Federal Court  Cour fédérale

Date: 20110218

Docket: IMM-3732-10

Citation: 2011 FC 201

Ottawa, Ontario, February 18, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

JASKARAN SINGH DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Jaskaran Singh Dhaliwal seeks judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board. The IAD upheld an exclusion order issued by the Immigration Division, which had found that Mr. Dhaliwal had misrepresented material facts by entering into a bad faith marriage for the purposes of securing permanent residence in Canada.

[2] At the conclusion of the hearing, I advised the parties that the application would be allowed as I was satisfied that Mr. Dhaliwal had been denied a fair hearing before the IAD. These are my reasons for coming to this conclusion.

Analysis

[3] As Mr. Dhaliwal claims to have been denied procedural fairness in this matter, the task for this Court is to determine whether the process followed by the IAD satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43.

[4] As counsel for the Minister put it, this was a “he said/she said” case. The outcome of the proceedings before the IAD depended entirely upon the relative credibility of Mr. Dhaliwal and his ex-wife, Ms. Mahli. While Ms. Mahli testified at some length before the IAD, Mr. Dhaliwal was denied a meaningful opportunity to fully present his side of the story to the Board.

[5] Mr. Dhaliwal and Ms. Mahli had each testified before the Immigration Division with respect to the circumstances surrounding their marriage and the subsequent breakdown of the union. The Immigration Division preferred the evidence of Ms. Mahli over that of Mr. Dhaliwal.

[6] Hearings before the IAD are *de novo* proceedings, and are not restricted to a review of the evidence that led to the exclusion order. Where new evidence is adduced on an appeal, the IAD must consider the whole case, including any new facts put before it: *Kahlon v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 104, 7 Imm. L.R. (2d) 91 (F.C.A.).

[7] Mr. Dhaliwal appeared before the IAD without the assistance of counsel. He made it clear to the presiding member that he wished to testify on the appeal, as he was of the view that all of the relevant facts had not been put before the Immigration Division. He was denied the opportunity to do so.

[8] It is evident from a review of the transcript that the presiding member simply did not understand how a self-represented litigant could put his own testimony before the Board without a lawyer present to conduct the individual's examination in chief.

[9] Mr. Dhaliwal came to the hearing anticipating that the Board member would question him. While there is no evidence before me that Mr. Dhaliwal had read it, the IAD's own "Information Guide" clearly contemplates that self-represented appellants may ask Board members to ask them the questions that the Member thinks are needed to decide the appeal: see *Information Guide – General Procedures for all Appeals to the Immigration Appeal Division (IAD)*, at section 3(1).

[10] The presiding member in this case refused to question Mr. Dhaliwal, advising him that "That is not the way it works": transcript p. 4. Rather, the member repeatedly asked Mr. Dhaliwal to explain who would question him in chief if he were to take the stand. When Mr. Dhaliwal could not provide a satisfactory answer to this question, the hearing moved on to other matters, and Mr. Dhaliwal was never given an opportunity to testify as to his version of events.

[11] The Board then stated in its decision that Mr. Dhaliwal “was not examined as he had chosen to act as his own counsel”.

[12] At no time did the member ever explain to Mr. Dhaliwal that he could simply take the witness stand, be sworn in and tell his side of the story. Mr. Dhaliwal would, of course, then be subject to cross-examination by the Minister’s counsel.

[13] There is no doubt that self-represented litigants can present challenges for adjudicators, who must be careful not to enter into the fray, or to try to act as counsel for the self-represented individual. At the same time, adjudicators do have a positive duty to ensure that all parties, including those who appear without counsel, receive a fair hearing.

[14] In *Davids v. Davids*, [1999] O.J. No. 3930, 125 O.A.C. 375, the Ontario Court of Appeal observed that fairness requires that decision-makers have to “attempt to accommodate unrepresented litigants’ unfamiliarity with the process so as to permit them to present their case”: at para. 36.

[15] Decision-makers have an obligation to ensure that the self-represented litigant understands the nature of the proceedings, and to direct the litigant’s attention to salient points of procedure: *Wagg v. Canada*, 2004 FCA 303, [2004] 1 F.C.R. 206 (F.C.A.) at paras. 32 and 33. That did not happen here. Indeed, it appears that the presiding member did not himself understand the procedural options available when an individual appearing without counsel wished to give evidence on his own behalf.

[16] Moreover, it is evident from a review of the transcript that after this initial error at the outset of the hearing, the hearing went downhill from there. The presiding member repeatedly interfered with Mr. Dhaliwal's cross-examination of Ms. Mahli. While some of these interventions were undoubtedly justified, on other occasions Mr. Dhaliwal was prevented from asking what were clearly relevant questions.

[17] The member also denied Mr. Dhaliwal any opportunity to respond to Ms. Mahli's testimony. According to the member, Mr. Dhaliwal was not entitled to adduce any rebuttal evidence responding to Ms. Mahli's evidence because once he had heard her testimony, Mr. Dhaliwal's own evidence would be "spoiled": transcript at page 15.

[18] Counsel for the Minister acknowledges that the IAD erred by preventing Mr. Dhaliwal from either testifying on his own account in chief or responding to Ms. Mahli's evidence. However, counsel submits that, at the end of the day, Mr. Dhaliwal was able to get his side of the story before the Board, through both his written submissions and through the testimony that he had given before the IAD.

[19] I do not agree.

[20] While the testimony that Mr. Dhaliwal gave before the Immigration Division was indeed before the IAD, Mr. Dhaliwal had made it very clear that he wished to supplement that testimony with additional information. He was prevented from doing so.

[21] Moreover, the Board's reasons explicitly state that any evidence that Mr. Dhaliwal attempted to adduce through his written submissions was disregarded by the presiding member. The decision says that "In his written submissions, the appellant has tried to further rebut Ms. Mahli's testimony, and, in so doing, he has attempted on several occasions to enter new evidence *which the panel necessarily must ignore*…": at para.16, emphasis added.

[22] It is therefore clear that Mr. Dhaliwal was denied some of the most fundamental elements of a fair hearing, namely the right to adduce evidence on his own behalf, and to respond to the evidence against him.

[23] I do not accept the Minister's contention that Mr. Dhaliwal should be deemed to have waived his right to complain about the procedural unfairness of his hearing. It is evident from the transcript that he continuously attempted to get his evidence before the Board, and that he was prevented from doing so by the Board. He was ultimately forced to accept the directions and rulings of the presiding member, and to proceed accordingly. The principle of waiver is not engaged in these circumstances.

[24] Finally, I do not accept the Minister's submission that notwithstanding the breaches of procedural fairness in this case, there would be no purpose to remitting the matter to the IAD, as the outcome of any re-hearing would be a foregone conclusion.

[25] As a general rule, a breach of procedural fairness will void the hearing and the resulting decision: see *Cardinal v. Kent Institution,* [1985] 2 S.C.R. 643, 1985] S.C.J. No. 78. There, the Supreme Court of Canada observed that the right to a fair hearing is "an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have". The Court went on to observe that "It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a [fair] hearing": at para. 23.

[26] There is a limited exception to this rule. That is, a breach of natural justice may be disregarded "where the demerits of the claim are such that it would in any case be hopeless": *Mobil Oil Canada Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 S.C.R. 202, [1994] S.C.J. No. 14, at para. 53. This may occur where, for example, the circumstances of the case involve a legal question which has an inevitable answer: at para. 52. This is not such a case.

[27] As was noted earlier, this is a classic "he said/she said" case. The stories told by Ms. Mahli and Mr. Dhaliwal differ in many fundamental respects. The Immigration Division preferred Ms. Mahli's version of events to that of Mr. Dhaliwal. The IAD will ultimately have to choose between these competing stories, but it must do so only after both sides have had a full and fair opportunity to present whatever relevant evidence they deem appropriate. I cannot say at this point that the outcome of the proceeding is pre-ordained.

Costs

[28] Counsel for Mr. Dhaliwal submits that the breaches of procedural fairness in this case were so egregious that an order of costs should be made in his favour.

[29] Costs are not ordinarily awarded in immigration proceedings in this Court. Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 provides that "No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders".

[30] The threshold for establishing the existence of "special reasons" is high, and each case will turn on its own particular circumstances: *Ibrahim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1342, [2007] F.C.J. No. 1734, at para. 8.

[31] This Court has found special reasons to exist where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith: see *Manivannan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392, [2008] F.C.J. No. 1754, at para. 51.

[32] However, "special reasons" have also been found to exist where there is conduct that unnecessarily or unreasonably prolongs the proceedings: see, for example, *John Doe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 535, [2006] F.C.J. No. 674; and *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] F.C.J. No. 1523, at para.

26; *Qin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1154, [2002] F.C.J. No. 1576. In my view, this is such a case.

[33] The mere fact that an immigration application for judicial review is opposed, and the tribunal is subsequently found to have erred, does not give rise to a "special reason" justifying an award of costs. However, this is, in my view, an exceptional case. The breaches of procedural fairness here were so obvious and so serious that the application for judicial review should never have been opposed.

[34] I am therefore satisfied that special reasons exist justifying an award of costs in Mr. Dhaliwal's favour. If the parties cannot agree as to the amount of costs, the Court may be spoken to.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, with costs. The decision of the IAD is set aside and Mr. Dhaliwal's appeal is remitted to a differently constituted panel of the IAD for re-determination in accordance with these reasons.

2. No question arises for certification.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3732-10
STYLE OF CAUSE:	JASKARAN SINGH DHALIWAL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
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