Federal Court  Cour fédérale

Date: 20160310

Docket: IMM-309-15

Citation: 2016 FC 306

Ottawa, Ontario, March 10, 2016

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

FAREEHA TAREEN, MOHAMMAD AZAM TAREEN, MOHAMMAD EDRISS TAREEN, SARA TAREEN AND MARWA TAREEN (BY HER LITIGATION GUARDIAN FAREEHA TAREEN)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] In a decision dated November 6, 2015, Justice Robin Camp dismissed the applicants' application for judicial review. The applicants had sought to overturn a decision of a visa officer finding that they were inadmissible to Canada under s 35(1)(b) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA] (all enactments cited are set out in an Annex). That provision states that persons who were senior officials in a government that has been involved in terrorism, or systematic or gross human rights violations are inadmissible to Canada. The officer concluded that Mr Tareen had worked as a senior public servant for the Taliban after it had taken over the government of Afghanistan and, therefore, came within the inadmissibility clause. Justice Camp found that conclusion to be reasonable.

[2] The applicants have now made a request to reopen and reconsider Justice Camp's decision. They rely on Rules 397 and 399 of the *Federal Courts Rules*, SOR/98-106. There are two distinct grounds for the applicants' motion. First, they submit that a matter has arisen subsequent to Justice Camp's decision that gives rise to reasonable apprehension that he did not conduct an unbiased assessment of their application for judicial review. The matter in question is a complaint lodged against Justice Camp with the Canadian Judicial Council (CJC) in respect of a decision he rendered as a judge of the Provincial Court of Alberta, prior to his appointment to the Federal Court.

[3] Second, they maintain that Justice Camp overlooked or accidentally omitted to consider the parties' submissions in respect of a question of general importance for certification. They submit that Justice Camp's decision not to state a question, which prevented them from appealing his decision, overlooked the fact that the parties had made a joint submission on that issue.

[4] The applicants ask me to order that the application for judicial review be reconsidered by another judge or to state the question they had asked Justice Camp to certify. The respondent takes no formal position on the applicants' motion, but counsel for the Minister did participate in a teleconference I convened to discuss the motion.

[5] After careful consideration of the evidence, I must dismiss the applicants' motion. That evidence includes:

- materials filed both on this motion and on the judicial review;
- submissions filed in respect of the complaint against Justice Camp;
- Justice Camp's decision in the case giving rise to that complaint;
- a recording of the hearing on the judicial review.

[6] I can find no basis for a reasonable apprehension of bias on the evidence. In respect of the proposed question for certification, I find that Justice Camp mischaracterized the stance that was taken by counsel for the respondent Minister. However, even if he had correctly described her position, it would have had no impact on his decision not to certify a question; the result would have been the same.

[7] There are two issues:

1. Has a matter arisen subsequent to Justice Camp's decision that would justify setting it aside or varying it on grounds of a reasonable apprehension of bias?

2. Should Justice Camp's decision not to state a certified question be reconsidered based on his having overlooked or accidentally omitted to consider the respondent's position?

II. Issue One - Has a matter arisen subsequent to Justice Camp's decision that would justify setting it aside or varying it on grounds of a reasonable apprehension of bias?

[8] The applicants maintain that the CJC complaint provides a basis for concluding that Justice Camp did not conduct an unbiased assessment of their case. The CJC complaint is based primarily on alleged gender insensitivity or discrimination. The applicants point out that their motivation for seeking residency in Canada was based, in part, on fear of gender persecution in Afghanistan. Accordingly, they suggest that Justice Camp may not have considered their circumstances with an open mind.

[9] I can find nothing in the materials before me that would support a reasonable apprehension of bias.

[10] The main issue in the judicial review was whether the visa officer had made an unreasonable factual finding when he concluded that Mr Tareen had been a senior official in the Afghanistan government until 1997, a year after the Taliban had come to power. Alternatively, the applicants argued that the inadmissibility clause should be read more narrowly in light of the Supreme Court of Canada's decision in *Ezokola v Canada (Minister of Citizenship and Immigration)* 2013 SCC 40. There, the Court limited the interpretation of a clause excluding persons from refugee protection for having committed serious crimes (s 98 of IRPA, incorporating Article 1F(a) of the Refugee Convention). It held that the provision caught only

those persons who had made a knowing contribution to the commission of crimes, not those who were merely associated in some way with the organization that carried them out. The applicants argued that s 35(1)(b) should be read similarly, importing a requirement of actual complicity, rather than mere association.

[11] Justice Camp held that there was sufficient evidence before the officer to support the conclusion that Mr Tareen worked for the government of Afghanistan during the period when the Taliban was in power. He also concluded that *Ezokola* had no effect on s 35(1)(b) because that provision renders persons inadmissible based on who they are, not what they have done: "inadmissibility flows from an individual's service for a government which engages in or has engaged in terrorism, systematic/gross human rights violations, genocide, a war crime, or a crime against humanity" (para 39). It was unnecessary, therefore, to consider whether Mr Tareen was actually complicit in any of those crimes himself. Accordingly, Justice Camp found that the officer had reasonably concluded that Mr Tareen was inadmissible for having been Deputy Director in the Ministry of Labour and Social Affairs in Afghanistan until 1997.

[12] The applicants also claimed that the officer had breached the duty of fairness by failing to provide adequate reasons and to disclose documents on which he had relied. In addition, they claimed a breach of their rights under s 7 of the *Canadian Charter of Rights and Freedoms*. Justice Camp found that the officer's reasons were adequate, that the officer had not failed to disclose relevant materials, and that the applicants' rights under the Charter were not engaged.

[13] In thorough reasons, Justice Camp addressed all of the issues raised by the applicants. I see nothing in his judgment that could cause an informed person, viewing the matter realistically and practically – and having thought the matter through – to conclude that it is more likely than not that Justice Camp, whether consciously or unconsciously, did not decide the case fairly (applying the test in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369). Further, Justice Camp afforded the parties ample opportunity to present their submissions at the oral hearing. He listened patiently and asked informed questions about the issues before him. He expressed his reservations about the legal arguments the applicants relied on in their application for judicial review, and gave their counsel every chance to address them thoroughly.

[14] The applicants maintain, however, that the nature of the CJC complaint against Justice Camp, in itself, gives rise to a reasonable apprehension of bias. They note that the complaint alleges behaviour and attitudes that are out of step with Canadian values, contrary to the CJC's *Ethical Principles for Judges*, and inconsistent with the role of Federal Court judges who must frequently rule on issues of race, gender, and disadvantage. In addition, they point out that Justice Camp is not presently sitting on other cases.

[15] The applicants rely on the affidavit of their daughter, who lives in Canada, in which she expresses her concern about Justice Camp's statements in the case giving rise to the CJC complaint and her belief that he was biased against her family. The test for apprehension of bias is not, however, subjective. The question is whether a reasonable person informed of all the relevant circumstances – the issues in the case, the quality of the hearing, and the reasons provided for the outcome – would conclude that Justice Camp probably had a closed mind with

respect to the issues. The applicants have not met the burden of demonstrating a reasonable apprehension of bias. There is simply no connection between the subject matter of the CJC complaint and the issues before Justice Camp on the judicial review.

[16] Therefore, I must dismiss this aspect of the applicants' motion.

III. Issue Two - Should Justice Camp's decision not to state a certified question be reconsidered based on his having overlooked or accidentally omitted to consider the respondent's position?

[17] At the hearing, counsel for the applicants urged Justice Camp to certify a question of general importance relating to the impact of *Ezokola* on s 35(1)(b) of IRPA. Counsel for the Minister asked Justice Camp to certify a question only if he should conclude that *Ezokola* altered the interpretation of that provision. In short, counsel for the applicants suggested that Justice Camp should certify a question regardless of the outcome, whereas counsel for the Minister asked that a question be certified only if Justice Camp was persuaded by the applicants' submission that *Ezokola* narrowed the scope of s 35(1)(b). She stated: "If you are going to find that Ezokola extends to s 35(1)(b), I would submit that it is a good opportunity to certify a question along the lines of the Kanagendren decision" (referring to *Kanagendren v Canada*, 2015 FCA 86). In other words, counsel for the Minister wished to have the opportunity to appeal if Justice Camp found in the applicants' favour.

[18] After the hearing, counsel for the Minister wrote to the Court and in her letter stated:

> In the event the Court makes a determination regarding the application of the *Ezokola* decision in this case, the parties jointly propose the following certified question:

> Does *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678, change the requirements to establish that a person is a prescribed senior official for the purposes of assessing inadmissibility under paragraph 35(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

[19] As mentioned, Justice Camp did not agree with the applicants about the effect of *Ezokola* and declined to certify a question on that issue. In doing so, Justice Camp stated in his reasons:

> The applicants, joined somewhat (it seemed to me) half-heartedly by the respondent, wish a question to be certified. That question is whether the *Ezokola* decision of the Supreme Court of Canada changes the requirements to establish that a person is a prescribed senior official for the purposes of assessing inadmissibility under paragraph 35(1)(b) of the IRPA.

[20] The applicants raise two concerns about this passage. First, they submit that Justice Camp overlooked the fact that the parties had made a joint submission regarding a certified question and, therefore, that he should have stated the question posed in the letter. Second, given that counsel for the Minister was female, they suggest that Justice Camp's description of her submission as "half-hearted" reflected a biased or stereotypical perception of women and reflected a reasonable apprehension of bias.

[21] I cannot conclude that Justice Camp overlooked the parties' submission on a certified question. In the passage quoted above, he framed the proposed question in precisely the terms set out in the letter from Minister's counsel. Further, in the circumstances, I do not believe it is accurate to say that the parties jointly proposed a question for certification. At the hearing, counsel for the Minister made clear that she wished a question to be certified only if Justice Camp was persuaded that *Ezokola* did have an effect on s 35(1)(b). While the Minister took no

position on this motion, counsel did express her objection to the description of her submission as "half-hearted". I agree that this was a mischaracterization. It is clear to me that counsel's submission was whole-hearted, but qualified - that a question should be certified only if the applicants' argument regarding *Ezokola* should prevail. She firmly reinforced that position before me. Looking at it in context, I am satisfied that the letter was intended to represent a joint submission on the wording of the question, not on the matter of certification itself. In any case, the description of counsel's submission as "half-hearted" was not accurate.

[22] However, nothing of significance turns on the mischaracterization. As mentioned, Justice Camp did not accept the applicants' argument on the effect of *Ezokola* and, in fact, agreed with the Minister on that point. Therefore, even if he had properly characterized counsel's submission, he would not have certified a question.

[23] Finally, I cannot conclude that Justice Camp's terminology raises a reasonable apprehension of gender bias. Again, the question is whether a reasonable person informed of all the relevant circumstances – the issues in the case, the quality of the hearing, and his reasons as a whole – would conclude that Justice Camp had a closed mind on the issues before him. In the full context of this case, I regard Justice Camp's inaccurate representation of counsel's submission as a minor error, perhaps reflecting a slight misunderstanding of that submission, that had no effect on either his disposition on the merits of the case, or his decision not to certify a question. I see no basis for a claim of gender bias.

IV. Conclusion and Disposition

[24] Looking at all of the relevant circumstances, I can find no basis for a reasonable apprehension of bias. In respect of the proposed question for certification, while Justice Camp mischaracterized the stance that was taken by counsel for the respondent Minister, that minor error had no impact on his decision not to certify a question. Therefore, the applicants' motion is dismissed. There is no order as to costs.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"James W. O'Reilly"
Judge

Annex

Federal Court Rules, SOR/98-106	*Règles des Cours fédérales*, DORS/98-106
Motion to reconsider	Réexamen
397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	**397.** (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
(a) the order does not accord with any reasons given for it; or	a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;
(b) a matter that should have been dealt with has been overlooked or accidentally omitted.	b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.
…	[…]
Setting aside or variance	Annulation
399. (2) On motion, the Court may set aside or vary an order	**399.** (2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or	a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)
Human or international rights violations	Atteinte aux droits humains ou internationaux
35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35.** (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

…

(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;

Exclusion — Refugee Convention

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

Canadian Charter of Rights and Freedoms

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[…]

b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

Exclusion par application de la Convention sur les réfugiés

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.Person in need of protection.

Charte canadienne des droits et libertés

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

FEDERAL COURT

SOLICITORS OF RECORD

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MOTION IN WRITING CONSIDERED AT OTTAWA, ONTATIO PURSUANT TO RULES 397 AND 399 OF THE *FEDERAL COURTS RULES*

PLACE OF HEARING:	OTTAWA, ONTARIO
ORDER AND REASONS:	O'REILLY J.
DATED:	MARCH 10, 2016

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