Federal Court  Cour fédérale

Date: 20140606

Docket: IMM-2287-13

Citation: 2014 FC 544

Ottawa, Ontario, June 6, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

LIJIN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the related decision to Federal Court File No. IMM-4109-13. In the present judicial review the Applicant challenges the decision of a Member of the Refugee Protection Division [RPD] denying her refugee claim and dismissing two motions for recusal. The substantive issue in this judicial review is the Member's decision refusing to recuse himself. The grounds of the recusal motion was the Member deciding a matter without hearing submissions.

This is a most unusual and unfortunate case involving a woman who had suffered from severe mental illness and was a vulnerable person, both in a legal and practical context.

II. Background

[2] The Applicant's history of mental illness is set forth in *Li v Canada (Minister of Citizenship and Immigration)*, 2014 FC 545.

[3] The Applicant's refugee hearing took place over three sittings spanning one year.

[4] After the first sitting in February 2012, the Applicant requested that the Member recuse himself on the basis that in 2011 he had accepted 0% of refugee claims from Chinese applicants whereas the RPD's average rate for such applicants is 59%. The decision on that motion was given at the second sitting in June 2012. It was dismissed and is not in issue in these proceedings.

[5] At the conclusion of the second hearing, the Member informed the Applicant that he required additional information from Citizenship and Immigration Canada [CIC] pertaining to any applications the Applicant may have made for Canadian visas.

[6] In July 2012 the RPD wrote to CIC to obtain FOSS Notes, and all visa and sponsorship applications; those documents were provided. The FOSS Notes disclosed that an H&C application had been filed in July 2012.

[7] On September 18, 2012, the RPD requested copies of the H&C. Shortly thereafter the Applicant was made aware of the extent of CIC's disclosure to the RPD.

[8] The following events gave rise to the principal procedural fairness challenge in this judicial review. On November 1, 2012, Applicant's counsel wrote to the RPD advising of her intent to bring a motion for the Member's recusal on the basis that his post-hearing request for and receipt of the H&C application without notice to the Applicant was an abuse of process.

Counsel further advised in the same letter that in order to bring the motion for recusal, the Applicant needed certain information including the source of authority to request the H&C document, its relevance, the reason for absence of prior notice and an explanation for any post-hearing in matters not discussed by the parties.

There was no response from the RPD; however, the Member sent a form seeking consent of the Applicant to release information from a Salvation Army shelter [the AIF].

[9] In further correspondence on December 12, 2012, the Applicant's counsel reminded the Member that in her fax of November 1, 2012, she expressed the intention to bring a recusal motion based on abuse of process. No such motion was filed before December 17, 2012.

[10] On December 17, 2012, the Member issued a six (6) page decision dismissing the recusal motion allegedly brought November 1 and asserting that the Member had the right to obtain any information he considered relevant to the proceeding and that to do so did not give rise to a claim of bias.

[11] On December 27, 2012, counsel outlined the problem that the Member's decision was based on an unperfected motion (there was in fact no motion at all). Counsel reiterated that the AIF was improper given that the matter of recusal was outstanding and further objected to the Member's decision.

Counsel also indicated that she would bring a further motion for recusal based on the Member's decision on an "unperfected motion".

[12] At the third sitting the Member invited (indeed challenged) the Applicant to make submissions in respect of the already decided unperfected motion regarding access to post-hearing documents. The Member suggested that his decision was interlocutory and that his mind remained open. Counsel refused to do so on the grounds that the Member's mind was made up. What followed was a heated, lengthy and unpleasant discussion between counsel and the Member.

[13] The Member then had the Applicant argue the second recusal motion – the denial of the right to make submissions on the first unperfected recusal motion. Counsel argued procedural unfairness but the Member dismissed this motion.

[14] The Applicant's refugee claim was rejected on the grounds of credibility.

III. Analysis

[15] As this matter will be remitted back on the basis of errors in procedural fairness, the Court will make limited comments on the refugee claim itself. One would expect that a more

balanced assessment would be made at the new determination. Certainly the taint of reasonable apprehension of bias should be removed by the referral back.

[16] In my view, the crux of this judicial review is the Member's treatment of the unperfected recusal motion and the second perfected recusal motion. The first perfected recusal motion regarding acceptance rates is irrelevant to the foregoing.

[17] The threshold for establishing reasonable apprehension of bias is necessarily high. As enunciated in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, the test is "what an informed person, viewing the matter realistically and practically, and having thought the matter through would conclude". The test takes into account whether the decision-maker consciously or unconsciously would or could decide the matter fairly.

[18] In deciding a reasonable apprehension of bias case, a court must be cautious about reading too much or too little into the transcript of a hearing. The transcript lacks context, tone, physical presence and other aspects of human interaction.

[19] Taking all these aspects into account, the transcript suggests that the Member was engaged in a heated confrontation with counsel that added little dignity to the process. This is not a case of tough questioning by a decision-maker (something that occurs in many of our court proceedings) but an attempt by the Member to explain away a decision on a motion which had not been formally filed.

[20] The Member's attempt to explain away the matter of the first motion as a "misunderstanding" is problematic. The record was clear that the Applicant "intended" to file a recusal motion, that questions to the RPD remained outstanding (even if there was no obligation on the RPD to answer them) and that further submissions were to be made. It is difficult to see how the Member could have been confused by the Applicant's repeated use of words such as "intent" or "intention".

[21] The Member erred in law and breached procedural fairness in deciding a matter which was not fully before him.

[22] The breach of procedural fairness was compounded by the Member's further attempt to have the Applicant re-argue the matter. It was, in the context of this case, disingenuous to suggest, as he did, that he had an open mind. This was not a case where further evidence would be filed which could change the basis for the original decision. No submissions were filed and yet the Member was able to issue a six-page ruling dismissing the matter.

[23] The Member's decision on the second recusal motion based on denial of the right to make submissions in the unperfected intended motion confirms that, when examined practically and realistically, the Applicant never had a fair chance to make an argument for recusal. Having made the first ruling it is impossible to conclude that the Member would have been open on the second motion to a finding in the Applicant's favour. This is particularly so given the Member's invitation for the Applicant's counsel to "poke holes in [his] arguments" as contained in the December 17th decision. This statement positions the Member's offer to hear a motion on the

matter as an appeal from the initial decision and not, in fact, as a fresh motion. The transcript belies any suggestion that the Member has not "stepped into the arena" of litigation.

[24] This is sufficient grounds to overturn the ultimate decision. There can be little confidence that the merits of the refugee application would be approached in dispassionate terms.

[25] The Member erred in making the first ruling; he should have then recused himself. That failure was compounded on the second motion. There is a denial of procedural fairness.

IV. Conclusion

[26] Therefore, this judicial review will be granted, the RPD decision quashed and the matter remitted back to the Board for a fresh determination by a differently constituted panel.

[27] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Refugee Protection Division decision is quashed and the matter is remitted back to the Board for a fresh determination by a differently constituted panel.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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