Federal Court  Cour fédérale

Date: 20210602

Docket: IMM-7834-19

Citation: 2021 FC 527

Ottawa, Ontario, June 2, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

BUSHRA MOHAMED IBRAHIM ABDELRAHMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, which upheld the decision of the Refugee Protection Division [RPD]. The RPD determined the Applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] [Decision]. The main issue below was the

Applicant's identity. Here, I have concluded there was a breach of procedural fairness at the at the RPD which the RAD did not adequately address.

II. Facts

[2] The Applicant is a citizen of Sudan and used to live in the Darfur region. In 2003, he says the government attacked and killed hundreds of people. Following this attack, the militia attacked his village, killing civilians, burning houses and displacing thousands of people. The Applicant's brother and sister were killed in this attack and the remaining family members relocated to another part of Sudan.

[3] The Applicant says after a month in the new location, another group targeted and killed the young men in their camp after determining their allegiance. The Applicant said he was on neither side but was tortured for three days until he agreed to support the government. He then went to another part of Sudan and stayed with distant relatives who warned him the government was arresting and imprisoning people from Darfur so he decided to leave Sudan.

[4] In 2004, he went to Egypt but did not make a refugee claim because he heard it was a difficult process and he heard of people who were arrested and removed after making a refugee claim. In 2005, following "the violent crackdown by Sudanese and Egyptian forces on Sudanese protesters gathered in front of the UN High Commissioner in Sudan", he decided to leave Egypt.

[5] In 2006, he entered Israel and was given temporary status for six months. He remained in Israel after his status expired and did not make any attempts to regularize it out of fear he would be forced to return to Sudan. In 2012, he was deported to South Sudan. In 2013, he went to Sudan to find his family and learned conditions had worsened since his departure. He then went back to South Sudan, got married and had children. He says war erupted in South Sudan and government soldiers burned houses, killed innocent people and broke into civilian homes, including the home of the Applicant which was broken into three times.

[6] The Applicant says a member of the Darfur opposition tried to recruit the Applicant as a soldier. When he refused, he was detained and tortured and he realized he needed to leave Sudan. He applied for a passport and he says the office estimated his date of birth based on his age and made an error.

[7] The RPD dismissed the Applicant's claim because he had not established his identity, a threshold issue in a refugee claim. The RPD impugned the Applicant's children's birth certificates due to concerns with their serial numbers, a matter not raised with the Applicant at the hearing.

III. Decision under review

[8] The Applicant filed new evidence on appeal to the RAD: a statement from his father and identity document; a statement from his sister and identity document; identity documents for his aunt; and his civil registration certificate.

[9] The RAD rejected all the new evidence.

[10] The RAD also upheld the RPD's decision to give no weight to the Applicant's children's birth certificates due to concerns with the serial numbers. Essentially, while the children were born several years apart, the birth certificates had sequential serial numbers.

IV. Issues

[11] At issue is whether the RAD breached principles of procedural fairness in the treatment of the Applicant's children's birth certificates?

V. Standard of Review

[12] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 per Binnie J at para 43. That said, I wish to note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 [*Bergeron*] per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Rennie JA]. In this connection I note the Federal Court of Appeal's decision which held judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[13] I also note from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[14] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [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.

VI. Analysis

[15] The determinative issue in this case turns on the RAD upholding the RPD's adverse credibility finding impugning the Applicant's children's birth certificates due to concerns with the serial numbers. The birth certificates had sequential serial numbers whereas the children were born some years apart. On this basis, the RPD gave the birth certificates no weight. The RPD did not raise this issue with the Applicant nor give him an opportunity to address this issue.

[16] The RAD found there was no breach in procedural fairness because the problem was in the documents themselves for which the Applicant had not provided an explanation.

[17] The Respondent submits the RAD rightfully concluded it was up to the Applicant to have offered up an explanation for an issue that occurred at the RPD stage on appeal. The RAD noted Applicant's counsel argued "Mr. Ibrahim may have offered an explanation for the serial numbers being in sequence, such as that they were requested at the same time. He reasonably could have had an explanation." The Respondent submits the RAD rightfully found "if this was the explanation, or, indeed, if the Appellant had any explanation for the issue, he could have offered it on appeal. He did not. I draw an adverse inference from this failure."

[18] However, the Applicant submits that the RAD did not consider the principles of procedural fairness under which the RAD should have ordered a new hearing because the RPD failed to provide the Applicant an opportunity to respond to the RPD's concerns thereby denying the Applicant procedural fairness. I agree for the reasons that follow.

[19] This Court in *Torishta v Canada (Citizenship and Immigration)*, 2011 FC 362 [Rennie J, as he then was] said a decision maker ought to provide an applicant the opportunity to respond if the decision maker is of the view a document was not authentic. In my view and with respect this is an accurate assessment of the law:

> [13] The letter is, on its face, legitimate. If the Board was of the view that the letter was not authentic and relied on specialized knowledge to impugn it as fraudulent, then the Board ought to have said so and provided the applicant the opportunity to respond. The address, letterhead, e-mail and telephone number of the NRC were all readily verifiable. The Board's failure to give notice to the applicant of the Board's conclusion that the letter was fraudulent constitutes a breach of procedural fairness, as well as a breach of Rule 18. What transpired before the Board was analogous to what would offend the evidentiary rule established in *Browne v Dunn* (1893), 1893 CanLII 65 (FOREP), 6 R. 67 (HL), discussed by the Supreme Court of Canada in *R v Lyttle*, 2004 SCC 5, [2004] 1 SCR 193.

[20] In my view, the duty of procedural fairness was breached when the RPD did not give the Applicant an opportunity to respond to this credibility assessment. Thus, the RAD erred in upholding the RPD's procedurally unfair decision.

[21] I turn now to the consequences of procedural unfairness; generally the decision must be set aside and remanded for redetermination because a procedurally unfair decision is invalid.

[22] The Supreme Court of Canada in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 23 confirms the general rule that "the denial of a right to a fair hearing must always render a decision invalid". This principle has been repeated many times, and was upheld recently in *Shaw Communications Canada Inc v Amer*, 2020 FC 1026 [Manson J] at para 21 and *Marcelin c Canada (Citoyenneté et Immigration)*, 2019 FC 1516 [Shore J] at para 18.

[23] The main exception to the general rule that a breach of procedural fairness is fatal to a decision occurs when the outcome is "legally inevitable". The Federal Court of Appeal in *Canada (Attorney General) v McBain*, 2017 FCA 204 [*McBain*] [Boivin JA] summarizes the jurisprudence:

> [8] The question of whether an administrative decision-maker complied with the duty of procedural fairness is reviewed for correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79).
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> [9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
>
> [10] Exceptions to this rule exist where the outcome is legally inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [*Mobil Oil*] or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).
>
> [Emphasis added]

[24] See also *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 [*Mobil Oil*] [Iacobucci J]:

> 51 Mobil Oil's application was greeted by a letter from the Chairman which stated that the application could "not be brought before the Board" because it was not "bona fide". While I agree that the Implementation Act absolutely cannot support the interpretation advocated by Mobil Oil, it goes too far to pretend that Mobil Oil did not deserve a full hearing, which could have been effected in writing, in respect of its novel interpretation. The Chairman's response was the product of an improper subdelegation which effectively interrupted Mobil Oil's procedural guarantees. Indeed, before this Court counsel for the Board admitted that it

would have been preferable for Mobil Oil to have been given a Board hearing. If it would have been preferable, why should another result be accepted?

52 In light of these comments, and in the ordinary case, Mobil Oil would be entitled to a remedy responsive to the breach of fairness or natural justice which I have described. However, in light of my disposition on the cross-appeal, the remedies sought by Mobil Oil in the appeal per se are impractical. While it may seem appropriate to quash the Chairman's decision on the basis that it was the product of an improper subdelegation, it would be nonsensical to do so and to compel the Board to consider now Mobil Oil's 1990 application, since the result of the cross-appeal is that the Board would be bound in law to reject that application by the decision of this Court.

53 The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: *Cardinal*, *supra*. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, viz., one which has an inevitable answer.

54 In Administrative Law (6th ed. 1988), at p. 535, Professor Wade discusses the notion that fair procedure should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness. But then he also states:

> A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.

In this appeal, the distinction suggested by Professor Wade is apt.

[Emphasis added]

[25] I am not persuaded the Applicant's case is "hopeless" or that the result would be "legally inevitable" per *Mobil Oil* or *McBain*. I am unable to determine what the result would have been had the RPD and the RAD not fallen into procedural fairness. Therefore it is not safe to uphold these decisions, and under this jurisprudence I am required to set aside the RAD's decision, noting the RPD's decision is equally flawed. Certainly, the breach of natural justice was not cured on the appeal to the RAD. Judicial review is to be granted.

VII. Conclusion

[26] Judicial review will be granted, and the matter remanded to the RAD for redetermination, which may entail the RAD returning this matter to the RPD for redetermination.

VIII. Certified Question

[27] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7834-19

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, and the matter is remanded to a differently constituted RAD for redetermination in accordance with these reasons.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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