Federal Court  Cour fédérale

Date: 20180504

Docket: IMM-3678-17

Citation: 2018 FC 478

Ottawa, Ontario, May 4, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

WEN WEN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a 30 year old citizen of China who arrived in Canada as a sponsored permanent resident in May 2005. After he was convicted of possession for the purpose of trafficking and unlawful production of cannabis in December 2015, the Canadian Border Services Agency advised the Applicant in October 2016 that there were reasonable grounds to believe he was inadmissible for reasons of serious criminality, and that a report had been prepared under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27

[*IRPA*]. Subsequently, in July 2017, the Applicant received a notice to appear for a hearing before the Immigration Division [ID] of the Immigration and Refugee Board [IRB] which, in a decision dated August 9, 2017, issued a deportation order against the Applicant. The Applicant has now applied under subsection 72(1) of the *IRPA* for judicial review of the ID's decision, asking the Court to set aside the decision and return the matter for redetermination by another member of the ID.

I. Background

[2] On May 19, 2013, the Applicant was arrested during a raid on a marijuana grow operation. He was found guilty on December 14, 2015, of possession for the purpose of trafficking and of unlawful production of marijuana, contrary to paragraph 5(3)(a) and sub-paragraph 7(2)(b)(iii) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*]. The Ontario Superior Court of Justice dismissed the Applicant's constitutional challenge to the mandatory minimum sentencing regime under sub-paragraph 7(2) (b) (iii) of the *CDSA* in March 2016, and he received a mandatory minimum sentence of 12 months' imprisonment for unlawful production of marijuana. The Applicant has appealed this sentence to the Ontario Court of Appeal [OCA] which heard the Applicant's sentencing appeal (along with two other factually similar cases) on November 1, 2017. The OCA's decision remains outstanding.

[3] Although the Applicant requested on November 28, 2016, that the inadmissibility report not be referred to the ID for a hearing, pending resolution of his appeal before the OCA, this request was refused. In July 2017, after the Applicant received notice to appear before the ID for a hearing on August 9, 2017, he requested that the hearing be adjourned pending disposition of

his sentencing appeal which had then been scheduled for November 1, 2017. The ID denied this request to adjourn prior to the hearing in a letter dated July 19, 2017, quoting the Chairperson's *Guideline 6: Scheduling and Changing the Date or Time of a Proceeding*, which states in relevant part:

> 6.6 The fact that there is a pending appeal of a conviction on criminal charges related to the subject of the proceedings or a pending application for Ministerial relief from inadmissibility is not generally a sufficient reason for the ID to grant an application to change the date or time of an admissibility hearing.

[4] As a result of the twelve-month sentence required by the mandatory minimum sentence provision, the Applicant is presently unable, by virtue of subsection 64(1) of the *IRPA*, to appeal the ID's decision to the Immigration Appeal Division [IAD] of the IRB.

II. The ID's Decision

[5] At the outset of the admissibility hearing on August 9, 2017, the Applicant requested again that the hearing be adjourned until disposition of his sentencing appeal before the OCA. The Applicant acknowledged jurisprudence to the effect that the ID is not mandated to grant adjournments to avoid secondary effects of a removal order, but argued that in this case the Applicant's sentence, which would determine his procedural rights under the *IRPA*, was still in dispute. This, according to the Applicant, was not a secondary effect of a removal order, and the case law dealing with secondary effects has concerned judicial review of referral decisions rather than review of underlying sentences. The Applicant submitted to the ID member that confidence in the administration of justice would be compromised if an individual were to suffer the consequences of a sentence before having the opportunity to challenge that sentence. The

Applicant recognized the ID's obligation under subsection 162(2) of the *IRPA* to dispose of matters as expeditiously as possible. In this case, however, the Applicant argued that there would be no undue delay in granting the adjournment since he cannot be removed until after his appeal is determined and he serves his sentence. The only effect of not granting an adjournment would be the Applicant losing his right of appeal by operation of subsection 64(1) of the *IRPA*.

[6] The Member considered the Applicant's arguments for an adjournment and decided as follows:

> So I have taken a little bit of time to review some case laws and the case law is really clear. Although it does provide the Member with some sort of discretion, but even that discretion is extremely limited because my Division has to proceed as soon as possible but, of course, taking into consideration fairness and natural justice. That being said, however, fairness and natural justice is with respect to the proceeding that is before me. So I have to be fair, you know, and respect natural justice with respect to the proceeding that is before me not with respect to other proceedings.
>
> In other words, if you're not ready to proceed today because you need an interpreter, you need counsel or you're ill so you cannot appropriately express yourself or you don't have proper representation, everything that is in relation of your right to be heard fairly and appropriately in my jurisdiction, I have to give it to you to respect fairness and natural justice.
>
> … I am asked to delay today's hearing to avoid a potential impact with respect to another proceeding. I understood counsel's submissions on that aspect trying to distinguish some of the case laws with your case.
>
> But quite frankly at the end of the day, it's pretty much the same. Some individuals have sought this hearing to be postponed so that the actual conviction could be appealed or was in the process of being appealed and postponement was denied.
>
> In this case, I'm asked to delay the hearing so that… the sentence appeal could be finalized.

> COUNSEL: Madam Board Member, would you be able to give me the cases where the postponement was sought and denied, where the appeal, where the conviction was being appealed?
>
> MEMBER: Not where the conviction was being appealed. I said where the - sorry, yes, the conviction, yes, I will be able to give it to you.
>
> COUNSEL: Okay. Thank you.
>
> MEMBER: I don't have, I don't have it here right now but I'll give it to you. No problem.
>
> COUNSEL: Thank you.
>
> MEMBER: All right, so to me it's more or less the same. So this is not really special circumstances on one hand. On the other hand, is that there's no specific date that is submitted. The hearing is, your appeal hearing is to take place on November 1st, 2017. But really the decision date is not known. December, 2017 appears to be a reasonable timeframe but at the same time really it is purely speculation and we don't grant postponement or sine die postponement.
>
> So because before me there isn't any breach of natural justice or procedural fairness, because I don't have a specific date until which this hearing, meaning the hearing before me, could be adjourned, a solid, specific date and because I don't see any specific or any extraordinary circumstances, I am not going to grant this adjournment.
>
> The Immigration Appeal Division has jurisdiction to assess or has jurisdiction to decide on their right of appeal. What I would suggest is if a deportation order is issued today, coupled with the transcripts of this hearing, you still submit an application at the Immigration Appeal Division. And if it is denied, the denial coupled with all the information be taken to the Federal Court.

[7] After denying the adjournment request, the ID then considered the uncontested evidence of the convictions and sentences, finding the Applicant inadmissible pursuant to paragraph 36(1)(a) of the *IRPA* and issuing a deportation order against the Applicant.

III. Analysis

A. *Standard of Review*

[8] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339); although the Federal Court of Appeal has recently observed that the standard of review for issues of procedural fairness is currently unsettled in that Court (see *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 11-14, 281 ACWS (3d) 472; also see *Canadian Copyright Licensing Agency (Access Copyright) v Canada*, 2018 FCA 58 at paras 151 and 175, [2018] FCJ No 334). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3).

[9] The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness. In other words, a procedural choice which is unfair will be neither reasonable nor correct, while a fair procedural choice will always be both reasonable and correct. In practice, the court's inquiry may resemble review for correctness insofar as a court will never defer to a tribunal's action which it deems to be unfair. However, a reviewing court will pay respectful attention to a tribunal's procedural choices and will not intervene except where they fall outside the bounds of natural justice. Where a tribunal acts within its jurisdiction, its decisions to control its procedure, such as the granting of an adjournment, are subject to the standard of

reasonableness (see: *Canada (Citizenship and Immigration) v Fox*, 2009 FC 987 at para 35, [2010] 4 FCR 3).

B. *Did the ID's decision violate procedural fairness?*

[10] The Applicant recognizes that adjournments are discretionary measures and that the ID controls its own procedures within the limits of fairness and natural justice. However, in this case, the Applicant submits that the ID failed to account for the elevated duty of fairness which the circumstances required, failed to address relevant factors, restricted its discretion based on authorities not provided to the Applicant, and failed to consider Federal Court jurisprudence supporting an adjournment pending the appeal of a criminal matter underlying an admissibility report. The Applicant argues that the ID referred to "really clear" case law where a postponement pending an appeal of an underlying conviction was denied, but did not provide these cases to the Applicant and failed to respond to contrary cases provided by the Applicant. According to the Applicant, individuals should not be punished based on an incorrect sentence.

[11] The Applicant points to this Court's decision in *Cabrera v Canada (Citizenship and Immigration)*, 2010 FC 709 at para 75, 372 FTR 211 [*Cabrera*], in which the applicant sought an adjournment to allow her to prepare a notice of constitutional question. The Court overturned the refusal to grant the adjournment, finding there was "no prejudice to the Minister but extreme prejudice to the Applicant" and "no real detrimental impact upon the system and/or the particular proceedings". In addition, the Court in *Cabrera* found that the ID member in that case had failed to consider all relevant factors under Rule 43(2) of the *Immigration Division Rules*, SOR/2002-229 [*Rules*], which requires consideration of whether changing or refusing to change the date of

a hearing would "likely cause an injustice." The Applicant argues that the same reasoning applies to the case at bar.

[12] The Applicant also points to *Canada (Citizenship and Immigration) v Da Silva*, [1999] FCJ No 1420, 91 ACWS (3d) 631 [*Da Silva*], in which the applicant was granted an adjournment of an immigration inquiry pending an appeal of the underlying criminal convictions. The Minister sought judicial review of the adjournment, but the decision was upheld. According to the Applicant, *Da Silva* shows that the ID member's discretion was not so limited that she could not grant the adjournment in the present case; that there is a distinction between adjournments based on appeals of underlying criminal convictions and those based on other proceedings such as H&C applications; and adjournments may be granted where the timeline for an appeal is not exact. By failing to consider this authority, the Applicant argues that the ID improperly restricted its discretion.

[13] Although the Applicant acknowledges that there is no right to an adjournment, he contends that the duty of fairness requires a decision-maker to conduct a full and proper inquiry to balance an applicant's interests against the public interest in having proceedings heard expeditiously. According to the Applicant, there was an elevated duty of fairness in this case based on the criteria identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39; notably, that this proceeding was more judicial than administrative in nature, this was a final determination where other potential recourses under *IRPA* are not available to the Applicant, there would be a severe impact on the Applicant and his family in being denied recourse to the IAD where H&C factors may be considered, and his

legitimate expectations were not met due to the ID failing to consider all relevant factors and failing to disclose the case law on which she relied.

[14] Lastly, the Applicant maintains that the ID failed to consider all relevant factors as required by Rule 43(2) of the *Rules*. Rule 43 provides as follows:

Application to change the date or time of a hearing	**Demande de changement de la date ou de l'heure d'une audience**
43 (1) A party may make an application to the Division to change the date or time of a hearing.	**43 (1)** Toute partie peut demander à la Section de changer la date ou l'heure d'une audience.
Factors	**Éléments à considérer**
(2) In deciding the application, the Division must consider any relevant factors, including	**(2)** Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, the existence of exceptional circumstances for allowing the application;	**a)** dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
(b) when the party made the application;	**b)** le moment auquel la demande a été faite;
(c) the time the party has had to prepare for the hearing;	**c)** le temps dont la partie a disposé pour se préparer;
(d) the efforts made by the party to be ready to start or continue the hearing;	**d)** les efforts qu'elle a faits pour être prête à commencer ou à poursuivre l'audience;
(e) the nature and complexity of the matter to be heard;	**e)** la nature et la complexité de l'affaire;

(f) whether the party has counsel;	**f)** si la partie est représentée;
(g) any previous delays and the reasons for them;	**g)** tout report antérieur et sa justification;
(h) whether the time and date fixed for the hearing was peremptory; and	**h)** si la date et l'heure qui avaient été fixées étaient péremptoires;
(i) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice.	**i)** si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice.

[15] According to the Applicant, he was not consulted and did not agree to the date chosen for the hearing, he had caused no prior delays, there was no prejudice to the Minister and extreme prejudice to the Applicant in not granting the adjournment, and the reason for the request was to finalize the sentence and determine the constitutional issues surrounding the mandatory sentence. In the Applicant's view, the ID unreasonably characterized his request for an adjournment as seeking to avoid an impact with respect to another proceeding, when in fact he was seeking to determine the underlying facts on which his admissibility finding would be based; and it also unreasonably failed to consider the fact that he was seeking to avoid losing his right of appeal to the IAD based on a sentence which might violate the *Charter* protection against cruel and unusual punishment.

[16] According to the Respondent, Rule 43 simply lists a number of factors which the ID must consider in determining whether to grant an adjournment, and does not require or allow the ID to consider subsequent injustice to a party against whom a deportation order is made. In addition,

the Respondent points to the Chairperson's *Guideline 6: Scheduling and Changing the Date or Time of a Proceeding*, which states in relevant part:

> 6.6 The fact that there is a pending appeal of a conviction on criminal charges related to the subject of the proceedings or a pending application for Ministerial relief from inadmissibility is not generally a sufficient reason for the ID to grant an application to change the date or time of an admissibility hearing.

[17] Finally, the Respondent states that if the OCA were to issue a judgment reducing the Applicant's sentence below six months, the Respondent would ask this Court to set aside the ID's finding of inadmissibility and the deportation order.

[18] I begin by noting that subparagraph 7(2) (b) (iii) of the *CDSA* has been declared unconstitutional in *R v Serov*, 2017 BCCA 456, 143 WCB (2d) 252 [*Serov*]. *Serov* was decided on December 28, 2017, and therefore was not before the ID. It is, of course, not a foregone conclusion that subparagraph 7(2) (b) (iii) will likewise be found unconstitutional by the OCA. But if the OCA follows the decision in *Serov* and declares that subparagraph 7(2) (b) (iii) of the *CDSA* is unconstitutional, the Applicant will have nonetheless lost his right of appeal to the IAD based on an unconstitutional mandatory minimum sentence provision. In my view, the ID did not seriously or sufficiently consider the possibility of adjourning the proceedings in order to avoid this outcome. This was not only unfair to the Applicant but an unreasonable determination as well.

[19] The ID was concerned about the indeterminacy of the adjournment request. The ID clearly stated that the lack of a fixed date on which to return was a reason for not granting the adjournment. However, in this regard, the ID conflated the factors under Rule 43 in making an

application to change the date or time of a hearing with a straightforward request to adjourn the hearing pending the OCA's decision. The exact date of the OCA's decision may have been unknown or indeterminate at the time of the hearing. But this indeterminacy or lack of a fixed date was not, in my view, a sufficient reason alone to refuse the adjournment because it is only a question of time when, and not if, the OCA renders its decision.

[20] Moreover, the case law pertaining to adjournments is not, as the ID stated, "really clear" and it appears the ID did not engage with the factors stated in Rule 43(2). In *Cabrera*, the ID refused an adjournment request, and this decision was quashed and returned for redetermination by Justice Russell, who wrote:

> [71] Be that as it may, it seems to me that the ID was obliged to consider the Applicant's adjournment request in accordance with section 43 of the *Immigration Division Rules*. Section 43(2) makes it mandatory for the ID to consider "any relevant factors" and then lists the factors that must be considered in all cases. If I look at the more obvious "relevant factors" in the present case, the following suggest themselves for consideration:
>
> a. The length of time for which the adjournment was being sought was very short;
>
> b. The adjournment would have had no detrimental effect on the immigration system;
>
> c. The adjournment would not have needlessly delayed, impeded or paralyzed the conduct of the inquiry;
>
> d. The Applicant herself was not to blame for any delay. Her counsel offered a legitimate reason for needing the intercede opinion and she also indicated that she had made efforts to get the letter on time: "I kept asking her when I could receive it";
>
> e. Another relevant factor would be that any adjournment would not have resulted in any prejudice to the Minister or unreasonably delay the

> proceedings, while the failure to grant the adjournment prevented the Applicant from raising her constitutional and Charter arguments, and the fact of her non-compliance with the time limits became a significant aspect of the Decision.
>
> ...
>
> [75] I would also add that, in the circumstances, there were some other obvious factors – e.g. no prejudice to the Minister but extreme prejudice to the Applicant given the ID's reasons for rejecting her constitutional and Charter arguments; no real detrimental impact upon the system and/or the particular proceedings – that should also have been considered on the facts at hand.

[21] The ID's reasons do not show that *Cabrera* was considered by the ID or that the "relevant factors" identified in that case were assessed by the ID. The ID's reasons are not sufficiently intelligible to know on what basis the ID made its decision to refuse the adjournment. It is troublesome that the decision to refuse the adjournment request and proceed with a hearing appears to have been based entirely on unnamed case law which was not provided to the Applicant's counsel. The ID's decision thus lacks the transparency and intelligibility required by *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, and *Delta Air Lines Inc v Lukács*, 2018 SCC 2, [2018] SCJ No 2; and, consequently, it must be set aside.

IV. Conclusion

[22] In conclusion, I find that the ID unfairly and unreasonably refused the Applicant's request for an adjournment, resulting in issuance of an unfair and unreasonable deportation order.

[23] Neither party proposed a question of general importance for certification; so, no such question is certified.

JUDGMENT in IMM-3678-17

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Immigration Division for redetermination by a different panel member; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Prasanna Balasundaram	FOR THE APPLICANT
John Loncar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT