Federal Court  Cour fédérale

Date: 20200110

Docket: IMM-4222-18

Citation: 2020 FC 26

Ottawa, Ontario, January 10, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

DEJAN TRBOLJEVAC

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made on August 2, 2018 by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] that determined the Applicant was not a Convention Refugee and not a person in need of protection [the Decision]. The Applicant seeks to set aside the Decision and have the matter referred to a different panel member for a new hearing.

[2] The Applicant does not challenge the merits of the Decision. Rather, he challenges the procedural fairness of the process that resulted in his hearing date not being rescheduled as he had requested. Specifically, he says that he was denied natural justice by each of three procedural decisions. Two of those decisions were made before his hearing began and the third was made at the start of the hearing.

[3] The first such procedural decision denied his request to reschedule the time and date of the hearing. The second procedural decision, made immediately prior to the start of the RPD hearing, confirmed the first decision. The third procedural decision was the refusal by the RPD Panel Member to accept documents which the Applicant tried to submit at the hearing in support of his claim.

[4] For the reasons that follow, this application is allowed.

II. **Background Facts**

A. *The Protection Claim*

[5] The Applicant is a citizen of Serbia who was resident in Kosovo. He arrived in Canada on January 24, 2012 and made a refugee claim in Hamilton, Ontario on January 30, 2012 on the basis of fear of assault by unknown Albanians and incarceration by the Serbian government. His Personal Information Form was received by the IRB on February 24, 2012.

[6] Over six years later, on June 27, 2018, the Applicant was sent a Notice to Appear for a hearing to be held on July 27, 2018.

[7] It is undisputed that the Notice to Appear was not received by the Applicant until July 14, 2018 as it was sent to an incorrect address.

B. *Notice of Intent to bring an Oral Motion*

[8] On July 24, 2018, the Applicant's former counsel wrote to the IRB on behalf of the Applicant. He advised that the Applicant intended to "bring a formal, oral motion at the time of the commencement of the scheduled hearing" to request the hearing date be rescheduled "to a date and time several weeks into the future, in early to mid September or so, as agreeable to the parties involved".

[9] The stated purposes for the request to reschedule were to permit the Applicant to prepare more effectively and appropriately, to obtain translations of various documents said to be significant with respect to the basis of claim, to review and consider new, more recent country condition documents, and to request the presence of witnesses both in person and by teleconference.

[10] The reason provided for the lateness of the rescheduling request was that it was not reasonably possible for the Applicant to make arrangements to prepare for the hearing given the short time period between receipt of the notice on July 14, 2018 and the scheduled hearing date of July 27, 2018.

[11] The request noted that it was not possible, due to this short period of time, to submit a formal written motion prior to the July 27, 2018 hearing. The request reiterated that it was the intention of the Applicant to make a formal, oral motion before the presiding member at the commencement of the July 27 scheduled hearing.

[12] On July 25, 2018, the day after the request to reschedule was sent to the IRB, a Notice of Decision on Application to Change Date and Time of the hearing together with the Decision and Reasons was faxed to the former counsel. The Decision dismissed the application to change the date of the hearing.

C. *The RPD Hearing*

(1) The Coordinating Member

[13] The RPD hearing was held on July 27, 2018. The Applicant and his former counsel both attended. Before the formal hearing began, a Coordinating Member considered the oral motion of former counsel for the Applicant requesting the adjournment.

[14] The Coordinating Member refused the adjournment. They stated that they had reviewed and agreed with the decision made on July 25, 2018 to refuse the application of July 24, 2018 for an adjournment. Shortly thereafter, former counsel left the hearing and the Applicant continued alone.

[15] The Coordinating Member subsequently addressed the Applicant directly. They pointed out that on March 21, 2018 the Applicant had received and signed a form saying that he was ready to proceed. The Applicant confirmed that fact.

[16] The Coordinating Member then stated to the Applicant that he had known since March 18, 2018 that his hearing was going to happen "at any time"; that was his opportunity to prepare documents and make his arrangements to proceed. The Coordinating Member also stated that the rules are very clear and a request has to be made ten days prior to the hearing date but the request was made on the 24th (of July), three days before the hearing.

[17] The Applicant stated that he agreed entirely with what the Coordinating Member said, except that the letter was received on July 24, 2018 and not the 20th (of June).

[18] After the Coordinating Member acknowledged the delivery error by the IRB, the Applicant said that he was ready for the hearing and he respected the decision of the Board. When told that he had to be prepared because he had known since March 18, 2018 that "it was going to happen", the Applicant replied and that "[e]verything this file (*sic*) except for the fact of some documents arrived later documents from my ex-wife from Serbia who has taken me to court".

[19] Shortly after that exchange, the Coordinating Member left the hearing room and the Panel Member entered to begin the hearing on the merits.

(2) The Panel Member

[20] After some formalities identifying the date and nature of the hearing, as well as confirming the language of interpretation, the Panel Member began by saying that they had reviewed the documents. The transcript indicates that the Applicant immediately said "I have lots of documents that will prove my claim."

[21] Moments later, after the Applicant began to explain when he came to Canada and who he feared, the Panel Member asked the Applicant if he had reported his assault to the police. The Applicant indicated that he had done so, and he had a police report and a medical report. The Panel Member said they could not accept the evidence as it had to be submitted 10 days in advance and "it is against the rule to accept here in (*sic*)." The Applicant then provided oral evidence as to the events, including his injuries.

[22] In terms of his fears, the Applicant stated that he feared the Serbian government because his ex-wife was suing him and she had told the government that he had made a refugee claim in Canada. As a result, his father had twice received an envelope requiring him to go to Court to explain why the Applicant had sought refugee status in Canada.

[23] The Applicant testified that he had proof for everything he had said, and that he was sorry it had not been submitted earlier. He ended by adding that he had reported to the CBSA every month for the past three and one-half years.

[24] On August 7, 2018, the RPD sent a Notice of Decision to the Applicant denying his claim for protection. As already stated, this decision is not challenged on the merits, but the Applicant seeks to set it aside because of breaches of the duty of procedural fairness that violated his right to natural justice.

III. **Issue and Standard of Review**

[25] The Applicant alleges that the RPD failed in its duty to provide him with a procedurally fair hearing and, as a result, the Decision must be set aside.

[26] When there is an issue of procedural fairness, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 and *Federal Courts Act*, RSC 1985, c F-7 at para 18.1(4)(b).

[27] The Federal Court of Appeal has recently further clarified that there is no standard of review for issues of procedural fairness. What is fair in any particular circumstance is highly variable and contextual. In assessing whether a process has been fair, no deference is given to the decision-making tribunal other than with respect to the choice of procedure. A reviewing Court uses the term "correctness" not as a standard of review but rather as the measure to determine whether the requirement to provide procedural fairness has been met. The reviewing court must be satisfied that the right to procedural fairness has been met: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR] at paras 40 and 49.

[28] Procedural fairness review involves asking whether a fair and just process was followed having regard to all the circumstances, including the nature of the substantive rights involved and the consequences for an individual: *CPR* at 53 - 54; *Mission Institution v Khela*, 2014 SCC 24 at para 79.

IV. **Analysis**

[29] This matter was heard before the Supreme Court of Canada released the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. I have reviewed *Vavilov* and note that it does not alter the existing approach to determining whether an applicant's procedural fairness rights have been met. As procedural fairness is the determinative issue in this case, it was not necessary to request further submissions from the parties in light of *Vavilov*.

A. *Submissions of the parties*

[30] The Applicant submits that failure to grant a reasonable request for an adjournment is a breach of the duty of procedural fairness. It also violates the provisions of subsection 170(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] which states that the RPD, in any proceeding before it, "must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations."

[31] To show that the hearing was procedurally unfair to him, the Applicant relies on *Siloch v Canada (Minister of Employment and Immigration)*, (1993) 151 NR 76 (FCA) [*Siloch*], where

the Federal Court of Appeal set out a number of factors to be taken into account by adjudicators in exercising their discretion when considering a request to grant an adjournment.

[32] The Respondent notes that *Siloch* is a 1993 case. As the *IRPA* was amended in 2012, the new *Refugee Protection Division Rules*, SOR/2012-256 [Rules] superseded *Siloch*. Nonetheless, from December 15, 2012, when revisions to the *IRPA* came into effect, to the date of this hearing, *Siloch* has been considered six times by this Court in immigration matters.

[33] Rule 54 provides the process an applicant is to follow to seek an adjournment; it also sets out the factors to be considered by the RPD when such an application is received. The Respondent relies on the fact that the Applicant did not comply with Rule 54 despite being aware since March 2018 that his hearing would be scheduled and despite having signed the Intention to Proceed form.

[34] For the reasons that follow, I find that by not accepting the documents which the Applicant attempted to tender at the opening of the hearing, the RPD deprived him of his right to be heard and to address the case against him.

[35] As a result of the foregoing, it is unnecessary to consider whether the *Siloch* factors apply or whether the Applicant complied with, or was required to comply with, the provisions of Rule 54. I also note that the Applicant received the Notice to Appear outside the time required by Rule 25 but find it unnecessary to determine the consequence of that fact.

B. *The Hearing was Procedurally Unfair*

[36] There is no doubt that procedural fairness is an overarching requirement of hearings at the IRB. Subsection 162(2) of the *IRPA* requires the RPD to deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[37] This Court's jurisprudence has established that while there is no absolute right to counsel, there is a right to a fair hearing, particularly for those who are unrepresented: *Aiyathurai v Canada (Citizenship and Immigration)*, 2018 FC 1278 at para 9 and cases cited therein.

[38] The actual hearing was quite brief. The transcript of the hearing itself is only three and one-half pages in length. The Member recognizes the Applicant is unrepresented then confirms the interpreter's language is Serbian. The Applicant then indicated that he had a lot of documents to prove his claim.

[39] After asking the Applicant when he arrived in Canada, why he came to Canada, who beat him and when they beat him, the Panel Member asked the Applicant if he had reported the incident to the police. At that point, the Applicant said "[y]es, I communicated this to the police I have report that (*sic*) and a medical report also." The Applicant indicated he had three copies of all the documents.

[40] Rather than accept the documents, the Panel Member said it was “against the rules” to accept them at the hearing. The Member indicated that no documents would be accepted that day as they had to be submitted 10 days in advance.

[41] The balance of the hearing involved a discussion of a beating and knife attack on the Applicant by unknown Albanians that resulted in the Applicant sustaining various cuts from the knife leaving scars on his back and face, as well as his teeth being broken.

[42] The Applicant also discussed his fear of the Serbian government and the fact that he had previously been sent back to Kosovo from Serbia after six months. The Applicant said he had proof of that and of everything he told the Panel Member.

[43] According to the transcript, at no point did the Panel Member question the Applicant as to the nature of the documents he brought to the hearing or ask to see them. Even when the documents were said to be directly responsive to questions put to the Applicant by the panel there is no indication that the Member was prepared to consider the documents.

[44] The Applicant also tried to tender his documents after the hearing concluded, but they were returned as the Decision had already been rendered.

[45] I have several concerns that lead me to conclude the hearing was not procedurally fair to the Applicant. First and foremost, he was self-represented. As previously indicated, the

jurisprudence of this Court indicates that being self-represented carries with it the right to a fair hearing.

[46] The Panel Member, based on the language used at the hearing, appears to have believed that they did not have the ability to accept any documents at the hearing. Subsections 170 (e), (g) and (h) of the *IRPA* however indicate that in any proceeding before the RPD it:

> (e) must give the person . . . a reasonable opportunity to present evidence . . .;
>
> (g) is not bound by any legal or technical rules of evidence;
>
> (h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances.

[47] While the Panel Member was aware of the ten-day time period in Rule 34(3) for disclosing documents, the failure of the Member to acknowledge or apparently be aware of the *IRPA* provisions allowing them to nonetheless accept the documents had the effect of preventing the Applicant from substantiating his claim.

[48] The facts of this case are very similar to those found in *Hasan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1537. In *Hasan*, Mr. Justice Phelan set aside an IRB refugee decision and returned it for redetermination. He noted that the IRB exercised its discretion when it refused to admit relevant evidence at the hearing because it was outside the time period provided in the rules, but that it failed to consider the rule which gave it discretion to admit documents.

[49] Mr. Justice Phelan found that the determination by the IRB not to admit the evidence significantly and adversely affected the ability of Mr. Hasan to prove his claim. He also noted that, if the evidence had been admitted, there was no offsetting prejudice to the Respondent. Mr. Justice Phelan concluded that the result was a denial of natural justice to Mr. Hasan as he was prevented from providing evidence to support his claim.

[50] In the present matter, the failure of the Panel Member to admit the evidence that the Applicant both offered up and referred to several times prevented him from having a fair hearing. This being a claim for refugee protection, the potential consequences to the Applicant of the denial of his protection claim are very serious. After waiting six years to have his claim considered, fairness required that the evidence he wished to tender at his hearing be accepted, considered and addressed.

[51] It is "appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other": *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 42. However, this respect for an agency's procedural choices coexists with an inquiry into whether the procedure followed by the decision-maker is fair in the circumstances of the case.

[52] At a minimum, the Panel Member should have addressed why they declined to exercise the discretion provided to them in section 170 of the *IRPA*. Failure to exercise that discretion was a breach of natural justice in this matter.

[53] The application is allowed and the Decision is set aside. The matter will be returned for redetermination by a differently constituted panel of the RPD.

[54] Neither party suggested a serious question of general importance for certification nor do I find that one exists on these facts.

JUDGMENT in IMM-4222-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the Decision is set aside.
2. The matter is returned for redetermination by differently constituted panel of the Refugee Protection Division.
3. No serious question of general importance is certified.
4. No costs are awarded.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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