Federal Court Cour fédérale

Date: 20211004

Docket: IMM-3279-20

Citation: 2021 FC 1024

Ottawa, Ontario, October 4, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

TANVEER AKRAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada denying the Applicant's request for a permanent stay of proceedings based on abuse of process and, pursuant to s 109(1) of the *Immigration and Refugee Protection Act* cite [IRPA], granting the application of the Minister of Immigration and Citizenship [Minister] to vacate the October 31, 2007 RPD decision granting the Applicant Convention refugee protection.

[2] For the reasons that follow, I am denying this application.

Background

[3] The Applicant arrived in Canada on October 8, 2006 claiming to be Tanveer Akram, a Pakistani national. On entry, he acknowledged he had travelled to Canada using a false passport. The Applicant applied for refugee protection and, in his Personal Information Form [PIF], indicated that he had not used or is known by any other names. He also provided a detailed narrative in which he claimed to have been a very active member of the Pakistan People's Party and that he had been persecuted in Pakistan for his political activities from 1999 to 2006. On January 8, 2007, a Document Examination and Evaluation Report was prepared by CBSA Immigration and Intelligence Officer Tony Osterling. This report concluded that Applicant's Pakistani identity card was genuine but had been altered. That finding was not disclosed to the RPD prior to the Applicant's refugee hearing which was held on October 31, 2007. The Applicant's claim for refugee protection was granted by the RPD on November 6, 2007.

[4] The Applicant applied for permanent residence in Canada on November 29, 2007. Inquiries concerning the Applicant's identity, criminality and history in the United States [US] were conducted by CBSA. Based on the results of those inquiries, a Notice of Application to Vacate, pursuant to s 109(1) of the IRPA, was issued by the Respondent on September 13, 2016.

[5] In response to the application to vacate, the Applicant sought to summon CBSA Officer Osterling, to testify. The original RPD vacation panel denied the Applicant's request and, by decision dated April 11, 2018 allowed the application to vacate. The Applicant sought judicial

review of that decision, on the basis that the RPD should have allowed the Applicant to summon the CBSA Officer. By decision dated February 11, 2019, Justice Ahmed granted the application, set aside the original RPD vacation decision and remitted the matter back for redetermination by a differently constituted panel.

[6] The RPD, in the new hearing, granted the Applicant's request to summons the CBSA Officer and he was called to testify.

[7] By a decision dated July 15, 2020 the RPD refused the Applicant's request for a permanent stay of proceedings on the basis of abuse of process and allowed the Respondent's application to vacate the decision to confer refugee protection on the Applicant. That decision is the subject of this application for judicial review.

Decision under review

[8] The RPD acknowledged the Applicant's position that: the delay of 9 years by CBSA in bringing the application to vacate; CBSA's failure to act on the 2007 report that the Applicant's national identity card was potentially fraudulent; and, the lack of a justification for the delay, was of such magnitude that it would bring the refugee determination system into disrepute. The RPD identified the test for determining whether delay incurred in administrative proceedings amounts to an abuse of process as being: whether the delay was unacceptable to the point of being so oppressive as to taint the proceedings either because of an impact on fairness to the proceedings, or otherwise causing a significant prejudice, referencing *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 at paras 101-122 [*Blencoe*].

[9] The RPD found that the test was not met. It found that the CBSA Officer's testimony was not sufficient to establish that there was an intent by CBSA to deliberately fail to intervene. And, while the delay was lengthy and not fully explained, CBSA's failure to intervene at the original RPD hearing or to commence the application to vacate sooner did not demonstrate that the fairness of the proceeding had been negatively impacted or, that the Applicant suffered prejudice as a result of the delay.

[10] The RPD rejected the Applicant's argument that the lack of written reasons, a transcript, or audio recording of the original refugee hearing held in 2007 caused prejudice to the Applicant due to a deficient record caused by the delay. The RPD found that the medical evidence submitted by the Applicant was insufficient to establish that the Applicant's health issues were caused by the delay or that he is significantly prejudiced by the passage of time and his health issues that have arisen over time. While the Applicant testified that he had some difficulty with his memory, the RPD found that the medical evidence regarding hypertension, diabetes, anxiety and depression did not sufficiently address memory loss issues, particularly with respect to basic facts such as the use of alternate identifies in the US and Switzerland, thus distinguishing the situation from *Canada (Public Safety and Emergency Preparedness) v Najafi*, 2019 FC 594.

[11] The RPD acknowledged that in some circumstances delay may be found to be an abuse of process even if the fairness of the hearing has not been compromised. In that regard, the RPD considered whether the delay itself had caused psychological harm or stigma sufficient to bring the refugee determination system into disrepute. The RPD found that there was insufficient evidence that any psychological harm that the Applicant may have suffered was of sufficient

magnitude to meet the required threshold. Nor did the delay rise to the level of bringing the refugee system into disrepute. The RPD found that the delay was outweighed by the interest of preserving the integrity of the system by removing protection from the Applicant who gained it by misrepresentation. The RPD found that there was no abuse of process and declined to grant a permanent stay of proceedings.

[12] With respect to the merits of the application to vacate, the RPD accepted the allegations of the Respondent – supported by fingerprint analysis, photographic comparison and other documentary evidence – that the Applicant had used undisclosed alternate identities in the US and Switzerland; the Applicant applied for permanent residence in the US in 1997 under another alias; that using aliases he had been convicted in the US of being in possession of a forged document in 1999 and for criminal impersonation in 2003; that contrary to his refugee claim made in Canada he had not had not lived continuously in Pakistan from 1967 to 2006 and, in particular, during the period of his alleged persecution from 1999 to 2006; and that the Applicant had not disclosed material facts concerning his identify or places of residence at his refugee hearing before the RDP.

Issue and standard of review

[13] The application for judicial review raises only one question. That is, whether the RDP erred in its determination that the pursuit of the application for vacation is not an abuse of process.

[14] The Applicant submits that the question of whether there has been a delay constituting an abuse of process is a question of law requiring review on the correctness standard. This is because it is a question of central importance to the administration of justice or because it is a matter of procedural fairness and, in either case, it is to be reviewed on the correctness standard (referencing *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at paras 100 and 105 [*Abrametz*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 60, 62 [*Vavilov*]).

[15] Conversely, the Respondent submits that reasonableness is the presumptive standard of review of the merits of an administrative decision (*Vavilov* at paras 16, 23 and 25). Although the Applicant frames the issues as abuse of process, the question is still related to the merits of the RPD decision, and the inquiry is whether the RPD reasonably determined that the Applicant's refugee status should be vacated, including their determinations regarding abuse of process.

[16] In *Shen v Canada*, 2016 FC 70, Justice Fothergill noted that:

> 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).

[17] In this matter, it is not in dispute that the RPD identified the correct legal test for determining if there has been an abuse of process caused by delay, being *Blencoe*. Accordingly, I am inclined towards the view that the analysis required of this Court is whether in applying that test the RPD reasonably concluded that the delay in bringing the application to vacate did not amount to an abuse of process – a breach of procedural fairness – that would justify the granting of a stay of the application. The RDP's decision will be reasonable if it is justified in relation to the relevant factual and legal constraints applicable to its decision (*Vavilov* at para 99).

[18] While abuse of process is an aspect of procedural fairness, in *Vavilov* the Supreme Court held that where a court reviews the merits of an administrative decision, the analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only when required by a clear indication of legislative intent (a statutory appeal) or by the rule of law (*Vavilov* at para 10, 23). "Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory regime, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate *and interpret the law applicable to all issues that come before it*" (*Vavilov* at para 24 [emphasis added], also see para 25). And, while the question of whether an abuse of process has occurred may encompass a legal question as well as factual determinations, that legal question is not a "general question of law of central importance to the legal system as a whole" which *Vavilov* identities as one of three types of legal question where respect for the rule of law requires courts to apply the standard of correctness (*Vavilov* at para 53, 59). Whether an abuse of process arises from the delay in this particular case is a question of mixed fact and law. In my

view it is not a general question of law of central importance to the legal system as a whole requiring a single determinate answer (*Vavilov* at para 62).

[19] In any event, in this matter the standard of review is not determinative. The application cannot succeed on either standard.

Analysis

[20] The Applicant submits that he was prejudiced by the delay between the initial discovery of evidence that the Applicant had relied on a fraudulent document, the January 2007 Document Examination and Evaluation Report, and the filing of the application to vacate in September 2016. He submits that the delay was so prejudicial and harmful as to constitute an abuse of process. The Applicant bases this on three arguments. First, that the lack of written reasons or transcripts from his the 2007 refugee hearing foreclosed the possibility of certain lines of defense, such as a claim that the Applicant did in fact disclose his alternate identities to the RPD, and rendered the vacation hearing procedurally unfair. Second, that the delay was prejudicial. CBSA knew of the potential fraud in 2007 and earlier action could have been taken in response. That it did not was oppressive as the Applicant has been carrying on his life believing that no further action will be taken against him. Finally, the Applicant submits that his *Charter* rights are engaged and the RPD did not adequately consider *Charter* values in its decision.

[21] I would first note that when appearing before me counsel for the Applicant advised that the Applicant was abandoning his deficient record argument. In my view, this was a wise decision. In his written submissions it was asserted that the Applicant may have, during the

refugee hearing, disclosed all or some of the evidence that now comprises a part of the Respondent's vacation application documentation. In its decision, the RPD noted that at the second vacation hearing the Applicant testified that he had not used alternate identities, which assertion was contradicted by the Respondent's extensive evidence to the contrary. In my view, the RPD made a reasonable inference that it was more likely than not that the Applicant did not disclose his alternate identities at his refugee hearing. The RPD pointed out that a note made at the refugee hearing recorded that the Applicant made a minor correction to his PIF, being his political constituency association number. The RPD concluded that it was reasonable to expect that had the Applicant disclosed and made a far more significant correction to his PIF – his alternate identities – a notation of this would also have made. And, given that the Applicant continues to deny the use of alternate identities, the RPD found that it was likely that he did not disclose them at the refugee hearing. I see no error in this reasoning. The Applicant failed to establish that deficiencies in the record resulted in an unfair vacation hearing.

[22] Moreover, had the Applicant disclosed any or all of the information about his identity, criminality and residency during the period of his alleged persecution in Pakistan, it is simply not fathomable that he would have been granted refugee protection. Those material facts completely discredit the basis of his claim.

[23] The Applicant next submits that the delay was prejudicial to him and brings the refugee determination process into disrepute.

[24] When appearing before me the Applicant relied heavily on *Abrametz*. To the extent that the Applicant is asserting that the RPD erred in not addressing *Abrametz*, I note that the decision in that case was issued on July 3, 2020, post-dating the Applicant's January 29, 2020 submissions made to the RPD. The record does not reflect that the Applicant brought the decision to the attention of the RPD and requested to make post-hearing submissions as to its relevance prior to issuance of the RPD's decision on July 15, 2020. Moreover, *Abrametz* concerned a statutory appeal, pursuant to s 56(1) of *The Legal Profession Act*, 1990, SS 1990-91, c. L-10, from decisions of the Law Society of Saskatchewan. One of the matters at issue was whether delay amounted to abuse of process. Although the Applicant submits that *Abrametz* is significant because it focuses on when the period of delay begins, that has little bearing on the matter before me. This is because the RPD's analysis – rightly or wrongly – stemmed from the premise that the delay began in 2007 when CBSA prepared the Document Examination and Evaluation Report. That is, the longest possible period of delay. I do not agree with the Applicant that the RPD erred in failing to make a decision as to when the clock started ticking.

[25] The RPD correctly identified *Blencoe* as the applicable legal test. There, the Supreme Court of Canada held:

> 121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, supra, at p. 9-68). There is no abuse of process by delay per se. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".
>
> 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings,

> whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[26] The RPD found that the delay was lengthy and not fully explained. However, that this did not establish that CBSA's failure to intervene in the refugee hearing or to have brought the application to vacate sooner caused the fairness of the proceeding to be negatively impacted or, that the Applicant suffered a significant prejudice as a result of the delay.

[27] As discussed above, the Applicant's only allegation as to the fairness of the hearing process pertained to the deficient record, which the Applicant has now abandoned. And, as held in *Blencoe*, the length of delay, in and of itself, is not determinative.

[28] As to prejudice, the RPD noted the Applicant's testimony that he has some difficulty remembering dates and is taking medication. The RPD referred to the documentary evidence in this regard. This evidence is comprised of a three-line letter dated July 9, 2019 from Temple Medical Clinic stating that the Applicant has multiple health issues including hypertension/diabetes mallitus, depression and anxiety. The letter states that he is taking multiple medications, feels sad most of the time and is unable to concentrate on his work. A second letter from the same source dated November 13, 2019 states that the Applicant has multiple health issues including depression and anxiety. This affects his day-to-day function and causes variation of mood and concentration difficulties. The letter states that the Applicant is taking multiple medications, including an anti-depressant.

[29] I find no error in the RPD's finding that there was insufficient evidence to establish that the Applicant's health issues are caused by the delay or that he was significantly prejudiced in responding to the vacation application because of them. The RPD noted that his medical issues of hypertension, diabetes, anxiety and depression do not sufficiently address memory loss issues; particularly with regard to basic facts as to whether the Applicant used alternate identities. I would add that the RPD states that the Applicant's testimony was that he did not use alternate identities. This would appear to contradict the suggestion that his memory is somehow so compromised that it prejudices his ability to respond to the vacation application.

[30] As to the Applicant's submission that the delay left him "in limbo" and separated from his family, there is no evidence in the record that subsequent to 2007, when the Applicant applied for permanent residence, and prior to 2016, when the Notice of Application to Vacate was issued, that he made any inquiry as to his status. That is, the delay was not concerning enough to him that it caused him to follow up on the status of his permanent residence application. Further, the Applicant knew that his refugee application had been granted on the basis of his false story. Given this, and the lack of response to his permanent residence application, he could not have "carried on his life reasonably believing that no further action would be taken against him" as he submits. This is not a circumstance such as *Fabbiano v Canada (Citizenship and Immigration)*, 2014 1219, relied upon by the Applicant, where the applicant made submissions about his potential inadmissibility in 2007 and heard nothing further until 2013. There the Court found that the applicant could reasonably have concluded that his submissions had been persuasive and that he was no longer at risk of removal. Further, he had been denied the ability to make further, updated submissions.

[31] Nor is there any evidence in the record before me demonstrating how this state of limbo caused the Applicant significant – or any – prejudice or that he had sought to visit his family or that they were precluded from visiting him.

[32] The RPD also considered whether the delay rose to the level that it would bring the refugee system into disrepute. The RPD agreed with the prior RPD panel's finding that:

> There is a public interest in timely investigation and adjudication of immigration matters and respondents should not generally be subjected to inordinate delays. However, this is outweighed by the interest in preserving the integrity of the system by removing protection form those who gained it by misrepresentation. In my view, continuing to protect those who acquired refugee status by illegitimate means would bring the system into disrepute, particularly when there is no evidence of significant prejudice caused by the delay.

[33] In the circumstances of this matter, I see no error in the RPD's balancing of the interests of the public and the Applicant.

[34] In sum, the RPD correctly identified the *Blencoe* test and correctly and reasonably applied the test. The RPD also correctly and reasonably determined that there had not been an abuse of process that would warrant a permanent stay of the application to vacate.

[35] Finally, the Applicant submits that the RPD failed to consider *Charter* values. As the Respondent points out, the Applicant made various *Charter* arguments in support of the first RPD hearing. However, that decision was set aside by this Court. The Applicant's submissions to the new RPD panel on re-determination did not raise *Charter* issues. I agree with the

Respondent that the RPD cannot be faulted for not addressing a matter that was not raised before it.

JUDGMENT IN IMM-3279-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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