Federal Court Cour fédérale

Date: 20210817

Docket: IMM-766-20

Citation: 2021 FC 756

Ottawa, Ontario, August 17, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SAYEF AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Sayef Ahmed, seeks judicial review of the decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC"), denying the Applicant's permanent residency application on the ground that he is inadmissible to Canada under subsection 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*"). The Officer found that the Applicant was associated with Jamaat-e-Islami ("JEI"),

an Islamist political party in Bangladesh, and there were reasonable grounds to believe that JEI engaged in acts of terrorism.

[2] The parties agree that this application for judicial review should be granted because the Officer breached their duty of fairness. The standard remedy for a breach of procedural fairness is to remit the matter back for redetermination. However, the parties disagree on further remedies sought by the Applicant. In particular, the Applicant seeks remedies of prohibition and/or *estoppel*, as well as *mandamus*.

[3] In my view, the remedies sought by the Applicant are either not warranted or not available to him in law. I therefore grant this application for judicial review and remit the Officer's decision back for redetermination.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a national of Bangladesh, where he worked as a doctor. From 1990 to 2014, the Applicant was a member of JEI. He also served as the Vice President and Acting President of JEI in Sylhet City. Through these roles, he gave public speeches and organized rallies and charitable events on behalf of JEI.

[5] The Applicant asserts that JEI is a legitimate political party and that he never condoned violent activity as a JEI member. Rather, the Applicant claims that he and his family were the victims of violent repression from the ruling political party in Bangladesh, the Awami League.

[6] On August 7, 2014, the Applicant, along with his wife and their two sons (born 1994 and 2003), entered Canada and made a claim for refugee protection. In a decision released May 26, 2015, the Refugee Protection Division (the "RPD") found that the Applicant and his family were Convention refugees under section 96 of the *IRPA*.

[7] On or about June 22, 2015, the Applicant and his family applied for permanent resident status.

[8] The Officer sent two procedural fairness letters to the Applicant. First, in a letter dated December 7, 2016, the Officer noted that the Applicant may be inadmissible to Canada due to his association with JEI, and invited the Applicant to make submissions on that issue. Second, in a letter dated February 6, 2017, the Officer disclosed several articles to the Applicant concerning JEI and invited the Applicant to make submissions on those articles. The Applicant, through his consultant, responded to both the Officer's letters with detailed submissions on January 27, 2017 and April 10, 2017, respectively.

[9] The Applicant's wife and children's permanent residency applications were approved in August 2017. However, the Applicant did not hear from the Officer regarding his application following his April 10, 2017 submissions.

[10] In an email dated December 24, 2019, the Applicant, through his consultant, contacted the Officer regarding the status of his file. The Applicant provided the Officer with two decisions of the Immigration Division (the “ID”) finding that JEI is not an organization that has engaged in terrorism or subversion under subsection 34(1)(f) of the *IRPA*.

[11] In an email dated December 27, 2019, the Officer informed the Applicant that his application for permanent residency was refused on security grounds on May 16, 2017. The Applicant was not notified of the Officer’s decision before the December 27, 2019 email.

B. *Decision Under Review*

[12] In a decision dated May 16, 2017, the Officer found that the Applicant was inadmissible under subsection 34(1)(f) of the *IRPA*. In particular, the Officer found that the Applicant was a member of JEI, and that JEI had engaged in terrorist activities as defined under section 83.01(1)(b) of the *Criminal Code*, RSC 1985, c C-46 (the “*Criminal Code*”).

C. *Respondent’s Motion*

[13] On October 22, 2020, the Respondent brought a motion pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the “*Rules*”). The Respondent conceded that “given the relevant jurisprudence coupled with the particular circumstances of this case, the reasons for refusal will not stand up to a ‘somewhat probing examination’ and judicial review should be granted.” The Respondent requested that this Court, among other things, set aside the Officer’s

decision and remit the matter back to a different decision-maker for redetermination on a priority basis.

[14] In their motion, the Respondent noted that they did not oppose the Applicant seeking leave for judicial review in this application, and that they have been attempting to settle this matter with the Applicant since July 8, 2020.

[15] The Applicant opposed the Respondent's motion. While the Applicant agreed that the Officer's decision should be set aside because the Officer breached their duty of fairness, the Applicant submitted that the Respondent should also acknowledge the substantive errors in the Officer's decision. Accordingly, the Applicant argues that this application for judicial review should proceed to a determination on the merits so that the Applicant may seek "an order of prohibition or estoppel to prevent the Officer from relying on the same evidence and further rejecting the Applicant's application on the same basis."

[16] In an order dated November 23, 2020, my colleague, Justice Fuhrer, dismissed the Respondent's motion. She noted that this Court has jurisdiction to grant the orders sought by the Applicant, and that granting the Respondent's motion would not necessarily result in a just determination of the proceeding on its merits pursuant to Rule 3 of the *Rules*.

III. <u>Preliminary Issue: Style of Cause</u>

[17] The style of cause names both the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness as respondents.

[18] The Respondent requests that the style of cause be amended to name only the Minister of Citizenship and Immigration. As an officer of IRCC rendered the decision under review, the Respondent asserts that the Minister of Citizenship and Immigration is solely responsible for the decision at hand under section 4 of the *IRPA*.

[19] The Applicant does not oppose the Respondent's request.

[20] I agree with the Respondent and therefore amend the style of cause to no longer name the Minister of Public Safety and Emergency Preparedness as a respondent.

IV. Issue

[21] The sole issue on this application for judicial review is whether the Applicant is entitled to further remedies for the Officer's breach of their duty of fairness, beyond remitting the Officer's decision back for redetermination.

V. Analysis

[22] It is common ground between the parties that the Officer breached their duty of fairness by not notifying the Applicant of their May 16, 2017 decision until December 27, 2019, thus disregarding the Applicant's December 24, 2019 submissions.

[23] I agree that the Officer breached their duty of fairness by refusing to consider the Applicant's December 24, 2019 submissions. The duty of fairness requires administrative

decision-makers to provide an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22).

[24] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Canada (Attorney General) v McBain*, 2017 FCA 204 at para 9, citing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643).

[25] The Applicant in this case seeks more than remitting the decision for redetermination, otherwise known as an order of *certiorari*. Rather, he seeks an order of prohibition and/or *estoppel*, in addition to *mandamus*.

[26] For the reasons explained in detail below, none of the further remedies sought by the Applicant are warranted.

(1) *Prohibition*

[27] The Applicant seeks an order prohibiting the Respondent from finding that he is inadmissible to Canada based on the same allegations and evidence relied upon by the Officer.

[28] Cromwell JA (as he then was) explained when an order of prohibition is warranted in *Psychologist Y v Nova Scotia Board of Examiners in Psychology*, 2005 NSCA 116 (“*Psychologist Y*”):

> [21] Prohibition is a drastic remedy. It is to be used only when a tribunal has no authority to undertake (or to continue with) the matter before it. Unless a lack of jurisdiction or a denial of natural justice is clear on the record, prohibition is also a discretionary remedy.

[29] Contrary to the Respondent's submissions, I find prohibition is available to remedy breaches of procedural fairness (see *Psychologist Y* at para 23; *Canada (Attorney General) v Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 2 FC 36, 123 FTR 320 (FCA) at para 30; *Bauer v Canada (Immigration Commission)*, [1984] 2 FC 455, 12 CRR 235 (FCTD) at para 11; Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2013) (loose-leaf updated May 2021, release 1) at 1:4).

[30] However, given its "drastic" nature, I find an order of prohibition is not warranted in the case at hand. The parties agree that the Officer breached their duty of fairness, but there is nothing to indicate that the Respondent's next delegate will do the same. The *status quo* for breaches of procedural fairness is to remit the matter for redetermination, and I find no reason to deviate from this norm in the circumstances.

(2) *Estoppel*

[31] The Applicant requests an "order in the form of *estoppel*" on the basis that he had "a legitimate expectation that the Officer would review and follow the established jurisprudence," including the relevant ID decisions.

[32] I find that the Applicant's argument is misplaced. *Estoppel* is a doctrine, not a remedy in itself. In public law matters, it is subsumed within the duty of fairness (*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras 40-42). The same is true with respect to the doctrine of legitimate expectations (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 94).

[33] There is no dispute that the Officer breached their duty of fairness and that their decision should be remitted on that basis. Accordingly, there is no purpose in considering whether the doctrines of *estoppel* and legitimate expectations apply to the Officer's decision, as they offer the Applicant no further remedy.

(3) *Mandamus*

[34] The Applicant seeks an order of *mandamus* requiring the Respondent to redetermine the Officer's decision no later than 30 days from the date of this Court's decision.

[35] An order of *mandamus* compels the performance of a particular statutory duty. It is an extraordinary remedy and *mandamus* applications must be assessed on the particular facts of each case (*Tapie v Canada (Citizenship and Immigration)*, 2007 FC 1048 at para 7). In *Apotex v Canada (Attorney General)*, [1994] 1 FC 742, 69 FTR 152 (FCA) ("*Apotex*") at para 55, the Federal Court of Appeal affirmed the following conditions must be met to issue *mandamus*:

1. There must be a public legal duty to act;

2. The duty must be owed to the applicant;

3. There is a clear right to performance of that duty:

    (a) the applicant has satisfied all conditions precedent giving rise to the duty;

    (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, *e.g.*, unreasonable delay;

4. Where the duty sought to be enforced is discretionary, consideration must be given to the nature and manner of exercise of that discretion;

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. There is no equitable bar to the relief sought; and

8. On a "balance of convenience," an order of *mandamus* should be issued.

[36] I find that the precondition for issuing an order of *mandamus* under step 3(b) of the *Apotex* test is not met, as the Respondent agrees to perform its statutory duty. The Respondent consents to redetermining the Applicant's permanent residency application on a priority basis.

[37] The remedy sought by the Applicant is more appropriately defined as *certiorari* with a specified deadline, as opposed to *mandamus* — *i.e.*, the Applicant seeks to have his permanent residency application redetermined within 30 days of this decision, as opposed to compelling the performance of a statutory duty that the Respondent refuses to exercise.

[38] Regardless of its classification, however, I find the remedy sought by the Applicant is not warranted. The Officer's delay in notifying the Applicant of their decision was significant, but I do not find that such a delay is sufficiently egregious to warrant this Court's intervention into the Respondent's administrative process, especially in light of the fact that the Respondent agrees to redetermine the Officer's decision on a priority basis. Further, if the Applicant's desire to have his permanent residency application redetermined was so pressing, he could have agreed to the Respondent's offer to settle as early as July 2020, more than a year prior to this decision.

VI. Question for Certification

[39] The Applicant proposes two questions for certification to permit an appeal under subsection 74(d) of the *IRPA*:

1. Whether the immigration officer's reliance on evidence obtained through internet searches in making a negative inadmissibility finding during an application for permanent residency, without disclosing the evidence to the person concerned, is a breach of the person's right to procedural fairness?

2. In the case at bar where the breach of natural justice by the immigration officer is clear on the record, whether the Federal Court shall invoke its power to "prohibit or restrain" under section 18.1(3)(b) to grant the remedy of *stopple* [*sic*] and/or prohibition to prohibit the immigration officer from further denying the Applicant's application for permanent residency based on the same grounds and evidence that were dismissed by the Members of Immigration Division of the IRB in other similar proceedings involving the same factual question?

[40] I agree with the Respondent that neither question satisfies the test for certification, as neither are "a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance" (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46).

[41] The Applicant's first proposed question is not dispositive of the appeal. This Court did not deal with the issue of procedural fairness, as the Respondent conceded this point. A question that is not dealt with in a decision is not an appropriate question for certification (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12).

[42] The Applicant's second proposed question does not transcend the interests of the parties. It merely recants the primary issue raised by the Applicant and asks whether prohibition is warranted in this case. This is evident by the very language used by the Applicant: "in the case at bar," "denying the Applicant's application," and so on. For the reasons discussed at length in this decision, I find an order of prohibition is not warranted in this case. The implications of this conclusion concern the interests of the Applicant and the Respondent alone.

VII. Conclusion

[43] The parties agree that this application for judicial review should be granted, as the Officer breached their duty of fairness. I therefore grant this application for judicial review and remit the Officer's decision for redetermination. The Applicant has failed to establish that the Officer's breach warrants any further remedy.

JUDGMENT in IMM-766-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter returned for redetermination by a different decision-maker.

2. The style of cause is hereby amended to name only the Minister of Citizenship and Immigration as the Respondent.

3. No question is certified.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-766-20
STYLE OF CAUSE:	SAYEF AHMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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