Federal Court  Cour fédérale

Date: 20150109

Docket: IMM-5138-13

Citation: 2015 FC 32

Ottawa, Ontario, January 9, 2015

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ALASSAN WILLIAMS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Introduction

[1] The applicant brings a motion appealing the order of Prothonotary Morneau, dated November 5, 2014, which dismissed his motion for an order permitting him to file new evidence by way of a supplementary affidavit, namely an email from the Chief Prosecutor of the Sierra Leone Special Court [SLSC], as well as a supplementary memorandum in conjunction with and based on the supplementary affidavit of new evidence.

II. Facts

[2] On April 21, 2009, a report was prepared pursuant to section 44(1) of the Act, which concluded that the applicant was inadmissible to Canada under paragraph 35(1)(*a*) of the Act based on his involvement with the Armed Forces Revolutionary Council [AFRC] and the Revolutionary United Front of Sierra Leone [RUF].

[3] On January 15, 2010, the Immigration Division [ID] concluded that there were no reasonable grounds to believe that the application was inadmissible under paragraph 35(1)(*a*) of the Act. During the hearing, the ID heard a testimony from the applicant and from Mr. Robert Hotson, former Senior Criminal Investigator at the Office of the Prosecutor for the SLSC.

[4] The applicant's counsel attempted to contact the SLSC on behalf of his client, requesting information on the applicant and his involvement with the AFRC and the RUF. This request was refused on October 12, 2012, the SLSC stating that it does not provide information to individuals.

[5] The respondent appealed the ID decision to the IAD. On July 25, 2013, the IAD concluded that the applicant had been involved with both the AFRC and the RUF between 1997 and 2001 and was therefore complicit in the crimes against humanity that were committed by those organizations. A deportation order was issued against the applicant.

[6] On August 2, 2013, the applicant applied for leave and for judicial review of the IAD's decision, based primarily on its admission and reliance upon Mr. Hotson's evidence. The applicant takes particular issue with the information Mr. Hotson obtained from an anonymous source identifying a photograph of the applicant as "Andrew" (a former member of the AFRC and the RUF) and the fact that this information was not verified properly by the SLSC Office of the Prosecutor [OTP]. He also challenged the IAD's conclusions on his identity documents, possession of photos of atrocities, and the identification of a person in military attire in some of the photographs.

[7] The applicant's counsel contacted the SLSC on August 21, 2013 but again, no information was forthcoming.

[8] On September 27, 2013, the respondent received an email from Ms. Brenda Hollis, the SLSC Chief Prosecutor. The email stated, among other things, that: the OTP was unable to confirm the identity of the person in the photo nor that of the anonymous source, the OTP was unable to confirm that the identification of the person in the photo was corroborated by other sources or by independent investigation, that the applicant's identity documents had been verified as authentic, and that it was possible that photos of atrocities had been circulated to the general public.

[9] On October 7, 2013, the applicant's counsel was advised by Ms. Hollis that she had transmitted information about the applicant to the Canadian authorities and that, if he wished to obtain that information, he would have to go through the Canadian government because the

SLSC does not deal with individuals. The applicant's counsel requested clarification and on October 31, 2013, Ms. Hollis advised that the information sent to the Canadian authorities "was an explanation that [they] were unable to confirm some of the information given by a witness."

[10] For the 9 months after he was first contacted by Ms. Hollis, the applicant made numerous attempts to obtain the information disclosed by Ms. Hollis to the respondent. This included making disclosure requests directly to the respondent's counsel and the CBSA representative, submitting access to information requests under the *Privacy Act*, RSC 1985, c P-21 [the Privacy Act] and filing complaints with the Privacy Commissioner of Canada.

[11] The applicant obtained directions from the Federal Court placing the court file in abeyance and granting extensions of time in order to allow the applicant to receive the information through his access to information requests and complaints to the Privacy Commissioner. The respondent objected to these extensions and, as noted by Justice Phelan in his order of June 4, 2013, was "careful not to claim that it does not know of the documents or not have possession of them or the information contained therein or whether such documents are relevant or admissible."

[12] The applicant filed a motion for disclosure on June 25, 2014. This appears to have initiated some further communications between the parties and the respondent made some documents available to the applicant in early July 2014. The applicant countered that these documents did not respond to the motion for disclosure and the Respondent later released the email from Ms. Hollis to the applicant ["the email"]. The applicant abandoned the motion for

disclosure on September 11, 2014, reserving the right to file a motion for permission to file the information.

[13] The applicant served and filed the motion to file new evidence which underlies the present appeal on September 24, 2014.

III. Impugned Decision

[14] Prothonotary Morneau concluded that the email was not and could not have been before the IAD. On this basis, he concluded that the email was inadmissible in a judicial review proceeding. He also stated that the Court could not consider that there had been a breach of procedural fairness on the part of the IAD. I do not interpret this latter conclusion as denying jurisdiction to consider a breach of procedural fairness, but rather that the Prothonotary did not find any unfairness in refusing to permit additional evidence to be introduced for the purposes of the judicial review application.

IV. Issues

[15] The following issues arise in the present matter:

1. Does the Federal Court have jurisdiction to entertain this appeal?

2. Did the Prothonotary base his decision on an incorrect principle by concluding that he could not consider that there had been a breach of procedural fairness on the part of the IAD in relation to the applicant's request to admit fresh evidence?

V. Standard of Review

[16] The standard of review applicable to a Federal Court judge considering a discretionary order of a prothonotary is that the order should not be disturbed unless: (a) the prothonotary made an error of law, including the exercise of his or her discretion based upon a wrong principle or upon a misapprehension of the facts, or (b) the order raises a question that is vital to the final issue of the case (*Merck & Co. v Apotex Inc.*, 2003 FCA 488, [2004] 2 FCR 459; *Canada v Aqua-Gem Investments Ltd*., [1993] 2 FC 425 at 462-63).

VI. Analysis

A. *Jurisdiction*

[17] The respondent submits that the Federal Court lacks jurisdiction to hear the motion because, as an appeal of an interlocutory judgment, it is barred by paragraph 72(2)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act]. Section 72(2) of the Act reads as follows:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
72. (2) The following provisions govern an application under subsection (1):	**72.** (2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(a) the application may not be made until any right of appeal that may be provided by this	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

Act is exhausted;	
(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;	b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;
(c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;	c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;
(d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and	d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;
(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.	e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.
[Emphasis added.]	[Je souligne.]

[18] The applicant contends that his motion is brought pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106. In this regard, he cites the decisions of *Spring v Canada (Minister of Citizenship and Immigration)*, 2014 FC 41, 243 ACWS (3d) 936 and *Douze v Canada (Minister*

of Citizenship and Immigration), 2010 FC 1086, 375 FTR 195. However, the issue of the court's jurisdiction was not raised in either case. Moreover, the Federal Court of Appeal stipulated at paragraph 16 of *HD Mining International Ltd. v Construction and Specialized Worker Union, Local 1611*, 2012 FCA 327, 442 NR 325 that preliminary procedural questions could not be excluded from the category of matters arising under IRPA by Rule 51, because to do so would strip section 72 of IRPA of its purpose. If paragraph 72(2)(*e*) applies to prothonotaries, then paragraph 72(2)(*e*) would similarly exclude Rule 51.

[19] The applicant further argues that the true interpretation of paragraph 72(2)(*e*) of the Act was to prohibit appeals of Federal Court interlocutory decisions and was not intended to apply to appeals of a decision of a prothonotary to a judge of the Federal Court. Justice Roy, in his order of November 20, 2014 delaying the disposal of the applicant's leave application until disposition of the appeal of Prothonotary Morneau's decision, commented on the obvious ambiguity of the concluding words of the provision underlined above. Justice Roy also noted that the Federal Court of Appeal decision in *Froom v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 331, 312 NR 282 [*Froom*] involved in interlocutory judgment of the judge of this Court which clearly is barred by the provision. I admit to having some empathy for the applicant's argument based on the wording of the provision.

[20] However, a careful reading of the *Froom* decision demonstrates that it cited and relied upon the initial Federal Court decision in *Yogalingam v Canada (Minister of Citizenship and Immigration)*, (2003) 233 FTR 74, 122 ACWS (3d) 750 [*Yogalingam*]. In that case, Justice O'Keefe interpreted paragraph 72(2)(e) as barring the Federal Court from jurisdiction in respect

of a decision of a prothonotary dismissing an application for an extension of time to file an application record. In addition, several cases since *Yogalingam*, *supra* and *Froom*, *supra* have ruled that an interlocutory order rendered by a prothonotary cannot be appealed (see for example *Lovemore v Canada (Minister of Citizenship and Immigration)*, 2013 FC 171 at para 2, 226 ACWS (3d) 918; *Patel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 670 at para 7, 205 ACWS (3d) 1060; *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1331 at para 3, 175 ACWS (3d) 14).

B. *Procedural Fairness*

[21] Nonetheless, the respondent has acknowledged that the prohibition against appealing a prothonotary's order is permitted "when the decision-maker refused to exercise his discretion and/or when there is a reasonable apprehension of bias." The applicant argues that this exemption should apply to the circumstances of this matter where the evidence sought to be introduced demonstrates or suggests that a key witness misled the applicant and the IAD in his evidence, thereby constituting a breach of procedural fairness.

[22] I have two main problems with the Prothonotary's decision. First, there appears to have been a failure to consider the significance of the new evidence which suggests that the IAD was misled on the crucial evidence that determined the case. Second, I think that some consideration had to be given to the reason that the email was not before the IAD, despite the applicant's efforts to obtain it before the decision.

[23] I find there is some foundation and logic for the applicant's argument on unfairness as a ground to admit fresh evidence. It has been a long-standing principle in administrative law "that fresh evidence is admissible on a judicial review where the proceedings are tainted by misconduct on the part of the Minister, or a member of the inferior tribunal or the parties before it to prove the particular misconduct" (see *R v West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Ltd*, [1973] 3 All ER 289 at 298, 301 [emphasis added] [*West Sussex*]). *West Sussex* was also cited in *R v Secretary of State for the Environment and another, ex parte Powis*, [1981] 1 All ER 788, wherein the Court of Appeal in England considered the categories of fresh evidence admissible on judicial review.

[24] A *prima facie* conclusion that there is no foundation for inculpatory statements made against a vulnerable party by an investigator of the alleged crimes smacks strongly of unfairness. The *West Sussex* decision placed it on the same plane as misconduct by a member of the tribunal, which generally falls into the same category as bias of the decision-maker in terms of its unfairness towards the adversely affected party.

[25] The fresh evidence suggests some misconduct and certainly that there was a lack of foundation for critical hearsay evidence relied upon by the IAD to find the applicant inadmissible. It is obvious that such a finding represents an extremely serious consequence for the applicant, who has no other way of defending himself from such a serious allegation except by verifying evidence in a foreign country. Having gone to that effort and procuring evidence which appears to lay bare the lack of foundation for the IAD's decision, the interests of justice

strongly support admitting the evidence so as to permit the applicant to clear his name and set the record straight.

[26] The significance of the evidence sought to be admitted is apparent from the extraordinary measures adopted by the respondent to prevent the applicant from obtaining a copy of the communications from the Office of the Prosecutor for the Sierra Leone Special Court and from placing that information before the Court.

[27] The respondent obtained the documents after the applicant had requested them from the Office of the Prosecutor, yet failed to disclose their receipt to the applicant. When the applicant learned that the Prosecutor's response was in the respondent's possession, the respondent refused to produce the documents as requested. Thereafter, the respondent forced the applicant's counsel to undertake a myriad of different steps to procure the documents, no doubt at considerable expense to his client. The respondent refused to consent to a series of extensions of time to allow the applicant to obtain a copy of the documents, instead vigorously opposing each one. The applicant was thereafter required to apply for disclosure of the documents under the *Privacy Act*, RSC 1985, c P-21only to receive the documents with the key passages redacted.

[28] Ultimately, when faced with motions before this Court to produce the relevant documents, the respondent first agreed to provide the documents, with a request that the motion be abandoned. However, the respondent once again withheld the key contents of the materials. When it was finally clear that the applicant was proceeding with the motion and would undoubtedly be successful, with what should have been a very healthy cost award on account of

the respondent's blatant stonewalling, the respondent simply handed the information over to the applicant. In the circumstances, I conclude that the respondent's efforts to prevent the applicant from obtaining this evidence are a reflection of the importance that the respondent attaches to the materials in the leave application. It also goes without saying that I cannot condone such "sharp practice" by officers of the Attorney General.

[29] On the basis of the foregoing, I conclude that the Prothonotary erred in his conclusion that no unfairness occurred by failing to consider the circumstances of the absence of the key evidence which underpinned the IAD's finding that the applicant is inadmissible. The Prothonotary was required to consider the unfairness to the applicant that would result from refusing to allow additional evidence that strongly suggests that the IAD was misled on the key factual conclusion underpinning its decision, which was not available to the applicant due to circumstances beyond his control and despite his diligent and reasonable efforts to obtain it.

VII. Conclusion

[30] The appeal is therefore allowed, the order of the prothonotary quashed and an order granted permitting the applicant to file new evidence, namely an email from the Chief Prosecutor of the Special Court in Sierra Leone, by way of a supplementary affidavit and a supplementary memorandum based on and in conjunction with the supplementary affidavit of new evidence.

[31] In addition, costs are awarded the applicant on the appeal and original motion, which I fix at $1,500.

ORDER

THIS COURT ORDERS that:

1. The order of Prothonotary Morneau, dated November 5, 2014, dismissing the applicant's motion is quashed;

2. The applicant may file by way of a supplementary affidavit new evidence, namely an email from the Chief Prosecutor of the Special Court in Sierra Leone, as well as a supplementary memorandum based on and in conjunction with the supplementary affidavit of new evidence; and

3. The respondent shall pay the applicant $1500 in costs.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5138-13
STYLE OF CAUSE:	ALASSAN WILLIAMS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
MOTION IN WRITING PURSUANT TO RULE 369:	OTTAWA, ONTARIO
ORDER AND REASONS:	ANNIS J.
DATED:	JANUARY 9, 2015

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