Federal Court  Cour fédérale

Date: 20181101

Docket: IMM-954-18

Citation: 2018 FC 1101

Toronto, Ontario, November 1, 2018

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ELIEZER COHEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The present Application is a judicial review of a decision of the Refugee Protection Division (RPD) dated December 19, 2017 (the Final Decision) which nullified the Applicant's status as a Convention Refugee. By consent of Counsel, and by my agreement at the opening of oral argument, also under review are two interlocutory decisions leading to the Final Decision: one dealing with the application of the *Refugee Protection Division Rules*, SOR/2012-256 (the *Rules*), and the other dealing with abuse of process issues. Only the former, coined in the

arguments as the First Interlocutory Decision (First Decision) is addressed in the present reasons with respect to its impact on the Final Decision.

I. A Precis of the History of the Present Litigation

[2] By a decision dated May 19, 2004, the RPD accepted the Applicant as a Convention Refugee. On February 27, 2007, the Respondent Minister (the Minister) made an application to vacate the Applicant's refugee status on the basis of misrepresentation. On November 3, 2009, the application was withdrawn for the reason that the Minister was "not able to establish an argument on which to base her case for vacation and is unable to determine whether there remains sufficient evidence to consider the original hearing to justify his refugee protection" (Final Decision, para. 5).

[3] In April 2010, the Canadian Border Services conducted an interview with the Applicant. Based on evidence obtained in the interview, on August 1, 2013, the Minister filed a subsequent application to vacate the Applicant's refugee status pursuant to Rule 64 of the *Rules*. By the First Decision, the RPD decided to allow the application to proceed.

[4] In the First Decision, the RPD found that the Minister's vacation application filed pursuant to Rule 64 as a "new" application was filed in error. The RPD decided that the application should have been filed pursuant to Rule 61(1) as a reinstatement of the 2009 withdrawn application to vacate. Nevertheless, the RPD permitted the new application to proceed as a reinstatement application to a vacation hearing resulting in the Final Decision presently under review.

[5] A primary concern of the Applicant in the present Application is that the First Decision was delivered without regard to apparently mandatory procedural provisions in the *Rules*. Thus, the focus of the present reasons is directed to this concern.

II. The Relevant Rules

[6] Rules 50 and 61(2) are at the heart of the Applicant's challenge to the First Decision. The provisions are quoted in their entirety in the Appendix to these reasons. For the purpose of evaluating the Applicant's argument, the following quotation is sufficient:

50 (1) Unless these Rules provide otherwise, an application must be made in writing, without delay, and must be received by the Division no later than 10 days before the date fixed for the next proceeding.	50 (1) Sauf indication contraire des présentes règles, toute demande est faite par écrit, sans délai, et doit être reçue par la Section au plus tard dix jours avant la date fixée pour la prochaine procédure.
(2) The Division must not allow a party to make an application orally at a proceeding unless the party, with reasonable effort, could not have made a written application before the proceeding.	(2) La Section ne peut autoriser que la demande soit faite oralement pendant une procédure que si la partie a été dans l'impossibilité, malgré des efforts raisonnables, de le faire par écrit avant la procédure.
(3) Unless these Rules provide otherwise, in a written application, the party must	(3) Dans sa demande écrite, sauf indication contraire des présentes règles, la partie :
(a) state the decision the party wants the Division to make;	a) énonce la décision recherchée;
(b) give reasons why the Division should make that decision;	b) énonce les motifs pour lesquels la Section devrait rendre

and	cette décision;
[…]	[…]
(4) Unless these Rules provide otherwise, any evidence that the party wants the Division to consider with a written application must be given in an affidavit or statutory declaration that accompanies the application.	(4) Sauf indication contraire des présentes règles, la partie énonce dans un affidavit ou une déclaration solennelle qu'elle joint à sa demande écrite tout élément de preuve qu'elle veut soumettre à l'examen de la Section
[…]	[…]
61 (1) The Minister may make an application to the Division to reinstate an application to vacate or to cease refugee protection that was withdrawn.	61 (1) Le ministre peut demander à la Section de rétablir une demande d'annulation ou de constat de perte de l'asile qu'il avait retirée.
(2) The Minister must make the application in accordance with rule 50.	(2) Le ministre fait sa demande conformément à la règle 50.
[Emphasis added]	[Je souligne]

III. The Content of the Decision and the Arguments

[7] Paragraphs 14 to 18 of the First Decision read as follows:

> The Refugee Protection Division Rules provides an overview of applications and how they should be made at Rule 49 and 50. Rule 61 specifically applies to the reinstatement of vacation or cessation applications that were previously withdrawn by the Minister. Rule 61 reads as follows:
>
> 1) The Minister may make an application to the Division to reinstate an application to vacate or to cease refugee protection that was withdrawn.
>
> 2) The Minister must make the application in accordance with rule 50.

3) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application.

4) In deciding the application, the Division must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay.

5) If the Minister made a previous application to reinstate that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

In his submissions, the Minister requests that the panel reinstate the 2013 vacation application under Rule 61 of the Refugee Protection Division Rules. The panel finds that the Minister is entitled to make such an application at this time, as Rule 61 does not include a timetable as to when such an application must be filed, only that it must be made in a timely manner. The panel agrees that the relevant sections of Rule 61 that apply in this case are subsections (3) and (4), respectively. Subsection (5) does not apply due to the fact that there has been no previous reinstatement application.

In relation to subsection (3), the panel finds that there has been no failure to observe a principle of natural justice in this issue. The Minister brought forward a vacation application in 2007, and requested a withdrawal of that application in 2009. That withdrawal was granted and written reasons were provided. The panel finds that the Minister was provided with ample procedural fairness in relation to the application and it was the Minister who initiated both the application and the withdrawal, they were affected by no other party.

On the issue of the interest of justice, the panel takes a different view than that of counsel for the Respondent. Within the framework of the *Immigration and Refugee Protection Act*, the Refugee Protection Division is tasked with the important work of determining who meets the definition of Convention Refugee or Person in Need of Protection. Critical in that determination is the assessment of an individual's credibility. The panel relies upon both documentary evidence and oral testimony provided by the

> claimant to determine the credibility of their story and to assess whether there is the possibility that an individual does not meet the definition required due to exclusionary issues, such as criminality. It is of the upmost importance that a claimant provide transparent information throughout the proceedings to ensure the integrity of the Canadian refugee protection system is upheld and that there is no err in the administration of the *Immigration and Refugee Protection Act*.
>
> In this case, the panel finds that it is in the interest of justice for the application to be reinstated under Rule 61 and the vacation application to proceed. Although we do not have the benefit of a transcript of the first proceeding, the panel has reviewed the original Member's decision as well as Mr. Cohen's documents that formed the record for his refugee determination. The Member makes no mention of any additional criminality or time of incarceration that Mr. Cohen served, relating to drug offences. What the panel does have before it are documents relating to the claim for the initial claim for protection. After a preliminary review of those documents, it appears they show that information relating to a material fact was withheld or misrepresented.

A. *The Applicant's Argument*

[8] The Applicant's argument with respect to the First Decision is framed as a jurisdictional issue. That is, the RPD had no jurisdiction to proceed to make findings on the reinstatement application, including that it was decided in the interests of justice, without first adhering to the fairness provisions expressed in Rule 61(2) and Rule 50. The Applicant's main concern is that the RPD did not give notice that it would consider a reinstatement application despite the fact that one was not filed.

B. *The Minister's Argument*

[9] The Minister provides the following statements in response to the Applicant's argument:

> As noted above, subs. 162(2) of the *IRPA* requires that each division of the IRB deal with all proceedings before it as

> informally and quickly as the circumstances and the considerations of fairness and natural justice permit.
>
> Secondly, Rule 70 of the *Refugee Protection Division Rules* specifically gives the Division the power to change a requirement of a rule, excuse a person from a requirement of a rule, and act on its own initiative without a party having to make an application or request to the Division. There are no exceptions to this Rule and thus Rule 61 and the specifications of how an application is normally made under that Rule are clearly within the jurisdiction of the Panel to waive. The Federal Court of Appeal in *Thamotharem* and this Court in the cases cited below have affirmed that the IRB is master of its own procedure.
>
> *Thamotharem v. Canada* (MCI), 2007 FCA 198 at para. 104
> *Vieira v. Canada (MCI)*, 2012 FC 838 at para. 14
> *Julien v. Canada (MPSEP)*, 2015 FC 150 at para. 16
> *Koky v. Canada (MCI)*, 2015 FC 562 at para. 38
>
> (Respondent's Further Memorandum of Argument, paras. 29 and 30)

[10] As noted, the Minister relies on the statement in *Thamotharen* at para. 104:

> [T]he differences in the legal characteristics of statutory rules of procedure and Guideline 7 should not be overstated. Rules of procedure commonly permit those to whom they are directed to depart from them in the interests of justice and efficiency. Thus, rule 69 of the Refugee Protection Division Rules permits a member to change a requirement of a rule or excuse a person from it, and to extend or shorten a time period. Failure to comply with a requirement of the Rules does not make a proceeding invalid: rule 70. [Emphasis added]

IV. Conclusion on the Arguments

[11] There is no debate in the arguments presented that, as a well recognized principle, the RPD is master of its own process; the outstanding issue relates to the application of the principle. In the content of the First Decision as quoted above, the apparently mandatory statements in Rule

61(2) and Rule 50 were known to the RPD but were not specifically addressed. There is no cogent evidence as to "why". With respect to this fact, no direct substantive comment is advanced by the Minister.

[12] The Minister's reference to Rule 70 in the last sentence of the quotation from *Thamotharen* is beside the point. The sentence is somewhat ambiguous, but fairly read in context it only appears to relate to the authority of the RPD to act to change the requirement of a Rule. That is, the failure to follow a Rule once changed does not render a proceeding invalid.

[13] In any event, in *Thamotharen* the Federal Court of Appeal only spoke about Rule 70 in the context of whether a Guideline of the RPD was an unlawful fetter of discretion. The decision did not express a ruling on the limits of when and how Rule 70 can be applied.

[14] The page reference in two of the other decisions relied on by the Minister make it clear that there are fairness limits to the application of Rule 70. In *Vieira v Canada (MCI),* Justice McTavish states "[t]he Refugee Protection Division of the Immigration of Refugee Board is a specialized tribunal and the master of its own procedure. As long as it respects the rules of fairness, the Board may control its own process". And in *Julien v Canada (MPSEP),* in the context of the Immigration Division, Justice Shore states "Administrative tribunals, such as the ID, are "masters of their own house" in that they control their own procedures, within the limits of the law and their compliance with the rules of fairness and natural justice". [Emphasis added in both quotations]

[15] It is obvious that engaging Rule 70 to amend the *Rules*, the RPD is required to take action:

Powers of Division	**Pouvoirs de la Section**
70 The Division may, after giving the parties notice and an opportunity to object,	70 La Section peut, si elle en avise au préalable les parties et leur donne la possibilité de s'opposer :
(a) act on its own initiative, without a party having to make an application or request to the Division;	a) agir de sa propre initiative sans qu'une partie ait à lui présenter une demande;
(b) change a requirement of a rule;	b) modifier l'exigence d'une règle;
(c) excuse a person from a requirement of a rule; and	c) permettre à une personne de ne pas suivre une règle;
(d) extend a time limit, before or after the time limit has expired, or shorten it if the time limit has not expired.	d) proroger un délai avant ou après son expiration ou l'abréger avant son expiration.
[Emphasis added]	[Je souligne]

[16] The RPD took no action pursuant to Rule 70 in the course of the decision-making process with respect to the First Decision. In the reasons for the First Decision, the RPD did not address the requirements under Rule 61(2) and Rule 50 for filing a reinstatement Application. Nor did the RPD provide notice to the Applicant that it was considering waiving these requirements under Rule 70. Therefore, since Rule 70 was not engaged in rendering the First Decision, it certainly cannot be engaged simply by argument at the stage of judicial review.

V. The Result

[17] I find that the failure of the Minister to tender the application to vacate in accordance with Rule 61(2) and Rule 50, and the failure of the RPD to identify the Minister's failure, renders the First Decision unreasonable. Because the First Decision was integral to the determination of the Final Decision, I also find that the Final Decision is unreasonable.

JUDGMENT IN IMM-954-18

THIS COURT'S JUDGMENT is that for the reasons provided, the Final Decision dated December 19, 2017 is set aside.

REGARDING CERTIFICATION OF A QUESTION

The Question for Certification Advanced by Counsel for the Minister:

Is the criteria under Rule 70 of the RPD Rules to give parties notice and an opportunity to object, satisfied by the Minister's request to waive a requirement of the RPD Rules where the Applicant has an opportunity to respond?

Upon Considering:

Counsel for the Minister's written argument in support of the Question dated October 19, 2018, Counsel for Mr. Cohen's written argument against the Question dated October 24, 2018, and Counsel for the Minister's reply dated October 26, 2018;

The Court's Response:

Because Rule 70 of the RPD Rules was not engaged by the RPD as found, the present Application and resulting decision are not about Rule 70 and its notice and "waiver" provisions.

The present Application and resulting decision are about the Minister's choice to proceed to vacate Mr. Cohen's status as a Convention Refugee without filing a reinstatement application, and the RPD's unilateral action without jurisdictional authority to permit the Minister to proceed.

As a result, the Question is not dispositive of the appeal and, therefore, is not accepted for Certification.

"Douglas R. Campbell"
Judge

APPENDIX

Refugee Protection Division Rules, SOR/2012-256

Application to reinstate withdrawn application to vacate or to cease refugee protection

61 (1) The Minister may make an application to the Division to reinstate an application to vacate or to cease refugee protection that was withdrawn.

Form of the Application

(2) The Minister must make the application in accordance with rule 50.

Factors

(3) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application.

Factors

(4) In deciding the application, the Division must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay.

Subsequent application

(5) If the Minister made a previous application to reinstate that was denied, the

Demande de rétablissement d'une demande d'annulation ou de constat de perte de l'asile retirée

61 (1) Le ministre peut demander à la Section de rétablir une demande d'annulation ou de constat de perte de l'asile qu'il avait retirée.

Forme de la demande

(2) Le ministre fait sa demande conformément à la règle 50.

Éléments à considérer

(3) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi ou qu'il est par ailleurs dans l'intérêt de la justice de le faire.

Éléments à considérer

(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment le fait que la demande a été faite en temps opportun et, le cas. échéant, la justification du retard.

Demande subséquente

(5) Si le ministre a déjà présenté une demande de rétablissement qui a été refusée, la Section prend en considération les

Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

motifs du refus et ne peut accueillir la demande subséquente, sauf en cas de circonstances exceptionnelles fondées sur l'existence de nouveaux éléments de preuve.

Written application and time limit

50 (1) Unless these Rules provide otherwise, an application must be made in writing, without delay, and must be received by the Division no later than 10 days before the date fixed for the next proceeding.

Demande par écrit et délai

50 (1) Sauf indication contraire des présentes règles, toute demande est faite par écrit, sans délai, et doit être reçue par la Section au plus tard dix jours avant la date fixée pour la prochaine procédure.

Oral application

(2) The Division must not allow a party to make an application orally at a proceeding unless the party, with reasonable effort, could not have made a written application before the proceeding.

Demande faite oralement

(2) La Section ne peut autoriser que la demande soit faite oralement pendant une procédure que si la partie a été dans l'impossibilité, malgré des efforts raisonnables, de le faire par écrit avant la procédure.

Content of application

(3) Unless these Rules provide otherwise, in a written application, the party must

(a) state the decision the party wants the Division to make;

(b) give reasons why the Division should make that decision; and

(c) if there is another

Contenu de la demande

(3) Dans sa demande écrite, sauf indication contraire des présentes règles, la partie:

a) énonce la décision recherchée;

b) énonce les motifs pour lesquels la Section devrait rendre cette décision;

c) indique si l'autre partie, le cas échéant, consent

party and the views of that party are known, state whether the other party agrees to the application.

Affidavit or statutory declaration

(4) Unless these Rules provide otherwise, any evidence that the party wants the Division to consider with a written application must be given in an affidavit or statutory declaration that accompanies the application

Providing application to other party and Division

(5) A party who makes a written application must provide

(a) to the other party, if any, a copy of the application and a copy of any affidavit or statutory declaration; and

(b) to the Division, the original application and the original of any affidavit or statutory declaration, together with a written statement indicating how and when the party provided a copy to the other party, if any.

à la demande, dans le cas où elle connaît l'opinion de cette autre partie.

Affidavit ou déclaration solennelle

(4) Sauf indication contraire des présentes règles, la partie énonce dans un affidavit ou une déclaration solennelle qu'elle joint à sa demande écrite tout élément de preuve qu'elle veut soumettre à l'examen de la Section.

Transmission de la demande à l'autre partie et à la Section

(5) La partie qui fait une demande par écrit transmet :

a) à l'autre partie, le cas échéant, une copie de la demande et, selon le cas, de l'affidavit ou de la déclaration solennelle;

b) à la Section, l'original de la demande et, selon le cas, de l'affidavit ou de la déclaration solennelle, accompagnés d'une déclaration écrite indiquant à quel moment et de quelle façon la copie de ces documents a été transmise à l'autre partie, le cas échéant.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-954-18
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