Federal Court Cour fédérale

Date: 20170130

Docket: IMM-3200-15

Citation: 2017 FC 115

Ottawa, Ontario, January 30, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHIYUAN SHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] Shiyuan Shen has brought a motion pursuant to Rule 399(2) of the *Federal Courts Rules*, SOR/98-106 for reconsideration and variance of my judgment in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 [*Shen*]. Mr. Shen argues that recently-disclosed documents from the Canada Border Services Agency [CBSA] leave no doubt that the Crown breached the duty of

candour, and its conduct amounts to an abuse of process. He asks this Court to prohibit the Crown's further intervention in his claim for refugee protection.

[1] For the reasons that follow, I have concluded that the newly-disclosed CBSA documents would not have a determining influence on my previous judgment. If they had been available at the time, they would only have provided further grounds for the relief that was granted. By the same token, I am unable to say that my previous judgment was obtained by fraud.

[2] Despite the shortcomings in the Crown's explanation for its failure to disclose the CBSA documents until late 2016, the record is not sufficiently clear to support a finding that the Crown breached its duty of candour or that its conduct amounts to an abuse of the Court's process. The motion for reconsideration is therefore dismissed. However, in the special circumstances of this case, costs are awarded to Mr. Shen.

II. Background

[3] 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".

[4] Shiyuan Shen is a citizen of China, where he was formerly involved in the steel trade. In 2002, he left China and travelled to the United States of America, taking up residence in New York City. Shortly thereafter, the Chinese authorities charged him with fraud. Mr. Shen entered Canada in 2007 and settled in Vancouver.

[5] Mr. Shen 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 CBSA arrested him for suspected involvement in illegal activities in China. Mr. Shen applied for refugee status in Canada, alleging that the charges brought against him in China were politically motivated.

[6] A hearing into Mr. Shen's refugee claim was convened by the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The Minister of Public Safety and Emergency Preparedness intervened to argue that Mr. Shen should be excluded from refugee protection under Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, Can TS 1969 No 6 and s 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Pursuant to these provisions, refugee protection will not be conferred if there are "serious reasons for considering" that a 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 allegation that there were serious reasons to believe that Mr. Shen had committed fraud in China.

[7] The RPD found Mr. Shen to be inadmissible to Canada. Mr. Shen sought judicial review of the RPD's decision in this Court. The application was allowed on consent, on the ground that Mr. Shen had received inadequate disclosure of the case against him. A further application to this Court resulted in an Order by Justice Beaudry dated September 15, 2014 compelling the Crown "to provide to the Applicant full disclosure of all materials relating to the Applicant's matter which are in the Respondent's possession, in particular full disclosure of all documents received

from the Public Security Bureau in China relating to the charges against the Applicant" (Court File No. IMM-3740-13).

[8] When the proceedings resumed before the RPD, Mr. Shen made two preliminary motions. The first motion sought the exclusion of all evidence emanating from the PSB on the ground that it was obtained by torture. The second motion sought to prevent the Crown from intervening in Mr. Shen's claim for refugee status, on the ground that the Crown had breached the duty of candour and its conduct amounted to an abuse of process. Both motions were dismissed by the RPD, and Mr. Shen sought judicial review in this Court.

[9] In *Shen*, I concluded that it was 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 the case, I found that questions concerning the duty of candour and abuse of process were not premature. I held that the RPD's assessment of whether the Crown had breached the duty of candour and whether this amounted to an abuse of process was internally inconsistent and legally incorrect. The application for judicial review was therefore allowed in part, and these questions were remitted to the same RPD member for re-determination.

III. Issues

[10] This motion for reconsideration and variance of my judgment in *Shen* raises the following issues:

A. Is the newly-discovered information a “matter” within the meaning of Rule 399(2) that was not discoverable by the exercise of due diligence, and which would have a determining influence on the previous judgment?

B. Was the previous judgment obtained by fraud?

C. Does the Crown’s alleged abuse of process extend to its conduct before this Court and, if so, what is the appropriate remedy?

IV. Analysis

[11] The general principle is that “an order, once made, cannot be revisited by the Court that made it” (*Janssen Inc v Abbvie Corp*, 2014 FCA 176 at para 35 [*Janssen*]). Rule 399(2) provides that, in very limited circumstances, the Court may set aside or vary an order by reason of a matter that arose or was discovered subsequent to the making of the order or where the order was obtained by fraud (Rule 399(2); *Noahs Ark Foundation v Canada*, 2015 FC 1183 at para 18 [*Noahs Ark*]).

[12] As Justice Snider held in *Procter & Gamble Pharmaceuticals Canada Inc v Canada (Health)*, 2003 FC 911 [*Procter & Gamble*], Rule 399(2) “does not give the Court a new original jurisdiction or a continuing jurisdiction to undertake a review of a judgment as if at first instance and cannot be used as a vehicle for revisiting judgments every time a change in the facts occurs” (at para 17; see also *Zeneca Pharma Inc v Canada (National Health & Welfare)*, [2000] FCJ No 2134 (TD) at para 6). A motion to vary under Rule 399 must be “supported by detailed, concrete

and proper evidence" (*Janssen* at para 41) and will be granted only "in the clearest of cases" (*Procter & Gamble* at para 29).

A. *Is the newly-discovered information a "matter" within the meaning of Rule 399(2) that was not discoverable by the exercise of due diligence, and which would have a determining influence on the previous judgment?*

[13] Three conditions must be met before the Court may grant a motion under Rule 399(2)(a): the newly-discovered information must be a "matter" with the meaning of the Rule; the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and the "matter" must be something which would have a determining influence on the decision in question (*Ayangma v Canada*, 2003 FCA 382 at para 3 [*Ayangma*]; see also *Procter & Gamble* at para 18; *Evans v Canada (Citizenship and Immigration)*, 2014 FC 654 at para 19 [*Evans*]).

[14] Under Rule 399(2), "matter" is "a word of broad import", and includes "an element of the relief sought as opposed to an argument raised before the court" (*Proctor & Gamble* at para 19; *Haque v Canada (Citizenship and Immigration)*, [2000] FCJ No 1141 (TD) at para 5; see also *Evans* at para 20). The "matter" must be relevant to the facts giving rise to the original order (*Proctor & Gamble* at para 19).

[15] Mr. Shen's motion is not based on "ignorance of the law or failure to raise an argument that could otherwise properly have been brought before the Court" (*Noahs Ark* at para 19). Nor does he rely on additional jurisprudence, new or old (*Ayangma* at para 4). Neither of these would constitute a "matter" under Rule 399(2). Instead, Mr. Shen relies on pre-existing but newly-

disclosed documents that he says have a direct bearing on the matters previously considered by the Court. I am satisfied that these circumstances are sufficient to meet the first branch of the test for reconsideration in Rule 399(2).

[16] If there is a "matter" within the scope of the Rule, an applicant must then "demonstrate that they could not with reasonable diligence have discovered the new matter sooner" (*Proctor & Gamble* at para 22; see also *Ayangma* at para 5). In this case, there is no dispute that the recently-disclosed documents, which have existed since 2012, were deliberately withheld from Mr. Shen by the Crown. I am therefore satisfied that they could not with reasonable diligence have been discovered sooner.

[17] In the final step, the judge considering the motion under Rule 399(2) is asked to enter the mind of the judge who heard the initial matter, and determine what they would have done if the new matter were before them (*Procter & Gamble* at para 29). Given the speculative nature of this step, a Rule 399 motion is "a very weighty request" (*Procter & Gamble* at para 29). In *Smith v Canada (Citizenship and Immigration)*, 2007 FC 712 at paragraph 20, Justice Gibson, because he was not the judge who made the initial Order, interpreted this as whether the matter "*might* have a determining influence" [emphasis original]. However, in this case, I am the judge who issued the previous judgment, and the test is therefore whether the new evidence would have a determining influence on that judgment.

[18] The newly-disclosed CBSA documents both relate to the admissibility to Canada of a police officer with the PSB who was to be called as a witness at Mr. Shen's first hearing before the RPD.

The documents noted that the PSB's human rights record had attracted criticism from reputable sources in publicly-available reports. These included assessments performed by the United States Department of State, a United Nations Special Rapporteur, Amnesty International and Human Rights Watch. One of the CBSA documents concluded that it was possible, although not probable, that the evidence to be offered by the PSB Officer was obtained by torture.

[19] The CBSA's recommendation regarding the admissibility of the PSB officer to give evidence in Canada is redacted, as are some further observations regarding the PSB. Counsel for Mr. Shen has been given access to less redacted versions of the documents, subject to the undertaking that he not disclose the protected information to his client. Mr. Shen is challenging the redactions in a separate proceeding before this Court (Court File No. DES-6-16).

[20] The PSB officer was permitted to enter Canada and testified at the first hearing before the RPD. Following his testimony, Crown counsel argued that his evidence was reliable and trustworthy. She took the position that Mr. Shen had failed to demonstrate that it was even plausible that the evidence provided by the PSB officer was obtained by torture. Mr. Shen argues that this was inconsistent with the CBSA's assessment that it was possible, although not probable, that the evidence resulted from torture, and the Crown once again breached its duty of candour to the RPD.

[21] In the earlier proceeding before this Court, Mr. Shen relied on documents emanating from the PSB that were disclosed pursuant to Justice Beaudry's Order of September 15, 2014. These included a statement from Mr. Shen's sister in which she said that she had cooperated only after "repeated education" by the PSB. The RPD held that this was insufficient to demonstrate a high

risk that the Applicant's sister's statements were the product of torture, and it would be necessary for the RPD to conduct its own credibility assessment in the upcoming hearing. The RPD acknowledged that there was a serious possibility the evidence had been obtained through coercion, but this assessment would also have to be made in the upcoming hearing.

[22] In my view, the newly-disclosed CBSA documents fall into the same category as the documents relied upon by Mr. Shen in support of his previous request for an order prohibiting the Crown from intervening before the RPD to argue against Mr. Shen's admissibility to Canada. They appear to have limited probative value. The CBSA documents repeat observations found in publicly-available reports of governmental and non-governmental agencies. Mr. Shen relied upon these same sources to cross-examine the PSB officer who testified at the first RPD hearing.

[23] I am therefore unable to conclude that the newly-disclosed CBSA documents would have a determining influence on my previous judgment. If they had been available at the time, they would only have provided further grounds for the relief that was granted: an order remitting the matter to the RPD for redetermination of whether the Crown's failure to disclose relevant information was a breach of the duty of candour; whether this was sufficiently serious to constitute an abuse of process; and, if so, the appropriate remedy.

[24] As alternative relief, the Crown asks that I clarify the scope of my judgment in *Shen* to assist in the resolution of disputes before the RPD regarding its interpretation and application. This request is clearly outside the scope of Rule 399, and it is unnecessary to consider it further (*Teva Neuroscience GP-SENC v Canada (Attorney General)*, 2010 FC 1204 at para 25).

B. *Was the previous judgment obtained by fraud?*

[25] Two criteria must be met before a motion to vary on the basis of fraud will be allowed. First, a false representation must have been made. Second, the false representation must have been "made either (i) knowingly, without an honest belief in its truth, or (ii) recklessly, careless of whether it be true or false" (*Imperial Oil Ltd v Lubrizol Corp*, [2000] FCJ No 853 (CA) at para 53 [*Imperial Oil*]; *Pfizer Canada Inc v Canada (Health)*, 2011 FCA 215 at para 20 [*Pfizer*]). An alleged fraud must go to the foundation of the case and be proven on the balance of probabilities (*Pfizer* at para 21; *Imperial Oil* at para 57).

[26] Mr. Shen says that the Crown misrepresented to this Court in the previous proceeding that full disclosure had been made to Mr. Shen, and the Crown either knew this statement to be false or was reckless as to its truth. The Crown responds that it did not mislead this Court in *Shen*, nor did it fail to abide by Justice Beaudry's Order of September 15, 2014 requiring disclosure of all relevant materials in the Crown's possession. The Crown argues that the CBSA documents benefited from litigation privilege, and were therefore not subject to disclosure. Crown counsel was unable to explain why the documents were ultimately disclosed to Mr. Shen in late 2016, but invited the Court to infer that privilege must have been waived.

[27] As noted above, I am unable to conclude that the newly-disclosed CBSA documents would have a determining influence on my previous judgment in *Shen*. By the same token, it cannot be said that my previous judgment was obtained through the Crown's intentional or reckless concealment of the CBSA documents. The matter was decided, at least in part, in Mr. Shen's

favour. If the Crown had acknowledged the existence of the CBSA documents at the time, this would not have changed the outcome.

C. *Does the Crown's alleged abuse of process extend to its conduct before this Court and, if so, what is the appropriate remedy?*

[28] This argument is in some respects connected to the assertion that the Court's previous judgment in *Shen* was obtained by fraud. Mr. Shen maintains that the Crown repeatedly and falsely asserted before this Court that all relevant materials had been disclosed to him when, in fact, the CBSA documents had been withheld. Mr. Shen says that the Crown breached its duty of candour to the Court, and also failed to comply with Justice Beaudry's Order of September 15, 2014. While he acknowledges that the RPD is well-placed to address any abuse of its own process, he maintains that only a judge of this Court may remedy an abuse of the Court's process.

[29] The Crown's explanation for its refusal to disclose the CBSA documents to Mr. Shen until late 2016 is far from satisfactory. At the hearing, Crown counsel initially sought to interpret Justice Beaudry's Order narrowly, suggesting that it was limited to documents emanating from the PSB. Given the plain language of the Order "to provide to the Applicant full disclosure of all materials relating to the Applicant's matter which are in the Respondent's possession", this was clearly an untenable position. After some equivocation, Crown counsel acknowledged that the CBSA documents were indeed relevant to Mr. Shen's refugee claim and *prima facie* subject to disclosure.

[30] The Crown then advanced the position that the CBSA documents, although relevant, benefited from litigation privilege, and had been withheld from Mr. Shen and the RPD for this reason. The Crown offered no evidence to substantiate this claim. Nor was any explanation offered for the Crown's decision to disclose the documents in late 2016, subject to only limited redactions.

[31] If privilege is to be claimed in respect of a document, then ordinarily the document must be clearly identified and the reason for withholding the document must be stated. This enables the party seeking disclosure to challenge the claim of privilege, and to ask a competent body to rule on the matter if requested (*Blank v Canada (Justice)*, 2006 SCC 39 at para 45).

[32] While I accept that proceedings before the RPD are informal, and the RPD is not bound by the strict rules of evidence (IRPA, s 170), I have been given nothing more than the bare assertion of Crown counsel to substantiate the claim that the CBSA documents were withheld from Mr. Shen and the RPD on the ground of litigation privilege. There is no affidavit evidence from someone with personal knowledge of the proceedings before the RPD to confirm that this in fact transpired.

[33] Despite the shortcomings in the Crown's explanation for its failure to disclose the CBSA documents until late 2016, the record is not sufficiently clear to support a finding that the Crown breached its duty of candour or that its conduct amounts to an abuse of the Court's process. As noted previously, the documents appear to have limited probative value. They consist primarily of summaries of widely-available reports published by foreign governments and non-

governmental organizations, accompanied by brief observations and conclusions of CBSA officials.

[34] Furthermore, it is unclear how the alleged abuse of process would be remedied. There are no ongoing proceedings before the Court that might be amenable to a stay. Mr. Shen does not require an adjournment in order to reconsider or adjust his approach to any proceedings before the Court. The only possible remedy would be an award of costs.

[35] Costs are not ordinarily payable in proceedings before this Court under the IRPA (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, Rule 22). However, in this case, I am satisfied that Mr. Shen and the Court have been needlessly inconvenienced by the Crown's late and largely unexplained disclosure of the CBSA documents. The Crown's request for alternative relief, which was clearly outside the scope of Rule 399, caused Mr. Shen to incur further unnecessary expense in the preparation of a supplementary record. In these special circumstances, it is appropriate to award costs to Mr. Shen.

V. Conclusion

[36] The motion for reconsideration and variance of this Court's judgment in *Shen* is dismissed. Costs are awarded to Mr. Shen in the lump sum of $2,500.00, inclusive of disbursements.

ORDER

THIS COURT ORDERS that the motion for reconsideration and variance of this Court's judgment in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 is dismissed. Costs are awarded to Mr. Shen in the lump sum of $2,500.00, inclusive of disbursements.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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