Federal Court  Cour fédérale

Date: 20201221

Docket: IMM-5461-19

Citation: 2020 FC 1171

Ottawa, Ontario, December 21, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

ISAEL DAVID GOMEZ PEREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] A person facing an application to vacate or cease their refugee protection must notify the Refugee Protection Division (RPD) in writing of any change in their contact information. Isael Gomez Perez failed to do that, leaving only a voicemail with the Immigration and Refugee Board (IRB) to advise them of his new phone number and address after he moved. The RPD sent the Notice to Appear that set out the hearing details for the Minister's cessation application to

Mr. Gomez Perez at his old address, so he did not receive it. After unsuccessfully trying to reach Mr. Gomez Perez on his old cell phone number, the RPD heard the cessation application in his absence on February 1, 2018. On February 15, 2018, it granted the application on the basis that Mr. Gomez Perez had reavailed himself of the protection of Cuba.

[2] Despite Mr. Gomez Perez's failure to properly advise the RPD of his change of address in writing, I conclude on the particular facts of this case that holding the hearing *in absentia* was procedurally unfair. The evidence indicates that someone from "immigration" later contacted Mr. Gomez Perez at the phone number he had left on the IRB's voicemail. The Minister filed no evidence regarding how that number may have come into the possession of the IRB or Immigration, Refugees and Citizenship Canada (IRCC) other than through the voicemail left by Mr. Gomez Perez. Nor was there evidence of how internal data systems would have prevented the RPD from obtaining the telephone number. I can therefore only conclude that the new contact information provided by Mr. Gomez Perez was in fact recorded by the IRB and/or IRCC in some form that could reasonably have been available to the RPD. In such circumstances, I conclude that proceeding *in absentia* without taking steps to obtain Mr. Gomez Perez's new location from the recorded information amounts to a breach of the duty of fairness.

[3] The application for judicial review is therefore granted, and the Minister's cessation application is remitted to the RPD for redetermination.

II. Issues and Standard of Review

[4] Mr. Gomez Perez raised a number of issues on this application, including questions relating to the merits of the RPD's cessation decision. In my view, the following two issues are determinative of Mr. Gomez Perez's application:

A. Is the evidence in the certified tribunal record regarding Mr. Gomez Perez's application to reopen the RPD's determination properly before the Court on this application for judicial review?

B. Did conducting the cessation hearing in Mr. Gomez Perez's absence result in procedural unfairness or a denial of natural justice?

[5] The first of these issues is a matter of evidence before the Court and does not involve a review of an administrative decision. No standard of review is therefore applicable. The second issue is a matter of procedural fairness.

[6] Although using different terminology, the parties are in agreement on the standard of review applicable to issues of procedural fairness. Mr. Gomez Perez submits that such issues are reviewed on a "correctness" standard, citing *Garces Caceres v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4 at para 18; see also *Mission Institution v Khela*, 2014 SCC 24 at para 79. The Minister noted that recent jurisprudence has suggested that "a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness": *Badial v Canada (Citizenship and Immigration)*, 2020 FC 108 at para 13, citing *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74; see also

Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69 at para 54; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 102.

[7] I am partial to the terminology espoused by the Minister, which recognizes that no standard of review is applicable to procedural fairness issues. Effectively, the Court applies a "fairness" standard, in which it assesses whether the requirements of procedural fairness have been met. Regardless of terminology, though, the assessment is the same. The Court asks whether, having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, and "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual," a fair and just process was followed: *Canadian Pacific* at para 54; *Moreau-Bérubé* at para 74.

[8] Although the Minister recognizes that this is the proper approach to judicial review of questions of procedural fairness, they argue that Mr. Gomez Perez's challenge is not truly such a question. Rather, they argue it is a challenge to the RPD's interpretation and application of Rule 12(*a*) of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], which sets out Mr. Gomez Perez's obligation to advise the RPD in writing of any change in his contact information. The Minister argues that the RPD's interpretation and application of its "own statute" should be granted deference in accordance with the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 25.

[9] I disagree. In my view, the case law establishes that procedural fairness issues are not reviewed on the reasonableness standard, even where they involve application of statutory

procedural requirements. In *Moreau-Bérubé*, for example, the Supreme Court considered a hearing before the Judicial Council of New Brunswick under sections 6.1 to 6.11 of the *Provincial Court Act*, RSNB 1973, c P-21. Although procedural requirements were set out by statute in subsection 6.11(3), the procedural fairness arguments required "no assessment of the appropriate standard of review": *Moreau-Bérubé* at paras 74–81. Similarly, in *Khela*, the Supreme Court applied the correctness standard in interpreting a statutory procedural right to disclosure: *Khela* at paras 79–85. In *Canadian Pacific*, the Federal Court of Appeal applied that standard in assessing fairness issues that included the Canada Transportation Agency's reliance on a statutory duty to make a decision within a fixed time period: *Canadian Pacific* at paras 31–36, 81–92. I therefore conclude that the fact that a procedural right is governed by a statutory provision does not make its application a matter of interpretation subject to the reasonableness standard.

[10] In any event, I disagree with the Minister that the issue is, at its heart, one of interpretation or application of Rule 12. There is no dispute between the parties that Mr. Gomez Perez failed to comply with Rule 12, as he did not notify the RPD and the Minister in writing without delay of his new contact information. The issue is whether it was fair in all of the circumstances, including Mr. Gomez Perez's failure to comply with Rule 12, that the RPD conducted the cessation hearing *in absentia*.

III. Analysis

A. *The Court Will Consider the Information in the Certified Tribunal Record Arising from the Reopening Application*

[11] The decision under review on this application is the RPD's February 15, 2018 decision to grant the cessation application after hearing the matter *in absentia*. At the time of that decision, the RPD had no evidence before it regarding the steps taken by Mr. Gomez Perez to advise the IRB of his change of contact information. Indeed, Mr. Gomez Perez did not know of the hearing or the decision until a year and a half later, in August 2019. At that time, he retained counsel, who filed both this application for judicial review and a request to the RPD to reopen the cessation application pursuant to Rule 62 of the *RPD Rules*.

[12] In support of his reopening application, Mr. Gomez Perez swore an affidavit and a subsequent "update affidavit." In those affidavits, Mr. Gomez Perez stated that he called the IRB office in Vancouver (apparently in 2017, although a reference is also made to 2016), leaving his new phone number and new address in a voicemail. He also stated that he did not hear further from the IRB or IRCC until May 2019, well after the cessation application had been decided in February 2018. By that time, Mr. Gomez Perez had moved again, while keeping the same phone number. He received a call at the number he left in the 2017 voicemail, asking for his new address. In August, Mr. Gomez Perez received a letter at his new address stating that his 2015 citizenship application had been refused because his refugee protection had ceased and he was no longer a permanent resident.

[13] In accordance with the Order of Associate Chief Justice Gagné dated February 4, 2020 granting leave to bring this application, and Rule 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*Federal Courts Immigration Rules*], the RPD filed a copy of its certified tribunal record (CTR) on February 24, 2020. To the expressed surprise of the Minister, the CTR included information pertaining to the request to reopen the cessation application. This included the affidavits filed by Mr. Gomez Perez, as well as submissions filed by the parties and correspondence with the RPD.

[14] In his application record filed on this application, Mr. Gomez Perez filed another affidavit, which included some of the background facts, but not all of those set out in the reopening affidavits. The Minister filed a brief affidavit attaching the RPD's decision refusing the application to reopen the cessation application. In submissions, the Minister advised that this was provided to give the Court the full context given the RPD's inclusion of information regarding the cessation application in the CTR.

[15] As noted, the decision under review on this application is the RPD's decision on the cessation application, and not its decision on the reopening application, which is the subject of a different application for leave and judicial review in Court File No IMM-7475-19. As a general rule, evidence that was not before an administrative tribunal and that goes to the merits of the matter is not admissible in an application for judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19. I agree with the Minister that the CTR prepared by the RPD was arguably over-

inclusive for purposes of a judicial review application of the RPD's February 15, 2018 decision on the cessation application.

[16] That said, one of the recognized exceptions to that general rule is evidence setting out matters going to issues of procedural fairness that cannot be found in the evidentiary record of the administrative decision maker: *Access Copyright* at para 20(b); *Tonda v Canada (Citizenship and Immigration)*, 2020 FC 67 at para 4. The facts set out in paragraph [12] above speaking to the procedural fairness issues fall in this category and are admissible on this application, as the Minister recognized. The RPD may have considered that this information therefore fell within the scope of "papers relevant to the matter that are in the possession or control of the tribunal" in Rule 17(*b*) of the *Federal Courts Immigration Rules*, given that Mr. Gomez Perez's application raised the issue of procedural fairness. In any event, had the CTR been limited to the record before the RPD in respect of the cessation decision, Mr. Gomez Perez could have filed an affidavit in the application for judicial review, setting out relevant facts going to the procedural fairness issues, pursuant to the exception to the general rule described above.

[17] In the present case, somewhat unusually, Mr. Gomez Perez initially argued that the information in the CTR pertaining to the application to reopen, and the Minister's affidavit setting out the decision, ought to be ignored or struck as irrelevant, while the Minister argued that the documents were admissible to respond to the procedural fairness arguments. At the same time, the only place in which there was evidence relating to Mr. Gomez Perez's voicemail to the RPD—on which Mr. Gomez Perez relied in his arguments—was in the affidavits filed on the reopening application.

[18] In the circumstances, I am satisfied that I should consider the additional information included in the CTR that pertains to the fairness issues. Since this evidence is otherwise admissible and was put before the Court by the RPD, I do not believe I should exclude or ignore it to the detriment of Mr. Gomez Perez simply based on the manner in which it was put before the Court.

[19] This does not mean that the additional facts put before the RPD in the reopening application pertaining to the merits of the decision would be appropriately before the Court on this application. Such evidence would fall within the general rule excluding additional evidence going to the merits. However, this does not affect the outcome in this case given my conclusions on the fairness issue. I also note that while the RPD rejected Mr. Gomez Perez's fairness arguments in declining to reopen the application, this is itself not relevant to my consideration of this application, which remains a review of the RPD's initial decision.

B. *The Hearing In Absentia Resulted in Unfairness*

(1) General principles

[20] I begin by briefly addressing the terms "procedural unfairness" and "principles of natural justice." A failure to observe either may ground relief on this application for judicial review: *Federal Courts Act*, RSC 1985, c F-7, s 18.1(4)(*b*). However, the terminology requires brief clarification because much of the relevant jurisprudence stems from applications to reopen a claim under Rule 62 of the *RPD Rules*. That Rule allows the RPD to reopen a proceeding only if "it is established that there was a failure to observe a principle of natural justice": *RPD Rules*,

Rule 62(6). An equivalent provision is found in Rule 49(6) of the *Refugee Appeal Division Rules*, SOR/2012-257.

[21] The rules of natural justice were traditionally considered applicable in respect of "quasi-judicial" decision making, while a general "duty of fairness" applied in the administrative or executive field: *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 at p 324. As discussed by Justice Diner of this Court in *Huseen*, the distinctions between the two have been largely eroded in the wake of *Nicholson*, such that the terms tend to now be used effectively interchangeably: *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at paras 19–20. Thus while the cases arising from reopening applications often refer to the denial of natural justice, I will use the term "procedural fairness" in these reasons.

[22] As Mr. Gomez Perez points out, one of the basic elements of procedural fairness is the "overarching right to be heard": *Huseen* at para 36, citing *Canada v Garber*, 2008 FCA 53 at para 40; *Vavilov* at para 127; *Matondo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 at para 18. However, it must be recognized that the principles of procedural fairness do not provide an untrammeled right to be heard, but the right to a *reasonable opportunity* to be heard: see *A(LL) v B(A)*, [1995] 4 SCR 536 at para 27; *Matondo* at para 19, quoting *Cooper v The Wandsworth Board of Works* (1863), 143 ER 414 at p 420. Where a party does not take advantage of that opportunity, or their actions or omissions result in them being unable to do so, procedural fairness does not automatically give them the right to another opportunity to be heard: *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at paras 238–245.

[23] Thus this Court has declined to find a breach of procedural fairness where an applicant's opportunity to be heard was lost because they failed to advise the RPD of their updated address and consequently did not receive notice of the hearing: *Mendoza Garcia v Canada (Citizenship and Immigration)*, 2011 FC 924 at paras 8, 14; *Gurgus v Canada (Citizenship and Immigration)*, 2014 FC 9 at paras 7–11, 23–26. As Justice Harrington put it, while the opportunity for a hearing was lost, the claimant was "the author of his own misfortune": *Mendoza Garcia* at para 15.

[24] At the same time, this Court has recognized that a hearing *in absentia* may result in procedural unfairness, even where a refugee claimant missed a deadline or failed to comply with the requirement to provide notice of new contact information, and even where the RPD had no grounds to know otherwise. In *Andreoli v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1111, the claimant had told an interpreter about a change in address, and the interpreter had said they would advise the RPD but failed to do so. In *Matondo*, a change of address had not been filed, but recently appointed counsel had advised IRCC that the claimant had moved and asked for further information. In *Huseen*, the claimant attended at an IRB office in person to give a change of address, and believed that her request for a change in venue for the hearing suspended the filing deadline for her basis of claim form. In each case, the Court quashed the RPD's refusal to reopen the application on procedural fairness grounds.

[25] Similarly, both the *RPD Rules* and this Court have recognized that inadequate representation by counsel may, in rare circumstances, amount to a denial of a fair hearing and a failure of procedural fairness, even though such issues do not arise through any fault or failure on the part of the RPD: *RPD Rules*, s 62(4); *Memari v Canada (Citizenship and Immigration)*, 2010

FC 1196 at paras 32–36; *Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 (CA) at pp 60-64.

[26] What is clear from the foregoing cases is that a failure to comply with procedural obligations does not automatically disqualify a claimant from relief on fairness grounds, but at some point a claimant will be considered the author of their own misfortune. The line between these two, and thus the assessment of procedural fairness, will be heavily dependent on the overall factual matrix and the conduct of the claimant.

(2) Application to this case

[27] Mr. Gomez Perez received notification of the Minister's cessation application before he moved. Representing himself, he successfully applied to change the venue of the hearing, which was changed from Toronto to Vancouver in July 2015. He changed his phone number in 2016 and his address in 2017. Still self-represented, he did not advise the RPD or the Minister in writing, but advised the IRB office in Vancouver by leaving a voicemail with his new contact information in 2017.

[28] The internal notes filed in the CTR show that when the Notice to Appear sent to Mr. Gomez Perez's old address was returned, the RPD took some steps to try to locate him. An RPD scheduler sent an email to "RPD Address Verification" asking if there was an updated address. A call was placed to the cell phone number listed, but the voicemail at that number was a woman's voice speaking in another language, so no message was left. The RPD therefore

concluded that it could go ahead with the hearing, and take representations from the Minister as to whether the hearing could proceed *in absentia*.

[29] On this basis, the Minister argues that Mr. Gomez Perez is the author of his own misfortune. Relying on *Mendoza Garcia* and *Gurgus*, they state that no procedural unfairness can arise from Mr. Gomez Perez's absence from the hearing when that absence arose from his failure to comply with Rule 12 by not advising the RPD in writing of his address change.

[30] There is much persuasive force to this submission. In this regard, I reject Mr. Gomez Perez's arguments that the RPD had a positive obligation to conduct extensive investigations to locate him, to the extent of engaging the enforcement powers of the Canada Border Services Agency that might be used to locate a person for apprehension. There is no such obligation on the RPD. To the contrary, Rule 12 of the *RPD Rules* places the obligation on the respondent to a cessation application to advise where they can be contacted. Nor can I accept Mr. Gomez Perez's argument that the RPD should have left a voicemail message at his former cell phone number, and/or called that number again during the hearing. In addition to the privacy concerns raised by the Minister arising from leaving information about a refugee application on an unknown voicemail, there was no evidence at all that Mr. Gomez Perez was in contact with the individual who had taken the number over, such that calling again or leaving a voicemail would have had any effect at all in locating him.

[31] Importantly, however, it appears that Mr. Gomez Perez's new contact information was in fact recorded after he left it on the IRB's voicemail. He was contacted in May 2019 at the

number he had left in the voicemail, and asked for his updated mailing address. There is no evidence as to what prompted that call, although it appears it may have been related to the letter that was subsequently sent advising Mr. Gomez Perez of the rejection of his citizenship application. Mr. Gomez Perez had moved again subsequent to leaving his voicemail in 2017, but it is unknown what, if any, address the caller was looking to update.

[32] In response to the evidence pertaining to Mr. Gomez Perez's voicemail and the return call he received, the Minister pointed to the efforts taken by the RPD as described in paragraph [28] above. However, although it would have been possible to do so, the Minister filed no evidence or records related to the return call, or that might explain how IRCC came into possession of Mr. Gomez Perez's telephone number other than through the voicemail he left in 2017. Nor did the Minister file any evidence or explanation regarding the IRB's practice in the case where contact information is left on a voicemail, how or whether such information is kept, the extent to which such information is available between the IRB and IRCC, or how or whether it could be accessed or obtained by the RPD.

[33] The Minister did make submissions noting that IRCC is a large organization, and underscoring the necessary separation of the IRB from other IRCC operations given its decision making functions. However, the evidence was that the contact information was left with the IRB, and that the phone number was subsequently used to contact Mr. Gomez Perez. In the absence of any other evidence, and with some sense of giving the benefit of the doubt to Mr. Gomez Perez since he cannot himself present evidence regarding internal IRB or IRCC practices, I conclude that Mr. Gomez Perez's new cell phone number was recorded in some form, and in a manner that

could have been accessed by the RPD. While the information in the CTR shows that the RPD took steps to locate Mr. Gomez Perez, I am not satisfied that it shows that Mr. Gomez Perez could not have reasonably been contacted. In these admittedly unusual factual circumstances, I conclude that proceeding *in absentia* resulted in a procedural unfairness to Mr. Gomez Perez and that he ought to be given the opportunity to respond to the Minister's cessation application on its merits.

[34] I hasten to point out that this conclusion should not be taken as an indication that leaving a voicemail is sufficient to satisfy the Rule 12 obligation, or that failure to comply with that obligation may not result in a claimant being considered the author of their own misfortune if they do not receive notice of a hearing. My conclusion is based on the particular circumstances of this case, in which the evidence shows that the voicemail Mr. Gomez Perez left when self-represented did effectively relay his new contact information in a manner that allowed him to be contacted, but that the RPD was, for an unknown reason, unable to obtain or use that information to contact him to provide the details of the hearing.

IV. Conclusion

[35] The application for judicial review is therefore allowed. The February 15, 2018 decision of the RPD is quashed, and the Minister's application for cessation of Mr. Gomez Perez's refugee protection is remitted for redetermination by another panel of the RPD.

[36] Neither party proposed a question for certification. I agree that none arises in the matter.

JUDGMENT IN IMM-5461-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, and the Minister's application for cessation of Mr. Gomez Perez's refugee protection is remitted for redetermination by another panel of the Refugee Protection Division.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5164-19
STYLE OF CAUSE:	ISAEL DAVID GOMEZ PEREZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

HEARING HELD BY VIDEOCONFERENCE ON JULY 8, 2020 FROM OTTAWA, ONTARIO (COURT) AND CALGARY, ALBERTA (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	DECEMBER 21, 2020

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