Federal Court  Cour fédérale

Date: 20190722

Docket: IMM-57-19

Citation: 2019 FC 883

Ottawa, Ontario, July 22, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

And

CHAMANPREET KAUR KALER

Respondent

JUDGMENT AND REASONS

UPON an application for judicial review of the decision of the Refugee Appeal Division ("RAD") of the Immigration and Refugee Board of Canada;

AND UPON reviewing the decision under review, in which the RAD overturned the Refugee Protection Division's ("RPD") determination that had denied the Respondent's claim

for refugee protection , but failed to address the RPD's finding that she was not excluded under Article 1E of the *United Nations Convention Relating to the Status of Refugees*;

AND UPON observing that before the RPD, the Minister intervened and the RPD made a separate detailed decision regarding the Article 1E exclusion before the second hearing on the merits;

AND UPON reading the material before the Court and hearing the parties' oral submissions;

AND UPON determining that this application should be granted for the following reasons:

[1] On August 2, 2016, the RPD convened to hear the Respondent's claim. At that time, the member decided to deal with the exclusion issue first, as, if the Minister had succeeded, the exclusion would have been dispositive of the claim and it would have been unnecessary to proceed. Given that arguments pertaining to the exclusion lasted the entire anticipated duration of the hearing, the member decided to reconvene to deal with the merits at a later date should she decide that Ms. Kaler was not excluded.

[2] On November 1, 2016, the RPD released its decision and reasons dismissing the Minister's application for exclusion (the "Exclusion Decision").

[3] A second hearing was held on February 20, 2017 to deal with the merits of the claim. In reasons dated March 27, 2017, the same RPD member denied the Respondent's refugee claim, primarily on the basis of credibility findings relating to subjective fear, delay in claiming protection and re-availment (the "Merits Decision").

[4] In the reasons for the Merits Decision, the RPD noted that:

> The claimant was the subject of an exclusion application brought by counsel for the Minister. The exclusion application was denied by this Panel, which has now gone forward and considered, and decided, the claim for inclusion.

[5] The Respondent appealed to the RAD. In a decision dated December 12, 2018, the RAD allowed the appeal, set aside the RPD's decision, and granted the Respondent refugee status.

[6] In allowing the appeal, the RAD limited itself to the following comments on the Minister's exclusion application:

> [17] The Minister of Public Safety and Emergency Preparedness (the Minister) intervened before the RPD by submitting observations and documents on an exclusion application based on the Appellant's permanent resident status and participated at the RPD hearing on credibility as well, but has not intervened in this appeal.
>
> [18] The exclusion application was denied by the RPD, who then considered and decided the claim for inclusion which is the subject of this appeal.

[7] The Respondent argues that the Minister should have appealed the Exclusion Decision in accordance with the *Refugee Appeal Division Rules*, SOR/2012-257, before the claim was heard on the merits, or that the Minister should have intervened before the RAD and made his 1E

exclusion argument. The Respondent submits that otherwise the Exclusion Decision was not an issue that they had appealed before the RAD, and there was therefore no reason why the RAD should have made its own determination regarding the Article 1E exclusion.

[8] The issue arises now because the RAD treated the determination of the exclusion and the determination of the merits as two different matters. A review of a checklist for the RAD member of issues that they have to decide on each file called the RAD Disposition Record (CTR at page 582 and 583) is left blank on the section regarding exclusion. This is understandable given that the exclusion application and the merits were dealt with in two separate sets of reasons.

[9] The RAD limited its review to the claim on the merits, and did not address the RPD's treatment of the Minister's application for exclusion: "[t]he exclusion application was denied by the RPD, who then considered and decided the claim for inclusion which is the subject of this appeal" (para 18 of the reasons for the Merits Decision, emphasis added).

[10] The difficulty in this case arises from the tension between the RAD's obligation to conduct its "own analysis" (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 ("*Huruglica*")) and Rule 3(3)(g), which limits the scope of an appeal before the RAD to the issues raised in an appellant's Memorandum of Argument. In the case at bar, this leads to the problem because Ms. Kaler was successful before the RPD regarding exclusion, so understandably did not raise the issue on appeal.

[11] It is well established that the RAD, in reviewing a decision of the RPD, conducts a hybrid appeal: "after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred": *Huruglica*, at para 103 (emphasis added). In doing so, in most circumstances, the RAD conducts a correctness review of the decision below. When it decides to set aside an RPD decision, the RAD decides the matter by "substituting its own determination of the merits of the refugee claim": *Ibid*, unless the RAD is of the view that it cannot make a final determination without hearing oral evidence, (emphasis added).

[12] Judges of this Court have emphasized that the RAD is not obligated to consider potential errors that an appellant has not raised: *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 18-20; *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 39.

[13] In this regard, RAD Rule 3(3)(g) "places the onus on the appellant" to identify the issues they believe should be addressed by the RAD, and appellants who fail to raise issues "do so at their peril": *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 at paras 31 and 34. In *Broni v Canada (Citizenship and Immigration)*, 2019 FC 365 at para 15, Justice McDonald emphasized this point:

> While I agree with the Applicant that the RAD has an obligation to conduct an independent assessment of the evidence and of the RPD decision, the RAD does so within the parameters of Rule 3(3)(g). This *Rule* makes it clear that it is the Applicant's obligation, and not the RAD's obligation, to identify errors made by the RPD and to make submissions accordingly. It is neither logical nor reasonable to expect the RAD to search the record and find something to make the case for the Applicant. In fact, this approach has been specifically denounced in the guiding case of *Dhillon*.

[14] The Chief Justice's decision in *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102, is also helpful, even if this guidance is provided in a context where the Court had to decide whether it could entertain an issue on judicial review that had not been raised in the applicant's notice of appeal to the RAD:

> [30] […] In my view, [Rule 3(3)(g)] makes it clear that the RAD is required to focus on the specific errors that an appellant has alleged have been made by the RPD.
>
> [31] Indeed, this would be consistent with the principle that the RAD should conduct "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 (CanLII), at para 103 ["*Huruglica*"], emphasis added).
>
> [32] In any event, the RAD also has the jurisdiction to determine whether other errors have been made by the RPD. […]
>
> [33] An assessment by the RAD of whether such other errors have been made would be consistent with the legislative history pertaining to the creation of the RAD, which suggests that the RAD was intended to be a "safety net that would catch all mistakes made by the RPD, be it on the law or the facts" (*Huruglica*, above, at para 98).

[15] Finally, even when the RPD makes one or more errors in its decision, the jurisprudence has held that the RAD can still confirm the RPD's decision, but on another basis. However, before doing so, the RAD must provide the parties with appropriate notice so that they can make submissions. Of course, the RAD is not obligated to provide notice if the basis on which it confirms the decision can "reasonably be said to stem from the issues as framed by the parties": *Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 33.

[16] The applicable principles from the jurisprudence are summarized as follows:

- Where an issue is raised by an appellant pursuant to RAD Rule 3(3)(g), the RAD is under an obligation to consider the ground of appeal.

- Where an issue is not raised by an appellant, the RAD can nevertheless address the issue if the member believes it is necessary to do so. The RAD respects procedural fairness if it does not address an issue that was not raised by an appellant. Similarly, the RAD respects procedural fairness if it addresses an issue that was not raised by an appellant, as long as the parties were put on notice or should have known that it could be an issue on appeal.

- However, in circumstances where the RAD grants refugee protection after conducting its own analysis, it must conduct a full and complete analysis of all relevant issues, just as if it had been the RPD conducting a refugee determination analysis. In other words, when the RAD substitutes its own determination of the merits of the refugee claim, it must conduct its own assessment to determine whether the claimant is a Convention Refugee pursuant to s 96 or a person in need of protection pursuant to s 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27.

[17] When applying the principles to these facts, even though the Article 1E exclusion issue was not raised in the Memorandum of Argument submitted by Ms. Kaler to the RAD, the member, prior to granting refugee status, was under an obligation to consider whether the exclusion applied. Effectively, the RAD granted refugee protection to the Respondent without

considering whether she was excluded pursuant to Article 1E, even though the RPD had made a determination on that issue. Such a decision cannot be said to fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[18] This conclusion does not impose a difficult burden on the members of the RAD. It may have been open to the RAD to only briefly address the exclusion issue. However, it was impermissible for the RAD to exclude from the scope of the appeal the initial RPD Exclusion Decision.

[19] This was unreasonable and does not align with the guidance of the Federal Court of Appeal in *Huruglica* that the RAD is to substitute the RPD's decision with "its own determination of the merits of the refugee claim". Depending on the facts of each case, the RAD must consider issues such as Article 1E exclusions, internal flight alternatives, and the availability of state protection before deciding to grant refugee status.

[20] Insofar as to the remedy, giving the opportunity to the same RAD member to address the exclusion issue seems like a more appropriate use of resources, rather than sending the matter back to be entirely re-determined by a different member, subject of course to any institutional reasons why this would not be possible.

[21] The parties agreed that in this unique situation, this remedy is the most appropriate.

[22] I will grant this application and send it back to the same decision maker to include a determination with respect to the RPD's decision regarding the exclusion under Article 1E.

[23] No question was presented for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is granted and the decision is returned to the same decision maker, subject to any institutional reasons why this would not be possible, to make a determination with respect to the RPD's decision regarding Article 1E;
2. No question is certified.

"Glennys McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-57-19
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v CHAMANPREET KAUR KALER
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 24, 2019
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JULY 22, 2019

APPEARANCES:

Brett J. Nash	FOR THE APPLICANT
Baldev S. Sandhu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Sandhu Law Office Surrey, British Columbia	FOR THE RESPONDENT