Federal Court  Cour fédérale

Date: 20200207

Docket: IMM-4690-18

Citation: 2020 FC 217

Ottawa, Ontario, February 7, 2020

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

YASSIR BENCHERY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Yassir Benchery, the applicant, arrived in Canada on January 19, 2017, with authorization to stay here for six months. He was granted an extension of his visitor status until November 30, 2017. He did not leave Canada or renew his authorization to remain in Canada after that date.

[2] In September 2018, the applicant was arrested by the police, who contacted the Canada Border Services Agency (CBSA) because the applicant had no status in Canada.

[3] The applicant was arrested by a CBSA officer on September 12, 2018, and, following an interview, a report was issued under section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. On the same day, after a second interview, a different officer made a removal order against the applicant.

[4] On September 14, 2018, the applicant appeared before the Immigration Division (ID) of the Immigration and Refugee Board of Canada (the Board) for a detention review hearing. At that time, the ID appointed a designated representative in the applicant's case.

[5] The applicant is seeking judicial review of the removal order.

II. Issues and standard of review

[6] The applicant submits that the removal order must be set aside by this Court because (i) the officers failed to verify the applicant's ability to appreciate the nature of the proceedings, as required under paragraph 228(4)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]; and (ii) his right to counsel under paragraph 10(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter] was breached.

[7] There is some case law holding that the first issue must be dealt with under a reasonableness standard of review, because it is a question of the officer's discretion in interpreting the enabling legislation. The recent Supreme Court decision in *Canada (Citizenship*

and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*] confirms that the applicable standard of review is presumed to be reasonableness.

[8] However, the applicant submits that the officers' failure to take the necessary steps to establish the applicant's ability to understand, as required under paragraph 228(4)(b), is a breach of procedural fairness. I accept the applicant's argument that the purpose of paragraph 228(4)(b) is to protect vulnerable persons and that a broad and liberal interpretation of such protection must be adopted. In the circumstances of this case, I agree that this issue must be dealt with as a matter of procedural fairness. The second issue also deals with procedural fairness.

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

III. Analysis

A. *Application of paragraph 228(4)(b) of the IRPR*

[10] The applicant alleges that the officers failed to properly exercise their jurisdiction because they did not adequately inquire into whether the applicant appreciated the nature of the proceedings, as required under paragraph 228(4)(b).

[11] Subsection 228(1) of the IRPR provides that a Minister's delegate may make a removal order without referring the case to the ID, except in the circumstances set out in subsection 228(4):

Reports in respect of certain foreign nationals	**Affaire à l'égard de certains étrangers**
(4) For the purposes of subsection (1), a report in respect of a foreign national does not include a report in respect of a foreign national who	**(4)** Pour l'application du paragraphe (1), l'affaire ne vise pas l'affaire à l'égard d'un étranger qui :
(a) is under 18 years of age and not accompanied by a parent or an adult legally responsible for them; or	**a)** soit est âgé de moins de dix-huit ans et n'est pas accompagné par un parent ou un adulte qui en est légalement responsable;
(b) is unable, in the opinion of the Minister, to appreciate the nature of the proceedings and is not accompanied by a parent or an adult legally responsible for them.	**b)** soit n'est pas, selon le ministre, en mesure de comprendre la nature de la procédure et n'est pas accompagné par un parent ou un adulte qui en est légalement responsable.

[12] The applicant submits that this section indicates that Parliament has put in place additional safeguards for vulnerable persons. To ensure that this protection is achieved, the Minister's delegate must make certain inquiries to confirm that the person in question appreciates the nature of the procedures. In this case, the officers did not make those inquiries, despite the applicant's fragile state at the time of his arrest.

[13] The applicant refers to statements by the Minister's representative at the detention review hearing on September 14, 2018, that the immigration officers noted that the applicant was somewhat fragile. Moreover, at the detention review hearing, a designated representative was appointed by the ID because the applicant was unable to appreciate the nature of the proceedings.

Given that the applicant did not have an opportunity to talk to a lawyer before the interviews, and considering that he was clearly in a fragile state, the officers should have done more to ensure that he was able to appreciate the nature of the proceedings, as required under paragraph 228(4)(b) of the IRPR.

[14] The respondent states that the officers made the necessary assessments and agreed that the applicant understood the proceedings and that his answers to the interview questions showed that he was competent. He expressed himself in a consistent and co-operative manner.

[15] There is no case law dealing with the interpretation of paragraph 228(4)(b) of the IRPR. In the context of hearings before the Board, subsection 167(2) of the IRPA provides similar protection for vulnerable claimants:

Representation	**Représentation**
(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.	**(2)** Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

[16] The case law on subsection 167(2) cannot be applied directly to the interpretation of paragraph 228(4)(b) of the IRPR, given the differences between the two proceedings. For example, the Federal Court of Appeal in *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51 at para 41 [*Hillary*], concluded that "given the adversarial nature of the [procedure of the Immigration Appeal Division (IAD)], it will only be in the most unusual circumstances that a panel is obliged to make inquiries in a case where the appellant is represented by counsel who has not raised the issue of the client's ability to understand the nature of the proceedings."

However, in this case, a removal order does not allow the applicant to make a claim for refugee protection and go before an independent tribunal such as the ID or the IAD.

[17] I agree that, despite the differences in the proceedings, the case law on subsection 167(2) is helpful because the decisions provide guidance on the nature of the evidence required to establish a breach of procedural fairness. For example, in *Hillary*, the fact that the applicant was schizophrenic was not sufficient to oblige the IAD to inquire into whether to appoint a representative under subsection 167(2) of the IRPA. The Court of Appeal noted that "[t]here was no evidence in the IAD's record about the current state of his mental health, its treatment, and the extent to which it was likely to impair his understanding of the nature of the proceedings" (at para 44).

[18] In *Sharma v Canada (Citizenship and Immigration)*, 2008 FC 908, Justice Lagacé rejected the argument that the Board had failed to comply with subsection 167(2). The judge noted at paragraph 23 that the applicants' argument "[was] essentially based on the Board's refusal to designate a representative for them for the hearing because of their fragile psychological state, not because they were unable to appreciate the nature of the proceedings". In the absence of evidence that the applicants were unable to appreciate the nature of the proceedings, there was no lack of procedural fairness in that case. See also *Bisla v Canada (Citizenship and Immigration)*, 2016 FC 1059.

[19] I agree that the same approach applies here. The officers stated that, at the time of his arrest and during the interviews, the applicant appeared to be able to appreciate the nature of the proceedings. He answered the questions and did not indicate that he was unable to understand them. There is no evidence that he did not appreciate the nature of the proceedings, and the fact

that another decision maker decided to appoint a representative later in the process is not, in itself, sufficient to demonstrate that the officers failed to fulfill their responsibilities under paragraph 228(4)(b) of the IRPR.

[20] I agree with the applicant that officers and ministerial delegates have an obligation to take the necessary steps to comply with the procedure set out in paragraph 228(4)(b). In this proceeding, based on the evidence, including the affidavits of the CBSA officers, I am of the opinion that the officers did not fail in their responsibility to ensure that the applicant was able to appreciate the nature of the proceedings.

B. *Right to counsel*

[21] The applicant submits that the removal order must be set aside because his right to counsel, which is guaranteed under section 10 of the Charter, was breached. From the moment the applicant was arrested by the CBSA, he had the right to retain and instruct counsel without delay. The right to counsel involves providing a reasonable opportunity to contact a lawyer.

[22] In this case, the applicant alleges that the CBSA officers did not provide him with a reasonable opportunity to seek counsel. Counsel appointed by the ID as the applicant's designated representative stated that the officer who prepared the report under section 44 of the IRPA indicated that the officer who arrested the applicant had given him an opportunity to seek counsel but that it was not feasible in a prison setting. The officer further stated that she gave the applicant an opportunity to call a lawyer when he arrived at the CBSA office; however, the applicant states that she did not inform him of his right to do so.

[23] The applicant submits that this is insufficient. Each case must be considered in the light of the circumstances and, in this case, the applicant was unable to contact a lawyer while in prison. Given the situation, the officers had a responsibility to inform him again of his right to counsel. Their failure to repeat this information deprived the applicant of his fundamental rights and breached procedural fairness.

[24] The respondent states that the officers respected the right to counsel. The arresting officer states that he informed the applicant that he had a right to counsel and that he could have access to a lawyer when he was at the CBSA offices. The officer also told the applicant that the consulate or embassy of his country of citizenship could be notified, but the applicant declined. In addition, the officer noted that the applicant did not understand French well and translated everything into Arabic to ensure that he understood.

[25] The officer who prepared the report under section 44 of the IRPA states that she also gave the applicant an opportunity to call a lawyer but that he declined. The respondent believes that, in the circumstances, the applicant's right to counsel was respected.

[26] The decision in *Dragosin v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 81 [*Dragosin*] sets out the rules that apply in this case:

> [16] In my opinion, the applicant’s right to counsel in this case arose from the moment he was ordered to be detained at the regional correctional centre. The immigration officers who arranged his detention had the responsibility under s-s. 103.1(14) to provide advice about and to facilitate access to counsel. It was an error in law not to do so, and, without finally determining the matter it appears that failure to facilitate access to counsel in the circumstances was not in accord with the right to counsel upon detention which is assured to everyone in Canada, including the applicant, under s. 10 of the Charter.

[27] I agree with the applicant that each case must be considered in light of the circumstances, and that once the right to counsel applies, officers must take reasonable steps to ensure that the applicant can access counsel. As described in *Dragosin* at paragraph 16, officers have the responsibility "to provide advice about and to facilitate access to counsel" (see *Rodriguez Chevez v Canada (Citizenship and Immigration)*, 2007 FC 709).

[28] There is a conflict in the evidence on this issue. The applicant's designated representative swears that the officer who wrote the report under section 44 of the IRPA failed to advise the applicant of his right to counsel when he arrived at the CBSA offices. The officer swears that she repeated the offer, and the arresting officer swears that he told the applicant that he could contact a lawyer once he arrived at the office for his interview. The applicant states that the officers' notes do not mention that they informed him of his right. The officers state that they followed their usual procedure.

[29] I am not persuaded that the applicant's rights have been infringed in the circumstances of this case. The arresting officer states that he informed the applicant of his rights and went a step further by translating the information to ensure that the applicant understood it. The second officer states that she also informed the applicant of his right to counsel at the CBSA's offices. There is no direct evidence from the applicant contradicting this evidence, and the affidavit of his designated representative does not contradict the evidence that the arresting officer informed the applicant of his right to counsel.

[30] In the circumstances of this case and considering all the evidence, I am not satisfied that the applicant's right to counsel was violated.

IV. Conclusion

[31] For all these reasons, the application for judicial review is dismissed. There is no question of general importance to certify.

JUDGMENT in IMM-4690-18

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question of general importance to be certified.

"William F. Pentney"
Judge

Certified true translation
This 17th day of February 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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