Federal Court Cour fédérale

Date: 20150416

Docket: IMM-1002-14

Citation: 2015 FC 475

Ottawa, Ontario, April 16, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

NAIM KERQELI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD/Board] wherein the Applicant was found to be neither a refugee nor a person in need of protection.

[2] As this matter is being sent back for a new determination because of a breach of fairness and natural justice, the Court will not comment on the reasonableness of the determinative issue of state protection or nexus to a Convention ground.

II. Background

[3] The Applicant is a citizen of Kosovo who alleges fear of persecution due to his membership in a particular social group, the Ashkali.

[4] He claims that in March 2012, his brothers were involved in a business opportunity and something occurred, which resulted in the investors' money being taken by a third party. Six of the investors seeking the return of their investment threatened the Applicant's brothers. The brothers fled to Canada where their refugee claims were upheld by the Board – a matter raised in the Applicant's claim. He was self-represented at the Board.

[5] In June 2013, the Applicant returned to Kosovo from Afghanistan where he was working. Shortly thereafter the investors approached the Applicant, then residing in Gjilan, Kosovo, and demanded the Applicant to return E60,000. These approaches continued for weeks until the six men threatened the Applicant with a gun. He then reported the matter to police but because nothing further was done by the police, the Applicant ascribed this to ethnic bias.

[6] The Applicant left Gjilan for Lipligan, a reasonable distance away by Kosovo standards, but the investors tracked him down within a month and again threatened him. He then left Kosovo for Canada.

[7] The Applicant's claim was dismissed on the basis of absence of nexus to a Convention ground and on the presumption of state protection in Kosovo. His removal was stayed by this Court.

[8] At the Board hearing, the Applicant was not represented by counsel. This has led to the argument that because of what was said by the Board, the Applicant did not understand that he was entitled to make final submissions at the end of the evidentiary phase of the RPD hearing.

[9] The critical passages in respect of the above are:

> Member: … Since you are self represented, I'm going to explain to you the process. Now, I would lead with the questions, so I'll start with my questions for you. And then you may have information that you think I should know, that I haven't asked you about, or you wanna raise. So after my questions, I'll give you an opportunity to make a statement if you wish, or you know, provide information …
>
> (Court underlining)
>
> Member: OK. Is there anything that I have missed that you want to tell me, that you think will help your case, or you think that may [*sic*] I don't understand.
>
> Claimant: I just want to say that I cannot return because if I do, they will kill me and I do not want to take that chance.

[10] The Applicant made no other comment in respect of the Member's comments. The issue of his brothers' successful refugee claims, while raised as a fact in his narrative, is not again referred to by the Board.

[11] The Applicant attests to his understanding of the process, particularly that he could not make submissions or argument. He was not cross-examined. I accept his evidence of his understanding as it is consistent with the transcript, and with his reactions to the Member as well as being unchallenged.

III. Analysis

[12] The sole issue which needs to govern this judicial review is whether there has been a breach of procedural fairness. The standard of review for this issue is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

[13] Self-represented litigants raise special challenges to courts and tribunals, in part because of lack of familiarity with the adjudicative process in this country. It is not the obligation of courts or tribunals to provide mini courses on law and procedure but it is their obligation to ensure that the legal process is fair. This was referred to by Justice Barnes in *Kamtasingh v Canada (Citizenship and Immigration)*, 2010 FC 45, 87 Imm LR (3d) 118, at para 10:

> … In a situation involving an unrepresented party, the scope of the duty of fairness is different and I subscribe to the views expressed by my colleague, Justice Danièle Tremblay-Lamer in *Law v. Canada (Minister of Citizenship and Immigration)* (2007), 2007 FC 1006, 160 A.C.W.S. (3d) 879 at paras. 15-19:
>
> > 15 Thus, the IAD is to be shown much deference in its choice of procedure so long as that procedural choice permits those who are affected by its decision to present their case.
> >
> > 16 Specifically, in the context of the procedural rights afforded to a self represented party, this Court has held that an administrative tribunal has no obligation to act as the attorney for a claimant who refused counsel, and that:

> […] it is not the obligation of the Board to "teach" the Applicant the law on a particular matter involving his or her claim. (*Ngyuen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1001, [2005] F.C.J. No. 1244 (QL), at para. 17)

17 However, while administrative tribunals are not required to act as counsel for unrepresented parties, they must still ensure that a fair hearing takes place. In *Nemeth v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, [2003] F.C.J. No. 776 (QL), at para. 13, O'Reilly J. asserted:

> […] But the Board's freedom to proceed in the absence of counsel obviously does not absolve it of the over-arching obligation to ensure a fair hearing. Indeed, the Board's obligations in situations where claimants are without legal representation may actually be more onerous because it cannot rely on counsel to protect their interests.

18 It has also been recognized that an unrepresented party "[…] is entitled to every possible and reasonable leeway to present a case in its entirety and that strict and technical rules should be relaxed for unrepresented litigants […]" (*Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, [2007] F.C.J. No. 254 (QL), at para. 22).

19 Therefore, it is evident that the specific content of procedural rights afforded to unrepresented parties is context-dependent. The paramount concern is ensuring a fair hearing where the unrepresented party will have the opportunity to fully present their case.

[14] People who, for one reason or another, represent themselves engage in a highly risk enterprise – the equivalent of doing open heart surgery on oneself. There are limits on how far a court or tribunal can go but it seems to me that the basic process – the hearing of evidence, the sequence of evidence and cross-examination and the conduct and timing of argument – are bare minimums, which must be explained.

[15] In so saying, I am not in the least critical of the Member. It is apparent that the Member attempted to explain the process in simple terms and with simple words. However, in practical effect, the reference to making "a statement" or providing "information" likely confused the Applicant as to whether information/evidences were part of his "statement" or whether there were two phases to the process – information/evidence taking as distinct from argument. The second quote compounded the confusion.

[16] Aside from the Applicant's affidavit, his reaction to the so-called invitation (or opportunity afforded) is consistent with a lack of understanding of this process. He merely asked not to be sent back and made no attempt to address the issues raised.

[17] Most telling is the failure of the Applicant to address the similar fact evidence of his brothers (who had been threatened by investors just like the Applicant) and their successful refugee claims. The Board's own rules raise the importance of similar fact evidence.

21. (1) Subject to subrule (5), the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar	21. (1) Sous réserve du paragraphe (5), la Section peut communiquer au demandeur d'asile des renseignements personnels et tout autre renseignement qu'elle veut

questions of fact or if the information is otherwise relevant to the determination of their claim.	utiliser et qui proviennent de toute autre demande d'asile si la demande d'asile soulève des questions de fait semblables à celles d'une autre demande ou si ces renseignements sont par ailleurs utiles pour statuer sur la demande.

Refugee Protection Division Rules, SOR/2012-256

[18] A breach of procedural fairness does not have to arise through fault or blame of the decision maker. Unintended circumstances may arise which create the unfairness and the unfairness is just as serious whether intended or not. This process was undermined by unfairness and the situation can be remedied by holding a new hearing.

IV. Conclusion

[19] Given that there was a breach of procedural fairness, the decision will be quashed and the matter remitted back for a new determination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is quashed and the matter is remitted back for a new determination.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1002-14
STYLE OF CAUSE:	NAIM KERQELI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 13, 2015
JUDGMENT AND REASONS:	PHELAN J.
DATED:	APRIL 16, 2015

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