Federal Court  Cour fédérale

Date: 20160607

Docket: IMM-5312-15

Citation: 2016 FC 626

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 7, 2016

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

LEUY BUT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Leuy But, a Cambodian rice farmer, applied for refugee protection in Canada because she was afraid she would be subjected to pressure, threats and imprisonment by local government representatives after she refused to sell her land to a powerful businessman. The Refugee Protection Division [RPD] rejected her application, finding that it was not credible. This decision was confirmed by the Refugee Appeal Division [RAD]. This is an application for judicial review of this last decision.

[2] The applicant raises two issues. First, she maintains that the RPD member wrongfully refused to recuse himself despite the appearance of bias. Secondly, she argues that the RAD was wrong to approve the RPD decision on its merits.

I. Appearance of bias

[3] Natural justice requires that all parties have a reasonable possibility of arguing the merits of his or her application before an impartial, or seemingly impartial, decision-maker. Any allegation of bias is very serious and must be carefully examined.

[4] Although it is often said that the applicable standard of review in this case is the standard of correctness, it seems to me that the concept of a standard of review is difficult to apply to fundamental matters of natural justice (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at paragraphs 100, 102). Thus, the RAD was not required to exercise deference towards the RPD decision and I am in no way required to exercise deference towards the RAD decision.

[5] Ms. But's argument is two-fold. First, she argues that the member was unwilling to reschedule her hearing even though she was clearly ill and in no condition to testify, and though he had agreed to do so more than once in the past. The applicant states that the member also began abandonment procedures. He eventually decided that the applicant did not abandon her application and that he would hear it on its merits.

[6] The second part of the applicant's argument concerns the member's behaviour towards her counsel. She maintains that he was rude, raised his voice and prevented her counsel from doing her job by interrupting her several times.

[7] The criterion for determining whether there is a reasonable apprehension of bias was described by the Honourable Mr. Justice de Grandpré in *Committee for Justice and Liberty et al. v. National Energy Board et al*., [1978] 1 S.C.R. 369 at page 394:

> The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, the test of "what would an informed person, viewing the matter realistically and practically—conclude?"

[8] This test is well established both in Canada and in England. In *Cipak v. Canada (Citizenship and Immigration)*, 2014 FC 453, at paragraph 24, the Honourable Mr. Justice Roy wrote:

> [24] In this case, the issue is not so much whether the decision-maker was biased against the applicants, but rather whether there is an appearance that there was a lack of impartiality. The inquiry does not focus on the subjective state of mind of the decision-maker; it focuses on the existence of a reasonable apprehension of bias, of an appearance of unfairness. The value that needs to be protected is the public confidence in the integrity of the decision-making process. Lord Denning MR stated in Metropolitan Properties Co (FGC) Ltd v Lannon, [1969] 1 QB 577.
>
> > The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The Judge was biased."
> > (Page 599)

[9] I am convinced that a reasonable person who thoroughly considered the matter would not conclude that there was an appearance of bias on the part of the member.

[10] Although the member may have taken a very narrow approach when applying the rules regarding medical evidence, he clearly explained that his main concern was to determine whether the applicant was fit to participate in the hearing.

[11] Regardless, the member concluded:

> [20] In spite of the incomplete medical information that would explain the claimant's incapacity to participate in the previously scheduled hearings, the panel decided not to declare abandonment regarding those previous dates and concluded that the claimant was having some medical difficulties. The panel proceeded with the hearing and concluded the hearing on 19 January 2015 with an adjournment until 2 February 2015 to permit counsel to make written submissions to be delivered to the panel on or before that date.

[12] There were some rather tense moments between Ms. But's counsel and the member. The member had a job to do, and he was justified in believing that the applicant's counsel's objections were, in fact, an attempt to suggest to her client the answers she should give.

[13] One specific exchange towards the end of the hearing caught the parties' attention. Ms. But was testifying in English through an interpreter. Her counsel objected to a question. The member asked her to wait for the interpreter to translate the question. Here is an excerpt from the exchange in question:

> Counsel: I have to object [inaudible 2:37:39.0].
>
> Member: Excuse me, I still have to have what I say translated.

Counsel: Well, sorry, [inaudible].

Member: No, stop immediately. Translate what I say, and then I'll let Counsel say something.

Claimant: The person who completed the form was wrong.

Member: Okay, go ahead, Counsel.

Counsel: I have objected before. You told me to wait, and then you continue on with your questions. So, this is not the way to do an objection.

Member: In fact, you were interrupting and talking at the same time I was talking. That is a major problem in trying to get interpretation, reliable interpretation, in any hearing. So, first of all, that was not appropriate. Secondly…which just it causes all kinds of technical problems with trying to have a reliable interpretation. Secondly, it's a reasonable question, and the objectioner …any observation you make can be made afterwards. And I don't want what you say to influence the answer of the claimant.

[14] The applicant's counsel stated that the questions asked were too complicated. The member agreed:

Member: My point is not to answer the questions for the claimant but rather that it could…the information could influence the answer that the claimant could give. But I understand. Simplifying the questions is probably a good idea.

[15] From time to time there are conflicts between counsel and decision-makers with both groups trying their best to do their job. That is certainly not enough to conclude that there is the appearance of bias. That would be the case in a situation such as *Sereiboth v. Canada (Citizenship and Immigration)*, 2013 FC 736, [2013] FCJ No 778, or even *Gonzalez v. Canada (Citizenship and Immigration)*, 2014 FC 201, [2013] FCJ No 210.

II. Merits of the claim for refugee protection

[16] Ms. But's application is based on the fact that she allegedly inherited farmland from her husband, who died in 1998. Local government representatives pressured her to sell this land at a low price to a powerful businessman.

[17] She was apparently threatened with imprisonment on the grounds that she had agreed to sell her land by putting her thumb print on a sale agreement. She says she was forced to put her print on a blank document to promise that she would vote for the party in power in the next general elections.

[18] The member was not convinced by the applicant's explanation, nor was he convinced that she was truly the owner of the farmland in question. The RAD conducted an independent analysis of the file and decided to show deference to the conclusions of the RPD regarding the applicant's testimony, in accordance with *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93. They reached the same conclusions as the RPD.

[19] Even if the RAD's analysis was inadequate, its decision was within the range of possible, acceptable outcomes in respect of the facts and the law. The facts on file certainly support the conclusion that Ms. But's story was not credible (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708). One needs only note that since she left Cambodia, her son has continued to farm the family land without any problem.

JUDGMENT

FOR THESE REASONS

THE COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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