Federal Court Cour fédérale

Date: 20190528

Docket: IMM-5078-18

Citation: 2019 FC 744

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 28, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

CARLOS DE ANTUNANO MARTINEZ
CARLOS DE ANTUNANO MELENDEZ
ARANTXA DE ANTUNANO MELENDEZ
HAYDEE MELENDEZ CORONA
AURKENE DE ANTUNANO MELENDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In May 2016, the applicants left Mexico for Canada, using visitor visas, and made a refugee protection claim upon arrival. They submit that they fled Mexico following threats from

a criminal group, attempts to abduct their children and threats of violence against the principal applicant, Mr. Carlos Martinez. His wife, Ms. Melendez Corona, worked for the Mexican judicial system. The applicants submit that the criminal group wanted her to disclose information about arrest warrants issued against persons that they would identify to her.

[2] The Refugee Protection Division (RPD) rejected their claim for lack of credibility. The Refugee Appeal Division (RAD) dismissed their appeal for the same reason. It is the RAD decision that is the subject of this application for judicial review.

II. Issues and standard of review

[3] The applicants submit that the RAD made two errors with respect to procedural fairness: (i) the RAD erred in rejecting the applicants' argument that there was a breach of procedural fairness since the hearing before the RPD was not recorded in its entirety, and (ii) the RAD erred in adding new grounds for a negative credibility finding, without notifying the applicants or giving them an opportunity to address its specific concerns.

[4] The Federal Court of Appeal recently dealt with how to approach procedural fairness issues in *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69. According to that decision, the Court does not apply a standard of review to a question of procedural fairness; rather, it must consider whether the process followed was fair and just, paying attention to the nature of the rights at stake and the consequences for the individuals affected (para 54; see also *Farrier v Canada (Attorney General)*, 2018 FC 1190 at para 29).

III. Analysis

A. *Lack of recording of the hearing before the RPD*

[5] The recording of the hearing before the RPD does not include the closing arguments of counsel for the applicants. However, it would appear that the entire remainder of the hearing, including the testimony of the applicants, was recorded.

[6] The applicants claim that the RAD erred in concluding that recording the hearing is not mandatory, and that the failure to record a portion of the hearing before the RPD did not violate their right to procedural fairness. They cite the *Immigration Appeal Division Rules*, SOR/2002-230, and the *Refugee Appeal Division Rules*, SOR/2012-257 (RAD *Rules*), noting references to the "transcript" of the hearing. The applicants submit that the RAD cannot fulfill its responsibilities, as defined by case law, without access to a full record of the hearing before the RPD (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103; *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 156).

[7] I am not persuaded by the applicants' argument. Neither the legislation nor the case law indicates that there is an obligation to record the hearing. I note that most of the section of the Rules cited by the applicants refer to a "full or partial transcript" of the hearing (see, for example, paragraphs 3(3)b), 4(3)a), 5(2)a), 9(2)b), and 11(2)a) of the RAD *Rules*). In addition, the case law is consistent in not requiring the recording of hearings before the RPD (*Huszar v Canada (Citizenship and Immigration)*, 2016 FC 284 at para 17; *Singh v Canada (Citizenship and Immigration)*, 2004 FC 363 at para 3).

[8] In *Patel v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 804 [*Patel*], Justice John Norris detailed the principles that apply:

> [31] . . . In cases where there is no statutory right to a recording "courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice" (*Canadian Union of Public Employees, Local 301 v Montréal (City)*, [1997] 1 SCR 793, at para 81). On the other hand, if the court cannot dispose of an application before it because of the absence of a transcript, this will violate the rules of natural justice.
>
> [32] The test for assessing the significance of gaps in the record of a proceeding under review was summarized succinctly by Justice Strickland in *Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242, at para 34 [*Nweke*]: "the applicant must raise an issue that affects the outcome of the case that can be determined on the basis of a record of what was said at the hearing such that the absence of a transcript prevents the Court from addressing the issue properly" [citations omitted]. . . .

[9] The applicants also argue that the Federal Court's case law regarding the lack of recording of the hearing under judicial review does not apply to the RAD, since the RAD's role on appeal is different from that of the Federal Court on judicial review. I agree that the roles of the RAD and the Federal Court are different, but I do not believe that the rules of principle are different with respect to the absence of a recording or transcription.

[10] The Supreme Court has established rules that must be applied in all circumstances where an appeal or review of a decision must be made without access to a complete record of the previous proceeding: *Canadian Union of Public Employees, Local 301 v Montréal (City)*, [1997] 1 SCR 793:

> [80] . . . In cases where the record is uncomplete, the denial of justice allegedly arises from the inadequacy of the information upon which a reviewing court bases its decision. As a consequence, an appellant may be denied his or her grounds of

> appeal or review. The rules enunciated in these decisions prevent this unfortunate result. They also avoid the unnecessary encumbrance of administrative proceedings and needless repetition of a fact-finding inquiry long after the events in question have passed.
>
> [81] In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious possibility" of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

[11] In this case, the RAD did not err in noting that the applicants did not establish a breach of procedural fairness:

> . . . Although it is true that the recording stopped at the moment when the counsel was starting to give his arguments, the [appellants'] memorandum does not indicate that there were any procedural issues or any other problems while the arguments were taking place. The RAD is of the view that the arguments in the memorandum, stating that it is impossible to know whether the counsel did his job correctly or whether the RPD raised any issues during this exercise, are only speculation that is not supported by any specific examples.

[12] I accept the respondent's argument that the specific circumstances of this case must be taken into account: unlike the situation in most of the cases cited by the applicants, it is only the arguments of the applicants' counsel before the RPD that have not been recorded. Thus, the question that arises is how the lack of a recording of the arguments of the applicants' counsel before the RPD has had "affects [on] the outcome of the case and can only be determined on the basis of a record of what was said at the hearing" or how "the absence of transcript prevents [the

RAD] from addressing the issue properly" (*Patel* at para 32, citing *Nweke v Canada (Citizenship and Immigration)*, 2017 FC 356 at para 34).

[13] The applicants claim that there is a connection between this argument and the next one, namely that it is impossible to know, without recording this portion of the hearing, whether the lawyer who pleaded before the RPD dealt with the new grounds raised by the RAD, whether he answered the RPD's questions on this issue, or whether he dealt with the same aspects of the evidence. There are two problems with this argument. First, these are mere speculation, since no affidavit from the lawyer who pleaded before the RPD has been filed with this Court, stating that such arguments were indeed made before the RPD. Second, the applicants' memorandum before the RAD could and should have repeated what had been said during the oral arguments. The lack of recording did not prevent the applicants from presenting their arguments before the RAD regarding the "new" grounds. These grounds were present in the RPD decision, and the applicants should therefore have addressed them in their memorandum before the RAD if they wanted to challenge them.

[14] The applicants have not demonstrated that there has been a breach of procedural fairness. I conclude that the RAD did not err in rejecting the applicants' argument on this point.

B. *The "new" grounds raised by the RAD in its decision*

[15] The applicants submit that the RAD violated their right to procedural fairness by adding new grounds to justify a negative credibility finding, without giving them an opportunity to respond. Case law teaches us that there are circumstances where procedural fairness requires the RAD to notify the parties before dealing with a "new issue" (see, for example, *Ching v Canada*

(Citizenship and Immigration), 2015 FC 725). A good summary of the case law and rules that apply in the circumstances of this case is the decision of Justice René LeBlanc in *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 [*Corvil*]:

> [TRANSLATION]
>
> [13] It is clear that when considering an issue that has not been raised before the RPD or by any of the parties to the appeal, the RAD must first notify the parties and give them an opportunity to respond (*Ching v Canada (Citizenship and Immigration),* 2015 FC 725 at para 71 [*Ching*]). However, it is now well established that where the claimant's credibility is at the heart of the RPD's decision and the grounds for appeal to the RAD, the RAD is entitled to make independent findings in this regard, without having to question the claimant about it or otherwise give him or her an opportunity to make submissions. In doing so, however, the RAD must be careful not to ignore conflicting evidence in the record or draw such conclusions from evidence that the claimant was unaware of [citations omitted].
>
> [14] In this case, credibility was at the heart of the RPD's concerns and the subsequent rejection of the applicant's refugee protection claim. It was also at the heart of the applicant's appeal to the RAD . . .
>
> [15] Therefore, the fact of having identified evidence on the record that appears to have escaped the RPD, and of having made a negative finding on the applicant's credibility without giving the applicant an opportunity to explain him- or herself, cannot be blamed on the RAD in the current state of the Court's case law since the applicant's credibility was presented as the central issue in the applicant's appeal.

[16] The applicants argue that the RAD erred in finding other grounds to justify the negative finding on the applicants' credibility. They dispute the fact that, although the RAD rejected the RPD's conclusion that they did not answer its questions directly and briefly, the RAD added further grounds for concluding that the applicants lacked credibility.

[17] It is not necessary to analyze this argument in detail. First, I believe that credibility was at the heart of the RPD's concerns, and that the RAD did not err in making an independent analysis of this issue. Second, I agree with the respondent's arguments that most of the RAD's analysis on this issue focuses on facts that the RPD had already addressed. Although the RAD rejected some of the RPD's findings on the credibility of the applicants, the facts pointed out by the RAD to support its negative credibility finding were initially raised in the RPD's decision.

[18] I adopt the analysis of Justice LeBlanc in *Corvil*. I also adopt the analysis of Justice Cecily Strickland in *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876, where she explains that the RAD must hear the case as a hybrid proceeding, and that when the time comes to consider the issues raised by the parties, the RAD must also conduct an independent analysis of the record, referring to the evidence that supports the RPD's findings and conclusions. She goes on to write as follows at paragraph 40:

> . . . In my view, the necessary corollary of this is that the RAD is also permitted to refer to evidence in the record before the RPD to explain why it believes the RPD erred with respect to an issue raised on appeal or why it does not agree with the RPD's findings of fact. Such reasons do not, in and of themselves, give rise to a new issue. The fact that the RAD views some of the evidence differently from the RPD is not a basis to challenge the RPD's decision on fairness grounds when no new issue has been raised (*Ibrahim* at para 30).

[19] I find that this is precisely what the RAD did in this case, and that procedural fairness was not breached. This is not a situation where the RPD based its decision on a very specific point of the applicants' credibility, as in *Ehondor v Canada (Citizenship and Immigration)*, 2016 FC 1253. Nor is this a situation where the RAD decided the case on a new issue that had not been dealt with by the RPD and was not the subject of the applicants' appeal

(*Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896; *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684.

[20] Here, the RPD found that there were legitimate grounds to conclude that the applicants lacked credibility. In reviewing the decision, the RAD found some additional grounds for the lack of credibility by relying on the file before it, not by considering a “new issue”. I agree that this is not a breach of procedural fairness.

IV. Conclusion

[21] For all these reasons, the application for judicial review is dismissed. The parties have not proposed a question of general importance, and I agree that there are none to certify in this case.

JUDGMENT in IMM-5078-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"William F. Pentney"
Judge

Certified true translation
This 6th day of June, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5078-18
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