the doctrine of abuse of process only applies to the delay in the proceedings before the RPD.

[10] In my view, the applicable standard of review in this case is reasonableness. As the Supreme Court of Canada made clear, this is the presumptive standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25, 31, 49 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 38-39 [*Mason*]. The presumption of reasonableness review is rebutted where the legislature has indicated that it intends a different standard apply, or where the rule of law requires that correctness review apply: *Vavilov* at para 33; *Mason* at paras 7, 39.

[11] This said, the rule of law requires correctness review for "general questions of law of central importance to the legal system as a whole": *Vavilov* at para 53, 58-62; *Mason* at para 47. I

am unable to conclude that the RPD's interpretation of the doctrine of abuse of process as it relates to vacation proceedings under the *IPRA* is a question of central importance reviewable on the correctness standard.

[12] For these reasons, I find that reasonableness is the applicable standard of review. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85; *Mason* at para 8. One of the legal constraints bearing on decision-makers is binding jurisprudence: "Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide": *Vavilov* at para 112.

III. Analysis

[13] The RPD's interpretation of the applicability of the abuse of process doctrine in this case is unreasonable. The RPD concluded that for delay to constitute an abuse of process it must pertain "to the proceeding before the RPD as it was commenced by the Minister": Reasons and Decision of the Refugee Protection Division dated May 8, 2023 at para 39 [RPD Decision]. This interpretation led the RPD to make two interrelated findings. First, that any delay by the Minister in investigating an alleged misrepresentation before it initiates a vacation application is not relevant to the evaluation of an abuse of process. Second, that the Minister's failure to disclose the immigration officer's notes "is not relevant to the proceeding that this panel has been tasked with overseeing": RPD Decision at para 40.

[14] As set out below, I find the RPD's interpretation is not justified in light of the relevant legal constraints bearing on the decision: *Vavilov* at para 112. In particular, the RPD failed to consider and apply recent Supreme Court of Canada and Federal Court jurisprudence: *Abrametz* and *Ganeswaran.*

A. *The RPD erred in refusing to consider the Minister's delay in the investigation*

(1) The RPD's interpretation is inconsistent with binding jurisprudence

[15] Abuse of process is a broad, flexible doctrine that applies in a wide variety of contexts and is rooted in the fairness of the decision-making process: *Abrametz* at paras 34-36. The duty of fairness "is relevant at all stages of administrative proceedings, including the investigative stage": *Abrametz* at para 58.

[16] The RPD dismissed the Applicants' abuse of process argument, finding that any delay in the Minister's investigative process leading up to the vacation application was irrelevant to the vacation proceeding itself. This Court, however, squarely addressed and rejected this argument in *Ganeswaran*.

[17] In that case, the Respondent argued, "the only delay that the RPD could consider is its own delay in holding a hearing and rendering a decision": *Ganeswaran* at para 37. Relying on the Supreme Court of Canada's decision in *Abrametz*, Justice Sadrehashemi concluded that: "The Minister's conduct in investigating a possible misrepresentation is not immune from scrutiny and is subject, like all administrative actors, to the duty of fairness": *Ganeswaran* at para 42.

[18] Justice Sadrehashemi further reasoned that to hold otherwise "would strip an RPD Member of the ability to refuse to hear an application that was brought in an unjust or unfair manner": *Ganeswaran* at para 43. Consequently, she held that the Minister's delay in bringing the vacation application was relevant in determining whether there was an abuse of process.

[19] The Respondent in this case raises the same argument that was rejected in *Ganeswaran* about the interpretation of *Abrametz*. Specifically, the Respondent argues that the last sentence of paragraph 58 of *Abrametz* supports its interpretation that the only relevant delay is that of the RPD, not of the Minister.

[20] In *Ganeswaran*, Justice Sadrehashemi dismissed the Respondent's narrow interpretation, finding that the statement in *Abrametz*, properly read in context, confirms that the investigation phase is relevant in a consideration of delay:

> [39] The Respondent's argument relies on the following statement from *Abrametz*: "When assessing the actual time period of delay, the starting point should be when the administrative decision maker's obligations, as well as the interests of the public and the parties in a timely process are engaged. It should end when the proceeding is completed, including the time taken to render a decision" (*Abrametz* at para 58).
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> [40] This statement has to be read in its complete context. It is found at the end of paragraph 58 of *Abrametz* which begins: "The duty to be fair is relevant to all stages of administrative proceedings, including the investigative stage." In *Abrametz*, the investigative stage consisted of the Law Society of Saskatchewan's pre-charge investigation of Mr. Abrametz's financial records. As an administrative body, the Law Society of Saskatchewan was responsible for conducting the investigation, issuing a formal complaint containing the charges, hearing the allegations, and deciding the case brought against Mr. Abrametz.
>
> [41] As noted above, the Supreme Court of Canada emphasized that the concept of abuse of process is a broad and flexible one, which

> can arise in a multitude of circumstances. I do not see the referenced statement in *Abrametz* as narrowly restricting the application of the abuse of process doctrine in the manner suggested by the Respondent. In my view, paragraph 58 of *Abrametz*, and its confirmation that the investigation phase prior to bringing a specific charge against Mr. Abrametz is included as part of the delay period, supports the Applicants' and the RPD's characterization of the delay in this case.
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> [Emphasis added]

[21] Significantly, both parties addressed the *Abrametz* and *Ganeswaran* decisions in their post-hearing submissions. It was incumbent on the RPD to engage with the parties' submissions and address their central arguments: *Vavilov* at paras 125-126. Instead, the RPD relied on earlier jurisprudence and failed to address these recent decisions.

[22] In particular, the RPD relied on this Court's decision in *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167 [*Seid*], a judicial review of a cessation application: RPD Decision at para 38. In that case, the Court concluded that for delay to constitute an abuse of process, "it must have been part of an administrative or legal proceeding that was already under way": *Seid* at para 30.

[23] The RPD also relied on various decisions addressing the doctrine of abuse of process in the context of Immigration Division inadmissibility proceedings: RPD Decision at para 39. In those cases, this Court found that the relevant period of delay is between the decision made by the Minister to prepare a section 44 report and the Immigration Division's inadmissibility finding: *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 32; *Ching v Canada*

(Immigration, Refugees and Citizenship), 2018 FC 839 at para 79; *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427 at paras 28-30.

[24] In light of the *Abrametz* and *Ganeswaran* decisions, which post-date the jurisprudence relied on by the RPD, the RPD's decision is unreasonable and must be set aside.

(2) The RPD must consider whether the alleged delay constitutes an abuse of process

[25] Because of its finding that the Minister's delay was irrelevant, the RPD did not proceed to consider whether the alleged delay constitutes an abuse of process. Delay may adversely affect the fairness of a proceeding where: (a) it impairs a party's ability to answer a complaint against them; or (b) it has caused a party "significant prejudice": *Abrametz* at paras 41-42.

[26] A three-step test is applicable to determining whether delay amounts to an abuse of process in this second category: (i) the delay must be inordinate; (ii) the delay must have directly caused significant prejudice; and (iii) when these two requirements are met, it must be demonstrated that the delay is manifestly unfair to a party, or in some other way brings the administration of justice into disrepute: *Abrametz* at para 43. The Applicants argue that they meet the three-part test.

[27] However, it is not for this Court sitting on review to step into the shoes of the decision-maker and make the decision it should have made. It is incumbent on the RPD, as the tribunal tasked with deciding these matters at first instance, to make a decision: *Vavilov* at para 142.

[28] Significantly, before considering whether there has been an abuse of process, the RPD must first determine the period of delay in question. In other words, it must determine when the clock starts ticking in this case. Does the delay start from when the Respondent requested and received confirmation from Interpol in September 2019 about the Applicants' identities? Or, does the delay start at some earlier point in time when the Respondent first had reason to believe that the Applicants may have misrepresented their identities? In order to determine the period of delay, the RPD must make a decision on the Applicants' argument about the Minister's disclosure obligations.

B. *The RPD erred in refusing to consider the Minister's failure to disclose officer's notes*

[29] Before the RPD, the Applicants also argued that the Minister breached his duty by failing to disclose the notes of the immigration officer. They asserted that this failure deprived them of information relevant to determining whether there had been an abuse of process, as the notes would provide the date when the Minister first became aware of the Applicants' possible misrepresentation.

[30] Given its conclusion that the Minister's delay was not relevant, the RPD did not address the merits of this argument. In light of the jurisprudence discussed above, delay on the Minister's part is relevant to whether there was an abuse of process. As a result, the RPD was not justified in dismissing this argument out-of-hand. It should have considered the parties' submissions on this issue and made a decision.

[31] Based on the Respondent's disclosure package, the Minister requested confirmation from Interpol of the Applicants' Swedish nationality on September 20, 2019. Interpol's September 30, 2019 response confirmed their citizenship. It is unclear whether the Applicants requested that the Minister provide the immigration officer's notes indicating when the alleged misrepresentation first came to light, or whether they argued that the Minister was required to disclose these notes as a matter of course in vacation proceedings.

[32] In any event, on redetermination, the new panel must engage with this procedural fairness issue and determine the nature and extent of the Minister's disclosure obligations in the context of vacation proceedings. The factors set out by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 will provide useful guidance: *Ali v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 1085 at paras 20-27.

IV. Conclusion

[33] For these reasons, I am allowing the application for judicial review. The RPD's decision is set aside and the matter is remitted to another panel for redetermination.

[34] The parties did not raise a question for certification and I agree that none arises in this case.

JUDGMENT in IMM-6591-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended so that the Minister of Public Safety and Emergency Preparedness is the Respondent.

2. The application for judicial review is allowed.

3. The decision of the Refugee Protection Division, dated May 8, 2023, is set aside and the matter is remitted for redetermination by a differently constituted panel.

4. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6591-23
STYLE OF CAUSE:	NORIA NAIMI, SARA KAZIMI, HANIA KAZIMI, BATOUL KAZIMI, ALI AHSAN KAZIMI, SULTAN KAZIMI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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