Federal Court  Cour fédérale

Date: 20110504

Docket: IMM-3201-10

Citation: 2011 FC 516

BETWEEN:

JUAN JOSE BELTRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] An immigration officer who is of the opinion that a foreign national in Canada is inadmissible may prepare a report to the Minister. If the Minister shares that opinion, he may refer the matter to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing. The issue in this case is whether that admissibility hearing should be allowed to proceed given that the Minister was aware of all relevant information for 22 years. In my opinion, it would be an abuse of process and offensive to Canadians' sense of fair play to allow the matter to continue.

THE FACTS

[2] Mr. Beltran, a citizen of El Salvador, is 48 years of age. He was 23 when he came here in 1987 to seek refugee status. He claimed to fear for his life because the authorities were targeting members or former members of the Ligas Populares 28 de Febrero (LP-28), a leftist student protest group. His refugee claim was accepted the following year.

[3] His involvement with the LP-28 raised concerns at the outset. He was interviewed by the Canadian Security Intelligence Service (CSIS) in 1989. In its brief to Citizenship and Immigration Canada, it stated the view that he was not inadmissible to Canada on security grounds.

[4] After being granted refugee status, Mr. Beltran applied for permanent residence status. However, while that application was pending, he was convicted in Canada in 1991 of sexual assault, which put his application on hold. Although this conviction could have given rise to his removal, he was granted a series of ministerial permits on the condition that he be law-abiding.

[5] He obtained a pardon from the National Parole Board in 2001, and so reactivated his application for permanent resident status. In February 2002, Citizenship and Immigration Canada requested an updated application form, which he submitted in April 2002. He attended an interview with CSIS in 2002 relating to security matters.

[6] It was at this point that Citizenship and Immigration Canada took another look at Mr. Beltran. In 2003, a senior analyst, Tactical Intelligence, Security Review, Intelligence Branch,

National Headquarters of Citizenship and Immigration Canada, wrote to the manager of hearings, Citizenship and Immigration, Vancouver Enforcement Office, the purpose of which was "to advise you that we have received information…indicating that Mr. Beltran is or was a member of LP-28, an organization there are reasonable grounds to believe engages, has engaged or will engage in terrorism."

[7] This 2003 letter from the security review people is a little disingenuous in that, at that point, it had already been known for 16 years that Mr. Beltran had been a self-professed member of LP-28, and that that membership served as a basis for his successful refugee claim.

[8] As a result, six years later, in February 2009 an officer prepared a report pursuant to section 44(1) of the *Immigration and Refugee Protection Act* [*IRP*A] stating that he was of the opinion that Mr. Beltran, a foreign national, was inadmissible. The Minister's Delegate was of the opinion that the report was well-founded and so referred it to the Immigration Division of the Immigration and Refugee Protection Board for an admissibility hearing.

[9] Section 34 of *IRPA* provides that a permanent resident or a foreign national is inadmissible on security grounds for, among other things, being a member of an organization there are reasonable grounds to believe engages, has engaged, or will engage in terrorism. By way of exception, section 34(2) provides that such a person is not inadmissible if he satisfies the Minister that his presence in Canada would not be detrimental to the national interest.

[10] Mr. Beltran obtained an interlocutory stay of the admissibility hearing to allow the parties to prepare full argument on whether the admissibility hearing should be permanently stayed.

THE ISSUES

[11] Mr. Beltran submits that:

a. the continuation of the admissibility hearing would be an abuse of process. As a result of the passage of time, his right to defend himself has been compromised. Witnesses are no longer available. In addition, he could have re-organized his life and gone to the United States as one of his brothers did.

b. the continuation of the admissibility hearing would deprive him of his right to life, liberty and security of the person guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*;

c. the respondent is *functus officio* having withdrawn a Notice of Inquiry in 1992; and

d. the respondent is estopped from proceeding under the doctrine of public promissory estoppel.

[12] The remedy sought is an order by way of prohibition preventing the Minister from proceeding with the admissibility hearing, and a permanent injunction.

[13] The Minister submits that if Mr. Beltran had any right at all to come to this Court, it was to seek judicial review of his decision to refer him to an admissibility hearing. The hearing should be allowed to continue. It may well be that Mr. Beltran will not be found to be inadmissible. In addition, even if so found, he has the right to endeavour to satisfy the Minister that his presence in Canada would not be detrimental as per section 34(2) of *IRPA*. Another route available to Mr. Beltran is section 25 of *IRPA*. He may ask to remain in Canada on humanitarian and compassionate grounds. These options were discussed in *Segasayo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 173, 361 FTR 259, appeal dismissed, 2010 FCA 296, [2010] FCJ No 1343 (QL)).

[14] The Minister also submits that the process to which Mr. Beltran has been subjected has not been abusive, and would deprive him of no rights under the *Charter*. The respondent is not *functus officio* and there is no estoppel.

THE CASE AGAINST MR. BELTRAN

[15] The report under section 44(1) of *IRPA* was based on Mr. Beltran's admission that in 1982 he was a member of LP-28. The report goes on to say:

> The LP28 was one of several organizations that comprised the Farabundo Marti National Liberation Front (also known FMLN) The FMLN is an organization that there are reasonable grounds to believe is or was engaged in terrorism and/or subversion.

[16] Mr. Beltran's evidence, both when he sought refugee status and again when he was re-interviewed in 2007, is that he was a member of LP-28 for about six weeks in 1982. He delivered pamphlets and attended various public demonstrations against the authorities. He left the organization and went into hiding after his brother, who was also a member of LP-28, was murdered by the authorities.

[17] There is an objective element to membership. Whether or not Mr. Beltran meets that standard is not before me. I will assume, without deciding, he was a member, based on his admissions.

MR. BELTRAN'S HISTORY IN CANADA

[18] Mr. Beltran has never hidden his involvement with LP-28, as stated above. Indeed, it served as the basis for his refugee claim.

[19] He arrived here illegally via the United States. He was the subject of a section 27 report under the former *Immigration Act* as he was alleged to be a person who came into Canada by improper means. An immigration inquiry was opened in February 1987, but adjourned a month later because his refugee claim was deemed eligible to be determined pursuant to section 45(1) of the Act. He was then found to be a convention refugee in March 1988 and submitted an application for permanent residence two months later.

[20] In February 1989, he was interviewed by CSIS. It forwarded its brief to the Security and Intelligence Section of Citizenship and Immigration Canada. It was of the opinion that he was not inadmissible to Canada on security grounds. It is important to keep in mind that this brief was issued before Mr. Beltran's criminal conviction.

[21] Two years later, in February 1991, he was found guilty of sexual assault. He received a six-month jail sentence and three years probation .The maximum sentence for that offence was imprisonment for a term not exceeding ten years.

[22] As a result, in October 1991, he was the subject of a section 27 report under the former Act. He was alleged to be a member of an inadmissible class of persons because he had been convicted in Canada of an offence punishable by a maximum term of imprisonment of ten years or more.

[23] Because of the criminal conviction, Mr. Beltran was no longer eligible to apply for permanent resident status.

[24] In reality, the inquiry that had been adjourned in March 1987 was reactivated. It cannot be said with certainty that the original inquiry related to his involvement with LP-28. In October 1992, the "Notice of Inquiry" was withdrawn.

[25] Thereafter, he was granted a series of ministerial permits allowing him to remain in Canada. Although it was stated that the Minister did not find enough evidence to support the proposition that

he was a danger to the public, the matter then at hand appears to have been his conviction for sexual assault, not his involvement with LP-28.

[26] The only subject of discussion between Mr. Beltran and the immigration authorities throughout the rest of the 1990s was that once he was eligible to seek a pardon, and if a pardon was obtained, he could re-apply for permanent resident status. There is no indication in the record that the authorities gave thought during this time to his involvement with LP-28, although, of course, there was nothing preventing them from so doing.

[27] In December 2001, Mr. Beltran received a pardon from the National Parole Board respecting his 1991 conviction. Three months later, he was informed by Citizenship and Immigration Canada that it would continue the processing of his application for permanent residence. An updated application form was requested and submitted in April 2002.

[28] In October 2002, he was interviewed by CSIS relating to security matters. Its brief worked its way through Citizenship and Immigration officials and led to an investigation from September 2004 to March 2007 at the Vancouver Enforcement Centre. In April 2007, he was informed that he was to be interviewed by the Canada Border Services Agency. The interview took place the following month. During this interview, his involvement with LP-28 was raised.

[29] The section 44(1) report was only issued in February 2009. Thereafter, the hearing was stayed, on an interlocutory basis, by order of Mr. Justice O'Keefe, to allow full argument as to whether the admissibility hearing should be permanently stayed.

DISCUSSION

[30] The Minister's position is that Mr. Beltran is bringing the wrong application to court. He should have sought judicial review of the decision of the Minister's delegate to refer him to an admissibility hearing. Furthermore, a permanent stay should be considered a remedy of last resort. As noted above, the Immigration Division of the Immigration and Refugee Protection Board may not find him inadmissible. Even if it does, the Minister may declare him to be admissible under the exception in section 34(2) of *IRPA*, and it may be that, in any event, he might be permitted to apply for permanent residence from within Canada on humanitarian and compassionate grounds in accordance with section 25 of *IRPA*.

[31] All that is so, but Mr. Beltran would face an uncertain future for years. As to seeking judicial review of the decision to refer him to an admissibility hearing, the delays have expired, but could be extended by the Court. A judicial review of that decision would involve assessing the reasonableness thereof. The decision was *ex parte* and so the Minister's delegate did not have before him evidence from Mr. Beltran that the passage of time has prejudiced his ability to defend himself.

[32] In cases involving an abuse of process arising from delay to prosecute on the part of the state, the merits of the matter are not considered. The purpose of the doctrine was summarized by Madam Justice L'Heureux-Dubé in *R v Conway*, [1989] 1 SCR 1659 (a criminal case) at paragraph 8, as follows:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the

> prosecution of the charge. The prosecution is set aside, not on the merits (see Jewitt, supra, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (Rothman v. The Queen, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.). It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

R v Conway was referred to in the leading administrative law case of *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, at paragraph 119.

[33] I am not prepared to dismiss this application on the grounds that other remedies may be available and that as a refugee Mr. Beltran would not, on the worst-case scenario basis, be removal ready for years. Moreover, I am inclined to the view that the *Charter* is not engaged, but need not make a final determination in that regard.

[34] The issues of *functus officio*, issue estoppel, *res judicata* and legitimate expectations are all serious. The record is not sufficiently clear to allow me to make findings with respect thereto on a stand-alone basis, but they are relevant in my overall assessment of abuse of process. I am not satisfied that a final determination based on the CSIS brief had been made in the early 1990s definitely holding that Mr. Beltran’s involvement with LP-28 did not constitute a danger to the public.

ABUSE OF PROCESS

[35] The leading case on this subject is *Blencoe*, above. Mr. Blencoe, while serving as a Minister in the British Columbia Government, was accused by one of his assistants of sexual harassment. In July and August of that year, further complaints of discriminatory conduct in the form of sexual harassment were filed with the British Columbia Human Rights Commission by two other women, alleging events which occurred between March 1993 and March 1995. The hearing was scheduled for March 1998, some two and a half years after the filing of the original complaint. Mr. Blencoe was removed from Cabinet, media attention was intense, he did not stand for re-election and suffered from depression. He moved to have the complaints stayed on the basis that the Commission lost jurisdiction due to an unreasonable delay which amounted to an abuse of process and a denial of natural justice.

[36] On the facts of the case, the Supreme Court held that the *Charter* was not engaged, and that an administrative law remedy was not available to him. A state caused delay, without more, will not warrant a stay as an abuse of process at common law. There must be proof of significant prejudice.

[37] The guidance set out by the Supreme Court in *Blencoe*, above, was aptly summarized by the Alberta Court of Appeal in *Wachtler v College of Physicians and Surgeons of Alberta*, 2009 ABCA 130, [2009] 8 WWR 657. This was a disciplinary hearing. The Court held that unexplained delays of 21 months were intolerable.

[38] This is what the Court had to say about *Blencoe* at paragraph 23 of its *Wachtler* reasons:

The leading case on inordinate delay in the context of procedural fairness and abuse of process is *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307. A number of principles emerge from that decision:

* The administrative process must be conducted in a manner entirely consistent with the principles of natural justice and procedural fairness (para. 105);

* Unreasonable delay is a possible basis on which to raise questions of natural justice, procedural fairness, abuse of process and abuse of discretion (para. 106, citing *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 at 490 (Sask. C.A.));

* Delay, without more, will not warrant a stay of proceedings as an abuse of process (para. 101);

* Administrative delay may impugn the validity of the proceedings where it impairs a party's ability to answer the complaint against him or her - where memories have faded, essential witnesses are unavailable, or evidence has been lost (para. 102);

* Where the fairness of the hearing has not been compromised, delay may nevertheless amount to an abuse of process, but few lengthy delays will meet this threshold (para. 115). It must be unacceptable to the point of being so oppressive as to taint the proceedings (para. 121). The court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (para. 120). This will depend on: the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or

> waived the delay, and other circumstances (para. 122);
>
> * If the delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the [administrative] system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process (para. 115);
>
> * Determination of whether the delay is unreasonable is, in part, a relative exercise in which one compares the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada (para. 129).

[39] In the present case, even leaving aside the decade in which Mr. Beltran was unable to apply for permanent resident status because of his criminal conviction, the delay is inexcusable. The record reveals very little information available with respect to LP-28, and its alleged relationship with FMLN. Although some of the literature disclosed by the Minister and to be produced at the admissibility hearing post-dates the 1980-1991 civil war in El Salvador, it does not appear that any new information has come to light. There is nothing in the record to indicate that CSIS was wrong in its 1989 analysis. Concerns expressed by someone else 14 years later, without any explanation, and without any justification, appear to be capricious (*Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2007 FC 6, 154 ACWS (3d) 673).

[40] Although the Minister submits that Mr. Beltran’s concerns are speculative, I find that the passage of time has prejudiced his defence. The fact that it may also prejudice the Minister’s attempt to prove he is inadmissible is not the point.

[41] *Blencoe,* above, has been the subject of considerable commentary both in the Federal Court of Appeal and in this Court. However, the cases are very fact-specific and so of little assistance. In *Al Yamani v Canada (Minister of Citizenship and Immigration),* 2003 FCA 482, 60 WCB (2d) 313, the Court of Appeal was dealing with a certified question on a report written up under the old Act. The prejudice allegedly suffered was related to stress, anxiety and stigma. There is no reference to the delay inhibiting Mr. Al Yamani's ability to defend himself against the allegations that he was a member of a terrorist organization.

[42] A recent decision of this Court which dealt with *Blencoe* was the decision of Madam Justice Tremblay-Lamer in *Canada (Minister of Citizenship and Immigration) v Parekh,* 2010 FC 692, 372 FTR 196, which dealt with citizenship revocation. She pointed out that an analysis of the reasonableness of administrative delay in a particular case is factual and contextual. She said at paragraph 56:

> In these circumstances I find that the delays which have marred these proceedings are inordinate and indeed unconscionable. Nothing in the circumstances of the case justified them. They are not the consequence of the complexity of the case or of any dilatory tactics employed by the Defendants, but of bureaucratic indolence and failure to give the matter the attention it deserved given the rights and interests at stake. The evidence clearly establishes that the Defendants had repeatedly admitted to the misrepresentations and that all the information necessary to proceed with the revocation of their citizenship was already available to CIC.

In this case, Mr. Beltran misrepresented nothing, and all the information necessary to proceed with an admissibility hearing was available for more than twenty years.

[43] I accept that Mr. Beltran has been prejudiced in his ability to locate witnesses who could testify as to his involvement with LP-28 and as to its involvement with FMLN. It is simply wrong to have all this information at hand for so many years and to do nothing about it.

[44] Mr. Beltran's application is supported by his affidavit. Although he was cross-examined thereon, the cross-examination did not touch upon the following points:

a. His recollection was that LP-28 was a political organization which formed part of a broad political coalition called the "Frente Democrático Revolucionario" (FDR).

b. He says he was never connected with the FMLN, with incidentally is now part of the Government of El Salvador.

c. He has tried to locate people who would be able to testify about his involvement with the LP-28 and its political nature, without success.

[45] The documentary evidence is clear in some respects, and sparse in others. There is no doubt that atrocities were committed both by government forces and rebels during the civil war. The basis of the case is that LP-28 was one of several organizations that comprised FMLN.

[46] The Minister is relying in part on *Revolutionary and Dissident Movements*, third edition, which was published in 1991. It identifies FMLN as one of a number of main left-wing alliances.

One of its main components was said to be the People's Revolutionary Army (ERP), the armed wing of LP-28.

[47] The LP-28 was described elsewhere in the publication as being one of the "other left-wing movements", as opposed to being listed under "main left-wing alliances" or "guerrilla movements". The ERP was listed as a guerrilla movement. In April 1980 (before Mr. Beltran's involvement), the LP-28 was said to have become a member of the Revolutionary Democratic Front, while the ERP became part of FMLN.

[48] In another document, *Terrorist Group Profiles*, which was received at the Parliament of Canada's Library in 1990, the FMLN is described as an umbrella organization for five insurgent groups, including the ERP. No mention is made of LP-28.

[49] In still another report, *El Salvador - A Country Guide*, date of publication not stated, the ERP was listed as a component of the FMLN. The ERP was founded in 1971 and "was" associated with the People's League of February 28, LP-28. [My emphasis.]

[50] There is also reference to FDR. In *Revolutionary and Dissident Movements*, above, the FDR was identified as the FMLN's political wing. In a separate entry, the FDR was identified as the political arm of FMLN and comprised a number of organizations, including the LP-28. Thus, that report takes LP-28 one step further away from the FMLN.

[51] The case against Mr. Beltran as a member of LP-28 is based on the fact that the group, at one point, was associated with ERP, which in turn was part of FMLN. Had this matter been pursued 20 years ago, Mr. Beltran would have been in a much better position to lead evidence both as to his involvement with LP-28 and its relationship with other organizations (*e.g.*, when they were created and when they were terminated).

[52] There is no suggestion that Mr. Beltran's involvement was any more than he said it was, which was distributing pamphlets and attending protest demonstrations for six weeks in 1982. It has to be established that LP-28 was a terrorist organization.

[53] In my opinion, it is completely wrong for the Government to keep information up its sleeve for 20 years and to re-assess the same information that CSIS analyzed in 1989.

[54] It is a fundamental principle of natural justice and the rule of law under which we live that a person be given a fair opportunity to answer the case against him. That opportunity has been lost. It was abusive to issue an opinion in 2009 that Mr. Beltran is inadmissible considering that the authorities had been aware of his situation for 22 years.

[55] To quote from *Blencoe*, above, at paragraph 120:

> […] the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted. […]

[56] Mr. Beltran has been badly treated. In 2007, his application for permanent residence was denied because of his criminal record. That decision was clearly wrong in the light of the pardon he had obtained in 2001. Then two years later, he is written up because of his involvement with the LP-28. No one should be treated this way by our authorities.

[57] Counsel for Mr. Beltran is directed, pursuant to rule 394 of the *Federal Courts Rules*, to prepare for endorsement a draft order to implement these reasons, approved as to form and content by the respondent, or failing that, to bring on a motion for judgment in writing in accordance with rule 369. The said draft order, or motion, as the case may be, is to be filed no later than 13 May 2011.

[58] Within the same delay, the Minister may propose a serious question of general importance which may support an appeal. If such a question is proposed, Mr. Beltran shall have one week thereafter to respond.

[59] It was agreed during the hearing that the Minister of interest in this case is the Minister of Citizenship and Immigration, not the original respondent, the Minister of Public Safety. The style of cause was ordered changed and is reflected in these reasons.

"Sean Harrington"
Judge

Ottawa, Ontario
May 4, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3201-10
STYLE OF CAUSE:	JUAN JOSE BELTRAN v MCI
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