Federal Court  Cour fédérale

Date: 20110112

Docket: IMM-2136-10

Citation: 2011 FC 31

Toronto, Ontario, January 12, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

NAREEZA PERSAUD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Appeal Division of the Immigration and Refugee Board dated March 29, 2010 wherein the Applicant's appeal against a removal order made against her by the Immigration Division of that Board was dismissed. For the reasons that follow I am allowing the applications, quashing the decision of the Appeal Division

with a recommendation that the matter be, in turn, sent back to the Immigration Division for a hearing *de novo*.

[2] The facts of this case are somewhat unusual. The Applicant is an adult female citizen of Guyana. On August 18, 2003 she married Muniraj Persaud, a Canadian citizen, in Guyana. Her husband shortly thereafter returned to Canada and sponsored an application by the Applicant to come to Canada as a member of the family class. On October 5, 2003 the Applicant entered Canada on that basis.

[3] The Applicant was interviewed by a Minister's Delegate on September 28, 2006, the purpose of that interview had not been previously disclosed to the Applicant, the Applicant did not have a lawyer present and was not advised that she could have a lawyer present. The Minister's Delegate prepared a Narrative Memoranda in which reference to the interview was made as well as reference to a statutory declaration of the husband which was said to have been attached but there is no record of that declaration in the file. That Memoranda recommended deportation of the Applicant stating, *inter alia*, that the Applicant had entered into a bad faith marriage.

[4] An Admissibility Hearing was held on May 28, 2008 before a Member of the Immigration Division. The Applicant was represented by Counsel and was examined. Counsel made representations including the impropriety of the September 28, 2006 interview and the failure of the Minister to provide the husband's statutory declaration referred to in the Narrative Memoranda.

[5] The Member of the Immigration Division gave a written decision dated June 9, 2008 in which it was determined that the Applicant was inadmissible because she entered into a non-

genuine marriage for the sole purpose of obtaining Canadian permanent residency. As an alternative, the Member determined that even if the Applicant had entered into the marriage in good faith, she failed to disclose her subsequent resolve not to reside with her husband. In the Reasons the Member, at paragraph 11, acknowledged that the September 28, 2006 interview was conducted in breach of a duty of fairness, therefore nothing would be made of the alleged contradictions between what was said there and other sources.

[6] An appeal from that decision was taken before Panel (a single member) of the Immigration Appeal Division. The Applicant was represented by Counsel and was examined before the Panel. Her Counsel made representations to the Panel. The Panel, on March 29, 2010, gave the decision at issue here denying the appeal. The Panel found that the Immigration Division Member, having found the initial interview to be seriously tainted, should have sent the whole matter back to be started over. The Panel said at paragraphs 9 to 14 of its Reasons:

> *[9] The panel notes with interest that Minister's counsel during this appeal made no attempt to refute the concern of counsel for the appellant as to the facts behind the circumstances behind the interview, and the panel, therefore, has reason to believe that in fact the appellant was called into the interview without a full understanding that she would be subject to removal from Canada as a result of her answers given at the interview.*
>
> *[10] In the panel's opinion, this contradicts procedural fairness and in itself is a breach of natural justice. The panel notes with interest that in his decision, at page 5 of the Record, the Immigration Division Member states the following at paragraph 11:*
>
> > *I agree with counsel that the interview at CIC Etobicoke was conducted in breach of the duty of fairness owed to the Respondent by Citizenship and Immigration Canada. She was not informed of the purpose of the hearing, was not given a copy of the documents relied on by the officer, and was not advised that she had the opportunity to have counsel observe the interview or assist her with written submissions. As a result, I decline to make any*

> *adverse findings concerning alleged contradictions between what was said at the interview and other sources.*
>
> *[11] The Immigration Division Member's conclusion is sound. However, in an earlier paragraph of his reasons, namely, at paragraph 8 (found on page 4 of the Record), the Immigration Division Member states the following:*
>
> > *During the hearing, she indicated that she never lived with the sponsor, correcting a statement to the contrary made during the CIC Etobicoke interview.*
>
> *[12] It is true that the Immigration Division Member then goes on to state that he would not made any adverse findings concerning alleged contradictions between what was said in the interview and other sources, but in the panel's opinion he should not have referred to a specific contradiction if he was not going to consider the interview.*
>
> *[13] But more importantly, in the panel's opinion, having come to the conclusion that the whole interview was seriously tainted, the Immigration Division Member should have, at that point, come to the conclusion that this appellant had not been dealt with fairly and should have sent the whole matter back to CIC and have them start over.*
>
> *[14] Surely, it is obvious from the Record that the interview of the appellant was instrumental in the Immigration officer's conclusion that the matter should have been referred to the Immigration Division.*

[7] The Panel then discussed in its Reasons further difficulties arising out of the Immigration Member's Division, stating that certain conclusions reached were speculation. The Panel concluded at paragraph 24 of its reasons that there was a breach of natural justice and the decision of the Member of the Immigration Division was not valid in law:

> *[24] It follows, therefore, that there has been a breach of natural justice in this decision and the decision in not valid in law.*

[8] However, the Panel did not stop there, it asked for submissions from Counsel as to whether it should substitute its own decision rather than referring the matter back. The Panel offered its

interpretation of the Supreme Court of Canada decision in the *Mobil Oil* case (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202).

> *[25] However, notwithstanding this finding, the panel indicated to both counsel that it wished to hear submissions on whether this panel could substitute its own decision rather than referring this matter back to the Immigration Division.*
>
> *[26] The panel referred counsel to prior decisions and received submissions at this point.*
>
> *[27] The law has been clearly set out by Madam Justice Layden-Stevenson in Qu. At paragraph 26 of this decision, Madam Justice Layden-Stevenson states that the law is that ordinarily a breach of procedural fairness voids the hearing and the resulting decision, but an exception to this rule exists.*
>
> *[28] She then states that the exception arises from Mobil Oil, where the Supreme Court of Canada explained that a breach of procedural fairness does not require a new hearing in "special circumstances" where the claim in question is otherwise "hopeless" or the outcome reached was "inevitable".*

[9] The Panel then reviewed the evidence before it. Applicant's Counsel submits that some errors were made. The Panel concluded that the Applicant's story was not plausible. At paragraphs 47 and 48 of its Reasons the Panel wrote:

> *[47] The panel has come to this conclusion based solely on the evidence of the appellant and has not relied whatsoever on the tainted documents that were in front of the Immigration Division Member at the Immigration Division hearing.*
>
> *[48] The panel is convinced that if an Immigration Division Member heard the same evidence the panel has heard during this appeal, the Immigration Division Member would come to the same conclusion that the panel has reached at this appeal. This would then lead to a further appeal in front of the Immigration and Refugee Board, with inevitably the same result.*

[10] The Panel, however, did not stop there, the ultimate conclusion apparently reached by the Panel was that there were breaches of natural justice and procedural fairness despite which, because of the Mobil Oil principle, the case is hopeless. It wrote at paragraphs 49 and 50:

> *[49] Given the plausibility concerns of the panel, it finds that despite the breach of natural justice and the breach of procedural fairness that took place at the Immigration Division hearing, the principle enunciated in Mobil Oil applies. The appellant's case is hopeless and her lack of success is inevitable.*
>
> *[50] The appeal is dismissed.*

ISSUES

[11] The essential issue in this case is how the Appeal Division is to deal with a decision of the Immigration Division once a finding has been made that a principle of natural justice had not been observed.

ANALYSIS

[12] Section 67 of the *Immigration and Refugee Protection Act (IRPA)*, S.C. 2001, c. 27 provides:

> *67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,*
>
> *(a) the decision appealed is wrong in law or fact or mixed law and fact;*
>
> *(b) a principle of natural justice has not been observed; or*
>
> *(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.*
>
> *Effect*
> *(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.*

[13] In the present circumstances we are dealing with section 67(1)(b) which provides that, to allow an appeal, the Appeal Division must find that a principle of natural justice has not been observed. In the present case this is precisely what the Appeal Division found.

[14] Once a finding has been made that a principle of natural justice has not been observed, section 67(2) provides that the Appeal Division can, if it allows the appeal, do one of two things, it can make the decision that it believes should have been made or it can refer the matter back for redetermination. In the present case the Appeal Division did something puzzling. It appears first to have made its own decision just on the evidence before it and, in so doing, arrived at the same result that the Immigration Division did. This is what the Appeal Division wrote at paragraph 47 of its reasons:

> *[47] The panel has come to this conclusion based solely on the evidence of the appellant and has not relied whatsoever on the tainted documents that were in front of the Immigration Division Member at the Immigration Division hearing.*

[15] However the Panel did not stop there, it seems to speculate that even if it did return the matter to the Immigration Division the member would reach the same result. While this may be possible it is by no means certain. Then the Panel says that if that decision were returned to the Appeal Division it again speculates as to an inevitable result. This form of prejudging what a decision maker or makers may do does not form a sound basis for refusing to return a matter. At paragraph 48 of its Reasons the Panel wrote:

> *[48] The panel is convinced that if an Immigration Division Member heard the same evidence the panel has heard during this appeal, the Immigration Division Member would come to the same conclusion that the panel has reached at this appeal. This would then lead to a further appeal in front of the Immigration and Refugee Board, with inevitably the same result.*

[16] In the final paragraphs of the Reasons, 49 and 50, the Panel found that "despite the breach of natural justice and procedural fairness" something that it called the "principle enunciated in *Mobil Oil*" applied and concluded that the case was "hopeless" and lack of success "inevitable", hence the appeal was dismissed.

> *[49] Given the plausibility concerns of the panel, it finds that despite the breach of natural justice and the breach of procedural fairness that took place at the Immigration Division hearing, the principle enunciated in Mobil Oil applies. The appellant's case is hopeless and her lack of success is inevitable.*
>
> *[50] The appeal is dismissed.*

[17] The "principle enunciated in *Mobil Oil*" referred to by the Panel is probably that set out in paragraph 28 of the Reasons:

> *[28] She then states that the exception arises from Mobil Oil, where the Supreme Court of Canada explained that a breach of procedural fairness does not require a new hearing in "special circumstances" where the claim in question is otherwise "hopeless" or the outcome reached was "inevitable".*

[18] Counsel for both parties before me agreed that *Mobil Oil* does not stand for such a proposition. *Mobil Oil* dealt with a unique set of circumstances where there was a finding of breach of procedural fairness which the Supreme Court found would have required the matter to be sent back for redetermination. However, since the matter that would have been the subject of redetermination was not the subject of the remedies sought, it was determined to be impractical to send it back. Iacobucci J. for the Court wrote:

> *Mobil Oil's application was greeted by a letter from the Chairman which stated that the application could "not be brought before the Board" because it was not "bona fide". While I agree that the Implementation Act absolutely cannot support the interpretation advocated by Mobil Oil, it goes too far to pretend*

that Mobil Oil did not deserve a full hearing, which could have been effected in writing, in respect of its novel interpretation. The Chairman's response was the product of an improper subdelegation which effectively interrupted Mobil Oil's procedural guarantees. Indeed, before this Court counsel for the Board admitted that it would have been preferable for Mobil Oil to have been given a Board hearing. If it would have been preferable, why should another result be accepted?

In light of these comments, and in the ordinary case, Mobil Oil would be entitled to a remedy responsive to the breach of fairness or natural justice which I have described. However, in light of my disposition on the cross-appeal, the remedies sought by Mobil Oil in the appeal per se are impractical. While it may seem appropriate to quash the Chairman's decision on the basis that it was the product of an improper subdelegation, it would be nonsensical to do so and to compel the Board to consider now Mobil Oil's 1990 application, since the result of the cross-appeal is that the Board would be bound in law to reject that application by the decision of this Court.

The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: Cardinal, supra. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., Harelkin v. University of Regina, [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, viz., one which has an inevitable answer.

In Administrative Law (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states:

> *A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.*

In this appeal, the distinction suggested by Professor Wade is apt.

[19] The point being made by the Supreme Court is that where a breach of natural justice or procedural fairness has been found the Court cannot refuse to send it back because it supposes that the case would be found to be futile. A rare exception exists where the remedy sought would not be relevant in the context of the matter presently before the Court.

[20] Here the remedy being sought by the Applicant is precisely the remedy affected by the lack of natural justice and procedural fairness. The Panel should not presume what the result would be nor should it prejudge the case as hopeless.

[21] In the present circumstances had the Panel stopped at paragraph 47 of its Reasons there would have been little for this Court to say. However since the Panel went on at paragraphs 48 to 50 this Court cannot treat this as mere surplusage. It must consider that the Panel was making a meaningful determination in this regard. That being the case, it is best to return the matter for redetermination. Since the Applicant only asked for redetermination by the Appeal Division that is what I will do however I recommend that the Appeal Division, it turn, return the matter to the Immigration Division.

[22] While Counsel have suggested possible certified questions, the matter is sufficiently fact specific that I will not certify a question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is allowed.
2. The matter is returned to the Immigration Appeal Division with a recommendation that it return the matter to the Immigration Division for a hearing de novo;
3. There is no question for certification;
4. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2136-10
STYLE OF CAUSE:	NAREEZA PERSAUD v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	January 11, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	January 12, 2011

APPEARANCES:

Robert Blanshay	FOR THE APPLICANT
Brad Gotkin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert Blanshay Toronto, ON	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT