Federal Court  Cour fédérale

Date: 20200228

Docket: IMM-5260-19

Citation: 2020 FC 317

Vancouver, British Columbia, February 28, 2020

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SAIDA AHMADI

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, the Minister of Public Safety and Emergency Preparedness, seeks judicial review of a decision by the Immigration Appeal Division [IAD] dated August 9, 2019.

[2] The Respondent, Saida Ahmadi, is a citizen of Afghanistan. She came to Canada in 2017 and claimed refugee status. In November 2017, an officer from the Canada Border Services

Agency issued a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] against the Respondent on the basis that there were reasonable grounds to believe she is inadmissible to Canada pursuant to paragraph 35(1)(*a*) of the IRPA. Specifically, the officer determined that the Respondent had committed an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24. The matter was referred to the Immigration Division [ID] for an inadmissibility hearing under subsection 44(2) of the IRPA.

[3] On August 9, 2018, the ID determined that the Respondent was not inadmissible pursuant to paragraph 35(1)(*a*) of the IRPA.

[4] The Applicant appealed the ID's decision to the IAD on August 29, 2018.

[5] After receiving the record of appeal, the IAD wrote to the parties on November 20, 2018 requesting that they provide submissions regarding whether the appeal could "proceed on the basis of the transcript from the ID proceedings". The IAD also indicated that the Applicant's submissions were due no later than December 20, 2018, that the Respondent had three (3) weeks to provide a written response and that thereafter, the Applicant had five (5) days to file a final written reply.

[6] On December 18, 2018, the Applicant responded to the IAD's request by indicating that no further *viva voce* evidence was required and that the transcript was sufficient for the purpose of deciding the appeal. In her submissions dated January 24, 2019, the Respondent also indicated

that she did not require further testimony, and she was satisfied that the appeal record was sufficient for the purposes of deciding the appeal. The Applicant filed no reply to the Respondent's submissions.

[7] In a decision dated August 9, 2019, the IAD dismissed the Applicant's appeal, agreeing with the ID that the Respondent was not inadmissible to Canada under paragraph 35(1)(*a*) of the IRPA. Before proceeding to address the issues of admissibility and complicity, the IAD noted that both the Applicant and the Respondent had submitted "there was no requirement for further testimony and that the Appeal Record would suffice as required evidence for the purposes of [the] appeal". The IAD added that since there was no requirement for an oral hearing, it considered the "materials in the Record" to render its decision.

[8] The Applicant argues that the IAD breached the principles of natural justice and procedural fairness when it failed to invite submissions from the parties on the substantive issues before rendering its decision on the merits.

II. Analysis

[9] Where issues of procedural fairness arise, the role of this Court is to determine whether the procedure is fair considering all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79). The approach to be followed when considering issues of procedural fairness appears to be unaffected by the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[10] I am satisfied that, in the circumstances of this case, the IAD breached the Applicant's right to procedural fairness.

[11] The Applicant's response to the IAD clearly demonstrates that the Applicant considered the IAD's request to be related to a procedural matter. The Applicant noted that the Respondent had given evidence about the relevant factors that are applicable to inadmissibility pursuant to paragraph 35(1)(*a*) of the IRPA and that it was the Applicant's understanding that the Respondent's testimony was part of the appeal record. The Applicant further indicated that, as a result, it "[did] not require further testimony" and submitted that "the transcript [was] sufficient for the purposes of deciding the appeal" before the IAD. The Applicant reiterated in his concluding remarks that the IAD had "the transcript of the proceedings, including the testimony of the Respondent", the transcript could be utilized for the appeal and the appeal could proceed on that basis. The Applicant's submissions are entitled "Appellant's Submissions on Procedure" and they consist of six (6) paragraphs, two (2) of which refer to the IAD's request. In his letter to the IAD attaching the submissions, the Applicant again refers to his understanding that the submissions are in response to the IAD's "question regarding procedure".

[12] The Respondent argues that in her response to the IAD's request, she not only indicated that she did not require further testimony, she also stated that she was satisfied that the appeal record was sufficient for the purposes of deciding the appeal before the IAD. She argues that, in light of this comment, it was incumbent on the Applicant to file a reply in response to tell the IAD that additional submissions would be provided.

[13] I am not persuaded by the Respondent's argument. A review of the Respondent's submissions also suggests that she shared the Applicant's understanding that the IAD's request related to procedure and not to the substantive issues. The Respondent's submissions consist of two (2) paragraphs and are entitled "Respondent's Submissions on Procedure". While the Respondent may have considered that additional submissions on the substantive issues were not required, I find that it was not unreasonable for the Applicant to form the view that the issue being addressed was in relation to the necessity of oral testimony, as the IAD's request specifically referred to the transcript of the proceedings and the transcript did not contain the submissions of the parties, as these submissions were provided to the ID in writing.

[14] I recognize that the IAD is to be shown considerable deference in its choice of procedure and that section 25 of the *Immigration Appeal Division Rules*, SOR/2002-230 contemplates that the IAD may require the parties to proceed in writing if this would not be unfair to the parties and there is no need for the oral testimony of a witness. However, the IAD invited the parties to provide submissions on whether the appeal could proceed on the basis of the transcript from the ID proceedings. It did not indicate that the appeal would be proceeding in writing or that it would proceed on the basis of the appeal record only. After receiving the responses of the parties, the IAD should have notified the parties that it was intending to proceed on the basis of the appeal record only. This would have permitted the Applicant to inform the IAD of his intention to file additional written submissions. Given the IAD's statement in the decision that the parties both submitted "that there was no requirement for further testimony and that the Appeal Record would suffice as required evidence for the purposes of [the] appeal", I am persuaded that the IAD conflated the transcript of evidence with the appeal record.

[15] The Court has previously stated that the IAD is required to give both parties the opportunity to make submissions and to notify them when it plans to render a decision (*Canada (Citizenship and Immigration) v Oganda Tonda*, 2018 FC 813 at para 23; *Canada (Citizenship and Immigration) v Conteh*, 2018 FC 416 at paras 8-9; *Canada (Citizenship and Immigration) v Chen*, 2011 FC 514 at paras 8-9). While I recognize that these cases are somewhat distinguishable, I am of the view that the underlying principles apply nonetheless.

[16] In the circumstances of this case, I find that it was unfair for the IAD to render a decision (i) without advising the parties that it would be proceeding on the basis of the appeal record only; and (ii) without giving them a meaningful opportunity to make additional submissions on the substantive issues to be determined, thus denying the parties their right to be heard. In my view, this breach of procedural fairness is fatal and justifies the Court's intervention.

[17] For these reasons, the application for judicial review is allowed. The decision is set aside and the matter is remitted back to a different panel for redetermination.

[18] On a final note, the parties agree that the proper Applicant in this proceeding is the Minister of Public Safety and Emergency Preparedness. The style of cause shall be amended accordingly.

[19] No questions of general importance were proposed for certification, and I agree that none arise.

JUDGMENT in IMM-5260-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of the Immigration Appeal Division dated August 9, 2019 is set aside and the matter is remitted back to a different panel for redetermination;
3. The style of cause is amended to replace the "Minister of Citizenship and Immigration" with the "Minister of Public Safety and Emergency Preparedness" as the Applicant; and
4. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5260-19
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v SAIDA AHMADI
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 27, 2020
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	FEBRUARY 28, 2020

APPEARANCES:

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