Federal Court  Cour fédérale

Date: 20110414

Docket: IMM-4887-10

Citation: 2011 FC 459

BETWEEN:

SUREEL LATA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

BLANCHARD J.

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 4, 2010, dismissing the Applicant's Abuse of Process Application for an Order dismissing or staying the Minister's Application to Vacate and directing the Minister's Vacation Application to be set down for hearing.

Factual Background

[2] The Applicant, Ms. Sureel Lata, is a 46 years old Indo-Fijian. She came to Canada on December 28, 1999 as a visitor and filed a refugee claim on June 2, 2000, following a *coup d'état* in Fiji.

[3] The Applicant's refugee claim was based on racially-motivated persecution of Indo-Fijians by native Fijians during and after the *coup d'état*. In her application, the Applicant alleged her home had been violently ransacked by native Fijians and that her husband and teenage children had barely escaped with their lives.

[4] On May 8, 2001, the Convention Refugee Determination Division (the CRDD) determined that the Applicant was a Convention Refugee.

[5] The Applicant then applied for permanent residence pursuant to the refugee category, including the Applicant's former husband and two children.

[6] The Applicant's former husband has been interviewed twice in Fiji, on October 11, 2002 and on March 21, 2003, in relation to the Applicant's permanent residence application and to clarify the circumstances surrounding the departure of his family from their former home. In both interviews, he indicated that he and the Applicant left their home in December 1999, shortly before the Applicant came to Canada, because their landlord did not renew their lease. He did not mention anything about the violent and forceful eviction from their home in Fiji by natives as related by the Applicant in her refugee claim.

[7] Following those interviews, a Canadian Border Services Agency Officer conducted an interview with the Applicant on December 21, 2005 to obtain her response to her former husband's statements.

[8] The Minister then filed the Vacation Application in March 2009 seeking to vacate the CRDD's determination that the Applicant was a Convention Refugee because she had misrepresented or withheld material facts.

[9] On February 10, 2010, the Applicant filed an Abuse of Process Application wherein she alleges that she suffered prejudice by reason of the Minister's delay in filing the Vacation Application rendering her unfit to testify or participate in the proceeding. As a consequence, she argues that she is unable to prepare a full answer and defence.

[10] Along with her Abuse of Process Application, the Applicant filed a psychological report of Dr. Krywaniuk wherein he opined that Ms. Lata "is severely depressed and that this has been building for the last number of years." He reported that Ms. Lata has a history of sexual abuse during her marriage and has scars to support this. Her symptoms had gradually abated, but some have been rekindled by her increasing stress levels brought about by the delay she has been experiencing with regard to her status in Canada. In his April 5th, 2010 affidavit, Dr. Krywaniuk affirmed that, "Perhaps in the barest of terms, I would say that, absent the long delay in bringing the vacation allegations, I think it very likely Ms. Lata would have continued to be psychologically functional."

[11] In another psychological report, Dr. Peach confirmed Dr. Krywaniuk's opinion that the Applicant is psychologically unfit to stand trial or participate in any court proceedings without causing a severe worsening of her underlying medical condition.

The Board's decision

[12] The Board dismissed the Applicant's Abuse of Process Application. Applying the test set out by the Supreme Court in *Blencoe v British Columbia Human Rights Commission,* 2000 SCC 44 (*Blencoe*), the Board found that proof of prejudice had not been demonstrated to be "of sufficient magnitude" to impact on the fairness of the hearing. It found that the Applicant would be afforded a fair hearing, even though she would not testify. The Board also found that the delay directly caused significant psychological harm to the Applicant, but did not find the harm to be of such magnitude that the public's sense of decency and fairness would be offended.

[13] The Board also determined that the Applicant was a vulnerable person under the Board's applicable guidelines (the *Chairperson's Guidelines on Procedures* with respect to *Vulnerable Persons Appearing Before the Immigration and Refugee Board),* and appointed the Applicant's sister as Designated Representative to instruct counsel and assist in gathering evidence for the purpose of the vacation proceeding. However, in a decision dated September 8, 2010, based on new evidence adduced by the Applicant, the Board revoked the Applicant's designation as a vulnerable person and the appointment of a Designated Representative.

Issues

[14] The following issues are raised in this judicial review:

1. Did the Board err in concluding that there has been no significant prejudice to the fairness of the Applicant's vacation proceeding?

2. Did the Board err in finding that the proceeding has not been so tainted as to bring the Immigration and Refugee Protection System into disrepute?

The Law

[15] In determining whether a person's right to a fair hearing has been violated by an inordinate delay, the Supreme Court in *Blenco*, above, at paragraphs 101 teaches that: "…delay without more, will not warrant a stay of proceedings as an abuse of process, …there must be a proof of significant prejudice which results from an unacceptable delay". The Supreme Court also defined the term "of significant prejudice" to include circumstances when the delay impairs a party's ability to answer the complaint against her because, for example, memories have faded; essential witnesses have died, became unavailable; or evidence has been lost.

[16] In *Blencoe*, above, the Supreme Court also found that, in circumstances where the delay did not warrant a finding of a breach of a person's right to a fair hearing, it was open to a reviewing court to find a proceeding to be so tainted by the delay as to bring the administrative agency or tribunal into disrepute in the eyes of the community. In such circumstances, the Supreme Court set out at paragraph 115 of *Blencoe*, a two part test: (1) whether the delay directly caused the Applicant to suffer significant psychological harm, and (2) whether the harm suffered by the Applicant due to

the delay has tainted the proceedings to such an extent as to bring the administrative agency or tribunal into disrepute. The Court specified at paragraphs 122 and 133 of its reasons, that the delay must have caused actual prejudice of such magnitude that the public's sense of decency is affected.

Standard of review

[17] Questions concerning whether the Board applied the correct legal test are questions of law reviewable on a correctness standard. Questions of fact and questions of mixed fact and law are reviewable on a reasonableness standard which concerns mostly the existence of justification, transparency and intelligibility within the decision-making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. See: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47.

Analysis

Fairness of the proceeding

[18] The Applicant advances the following grounds relating to the fairness of the hearing:

(1) The Board applied the wrong legal test in deciding not to grant the stay;

(2) The Board failed to appreciate that the Applicant is an essential witness and necessary to building a defence;

(3) The board erred in finding that the statutory declaration of the CBSA Officer could be substituted for the Applicant's evidence;

(4) The Board erred in speculating on the availability of alternate witnesses.

The fairness of the hearing

[19] The Applicant first contends that the Board erred by applying the wrong legal test in dismissing the request for a stay. She argues that the test set out in *Blencoe*, above, on when a stay may be ordered by reason of delay amounting to an abuse of process requires consideration of whether, "memories have faded, essential witnesses have died or are unavailable or some other similar form of prejudice that impairs a party's ability to answer the complaint." Therefore, by asking whether the Applicant could address the issues at the vacation hearing through other means, the Applicant contends the Board committed a reviewable error of law. I disagree. The test in *Blencoe*, above, requires that the person alleging abuse of process show that, because of the delay, they have suffered prejudice of "of significant magnitude" to impact on the fairness of the hearing. In my view, the Board applied the correct legal test and, in so doing, reasonably considered other options open to the Applicant to address the issues to be raised at the vacation hearing. This does not amount to a misapplication of the legal test set out in *Blencoe*.

[20] The Applicant argues that her testimony and knowledge are vitally important, as the Vacation Application is completely fact-driven. She contends that evaluating the truthfulness of her former husband's statements in 2000, 2002 and 2003 is at the heart of the Vacation Application. She argues that her testimony is required to establish the circumstances under which her former husband's statements to her were made in 2000. She maintains that evidence relating to changes in their relationship such as divorce proceedings may explain her former husband's subsequent statements in which he relates a contradictory account of events. She argues that she is the only one that could provide such evidence.

[21] The Applicant further contends that she is best situated to assist counsel in identifying potential witnesses and advise counsel of relevant facts and circumstances relating to the vacation proceeding. Consequently, her active participation is required to allow her to advance her position and provide full answer and defence. The Applicant argues that by reason of her mental condition caused by the delay in bringing the vacation proceeding she is now unfit to testify and participate meaningfully in her vacation hearing.

[22] The alleged misrepresentation by the Applicant, which led to the filing of the Vacation Application by the Minister, relates to the circumstances surrounding the departure of her former husband and children from the family home in Fiji. The Applicant was not present at the time of the *coup d'état* in Fiji when she claims that the Native Fijians ransacked their home, forcibly evicted her husband and children, and threatened them with death and serious bodily harm. At the time, she had already departed for Canada. Therefore, she has no first-hand knowledge of how events unfolded on that day. She could only relate information that she learned from others. The best evidence would be adduced by first-hand witnesses, such as her children who were present at the time of the alleged forceful eviction. Consequently, the Applicant's evidence is not essential to establish the critical alleged facts at her vacation hearing.

[23] The Applicant's relationship with her husband may be relevant to shed light on her former husband's subsequent statements, but this is not the only evidence that may be adduced to challenge the credibility of his statements. As found by the Board, others could be called to verify the Applicant's account of the family's departure from the family home. In the circumstances, it was reasonably open to the Board to find that other options were available to the Applicant to adduce

evidence to support her version of events. It pointed to potential witnesses and/or potential documentary evidence to corroborate the Applicant's refugee claim. I disagree with the Applicant's submissions that those findings were speculative. The record shows that other family members, including the Applicant's own children, who were young adults at the time, were present in Fiji when the c*oup d'état* occurred and had personal knowledge of the circumstances mentioned in the Applicant's claim. There is also mention of the existence of a lease for the family property. Should such documentary evidence be found, it may shed light on the terms of the leasehold agreement and whether the term was expired as alleged by the Applicant's former spouse. In the circumstances, the Board did not err in finding that even if the Applicant were not able to testify at her vacation hearing, it would not lead to an unfair hearing.

[24] I agree with the Applicant that the CBSA Officer's statutory declaration is no substitute for her testimony. It is, however, evidence that is relevant to the issue raised in the vacation hearing. The declaration reproduces the questions and answers put to the Applicant by the CBSA Officer during the December 21, 2005 interview and will be weighted against other evidence to be adduced. Its probative value will be decided at the vacation hearing.

[25] Further, the Applicant does not point to any specific evidence she would adduce that would challenge the Minister's allegation in the vacation hearing. She had an opportunity to provide such evidence during the December 2005 interview with the CBSA officer, at which time she clearly understood that there were important contradictions between her version of events and that of her former husband.

[26] While the Applicant may not be able to testify at her hearing, I am of the view that she is able to assist her counsel in identifying witnesses and instruct counsel. The psychological evidence adduced by the Applicant and accepted by the Board, at the reconsideration hearing, shows that while the Applicant would be unable to testify she understood the importance and purpose of the vacation proceeding. The psychological reports opine that she is too ill and completely incapable of preparing for a hearing or testifying. However, evidence indicates that she was actively involved in all matters concerning her status in Canada, including the vacation proceedings, and regularly met with her counsel to discuss these matters and was able to give instructions to her counsel. The Applicant's counsel at the time of the application for reconsideration affirmed that:

> (a) I have not been shielding Ms. Lata from the vacation proceedings;
> (b) I have at all times been sharing information with Ms. Lata about the vacation proceedings;
> (c) I have satisfied myself that Ms. Lata understands the vacation proceedings and can instruct me with respect to those proceedings;
> (d) I have been taking instructions from Ms. Lata throughout the vacation proceedings;
> (e) With respect to the Rule 20 Conference on 28th April, 2010 ["Pre-hearing Conference"], I spoke to Ms. Lata about the Conference both before and after appearing on her behalf. I explained what the conference was about and what had happened at it. I satisfied myself that Ms. Lata understood the nature of the Pre-hearing Conference and that she could give me instructions in this respect.
> (f) I have at all times informed Ms. Lata about the abuse of process application, satisfied myself that she understood these proceedings, could give me instructions, received instructions from her on the application, as well as on all other matters regarding her vacation proceeding." (Affidavit of Naomi Minwalla, affirmed August 16th, 2010, Applicant's record at page 264-65)

This is the same evidence that persuaded the Board to reconsider and revoke its Order declaring the Applicant a vulnerable person and appointing a Designated Representative.

[27] In my view, the Board reasonably found that the delay at issue ran from December 21, 2005, the day the Applicant was interviewed to respond to her former husband's account of events which contradicted important facts which were the basis of her refugee claim. It is at that time that the Applicant was first informed of the issue which led to the filing of the vacation hearing. The psychological reports indicate that up to that time "she was able to function well enough to work and otherwise lead a normal life." The burden is on the Applicant to show that, as a result of the delay, she has suffered prejudice of sufficient magnitude to impact on the fairness of the proceedings. On the evidence, I am satisfied that the Board reasonably concluded that the Applicant did not establish that she would be denied a fair hearing by reasons of the delay.

Did the Board err in finding that the proceeding has not been so tainted as to bring the immigration and refugee protection system into disrepute?

[28] The Applicant argues alternatively, that notwithstanding the fairness of the hearing itself, the delay would so taint the proceeding as to bring the immigration and refugee protection system into disrepute.

[29] The applicable legal test on the question is set out in *Blencoe*, above. First, it must be decided whether the Minister's delay in initiating the Vacation Application directly caused the Applicant to suffer significant psychological harm; and second, if so, it must be determined if the harm suffered by the Applicant due to the delay has tainted the proceedings to such an extent as to bring the administrative agency or tribunal into disrepute (*Blencoe*, at paragraph 115). The Supreme Court found that the delay must have caused actual prejudice of such magnitude that the public's sense of decency is affected (*Blencoe*, at paragraphs 122 and 133).

[30] There is no dispute relating to the Board's finding, on the first part of the test, that the delay directly caused significant psychological harm to the Applicant.

[31] The Applicant submits that the Board incorrectly applied the second part of the test. She claims that the focus should have been on the harm actually suffered by the Applicant instead of the harm that would have been hypothetically suffered by an ordinary person. I disagree. I find the Board correctly applied the second part of the test. The Board had to determine whether the harm suffered by the Applicant was of such a magnitude that the refugee system would be brought into disrepute because the public's sense of decency would be affected. In its decision, the Board carefully considered the Applicant's circumstances and the harm she suffered. This assessment was conducted with regard to the particular circumstances and contextual factors surrounding the Applicant's refugee claim and the developments which led to the bringing of the Vacation Application. These factors include, amongst others; the Applicant's ability to instruct counsel on her Vacation Application, the likely availability of other witnesses that could be called on behalf of the Applicant at the hearing, including her own children, and the fact that the Applicant was not present in Fiji on the day she claims Native Fijians ransacked their home, forcibly evicted her husband and children, and threatened them with death and serious bodily harm. The latter is the key allegation upon which the Applicant founded her refugee claim. The Board did not commit a reviewable error by considering the harm that an ordinary person might suffer in similar circumstances.

[32] On the evidence, it was reasonably open to the Board to conclude that the immigration and refugee protection system has not been tainted because Ms. Lata has suffered in the ways she has. In

my view, the harm suffered by the Applicant was not of such a magnitude that the refugee system would be brought into disrepute because the public's sense of decency would be affected. Given the harm suffered by the Applicant, the facts of this case do not meet the very high threshold of prejudice required to meet the test.

[33] For the above reasons, the application for judicial review will be dismissed.

[34] Counsel are requested to serve and file their submissions with respect to the certification of a question or questions of general importance, if any, within ten (10) days of receipt of these reasons. Each party will have a further four (4) days to serve and file any reply to the submission of the opposite party. Following consideration of those submissions, an order will issue dismissing the application for judicial review and disposing of the issue of a serious question of general importance as contemplated by section 74(*d*) of the *Immigration Refugee Protection Act*, SC 2001 c 27.

"Edmond P. Blanchard"
Judge

Ottawa, Ontario
April 14, 2011

FEDERAL COURT

SOLICITORS OF RECORD

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