Federal Court  Cour fédérale

Date: 20121205

Docket: IMM-2990-12

Citation: 2012 FC 1422

Toronto, Ontario, December 5, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

KRISZTIAN SZABO
KAROLINA SARKOZI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants challenge the legality of a decision of the Refugee Protection Division of the Immigration and Refugee Board [tribunal] denying their application to reinstate the claims for refugee protection they had previously withdrawn from the tribunal.

[2] The applicants, both citizens of Hungary, attended a scheduling hearing on November 14, 2011, where they signed a form indicating they were withdrawing their claims. In the formal application for reinstatement made in February 2012 on behalf of the applicants, it is alleged that

their request for reinstatement fall within Rule 53(3) of the *Refugee Protection Division Rules*, SOR/2002-228, because they were notably unable to locate their counsel for the scheduling hearing and the tribunal advised them that their counsel was being investigated and had disappeared. The applicants alleged they signed the form because they were nervous and unsure how to proceed. On February 21, 2012, the tribunal rejected their request for reinstatement.

[3] In a nutshell, the tribunal determined that there was no failure to observe a principle of natural justice. It found that the purpose of a scheduling hearing is merely to set a date and not to give evidence, and normally, claimants are given information on how to seek counsel. It noted that the male applicant had indicated he could read and understand the form withdrawing the claims, and an interpreter's declaration indicated the form had been translated into Hungarian. It went to find there was no indication in the recording of the scheduling hearing that the applicants' then-counsel was under investigation, or any persuasive evidence that she had disappeared. It also found no evidence that the female applicant's pregnancy had impaired her decision-making ability. Since no breach to a principle of natural justice had occurred, the request for reinstatement was dismissed by the tribunal.

[4] Today, the applicants submit that the tribunal erred by only considering whether a breach of natural justice had occurred, ignoring the second possibility under Rule 53(3), that a request for reinstatement must be granted "if it is otherwise in the interests of justice". The applicants indicated in their application that they were seeking reinstatement under the "interests of justice" criterion, in addition to the "natural justice" criterion. The applicants argue that there is nothing in the tribunal's reasons indicating it considered the "interests of justice" option. Applying the wrong test is an error

of law that is reviewable on the standard of correctness. Otherwise, the failure to address the second possibility is a reviewable error which renders the whole decision unreasonable.

[5] On the other hand, the respondent submits that the appropriate standard of review is reasonableness, as the tribunal's determination of a reinstatement application is a question of mixed fact and law. The respondent argues that when the tribunal's decision is read as a whole, it is clear that it considered the entire test as set out in Rule 53(3). Reasons do not have to be perfect or comprehensive, and should be reviewed by a court in the context of the evidence, the parties' submissions and the process. Here, the applicants' submissions on natural justice and interests of justice were largely the same. The applicants provided the tribunal with no further explanation for why the interests of justice require the reinstatement of their claim than the arguments presented relating to natural justice. On the whole, the impugned decision is reasonable.

[6] The intervention of the Court is warranted in this case.

[7] Firstly, I agree with the respondent that the appropriate standard of review is reasonableness. Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57, [2008] 1 SCR 190 [*Dunsmuir*]. In this case, this Court has previously held that reasonableness is the appropriate standard in reviewing a reinstatement application: *Ohanyan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078 at para 6. In this context, the reviewing court must consider the record in its entirety when determining whether a decision was reasonable:

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paras 12 and 15, [2011] 3 SCR 708 [*Newfoundland Nurses*].

[8] Secondly, I note that Rule 53(3) contains two separate grounds for reinstating a refugee claim. A request for reinstatement must be allowed if there was a failure to observe a principle of natural justice. In addition and distinct from the first ground, the request must be allowed if it can be established that it "is in the interest of justice to do so".

[9] Thirdly, as noted by the Court in *De Lourdes Diaz Ordaz Castillo v Canada (Citizenship and Immigration)*, 2010 FC 1185 at para 5 [*Ordaz*]:

> It is entirely possible that the evidence before the Board may be relevant to both grounds. However, a decision that is reasonable and reflects "justification, transparency and intelligibility" (*Dunsmuir*, para. 47) must address both branches of Rule 53(3). It must be clear to the reader (and the reviewing Court) that the Board understood that there are two separate grounds in Rule 53(3).
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> [emphasis added]

I fully agree with the observations of the Court in *Ordaz*.

[10] Fourthly, it is not clear that the tribunal understood that there are two separate grounds in Rule 53(3). The tribunal describes in the impugned decision the applicable test in the following terms: "I am bound by Rule 53 and must determine whether or not there has been a 'failure to observe a principle of natural justice'." The tribunal does not refer in this sentence or elsewhere in the impugned decision to the alternative criteria "in the interests of justice". On the other hand, natural justice is referred to four times by the tribunal. Accordingly, when I read the impugned decision as a whole and in light of the record in its entirety, there are strong indications that the

tribunal erred in thinking that reinstatement can only be granted if there was a failure to observe a principle of natural justice.

[11] Fifthly, I do not believe that to "supplement" the tribunal's reasons, as suggested by *Newfoundland Nurses*, above, means that the reviewing court must substitute itself to the tribunal and determine on its own motion, after an analysis of the evidence on record, whether or not it is in the "interests of justice" to allow or dismiss an application for reinstatement. While the Supreme Court of Canada "has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons", on the other hand, before this Court, "the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable", as stated by the Supreme Court in *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3. The mischaracterization by the tribunal of the applicable test under Rule 53(3) renders the whole decision unreasonable.

[12] To conclude, I am simply not satisfied that the tribunal gave proper consideration to the alternative submission made by the applicants that their request for reinstatement should be allowed because it would be in "the interests of justice". In this regard, I agree with the applicants that this ground is much broader than the natural justice ground. Accordingly, while there may not have been a failure to a principle of natural justice, this did not automatically mean that it was not in the interests of justice to allow the request for reinstatement made by the applicants; a fundamental issue which has remained unsolved up to now by the tribunal. This goes far beyond the simple grievance made in other cases that an argument was not considered by the administrative tribunal.

[13] As a result, I will allow the application. The impugned decision shall be set aside and the matter returned back for redetermination by another member of the tribunal. The parties have not proposed any question for certification and none shall be certified by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be allowed. The impugned decision made by the tribunal is set aside and the matter is referred back for redetermination by another member of the tribunal. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Hart A. Kaminker	FOR THE APPLICANTS
Rafeena Rashid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT