Federal Court  Cour fédérale

Date: 20101118

Docket: IMM-5491-09

Citation: 2010 FC 1160

Ottawa, Ontario, November 18, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MOHAMMED ABED
(A.K.A. MOHAMED HASSAN ABED)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant applies for judicial review of the October 2, 2009 decision of the Immigration and Refugee Board, Refugee Protection Division (the Board) in which the Board refused the Applicant's claim for refugee status.

[2] The Respondent also brings a motion for an order to quash the Board's decision and remit the matter back for redetermination.

[3] Where the Applicant and Respondent differ is on the appropriate remedy attendant on granting the judicial review. The Respondent, on its motion, sought to have the Board's decision quashed and referred back for redetermination by a different panel member without costs. On its application for judicial review, the Applicant sought various remedies including:

a. that the Board be ordered by the Court to declare the Applicant to be a Convention Refugee and/or a person in need of protection;
b. in the alternative the matter be referred back on the existing record, to reconsider the matter in accordance with the reasons/order of this Court;
c. in the further alternative, the matter be referred back to the Board for a new hearing before a different panel; and
d. costs

[4] I am satisfied that judicial review should be granted. The question is whether the Court should provide directions on redetermination.

Background

[5] The Applicant had applied for refugee status along with his brother because each had converted from the Muslim religion to Christianity, albeit with different churches. Their claims were based on the hostile attitude by Muslims in Egypt towards apostates who have converted. In its written decision the Board decided the Applicant was not a true convert from the Muslim faith to Christianity because he did not know the basic tenets of his faith. The Board went on to consider an alternative claim which it dismissed on credibility grounds in reliance in part on its earlier conclusion that the Applicant lacked the knowledge that a convert to Christianity would have.

Decision Under Review

[6] The Applicant, who had converted to Christianity by joining the United Church, had testified that the Church has only two sacraments: communion (the Eucharist) and baptism. The Board dismissed the Applicant's claim stating:

> "It is not reasonable that person [sic] who attends Church weekly and reads the bible on his own would not know the faith's basic tenets, such as, the names and number of the faith's sacraments. It is for this reason that I find the claimant is not a true convert to Christianity."

Standard of Review

[7] Section 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 provides that a decision may be set aside if the decision is made on an erroneous finding of fact in a perverse or capricious manner without regard to the material before it.

Analysis

[8] The documentary evidence discloses that the Applicant was correct: the United Church only celebrates two sacraments, the Eucharist and baptism. Further, the Board had earlier stated on the record that it accepted the Applicant's answer as credible, only to change its conclusion later in its written decision because of error. The Respondent concedes the Board erred and has moved for an order granting the application for judicial review.

[9] The Board found the Applicant was not a true convert to Christianity but one of convenience. The Board must decide on evidence and not on speculation. Its only perfunctory reference to evidence on the question of conversion to Christianity is in error. Later, when the Board discusses the Applicant's account about problems with Egyptian authorities because of religious

issues, it states “these could be due to other reasons not before the panel” which is clearly speculative.

[10] The Applicant’s evidence about his growing religious belief was neither short nor perfunctory. The Applicant had been questioned on this religious topic by the Refugee Protection Officer and his own counsel. The Applicant also submitted unchallenged documentary evidence.

[11] Not only had the Applicant answered the question about the sacraments correctly, he provided documentation in support of the fact of his conversion to Christianity. It was not a recent conversion. The Applicant converted through baptism, a sacrament of the United Church. He has produced a baptismal certificate documenting his baptism in 2003 and the United Church Minister confirmed his membership and contribution to the United Church community since that time. His brother’s wife, who the Board accepted as a credible witness, testified about the Applicant’s preferred use of his Christian name. The Applicant also testified and provided documentation in relation to his earlier interest in Christianity and his resultant difficulties in Egypt. The Board makes no reference to this documentation.

[12] In result, I find the Board erred in basing its decision on an erroneous finding of fact in a perverse or capricious manner without regard to the material before it.

[13] In considering the question of remedies, I am mindful that the Applicant’s claim had been joined with that of his brother. The brother had suffered a serious accident that left him unable to

testify and the Applicant subsequently sought to proceed separately. The Board decided the claims would not be severed because evidence had already been disclosed with respect to both brothers.

[14] At the hearing, the brother's wife testified about the brother's conversion to Christianity, specifically to joining the Roman Catholic Church. She also testified the Applicant was known to her by his Christian name which I take to be confirmatory of his conversion to Christianity. I note that the brother's refugee claim was accepted by the Board on the basis that he had converted to Christianity. I see no difference between the two brothers' claims other than that one elected to join the Roman Catholic Church and the other to join the United Church. The issue about conversion to Christianity is in itself determinative and was accepted as such by the Board in the brother's case.

[15] This Court may provide directions with respect to the way a case is redetermined pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*. This is an extraordinary power. The Federal Court of Appeal found in *Canada (Minister of Human Resources Development) v. Rafuse,* 2002 FCA 31 at para. 14:

> While directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: … Such will rarely be the case when the issue in dispute is essentially factual in nature (Ali v. Canada (Minister of Employment and Immigration), [1994] 3 F.C. 73 (T.D.), particularly when, as here the tribunal has not made the relevant finding.

[16] I have been provided with a number of cases where the Court has referred the matter back with and without direction. In *Antwi-Boasiako v. Canada (Minister of Citizenship and Immigration)*, [1995] 96 F.T.R. 186 (T.D.), the Court directed the matter be redetermined on the basis the applicant had a credible basis for his refugee claim. In *Dhanai v. Minister of Citizenship*

and Immigration, [1994] F.C.J. No. 636, Justice Rothstein, now on the Supreme Court of Canada, referred the matter back with a direction the applicant have the opportunity to adduce further evidence.

[17] The authority to recognize an applicant's claim for refugee status is vested in the Refugee Protection Board by virtue of sections 162 and 170 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Accordingly, the matter is to be referred back to a differently constituted panel for redetermination. It is to be redetermined on the record on the issue of whether the Applicant has converted from the Muslim faith to Christianity with such additional evidence as the Applicant may choose to submit.

[18] In my view, this is not a case where a general question of importance should be certified.

[19] Since the evidence on record will be available on redetermination and since the Respondent has not opposed the application for judicial review itself, I make no order for costs.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The matter is referred back for redetermination by a differently constituted panel in accordance with the reasons given in this Order.
3. No question of general importance is certified.
4. I make no order for costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5491-09
STYLE OF CAUSE:	MOHAMMED ABED (A.K.A. MOHAMED HASSAN ABED) v. MINISTER OF CITIZENSHIP AND IMMIGRAITON
PLACE OF HEARING:	TORONTO, ON
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