Federal Court  Cour fédérale

Date: 20200512

Docket: IMM-1022-19

Citation: 2020 FC 612

Ottawa, Ontario, May 12, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TAREQ AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Tareq Ahmed (the "Applicant") seeks judicial review of the decision of a Senior Immigration Officer (the "Officer"), acting as a delegate of the Minister of Citizenship and Immigration (the "Respondent"), refusing his application for permanent residence as a protected person. The Officer found that the Applicant was inadmissible pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), based on his former membership in the Bangladesh National Party ("the BNP").

[2] The Applicant is a citizen of Bangladesh. He arrived in Canada in July 2014 and claimed protection pursuant to section 96 and subsection 97(1) of the Act. The Immigration and Refugee Board, Refugee Protection Division (the "RPD") accepted his claim on July 15, 2015 and found that he was a Convention refugee on the basis of political opinion, that is his membership in the BNP.

[3] After obtaining Convention refugee status, the Applicant applied for permanent residence as a protected person in August 2015. On October 12, 2018, his application was referred to the Immigration, Refugees and Citizenship Canada ("IRCC") Humanitarian, Migration and Integrity Division for a security assessment.

[4] On November 5, 2018, the Officer notified the Applicant, through a procedural fairness letter, that he may be inadmissible to Canada due to his membership in the BNP. The letter provided the Applicant with the opportunity to respond and included a copy of subsection 34(1) of the Act.

[5] The Officer also provided two documents, that is a United Nations Development Programme Report entitled "Beyond Hartels: Towards a Democratic Dialogue in Bangladesh" and "Bangladesh Query Response: Awami League (AL) and Supporters of the Bangladesh National Party (BNP)", a report commissioned by the United Nations High Commissioner for Refugees, Division of National Protection.

[6] On December 5, 2018, the Officer received the Applicant's response to the procedural fairness letter, which included a letter written by him and submissions from his counsel.

[7] On January 11, 2019, the Officer refused the application for permanent residence, on the grounds that the Applicant was a member of the BNP and that there were reasonable grounds to believe that the BNP engaged in acts of terrorism. For these reasons, the Officer found that the Applicant was inadmissible to Canada pursuant to paragraph 34(1)(f) of the Act.

[8] The Applicant submits that the delay in raising the inadmissibility concerns gave rise to an abuse of process. He also argues that the principle of *res judicata* applies because the RPD had previously decided the issue of admissibility when it found he was a Convention refugee.

[9] The Applicant further submits that the decision was unreasonable because the Officer erred in interpreting section 34 of the Act and failed to consider all of the evidence.

[10] As well, the Applicant argues that his procedural fairness rights were breached because the Officer failed to disclose all relevant evidence and provide sufficient notice of a new issue. He also alleges that the Officer was biased due to his status as an employee of the Respondent.

[11] The Respondent submits that there was no abuse of process and that *res judicata* does not apply.

[12] The Respondent further argues that the decision was made with regard to all of the evidence and that there was no breach of procedural fairness.

[13] At the hearing, the Applicant made oral submissions about procedural fairness rights relative to the IRCC Manual "Inland Processing 10: Refusal of National Security Cases/Processing of National Interest Requests" (the "Manual") that were not raised in his Further Memorandum of Argument.

[14] The Respondent objected to these arguments because they were not included in the Applicant's Further Memorandum of Argument and requested an opportunity to provide further submissions if the Court were to consider these submissions.

[15] The first issue to be addressed is the applicable standard of review.

[16] In its recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada revisited the standard of review of administrative decisions. It said that, presumptively, such decisions are reviewable on the standard of reasonableness, with two exceptions: where legislative intent or the rule of law requires otherwise. Neither exception applies in this case.

[17] In *Vavilov, supra*, the Supreme Court of Canada confirmed the content of the reasonableness standard as set out in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[18] According to the decision in *Dunsmuir*, *supra*, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[19] *Vavilov*, *supra*, has not changed the approach to be taken on questions of procedural fairness, including a breach of natural justice. These issues are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[20] As noted above, the Applicant raises issues of abuse of process and *res judicata*. He bases his arguments upon the fact that he had been found admissible to Canada, pursuant to the decision of the RPD. Abuse of process is an aspect of procedural fairness and is reviewable on the standard of correctness.

[21] In my opinion, these arguments cannot succeed.

[22] A finding by the RPD upon a claim for protection involves considerations of risk, as outlined in the Act. An application for permanent residence requires consideration of other factors, again outlined in the Act.

[23] A finding by the RPD, about protected status, is not binding upon the Respondent when dealing with an application for permanent residence; see the decision in *Ratnasingam v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1096.

[24] Subsection 34(1) of the Act provides as follows:

Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants:
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	**a)** être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(b) engaging in or instigating the subversion by force of any government;	**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	**b.1)** se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(c) engaging in terrorism;	**c)** se livrer au terrorisme;
(d) being a danger to the security of Canada;	**d)** constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	**e)** être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	**f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

[25] Subsection 21(2) of the Act provides as follows:

Protected Person	**Personne protégée**
21 (2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38	**21 (2)** Sous réserve d'un accord fédéro-provincial visé au paragraphe 9(1), devient résident permanent la personne à laquelle la qualité de réfugié ou celle de personne à protéger a été reconnue en dernier ressort par la Commission ou celle dont la demande de protection a été acceptée par le ministre — sauf dans le cas d'une personne visée au paragraphe 112(3) ou qui fait partie d'une catégorie réglementaire — dont l'agent constate qu'elle a présenté sa demande en conformité avec les règlements et qu'elle n'est pas interdite de territoire pour l'un des motifs visés aux articles 34 ou 35, au paragraphe 36(1) ou aux articles 37 ou 38.

[26] In my opinion, the clear meaning of subsection 21(2) of the Act is that a finding of protected person status by the RPD does not foreclose considerations of admissibility, pursuant to subsection 34(1) of the Act.

[27] In the circumstances, I see no foundation in support of an argument about abuse of process. Indeed, I see no foundation for consideration of the doctrine of *res judicata* and that argument will not be addressed.

[28] The Applicant complains about a breach of procedural fairness. He says the Officer failed to disclose to him all relevant evidence upon which the admissibility decision would be made. The allegation of bias, arising in respect of the Officer's employment, is another aspect of procedural fairness.

[29] The procedural fairness letter included a copy of subsection 34(1) of the Act, as well as copies of two documents. The Officer gave the Applicant one month to provide additional submissions and evidence on his membership or activity in the BNP and to respond to the two documents forwarded. In response, the Applicant provided his own submissions and submissions from his counsel, addressing the documents disclosed by the Officer and the characterization of the BNP as a terrorist organization.

[30] Respect for procedural fairness requires that an applicant be provided with information upon which a decision will be made; see the decision in *El Maghraoui v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 883.

[31] An officer is not required to disclose publicly available information before making a decision; see the decision *Azizian v. Canada (Minister of Citizenship and Immigration)*, 2017 FC 379.

[32] As noted by the Respondents, two of the reports were available on the Immigration and Refugee Board website and the other available through Human Right Watch's website.

[33] Procedural fairness requires that a party receive the opportunity to present his or her case. That opportunity was provided to the Applicant, that is the opportunity to respond to the procedural fairness letter.

[34] In my opinion, the Applicant has failed to show any breach of his right to procedural fairness. He was aware of the material to be considered by the Officer. He was given the opportunity to respond to the concerns raised by the Officer; in other words he had the opportunity to present his case.

[35] The Applicant alleges bias on the part of the Officer, rising from his status as an employee of the Respondent.

[36] The test for bias was recently addressed by the Federal Court of Appeal in *Oleynik v. Canada (Attorney General)*, 2020 FCA 5 at paragraph 56, relying on the decision of the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al*., [1978] 1 S.C.R. 369. That test is as follows:

> [W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[37] At paragraph 57 of its decision in *Oleynik*, *supra*, the Federal Court of Appeal noted the following:

> In setting out this test in *Committee for Justice and Liberty* at 394, Justice de Grandpré was careful to state that the grounds for the apprehension must be "substantial." He also agreed that the test –

> what would a reasonable, informed person think – cannot be related to the "very sensitive or scrupulous conscience." In other words, the threshold for a finding of a reasonable apprehension of bias is a high one, and the burden on the party seeking to establish a reasonable apprehension is correspondingly high: see Yukon *Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 25-26.

[38] In my opinion, the Applicant failed to establish any kind of foundation for the allegation of bias on the part of the Officer, arising from his employment by the Respondent.

[39] I note that in the course of oral submissions, the Applicant raised a new argument about breach of procedural fairness, that is relative to the Manual. The Respondent objected to the late introduction of this argument.

[40] In the exercise of my discretion, I decline to entertain this argument.

[41] The Applicant had the opportunity to raise this issue in a Further Memorandum of Fact and Law and did not do so.

[42] Finally, I turn to the overall reasonableness of the decision under review.

[43] As noted above, the fact that the Applicant was found "admissible" before the RPD does not dictate the same result in respect of an application for permanent residence. Having regard to the provisions of the Act, and the evidence submitted, the Officer's decision meets the standard of reasonableness as discussed in *Dunsmuir*, *supra*, and confirmed by the decision in *Vavilov*, *supra*.

[44] I am satisfied that there was no breach of procedural fairness, including bias on the part of the Officer. The decision is reasonable upon the facts and the law and there is no basis for judicial intervention. It follows that this application for judicial review will be dismissed.

[45] At the hearing, the Applicant proposed two questions for certification, and in written submissions a third question for certification, as follows:

> 1. In an admissibility proceeding in which the Minister has neither referred the matter for a security certificate pursuant to section 77 of the *IRPA* nor invoked national security privilege, whether an immigration officer or relevant tribunal's reliance on open-source evidence in making negative inadmissibility finding, without disclosing the evidence to the person concerned, is a breach of the person's right to natural justice?
>
> 2. In a case such as this, where the organization, BNP, that has a long and legitimate political history and is not listed by Canadian or any other government as terrorist organization, whether a tribunal or the immigration officer is required to conduct an analysis of the alleged acts of violence in the context of the country and analyze the particular circumstance in which the alleged acts occurred to satisfy the specific intent requirements under s. 34 of the *IRPA*.
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> 3. Whether the Federal Court shall interpret and exercise its power to "prohibit or restrain" under section 18.1(3)(b) to grant the Applicant the common law remedy of *stopple* [*sic*] to prohibit an administrative decision maker from denying the Applicant's application on the grounds that are not justifiable or may have been dealt adequately by another authority with competent jurisdiction?

[46] The Respondent opposes certification of these questions.

[47] The test for certifying a question is set out in *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 and was recently confirmed in *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, [2018] 3 F.C.R. 674. The test for certification requires a

serious question that raises issues of broad significance or general importance and that is dispositive of an appeal.

[48] In my opinion, the proposed questions do not meet the test for certification and no question will be certified.

JUDGMENT in IMM-1022-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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