Federal Court  Cour fédérale

Date: 20140708

Docket: IMM-12692-12

Citation: 2014 FC 667

Ottawa, Ontario, July 8, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ALEXANDRA VAKULENKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the sole issue for disposition is whether the duty of fairness owed to the applicant has been breached by the Refugee Protection Division [RPD] in the treatment given to the concerns about the interpretation made available to the applicant at the hearing.

[2] The applicant has raised some other issues but they are, in my view, devoid of any merit. There was not in this case a reasonable apprehension of bias: on the contrary the RPD sought to be fair to the applicant, including attempting to satisfy concerns about the quality of the translation when the matter was raised at the hearing. Similarly the alleged failure to consider the so-called "gender guidelines", issued by the Chairperson of the Immigration and Refugee Board of Canada pursuant to paragraph 159(1)(h) of the IRPA, did not have an air of reality. Not only no such failure was shown, but it is not clear whether such failure could constitute an error in law giving rise to a reviewable error. Guidelines are issued for the purpose of assisting members in carrying out their duties. Without more specificity, the argument around the use of guidelines fails.

[3] The central issue in this case was the credibility of the applicant. She was a woman of 73 years of age at the time the application for judicial review was made. She came to Canada from her country of nationality, Russia, on a temporary resident visa. It was not completely clear what her purpose was in coming to Canada: one purpose was to attend a wedding; the other was an attempt to get away from an abusive partner and to live with her relatives in Canada.

[4] It appears that her stepson considered ways to allow her to stay in Canada. She eventually made an application based on sections 96 and 97 of the IRPA. It is from the refusal of the RPD to grant that application that judicial review is sought.

[5] The RPD found that a number of credibility issues rendered her application unsupportable (Reasons, at para 18). However, the applicant states that difficulties with the

interpretation before the RPD generated confusion that was held against the applicant as affecting her credibility.

[6] The matter of the quality of interpretation was raised at the hearing by the applicant's granddaughter. A discussion ensued between counsel for the applicant (who is not counsel for the applicant on the judicial review application) and the RPD panel. The upshot of the discussion was that a "spot audit" would be done for the purpose of ascertaining the quality of the interpretation.

[7] As I understand it, a spot audit consists of increments of testimonies, of a few minutes each, picked at random, and reviewed by another interpreter with a view to rating the interpretation. In this case, the RPD chose to require such a spot audit.

[8] However, once it had received the results of the spot audit, the RPD also chose to satisfy itself that the interpretation was adequate in the circumstances and proceeded to decide against the applicant without seeking observations or comments from her or her counsel. In other words, the RPD never shared with the applicant the results of the spot audit before making its decision on the merits, including findings on the credibility of the applicant. The applicant was not heard by the decision-maker on the results of the audit it was agreed on at the hearing.

[9] Since the interpretation was deemed adequate by the decision-maker, it was not necessary to consider further if some of the credibility issues were due to confusion created by the interpretation.

[10] In my view, there is one determinative issue here and it relates to procedural fairness, which carries a standard of review of correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392). As put by Bastarache and Lebel JJ in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

> [50] … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[11] The issue is whether or not it was incumbent on the RPD to allow the applicant to comment on the results of the audit before a decision was to be made on the adequacy of the audit. Was the RPD right in finding the interpretation to be adequate without having afforded the applicant an opportunity to comment on the audit and the conclusion that it was adequate?

[12] The Crown was largely silent on the issues raised in this judicial review application. The respondent seems to argue that the interpretation was adequate. But nothing is offered on the right to participate in the hearing and to be offered an opportunity to present observations on the audit that was obviously deemed to be necessary in view of the allegation that the translation was deficient, which could have had an impact on the ability of the applicant to testify credibly.

[13] The law on interpretation is not in dispute. Following in the footsteps of the Supreme Court of Canada in *R v Tran*, [1994] 2 SCR 951 [*Tran*], the Federal Court of Appeal confirmed in *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4

FC 85 [*Mohammadian*], that the same framework as described in *Tran* applies in refugee cases. Thus, "the interpretation provided to applicants before the Refugee Division must be continuous, precise, competent, impartial and contemporaneous." Furthermore, the Court of Appeal agreed with the trial judge in that case that no proof of actual prejudice is required in order to obtain relief. Specifically, the Court endorsed fully in the context of refugee claims this passage of *Tran*: "it would be wrong to introduce into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights."

[14] However, it is also acknowledged that the standard of perfection is not the one to be attained. The Supreme Court spoke in terms of "linguistic understanding" and the standard was adopted in refugee cases. Some have encapsulated the standard in one word: adequate (*Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161 [*Singh*]).

[15] Once the quality of the interpretation has been raised at the hearing, which was not late and is in due course according to *Mohammadian*, *supra*, and it is decided that an audit would assist in determining whether it meets the standard of linguistic understanding, the question is whether the audit ought to be shared before a decision can be made. It was certainly shared in *Singh*, *supra*, and, in my view, it is a requirement of procedural fairness that the applicant be given an opportunity to comment. That was not done in this case as the results of the audit were not made available to the applicant in order to afford an opportunity to be heard.

[16] The content of the duty of fairness will vary in any administrative decision-making situation: the requirements have to vary in view of the diversity of administrative action. It can be minimal, as in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, or it may be much more extensive. Brown and Evans, in *Judicial Review of Administrative Action in Canada* (Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto, On: Carswell, 2013) (loose-leaf updated 2014, release 1)) identify what they call "a common core to the participatory rights." They wrote at paragraph 7:3110:

> Despite the diversity of content, however, it is possible to identify a common core to the participatory rights that the duty of fairness requires. Its principal purpose is to provide a meaningful opportunity for those interested to bring evidence and arguments that are relevant to the decision to be made to the attention of the decision-maker, and correlatively, to ensure that the decision-maker fairly and impartially considers them.

[17] It is of course in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], that the Court enumerates five factors in determining the content of the duty of fairness. They are usefully summarized in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650 :

> 5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

[18] In my view, the requirements of procedural fairness in a case like this fall closer to the judicial end of the range than the legislative one. As put by L'Heureux-Dubé J in *Baker*, "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making." (para 23)

[19] Here, the RPD conducts hearings, makes findings of fact, applies legislation and the facts to that legislation in cases where the stakes are vey high for the applicants. It is evidently important that they be able to participate fully in hearings that may well determine their fate. Thus the law on interpretation at those hearings is the same as that in criminal trials, that is it must be continuous, precise, competent, impartial and contemporaneous.

[20] Once it has been determined that there is an issue around the quality of the interpretation requiring some verification, the process has to be completed by allowing the applicant to comment on the results of the audit. Such would be a reasonable expectation of someone directly affected by the interpretation. The right to participate fully in the hearing of that importance carries the right to see the results of the audit and to be able to comment on them.

[21] Furthermore, in the case at hand, the quality of interpretation was somewhat equivocal. As acknowledged by the audit itself, the interpretation was less than perfect.

[22] The respondent's argument that the audit shows that the interpretation was adequate seems to me to miss the point. The adequacy of interpretation issue is not reached if procedural

fairness is not itself adequate. Administrative tribunals are owed a large measure of deference, through the standard of review of reasonableness, when deciding the merits of cases. However, the law requires that they follow the rules of procedural fairness in the process leading to that decision on the merits. As I see it, procedural fairness is a condition precedent to a valid consideration of the merits of the case.

[23] Persons affected by those decisions have the right to participate. Brown and Evans, *supra*, put it this way: "In particular, many public decision-makers are under a legal duty to afford to interested persons a fair opportunity to participate in the decision-making process before any action is taken that is detrimental to their interests." (para 7:1100) Once the quality of the interpretation is considered sufficiently doubtful that an audit is ordered, the fairness of the process commands that it include the opportunity to comment on the results. The participation, which "tend[s] to enhance the acceptability of administrative action" (Brown and Evans, para 7:1212) is at the heart of the duty to act fairly (see *Baker*, *supra*, at page 831; also *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3). If the duty to act fairly has been deficient, one never reaches the merits of the case which is reviewable on a reasonableness standard.

[24] As a result, the application for judicial review is granted. The matter is sent back for redetermination by a differently constituted panel in view of the fact that the panel, in this case, had already determined the merits of the claim in spite of the procedural fairness infringement. The acceptability of administrative action comes at that price. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is sent back for redetermination by a differently constituted panel. There is no question for certification.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12692-12
STYLE OF CAUSE:	ALEXANDRA VAKULENKO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 25, 2014
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 8, 2014

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