Federal Court Cour fédérale

Date: 20160121

Docket: IMM-3200-15

Citation: 2016 FC 70

Toronto, Ontario, January 21, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHIYUAN SHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Shiyuan Shen has brought an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD dismissed two preliminary motions brought by Mr. Shen regarding the re-determination of his claim for refugee protection.

[2] The Minister of Public Safety and Emergency Preparedness intervened in Mr. Shen's hearing before the RPD to argue that he should be excluded from refugee protection pursuant to Article 1F(b) of the United Nations Convention Relating to the Status of Refugees, Can TS 1969 No 6 [Convention] and s 98 of the IRPA. Together, these provisions provide that refugee protection will not be conferred if there are "serious reasons for considering" that the person committed a serious, non-political crime outside of Canada prior to the person's admission to Canada. The Minister submitted evidence obtained from the Chinese Public Security Bureau [PSB] to support the claim that there were serious reasons to believe that Mr. Shen had committed fraud in China.

[3] The first motion brought by Mr. Shen sought the exclusion of all evidence emanating from Chinese authorities on the ground that it was obtained by torture. The second motion sought to prevent the Minister from intervening in Mr. Shen's claim for refugee status, on the ground that the Minister had breached the duty of candour and his conduct amounted to an abuse of process.

[4] For the reasons that follow, I have concluded that it is premature for this Court to review the RPD's refusal to exclude certain evidence on the ground that it may have been obtained by torture. However, given the circumstances of this case, questions concerning the duty of candour and abuse of process are not premature. The RPD's assessment of whether the Crown breached the duty of candour and whether this amounted to an abuse of process was internally inconsistent and legally incorrect. These questions are therefore remitted to the same RPD member for re-determination. The application for judicial review is allowed in part.

II. Background

[5] In these reasons, I refer to the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration collectively as "the Crown".

[6] Mr. Shen is 43 years old and a citizen of the People's Republic of China. He is a businessman who was involved in the steel trade in China. He was the directing mind of two companies in Shanghai, from which he withdrew in July 2001. Mr. Shen left China on February 3, 2002. He arrived in New York City, United States of America, on February 22, 2002.

[7] On April 3, 2002, the PSB in Shanghai issued an arrest warrant for Mr. Shen, alleging that he had committed fraud in China.

[8] Mr. Shen entered Canada on May 26, 2007 and took up residence in Vancouver, British Columbia. He married a Canadian citizen and started a successful kitchen cabinet business. He applied for permanent residence as a member of the Spouse or Common-Law Partner in Canada Class. Following his application, the Canada Border Services Agency [CBSA] arrested him for suspected involvement in illegal activities in China.

[9] On March 9, 2011, Mr. Shen applied for refugee protection in Canada. He maintains that he has never participated in any illegal activity in China, and that the Chinese authorities have targeted him for political reasons.

[10] Before the RPD, Mr. Shen argued that the PSB documents relied upon by the Crown were incomplete, and that the Crown was required to disclose all documents obtained from China that concerned his case. Counsel representing the Crown argued that full disclosure was not required, and made the following statement:

> In the present case, a CBSA officer reviewed all of the documents from the PSB with an interpreter. The officer then decided which documents were relevant to the Crown's case and arranged to have them translated from Chinese to English. The Crown is not aware of any exculpatory evidence in the information from the PSB. The claimant has not referred to any evidence that indicates the existence of exculpatory evidence in the possession of the PSB or CBSA. The claimant's submissions on the point are based upon speculation and suspicion and not on any evidence.

[11] In a decision dated May 6, 2013, the RPD found that Mr. Shen was excluded from refugee protection in Canada because he is a person referred to in Article 1F(b) of the Convention. The RPD concluded that the evidence "painted a clear picture of a fraud" and determined that Mr. Shen was "the person who masterminded the criminal conspiracy and was the person who gained from the illegal activity".

[12] Mr. Shen applied for leave and for judicial review of the RPD's decision. As a result of this Court's decision in *B135 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 871 [*B135*], the Crown conceded that there had been insufficient disclosure of information to Mr. Shen and the application for judicial review was allowed on consent. The Crown nevertheless refused to provide Mr. Shen with all documents obtained from the PSB relating to Mr. Shen's case. Mr. Shen sought relief from this Court, and on September 15, 2014, Justice Beaudry

ordered the Crown to provide Mr. Shen with full disclosure of all documents received from the PSB regarding the charges against him.

[13] After reviewing the newly-disclosed documents with his lawyers, Mr. Shen concluded that many were relevant to the charges against him and some were exculpatory in nature. In particular, Mr. Shen discovered records pertaining to a PSB interview with his sister, in which she admitted to the PSB that she had delivered money to individuals in China on behalf of her brother's companies, and that she had withheld accounting records from the PSB. During the interview dated February 26, 2002, she stated the following: "… at the beginning, I did not want to tell. Later, after repeated education from comrades at your PSB(s), I felt it would not be all right not to tell. It would be wrong, and it would constitute a crime. I was also shown (a) book(s) of law for me to read. The more I thought of it, the scarier it was. I simply said it to get a lenient treatment. So I voluntarily submitted the accounting materials". Mr. Shen maintains that this statement clearly demonstrates that his sister's evidence was obtained by torture.

[14] Mr. Shen brought two preliminary motions at a pre-hearing conference before the RPD. The first motion sought the exclusion of all evidence emanating from the PSB on the basis that it was obtained by torture. The second motion sought to prevent the Crown from intervening in the re-determination of his claim, on the ground that the Crown had breached the duty of candour during the first RPD hearing and that its conduct amounted to an abuse of process.

[15] Counsel representing the Crown acknowledged that not all relevant documents had been disclosed, but provided no explanation for her previous statement that no exculpatory material

had been withheld. She said only that she was "unable to enter evidence or testify regarding the documents and motivations behind their non-disclosure where any existed at all".

III. The RPD's Decision

[16] The RPD found that Mr. Shen had failed to establish a "plausible connection to torture of evidence emanating from the PSB in China in relation to his case". The RPD accepted that Mr. Shen had demonstrated a *prima facie* connection between the evidence and the use of torture, which gave rise to a rebuttable presumption. However, the RPD found that the Crown had successfully rebutted the presumption, based on the argument that one cannot infer from the widespread use of torture by Chinese officials that torture was used in Mr. Shen's case. The RPD declined to exclude the evidence, but stated that any evidence that was shown to have been obtained through coercion or forced confession would be accorded little or no weight at the hearing.

[17] The RPD rejected Mr. Shen's argument that the Crown had breached its duty of candour because of counsel's statement that no exculpatory evidence had been withheld during the first RPD hearing. The RPD agreed that some of the documents that were previously undisclosed could be considered exculpatory, and noted that some of the undisclosed evidence had in fact been translated for the first RPD hearing, thereby demonstrating that the Crown may have been aware of its existence and relevance. The RPD stated that it would draw a negative inference from the Crown's failure to provide an explanation for the false representation made during the first hearing, but then remarked: "To insinuate that Minister's counsel was aware of the

relevance and exculpatory nature of the documents when she had received the information from someone prior to her who had vetted the information, is stretching".

[18] By the same token, the RPD rejected Mr. Shen's argument that the Crown's conduct during the first hearing amounted to an abuse of process. Applying the test in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, the RPD determined that the Crown's failure to disclose all of the evidence did not taint the proceedings to such a degree that it amounted to one of the "clearest cases" where the Crown should be prevented from further participation in the proceedings. The RPD noted that there was a public interest in determining the question of Mr. Shen's exclusion, and found that he would now be given a full opportunity to meet the case against him with the benefit of the newly-disclosed documents. The RPD noted that in *B135*, the remedy provided for a breach of the duty of disclosure was re-determination of the claim. Since this was already underway in Mr. Shen's case, the RPD concluded that no other remedy was necessary.

IV. Issues

[19] This application for judicial review raises the following issues:

A. Is the application for judicial review premature?

B. What is the applicable standard of review?

C. Was the RPD's determination that there was no breach of the duty of candour and no abuse of process correct?

V. Analysis

A. *Is the application for judicial review premature?*

[20] The Crown takes the position that Mr. Shen's application for judicial review is premature. The Crown notes that the RPD has not made a decision regarding Mr. Shen's claim for refugee protection. Mr. Shen may ultimately be successful before the RPD, rendering any concern about abuse of process moot. Furthermore, the Crown says that although the RPD declined to exclude the evidence emanating from the PSB, it has yet to determine whether the evidence will be relied upon. The Crown therefore urges this Court to refrain from intervening in the RPD's interlocutory decisions.

[21] The Crown relies on the general rule that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" *(Canada (Border Services Agency) v CB Powell Ltd.*, 2010 FCA 61 at paras 31-33 [*CB Powell*]). The Crown submits that the threshold for exceptionality is high, and even concerns about procedural fairness, bias, or important constitutional issues do not allow the parties to bypass the administrative process where issues may be raised and an effective remedy may be granted (*CB Powell* at para 33; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*]).

[22] Mr. Shen does not dispute the general principle that courts should refrain from interfering in ongoing administrative proceedings, but submits that the exceptional circumstances of his case warrant a departure from this rule. He asserts that the doctrine of abuse of process is a recognized exception to the general principle against non-interference in administrative proceedings (*John Doe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 327; *Almrei v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1002 [*Almrei*]; *Beltran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 516).

[23] I agree with the Crown that Mr. Shen's request that this Court review the RPD's refusal to exclude evidence on the ground that it was obtained by torture is premature. The RPD found that Mr. Shen's arguments were speculative, and that evidence of widespread torture in China was not sufficiently specific to Mr. Shen's circumstances. The RPD held that "there is insufficient evidence for me to determine that there is a high risk that the Applicant's sister's statements are a product of torture … until I have had the opportunity to conduct my own credibility assessment in an upcoming hearing". The RPD also found that there was a serious possibility that the evidence had been obtained through coercion, but this assessment would have to be made "in the fullness of the upcoming hearing".

[24] The RPD rejected Mr. Shen's motion to exclude evidence, but left the door open to further consideration of the matter. Mr. Shen will have an opportunity to adduce evidence and make arguments regarding the way in which his sister's statement, or any other evidence relied upon by the Crown, was obtained. If Mr. Shen is able to demonstrate that evidence was obtained not only through coercion but also by the use of torture, then that evidence must be excluded.

There is also the possibility of judicial review of the RPD's final decision. I am satisfied that adequate remedies are available to Mr. Shen, and the Court's intervention at this time would be premature.

[25] Turning to the question of abuse of process, six factors guide the Court in determining whether to refuse relief on the ground of prematurity: (i) hardship to the applicant; (ii) waste; (iii) delay; (iv) fragmentation; (v) strength of the case; and (vi) the statutory context (*Almrei* at para 34, citing *Air Canada v Lorenz*, [2000] 1 FC 494, [1999] FCJ No 1383). This case already has a lengthy procedural history. The first hearing before the RPD lasted 14 days, and resulted in three applications to this Court. This may be contrasted with *CB Powell* and *Halifax*, both of which concerned a single administrative proceeding with no previous procedural history (*Almrei* at para 36).

[26] Although hardship to an applicant is not a determinative factor (*Almrei* at para 35), the RPD found that Mr. Shen suffered "great emotional and financial" strain during the first RPD hearing. The statement of Mr. Shen's sister was translated for the first hearing but not disclosed, lending an air of reality to the allegation that it was deliberately withheld. As Justice Mosley found in *Almrei* at para 59, any waste, delay or fragmentation that may result from proceeding with this aspect of Mr. Shen's application for judicial review is attributable to the conduct of the Crown.

[27] The Federal Court of Appeal held in *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 89 that even if an abuse of

process is present, premature intervention by way of judicial review will be unwarranted so long as an adequate alternative remedy exists. The adequacy of effective recourse depends upon the circumstances of each case. Here, I am not satisfied that the possibility of judicial review of the RPD's final decision provides an effective remedy.

[28] The Supreme Court of Canada held in *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 40, [2013] 2 SCR 227 that the doctrine of abuse of process is characterized by its flexibility and is unencumbered by specific requirements. The doctrine evokes the public interest in a fair and just process and the proper administration of justice. In the unusual circumstances of this case, permitting the proceedings to continue without a proper enquiry into whether the duty of candour was breached or an abuse of process has occurred may harm the integrity of the RPD's proceedings, and may ultimately bring the administration of justice into disrepute.

B. *What is the applicable standard of review?*

[29] In *B006 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1033 at paras 35-36, Justice Kane held that the standard of correctness applies to the RPD's articulation of the legal test for abuse of process, but its determination that there has been no abuse of process is subject to review by this Court against the standard of reasonableness. Abuse of process may also be characterized as an aspect of procedural fairness, which is reviewable against the standard of correctness (*Muhammad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 448 at para 51, citing *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at para 29 and *Herrera Acevedo v Canada (Minister of Citizenship & Immigration)*, 2010 FC 167 at para 10).

[30] In this case, I am not satisfied that the RPD articulated or applied the correct test for abuse of process. The RPD's decision is therefore subject to review against the standard of correctness. No deference is owed to the RPD's decision, and the Court must undertake its own analysis (*New Brunswick v Dunsmuir*, 2008 SCC 9 at para 50).

C. *Was the RPD's determination that there was no breach of the duty of candour and no abuse of process correct?*

[31] Before the RPD, Mr. Shen argued that the Crown must have known that the undisclosed PSB documents included exculpatory evidence because his sister's statement to the PSB was translated during the initial proceedings. Mr. Shen says that the statement of counsel for the Crown that she "was not aware" of any exculpatory evidence was a breach of the duty of candour, and tantamount to an abuse of process.

[32] The duty of candour requires the Crown's representatives to be candid and fair in their dealings with both litigants and tribunals (*Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504 at para 42 [*Tursunbayev*]; *Odosashvili v Canada (Minister of Citizenship and Immigration)*, 2014 FC 308 at para 20 [*Odosashvili*]). The fact that statements were made in submissions rather than in evidence does not limit or reduce the representative's duty of candour (*Tursunbayev* at para 42).

[33] The RPD found that there was no breach of the duty of candour because the Crown representative who made the statement was not the same person who reviewed the evidence to determine whether it should be disclosed to Mr. Shen. The RPD noted that a CBSA officer

reviewed the evidence, totalling thousands of pages, decided upon its relevance, requested translation of any relevant material, and only then provided it to counsel representing the Crown.

[34] The RPD found it "plausible" that the Crown knew about the exculpatory nature of the documents. However, the RPD held that Mr. Shen could not speculate about the motivations or state of mind of counsel representing the Crown during the first RPD hearing. The RPD held that, without direct evidence that the CBSA had "forwarded the evidence to Minister's counsel", it could not be inferred that the Crown had deliberately withheld the documents in order to further its case against Mr. Shen. This analysis was internally inconsistent and legally incorrect.

[35] A breach of the duty of candour does not require that the individual who makes the statement know that the information is false. This Court has found a breach of the duty of candour when statements or materials presented by Crown counsel contained information that was "known or ought to have been known to be false" (*Odosashvili* at para 13).

[36] The RPD found that it was incumbent upon the Crown to provide an explanation for failing to disclose evidence that was relevant and exculpatory. Counsel representing the Crown declined to provide any explanation, ostensibly because she could not provide evidence and continue to act as counsel. The RPD then declared that it was drawing an adverse inference against the Crown, but did not explain what this inference was. The natural inference would be that the Crown's withholding of evidence was deliberate, and intended to undermine Mr. Shen's opportunity to make full answer and defence. If this were true, then it could be sufficiently serious to warrant a stay of the Crown's intervention in Mr. Shen's claim for refugee protection.

[37] The RPD found that the statement by counsel representing the Crown during the first hearing that no exculpatory evidence had been withheld was false. Mr. Shen therefore established a *prima facie* case that there had been a breach of the duty of candour. It was incumbent upon the Crown to provide an explanation for the failure to disclose relevant and exculpatory evidence. Where a party "fails to bring before a tribunal evidence which is within the party's ability to adduce, an inference may be drawn that the evidence not adduced would have been unfavourable to the party" *(Bains v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1264 at para 38, [2001] 1 FC 284; *Canada (Minister of Citizenship and Immigration) v Malik*, [1997] ACF No 378 at para 4, 128 FTR 309 [*Malik*]; *Ma v Canada (Minister of Citizenship and Immigration)*, 2010 FC 509 at paras 1-7). An adverse inference will not be drawn against a party where a reasonable explanation is provided (*Malik* at para 4).

[38] This matter must be returned to the RPD member to determine whether the duty of candour was breached; whether this amounted to an abuse of process; and, if so, the appropriate remedy. The Crown must be given a clear opportunity to provide an explanation for its failure to disclose relevant and exculpatory evidence. This will likely require the involvement of counsel who did not participate in decisions respecting disclosure that were made during the first hearing before the RPD.

[39] The RPD must then consider the adequacy of the Crown's explanation. If no explanation is forthcoming, then the RPD may draw an adverse inference and must state clearly what that inference is. If the evidence establishes, or an inference is drawn, that the Crown's withholding of relevant and exculpatory documents was deliberate, then this will amount to a breach of the

duty of candour and the RPD must consider whether it also constitutes an abuse of process. If the answer is yes, then the RPD must fashion an appropriate remedy, bearing in mind that a stay of proceedings or equivalent remedy will be justified only in the "clearest of cases" *(Fabbiano v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1219 at para 9).

VI. Conclusion

[40] For the foregoing reasons, the application for judicial review is granted in part. Questions regarding the duty of candour and abuse of process are remitted to the same member of the RPD for re-determination in accordance with these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted in part. Questions regarding the duty of candour and abuse of process are remitted to the same member of the RPD for re-determination in accordance with these reasons.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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