Federal Court  Cour fédérale

Date: 20190507

Docket: IMM-3411-18

Citation: 2019 FC 594

Ottawa, Ontario, May 7, 2019

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MOHAMMAD TAGHI NAJAFI

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Minister of Public Safety and Emergency Preparedness [Minister] seeks judicial review of an Immigration Appeal Division [IAD] decision confirming the Immigration Division's [ID] decision staying the admissibility proceedings with respect to Mohammad Taghi Najafi on the grounds that the unreasonable delay in referring the section 44 admissibility report to the ID amounted to an abuse of process.

[2] This case raises the question of whether the ID has the jurisdiction to permanently stay an admissibility hearing conducted pursuant to sections 44 and 45 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This Court must assess whether previous decisions from this Court and the Federal Court of Appeal have conclusively answered this question, and whether the present case falls within what has been identified as the ID's limited discretion to stay proceedings before it for abuse of process.

II. Facts

[3] Mr. Najafi is a 58-year old citizen of Iran. He is married to a Canadian citizen and has two children born in Canada. He arrived in Canada in 1992 and became a protected person in 1993.

[4] In his refugee claim, Mr. Najafi explained that while he was studying in India, he was engaged in political activism with the Muslim Iranian Student Society [MISS], a front organization for the People's Mujahedeen Organization (Mojahedin-e Khalq), which opposed the Iranian Islamic government and was listed by the Canadian government as a terrorist organization from May 2005 to December 2012.

[5] Mr. Najafi applied for permanent residence on June 16, 1994. His application was referred to the Royal Canadian Mounted Police for criminality screening and to the Canadian Security Intelligence Service [CSIS] for security screening. To this day, no decision has been made on his permanent residence application due to concerns Mr. Najafi may be inadmissible to Canada on security grounds.

[6] A CSIS letter dated February1997 addressed to Citizenship and Immigration Canada [CIC] refers to two interviews taking place in November 1994 and August 1995, during which Mr. Najafi described his activities on behalf of the MISS, which included distributing "anti-Khomeini literature, collecting donations from businesses, printing literature, attending demonstrations and lobbying government agencies to explain Khomeini policies and point out atrocities in Iran under the Khomeini leadership". He also took two years off from his studies to work on behalf of the MISS. When pressed, Mr. Najafi divulged certain of his activities and contacts with members of the People's Mujahedeen Organization and with individuals connected with the Iranian Intelligence Services. However, the letter indicates CSIS did not intend to initiate certificate action pursuant to section 40.1 of the former *Immigration Act*, RSC 1985, c I-2.

[7] On May 18, 2002, Mr. Najafi applied to this Court for an order of mandamus to compel CIC to complete the processing of his application for permanent residence. His application was dismissed "without prejudice to commence a new proceeding in the future".

[8] In April 2003, a section 44 report was prepared reporting Mr. Najafi to be inadmissible pursuant to paragraph 34(1)(*f*) of the IRPA. Shortly thereafter, Hearings Officer Murray wrote to Mr. Najafi's counsel to advise him of the section 44 report, and to ask whether Mr. Najafi intended to seek Ministerial relief. In the event he did not, the request for an admissibility hearing before the ID would proceed.

[9] Counsel advised Hearings Officer Murray of Mr. Najafi's intention to seek Ministerial relief and eventually provided written submissions in that regard.

[10] In September 2003, Hearings Officer Murray sent a copy of the Ministerial relief package to CIC Security Review, recommending that the application for Ministerial relief be given favourable consideration.

[11] In November 2007, a Canada Border Services Agency [CBSA] Enforcement Officer disclosed to Mr. Najafi the Ministerial relief package which rather contained a negative recommendation for Ministerial relief.

[12] In June 2016, CBSA sent the section 44 report and the request for an admissibility hearing to the ID.

[13] However, on January 18, 2017, the ID granted a permanent stay of proceedings finding that the undue delay on the part of the Minister amounted to an abuse of process.

III. Impugned Decision

A. *ID*

[14] The ID found that it had jurisdiction to decide abuse of process motions and to apply appropriate remedies if necessary. Administrative tribunals are "masters in their own house" (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568-569)

and must be able to protect their own process from abuse (*Canada (Human Rights Commission) v Canada Post Corp*, 2004 FC 81 at paras 14-15 aff'd 2004 FCA 363).

[15] Administrative tribunals are empowered to uphold the principles of natural justice and the duty of fairness. In particular, the ID has sole and exclusive jurisdiction over questions of law, fact and jurisdiction in proceedings brought before it under the IRPA (subsection 162(1)); it may consider fairness and natural justice in all proceedings before it (subsection 162(2)). Section 165 of the IRPA gives ID members the power and authority of a commissioner appointed under Part I of the *Inquiries Act*, RSC 1985, c I-11.

[16] In the past, the ID's jurisdiction to consider abuse of process motions has not been controversial (see for example: *Wajaras v Canada (Citizenship and Immigration)*, 2009 FC 200; *B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033; *Canada (Public Safety and Emergency Preparedness) v Sonnenschein*, 2007 CanLII 47729 (CA IRB); *Canada (Public Safety and Emergency Preparedness) v X*, 2008 CanLII 72162 (CA IRB).

[17] While in *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591, the Federal Court found that the ID did not have jurisdiction to stay proceedings based on abuse of process, the ID has in the past done so. The Supreme Court has noted that the administration of justice and fairness are at the heart of the doctrine of abuse of process (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 40-41). A decision-maker must decide whether proceeding would harm the integrity of the justice system (*R v Babos*, 2014 SCC 16 at para 38) or prevent a party's

ability to answer the complaint against him or her (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 102).

[18] In this case, the delay has prejudiced Mr. Najafi's ability to answer the case against him; during this period of more than 20 years, he has forgotten the details of what occurred in India and has lost contact with his friends and associates, who may be difficult to locate all these years later.

[19] The information regarding Mr. Najafi's political activism has been available to the Minister since Mr. Najafi made his refugee claim and was interviewed by CSIS between 1992 and 1995. No justification was given by the Minister for such a long delay in bringing inadmissibility proceedings. Nothing stopped the Minister from bringing the inadmissibility proceedings while Mr. Najafi's applications for permanent residence and for Ministerial relief were pending.

[20] The remedy granted by the ID must protect the fairness and natural justice of its proceedings. While a stay of proceedings is an extraordinary remedy reserved for the clearest of cases, this is such a case. No other remedy would undo the prejudice caused to Mr. Najafi.

[21] The damage to the public interest in the fairness of administrative proceedings would exceed any harm in the non-enforcement of the legislation. Mr. Najafi has been in Canada for many years without security or criminality problems. He is also a protected person and would not

be removable unless a Minister's Danger Opinion is issued. Proceeding with an unfair hearing would violate the essential principles of fairness and natural justice.

[22] For these reasons, the ID concludes the proceedings should be permanently stayed.

B. *IAD*

[23] The IAD confirmed the ID's decision. It found that the ID had jurisdiction to grant a stay of proceedings, and that the Minister committed an abuse of process in delaying the referral of the admissibility hearing for 13 years. Mr. Najafi's ability to make a full answer to the allegations against him has been prejudiced such that granting a stay is the only appropriate remedy.

[24] The IAD found that the ID had jurisdiction to grant a stay of proceedings despite the Federal Court expressing doubts in *Torre*. In the present case, the IAD found the delay so unreasonable and inordinate that the ID was compelled to exercise its jurisdiction to look behind the reason for the delay; it should look at the impact this delay would have on the fairness of the hearing and on Mr. Najafi.

[25] *Torre* was also followed in *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427. In both cases, the Court found that while the administrative delays had been lengthy, they did not amount to an abuse of process or a significant prejudice to the person concerned.

[26] The analysis of the administrative delay is factual and contextual (*Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 27 citing *Blencoe* at para 122). The ID is in the best position to determine whether the delay in initiating an admissibility hearing is unreasonable, as it is the body to which all referrals are made and is able to make a preliminary assessment of the case.

[27] Contrary to the decision in *Torre*, the IAD finds that the ID has jurisdiction to grant a stay of proceedings, when considering the statutory framework requiring holding an admissibility hearing quickly. The Minister failed to take action quickly, leaving Mr. Najafi to attempt to recall and answer for his activities from 1979 to 1992. It would be unfair to him to proceed in such circumstances, as he is prejudiced in his ability to respond to the Minister's case.

[28] The only appropriate remedy is to stay the proceedings. The 13-year delay in referring the admissibility hearing is a "uniquely inordinate, egregious and inexcusable delay". The Minister's reliance on its previous administrative policy, which postponed enforcement proceedings, cannot explain or excuse the delay.

[29] This delay significantly impacted the fairness of the proceedings, since Mr. Najafi's memory has faded and he may not be able to call witnesses that could speak to his involvement with the MISS between 1979 and 1992.

[30] While Mr. Najafi has suffered emotional stress and uncertainty, there is not sufficient evidence to establish that the proceedings should be stayed on the sole basis of negative psychological impact.

IV. Issues

[31] This application for judicial review raises the following issues:

A. *Did the ID have jurisdiction to grant a stay of proceedings?*

B. *Did the IAD reasonably uphold the ID's decision to grant a stay of proceedings?*

[32] The parties agree that the standard of reasonableness applies to both issues (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 46, 48). I have proceeded on that basis despite the fact that the standard of correctness was applied in both *Torre* at paragraph 17 and *Ismaili* at paragraph 7. In any event, nothing turns on this issue as, in my opinion, the outcome of this case would be the same under either standard of review.

V. Analysis

A. *Did the ID have jurisdiction to grant a stay of proceedings?*

[33] Sections 162 and 165 of the IRPA grant broad powers to the ID to deal with proceedings brought before it:

Sole and exclusive jurisdiction	**Compétence exclusive**
162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.	**162 (1)** Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie.
Procedure	**Fonctionnement**
(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	**(2)** Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.
Powers of a commissioner	**Pouvoir d'enquête**
165 The Refugee Protection Division, the Refugee Appeal Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the Inquiries Act and may do any other thing they consider necessary to provide a full and proper hearing.	**165** La Section de la protection des réfugiés, la Section d'appel des réfugiés et la Section de l'immigration et chacun de leurs commissaires sont investis des pouvoirs d'un commissaire nommé aux termes de la partie I de la Loi sur les enquêtes et peuvent prendre les mesures que ceux-ci jugent utiles à la procédure.

[34] In addition, the ID, as any other administrative tribunal, may consider the principles of natural justice and the duty of fairness in these proceedings (*Blencoe* at para 102).

[35] The Minister concedes in its submissions that nothing in the IRPA withdraws from the ID "any authority it normally holds by virtue of being an administrative tribunal that controls its own process and that must ensure that its processes comply with the rules of procedural fairness".

[36] Therefore, it would appear that the ID is empowered to make an abuse of process finding and to stay admissibility proceedings.

[37] However, two cases of the Federal Court have held that the ID has only limited (if any) jurisdiction to stay admissibility proceedings. In *Torre* at paragraph 22, Justice Danièle Tremblay-Lamer found that "when a report is referred to it under subsection 44(2) of the IRPA […] the ID has no discretion. It has to hold an admissibility hearing quickly, and if it finds the person inadmissible, it must make a removal order". In that respect, I note that section 45 of the IRPA, which dictates the possible decisions at the conclusion of an admissibility hearing, does not list a stay of proceedings as one of the possible outcomes. However, Justice Tremblay-Lamer left the door open to consider a delay occurring between the Minister's decision "to prepare a report under section 44 of the IRPA and the ID's admissibility finding" (*Torre* at para 32).

[38] In *Ismaili* at paragraphs 12 and 30, Justice Alan Diner agreed with Justice Tremblay-Lamer's analysis, commenting that the ID has a "very limited ability to consider abuse of process" and that "when this Court must decide whether an abuse of process merits a stay of admissibility proceedings before the ID, the clock starts when the immigration officer decides to prepare a report under subsection 44 (1) of IRPA".

[39] In the present case, there was a 24-year delay in bringing an admissibility proceeding before the ID, including a 13-year delay between the preparation of the section 44 report and its referral to the ID. Considering this significant delay, the ID was not in a position to hold an admissibility hearing and to render a decision until 2016. Mr. Najafi argues that the ID and the IAD properly determined that this delay was so unreasonable and inordinate that the ID was compelled to exercise its jurisdiction to stay the admissibility proceedings.

[40] In my view, the conclusion that the ID had jurisdiction to grant a stay of proceedings under the present circumstances is not inconsistent with the decisions in *Torre* and *Ismaili*; it could be said to fall within the ID's very limited jurisdiction on the subject since a significant, 13-year delay occurred between the date on which the section 44 report was prepared and the date on which it was referred to the ID.

B. *Did the IAD reasonably uphold the ID's decision to grant a stay of proceedings?*

[41] According to the Supreme Court's decision in *Blencoe* at paragraphs 101 to 104, a remedy is available when an administrative delay impairs the fairness of the hearing, "because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost".

[42] In certain circumstances, a Court may also find that the delay amounts to abuse of process, even when the fairness of the hearing has not been compromised (*Blencoe*, above at para 115).

[43] In order to find an abuse of process:

> […] the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, supra, at p. 9-68). According to L'Heureux Dubé J. in Power, supra, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (Power, supra, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.
>
> (*Blencoe*, above at para 120.)
>
> Whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.
>
> (*Blencoe*, above at para 122.)

[44] In this case, the IAD confirmed the ID's decision that the delay should give rise to a stay. The IAD found that "the delay in referring the admissibility report to the ID for 13 years has had a profound negative impact on the respondent, the delay is unexplained, unfair and inordinate, and the respondent's ability to rebut the allegations against him have been significantly compromised".

[45] In reaching this conclusion, the ID and the IAD considered relevant factors, such as the fact that Mr. Najafi had made an application for Ministerial relief which has been pending for over 15 years without any reasonable explanation, and the fact that Mr. Najafi, as a protected person, cannot be removed from the country unless a Minister's Danger Opinion is issued pursuant to subsection 115(2) of the IRPA, a possibility that appears purely hypothetical at this juncture given Mr. Najafi's many years in Canada without criminality or security problems. Further, given the difficulty in remembering events which occurred between 1979 and 1992 and in tracking down former friends and associates who lived in India at the time, it was reasonable to find that Mr. Najafi's ability to meet the case against him had been compromised by the delay.

[46] For the avoidance of doubt, the IAD should not and did not conduct a humanitarian and compassionate analysis at this stage. It should only consider the delay's impact on the various rights at issue in the proceeding.

[47] At the hearing, counsel for the Minister proposed the following question for certification:

> In light of the Federal Court's decision in *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 (upheld on appeal 2016 FCA 48), do the Immigration Division and Immigration Appeal Division of the Immigration and Refugee Board have the jurisdiction to grant a permanent stay of proceedings after assessing allegations of an abuse of process due to delay which is alleged to have occurred during the CBSA processing of the s. 44(1) report or s. 44(2) referral?

[48] Mr. Najafi's counsel proposed a slightly different question:

> In light of *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, do the Immigration Division and Immigration Appeal Division of the Immigration and Refugee Board have the jurisdiction to grant a permanent stay of

> proceedings based on an abuse of process on the basis of a delay which is alleged to have occurred following the signing of the s. 44(1) report and/or s. 44(2) referral?

[49] The question of jurisdiction being at the heart of this application for judicial review, I am of the view that it meets the test for certification by this Court as set out in section 82.3 of the IRPA; it is of general importance and determinative of the case.

[50] I propose the following question:

> Do the Immigration Division and the Immigration Appeal Division of the Immigration and Refugee Board have the jurisdiction to grant a permanent stay of proceedings based on an abuse of process on the basis of a delay which is alleged to have occurred following the signing of the s. 44(1) report and/or s. 44(2) referral?

VI. Conclusion

[51] The ID has broad jurisdiction to hear and determine all questions of law, fact and jurisdiction. In the appropriate circumstances, it may exercise its jurisdiction to stay an admissibility hearing. In the present case, the ID and the IAD reasonably concluded that the 13-year delay between the preparation and the referral of the section 44 admissibility report was so inordinate and unreasonable that it amounted to an abuse of process. In my view, this conclusion was reasonable.

[52] This application for judicial review is therefore dismissed and the above question is certified.

JUDGMENT in IMM-3411-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. The following question is certified:

   Do the Immigration Division and the Immigration Appeal Division of the Immigration and Refugee Board have the jurisdiction to grant a permanent stay of proceedings based on an abuse of process on the basis of a delay which is alleged to have occurred following the signing of the s. 44(1) report and/or s. 44(2) referral?

"Jocelyne Gagné"

Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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