Date: 20060418

Docket: IMM-3826-05

Citation: 2006 FC 492

Ottawa, Ontario, April 18, 2006

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JENNIFER JULIET PEARCE

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated on May 26, 2005. The Board rejected the application by the Minister of Citizenship and Immigration (the Minister) to vacate a previous decision of the Refugee Division (T99-14691) wherein the Respondent was found to be a Convention refugee.

[2] The Applicant seeks an order setting aside the decision of the Board and remitting the matter back to the Board for re-determination by a differently constituted panel.

2. Factual Background

[3] The Respondent, Jennifer Juliet Pearce, is a citizen of Jamaica. She came to Canada in September 1995. In December 1999, she made a claim for refugee protection on the basis of her membership in a particular social group as a victim of domestic abuse. The Respondent's refugee hearing before the Convention Refugee Determination Division (the First Panel) was held on September 7, 2000; the First Panel reserved its decision.

[4] On or about October 15, 2000, the Respondent went to Jamaica using another person's passport and Canadian landing documents. On November 4, 2000, the Respondent returned to Canada using the same person's documents. She was found to be carrying 200 grams of cocaine and was charged under the *Controlled Drug and Substances Act*, S.C. 1996, c. 19.

[5] On November 30, 2000, the First Panel found that the Respondent had established a well-founded fear of persecution in Jamaica and granted her Convention refugee status.

[6] The Respondent pled guilty on December 11, 2000 to importing a controlled substance and wilfully obstructing a peace officer. She was sentenced to two years plus a day in custody. On November 6, 2001, the Adjudication Division of the Immigration and Refugee Board found the Respondent to be inadmissible pursuant to paragraph 19(1)(*c*) of the *Immigration Act*, R.S.C. 1985, c. I-2 and ordered her deported.

[7] The Minister issued a danger opinion against the Respondent but that danger opinion was quashed by the Federal Court on November 13, 2002.

[8] On August 26, 2003, the Minister commenced an application to vacate the First Panel's positive refugee determination, pursuant to section 109 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), on the basis that she had directly or indirectly misrepresented or withheld material facts – the alleged material facts being her re-availment to Jamaica and her serious criminal activity in Jamaica and Canada.

[9] On February 25, 2005, the Board ruled that portions of the Applicant's documentary evidence would be excluded from consideration by the Board hearing the vacation application. This included evidence that post-dated the First Panel's determination of the Respondent's refugee claim, including information about the Respondent's conviction in Canada.

[10] The Board heard the vacation application on March 31, 2005. The Respondent did not attend the hearing nor did counsel appear on her behalf. The Board rendered its decision orally, dismissing the Minister's application to vacate. The Board later issued written reasons on May 26, 2005.

[11] The Minister filed an application for leave and judicial review on June 22, 2005. The Respondent did not file a notice of appearance. The Applicant sought and received an order from the Court dispensing of personal service and an order for substituted service on July 7, 2005.

[12] Leave for judicial review was granted on September 12, 2005.

[13] The Respondent has not responded to this application for judicial review.

3. Impugned Decision

[14] In its written reasons, the Board acknowledged that the information about the Respondent's return to Jamaica and her subsequent arrest for possession of cocaine "would have had a profound effect on [the] reasoning" of the First Panel. That panel had accepted the Respondent's refugee claim on the grounds that she was a credible witness and that she had established a well-founded fear of persecution in Jamaica. The Board added that: "The case becomes a difficult one for the Immigration and Refugee Board (the "Board") because the Board seems to have been mocked by this particular respondent."

[15] However, despite finding that the Respondent's positive refugee determination was obtained as a result of the withholding of material facts relevant to the Respondent's claim, the Board declined to exercise its discretion under subsection 109(1) to vacate the First Panel's decision. In making its determination, the Board took into consideration the fact that the Respondent had only nine years of education and had led "an unsophisticated life" both in Jamaica and in Canada. More significantly, the Board held that Citizenship and Immigration Canada (CIC) was to be faulted for not bringing the relevant information to the attention of the First Panel; CIC was informed about the Respondent's trip to Jamaica and her arrest for importing cocaine into Canada about 25 days before the First Panel issued its decision.

[16] Specifically, the Board noted that when the Respondent became aware that "the jig was up", she acknowledged her true identity to CIC, sometime near midnight on November 4, 2000. The Board found that it was not reasonable to expect in the circumstances, "with all of this unhappiness falling upon this women that she would have considered to ponder the difference between CIC and the Board." The Board did not fault the Respondent for not bringing this new information to the attention of the First Panel, rather, the Board faulted CIC for doing nothing when it could have brought the new information to the attention of the First Panel before it rendered its decision. The Board stated that: "CIC would be expected to bring that information to the Board's [First Panel's] attention; this expectation is much greater than that is placed on the respondent."

[17] As a result, the Board refused the Minister's application to vacate the Respondent's positive refugee determination pursuant to subsection 109 of the IRPA.

4. Relevant Statutory Provisions

[18] Section 109 of the IRPA prescribes the authority of the Board in determining applications to vacate positive refugee decisions:

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109. (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	**(2)** Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified	**(3)** La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

Subsection 109(1) confers on the Board the discretion to vacate a positive refugee determination if it finds that that decision was obtained as a result of the refugee directly or indirectly misrepresenting or withholding material facts relevant to his or her claim. The Board may reject the vacation application if, pursuant to subsection 109(2), it is satisfied that other evidence before the panel which decided the claim is sufficient to justify granting refugee protection.

5. Issues

[19] The two following issues are raised in this application for judicial review.

1. whether the Board erred by basing its decision to reject the Minister's application to vacate the First Panel's positive refugee determination on irrelevant factors, namely:

    a) the Respondent's limited education and lack of sophistication which caused her not to appreciate the difference between CIC and the First Panel; and

    b) CIC's conduct in failing to inform the First Panel of the new material facts related to the Respondent's refugee claim.

2. Whether the Board erred by failing to consider if there was "sufficient other evidence" before the First Panel to justify a positive refugee decision before rejecting the Minister's application to vacate.

6. Standard of Review

[20] In order to determine the applicable standard of review, the Supreme Court of Canada dictates that four contextual factors, which generally comprise the "pragmatic and functional approach", must be weighed: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact, or mixed law and fact: see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226. Considering these four factors enables the Court to address the core issues in determining the degree of deference to be afforded to the Board. Depending on the level of deference, three standards of review are possible: correctness, reasonableness *simpliciter* and patent unreasonableness.

[21] There are two issues that must be considered by the Board in the context of an application to vacate. These matters are essentially raised by the operation of subsections 109(1) and (2) of the IRPA and require the Board to make factual determinations. First, under subsection 109(1), the Board must determine if the positive decision was obtained as a result of direct or indirect misrepresentation or withholding of material facts relating to a matter relevant to the refugee claim. Second, the Board notwithstanding the misrepresentation or withholding may still reject the

application to vacate if it finds that there is sufficient "other evidence," untainted by the misrepresentation or withholding of evidence, to justify refugee protection.

[22] In the present case, the Board did not conduct the analysis required under subsection 109(2) of the IRPA. This constitutes an error of law reviewable on a correctness standard: *Pushpanathnan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. It is therefore unnecessary to conduct a pragmatic and functional analysis in respect to this issue.

[23] I will now proceed with the pragmatic and functional analysis in respect to the subsection 109(1).

A. *The presence or absence of a privative clause or a statutory right of appeal*

[24] Although the IRPA does not contain a privative clause or a statutory right of appeal, several statutory provisions indicate that a greater level of deference is due to the Board. First, subsection 162(1) of the IRPA states that the Board has "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction". Second, by virtue of subsection 72(1), an application to judicially review decisions of the Board requires leave of the Federal Court. Further, although the Board's decision with respect to a vacation application may be judicially reviewed pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the availability of a judicial review does not necessary decrease the level of deference owed to the Board. As the Supreme Court of Canada stated in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. At paragraph 31, the

Supreme Court stated that: “In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal”. On judicial review, the Court’s role is to review the decision on the applicable standard of review. As a consequence of the above provisions, I am of the view that with regard to this first factor a greater level of deference owed to the Board.

B. *The relative expertise of the Commission*

[25] In evaluating this second factor, the Court must consider the “three dimensions” of relative expertise, stated in *Pushpanathan*, above, at paragraph 33:

a. the Board’s expertise;

b. the Court’s own expertise relative to that of the Board; and

c. the nature of the specific issue before the Board relative to the Court’s expertise

[26] The Supreme Court of Canada elaborated on the relationship between expertise and curial deference in *Dr. Q.*, above. At paragraph 28 of its reasons, citing *Moreau-Bérube v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, the Supreme Court stated that:

> Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts, and the question under consideration falls within the scope of this greater expertise.

[27] In the present case, the nature of the specific issue determined by the Board – that is, whether the Respondent’s refugee claim ought to be vacated by virtue of subsection 109(1) of the

IRPA – is two-fold: first, whether the Respondent withheld information, and second, whether the new information concerning the Respondent can be said to be material and a matter relevant to the Respondent's refugee claim.

[28] Whether the impugned information is material to the Respondent's refugee claim and whether the information was indeed withheld by the Respondent at the time of the first determination, are questions of fact. To the extent that such questions involve assessing a claimant's credibility in respect to the new evidence, it is generally accepted that such determinations are within the specialized expertise of the Board and afforded curial deference by the reviewing court: see *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (C.A.) (QL). However, when the questions to be answered, as is the case here, do not involve credibility or plausibility assessments, but rather involve simply assessing whether new information was withheld and whether that information is material to the Respondent's refugee claim then, in my view, the Board has no particular expertise in such matters that would warrant the same degree of curial deference. The Board has no greater expertise relative to the Court's expertise on such issues. It follows, in my view, that this second factor is neutral.

C. *The purpose of the statute and the provision in question*

[29] The purpose of the IRPA, in general, with respect to refugee protection is set out in subsection 3(2). Among the objectives are the following:

3. (2) The objectives of this Act with respect to refugees are (*a*) to recognize that the	**3. 2)** S'agissant des réfugiés, la présente loi a pour objet : *a*) de reconnaître que le programme pour les réfugiés

refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;	vise avant tout à sauver des vies et à protéger les personnes de la persécution;
(*b*) to fulfill Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;	*b*) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;
…	[…]
(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;	*d*) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;
…	[…]
(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.	*h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

[30] The purpose of section 109 of the IRPA is to provide a mechanism for the Minister to apply to vacate a positive decision for refugee protection in circumstances where a person was granted refugee protection on the basis of misrepresentation or concealment of relevant facts. Section 109 is permissive and provides the Board with discretion in deciding vacation applications. That discretion

is limited by subsection 109(2) which provides that the Board may reject an application to vacate if it satisfied that there is other sufficient evidence considered at the time of the first determination to justify refugee protection.

[31] The IRPA sets out a statutory scheme for determining the claims of persons seeking the protection of Canada. Section 109 complements the general objective of refugee protection stated in the IRPA by ensuring that persons do not improperly obtain refugee status. The refugee protection provision of the IRPA provides for the adjudication of rights and entitlements in respect to refugee claimants and not the balancing of competing interests. As a result, this third factor militates in favour of less curial deference to the Board.

D. *The nature of the question*

[32] Finally, with respect to the fourth contextual factor of the pragmatic and functional approach, as noted above, I find the substantive issues before the Court in this case to be questions of fact. As a consequence, I am of the opinion that this factor militates towards greater deference.

[33] Upon considering the four contextual factors of the pragmatic and functional approach and the facts of this case, I find that the applicable standard of review with respect to the first issue raised in the application for judicial review to be patent unreasonableness. I note that in *Sethi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178, Justice Danielle Tremblay-Lamer came to the same conclusion respecting the appropriate standard for reviewing the Board's decision under subsection 109(1) after conducting a pragmatic and functional analysis.

7. Analysis

[34] The Board, in its reasons, recognized that material facts were withheld from the First Panel and that those material facts would have had a profound impact on the First Panel's decision. Notwithstanding this determination the Board rejected the vacation application on the basis of the following findings, namely:

1) given the Respondent's limited education and her lack of sophistication, she would not have understood the difference between CIC and the First Panel; and

2) CIC was at fault for failing to bring the new material facts to the attention of the First Panel.

[35] While finding that material facts were withheld from the First Panel, the Board appears to be saying that the Respondent is nevertheless forgiven for doing so because of her limited education and lack of sophistication. Further, the Board also appears to say that since CIC became aware of the material facts on November 4, 2000, when these were admitted by the Respondent, CIC, and not the Respondent, had the obligation to bring this new information to the attention of the Board.

[36] In my view, it was patently unreasonable for the Board to base its decision to reject the Minister's application to vacate on these two factors. First, whether the Respondent had the intellectual capacity to understand or the intention to misrepresent the facts or withhold material facts is not relevant. Subsection 109(1) states simply that the Board may vacate "…if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding

material facts relating to a relevant matter." In *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 619, at paragraph 27, Justice James Russell states the following:

> There is nothing in the wording of section 109, for instance, that requires that any misrepresentation or withholding of material facts must be deliberate and necessitate an inquiry into the Applicant's intent.

I agree. In my view, the Board's decision under the subsection 109(1) does not warrant consideration of the Respondent's motives, intention, negligence or *mens rea*.

[37] Second, I agree with the Applicant that it is the behaviour of the Respondent - in withholding material facts - that is relevant to the determination of the vacation application. While it may have been desirable for CIC to communicate the new information to the Board, this cannot excuse the Respondent from her obligation to make known all material facts relevant to the refugee claim to the First Panel. The Board was wrong in effectively shifting the onus away from the Respondent and onto the CIC. It was patently unreasonable to rely on such an erroneous finding to dismiss the application to vacate.

[38] What then is the ambit of the Board's discretion once it finds that material facts are misrepresented or withheld? In my view, subsections 109(1) and 109(2) must be read together. The ambit of the Board's discretion to reject an application is limited by the language of subsection 109(2) which provides for rejection of an application to vacate by the Board, "…if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee

protection.” The Board in this case failed to consider whether there was other untainted evidence considered at the time of the first determination which would justify granting refugee protection to the Respondent, notwithstanding the withheld material facts. The Board simply exercised its discretion to reject the Minister’s application based on the above-noted irrelevant considerations. The Board could not, in my view, reject an application to vacate after finding that the requirements of subsection 109(1) were met without first considering whether “other sufficient evidence” before the First Panel supported the Respondent’s refugee claim. By failing to do so, the Board committed a reviewable error. It erred at law by failing to comply with the provisions of subsection 109(2) of the IRPA.

[39] On the record, it is not obvious that other sufficient evidence was before the First Panel which would have justified granting the Respondent refugee protection. It is not, however, for this Court on judicial review, to make such a determination.

8. Conclusion

[40] In conclusion, the Board committed a reviewable error by basing its decision to reject the Minister’s application to vacate on irrelevant factors. The Board also committed a reviewable error by failing to conduct a proper analysis under subsection 109(2) of the IRPA before rejecting the application to vacate. In the result, the Board’s decision will be set aside and the matter remitted for re-determination by a differently constituted panel.

[41] The Applicant had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(*d*) of the IRPA, but did not do so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is allowed.

2. The Board's decision will be set aside and the matter is remitted for re-determination by a differently constituted panel.

3. No serious question of general importance is certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3826-05
STYLE OF CAUSE:	MCI v. JENNIFER JULIET PEARCE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 8, 2005
REASONS FOR ORDER AND ORDER:	Blanchard J.
DATED:	April 18, 2006

APPEARANCES:

Ms. Alexis Singer	FOR THE APPLICANT
No one appeared	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C Deputy Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
No one appeared	FOR THE RESPONDENT