Federal Court  Cour fédérale

Date: 20091126

Docket: IMM-1057-09

Citation: 2009 FC 1211

Ottawa, Ontario, November 26, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JACQUES GRANDMONT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and facts

[1] The Minister of Citizenship and Immigration (the Minister) is requesting that the decision of a member of the Immigration Appeal Division (the IAD or panel) of the Immigration and Refugee Board (IRB), dated February 18, 2009, be set aside and that Mr. Grandmont's appeal be referred back to the IAD for redetermination by a differently constituted panel.

[2] The Minister cites two reasons in support of his application for judicial review. First, he submits that paragraphs 7 to 9 of the IAD's decision raise a reasonable apprehension of bias that requires the intervention of this Court and, second, he argues that the panel's findings regarding the determining factors of its decision are unreasonable.

[3] Counsel for Mr. Grandmont maintains that paragraphs 7 to 9 of the panel's decision, regarding the background, circumstances and content of the decision, are not indicative of any real likelihood of a reasonable apprehension of bias; he also submits that the panel's findings on the merits are not unreasonable. He raises an additional issue. He notes that the panel's record does not include a transcript and submits that that causes irreparable harm to his client, since the panel's statements during the hearing cannot be used to show that no possible apprehension of bias exists.

[4] Before the IAD, Mr. Grandmont appealed the decision dated October 22, 2007 of visa officer Cormier (the officer), who was Second Secretary (Immigration) in Beijing, to deny a permanent resident visa in the family class to Ms. Feng Hua Xiu (the applicant), who is a citizen of China. The officer had found that, under section 4 of the *Immigration and Refugee Protection Regulations* (the Regulations), the marriage of Mr. Grandmont and Ms. Feng Hua Xiu, which took place in China on May 9, 2007, was not genuine and had been entered into primarily for the purpose of acquiring a status or privilege under the Regulations.

[5] The hearing before the panel took place from 11:00 a.m. to 4:30 p.m. on December 24, 2008. The appeal was *de novo,* that is, it could be based on evidence that was not before the officer. Mr. Grandmont testified by teleconference before the IAD and the applicant. The

panel also heard testimony from Mr. Lu and Ms. Feng, the applicant's uncle and aunt, who live in Montréal. The matter was taken under consideration and a decision was delivered on February 18, 2009.

[6] During its deliberation, the panel received notification from the Minister that its term would not be renewed; the panel made no mention of this to the parties, but, in allowing Mr. Grandmont's appeal, it wrote the following at paragraphs 7, 8 and 9 of its reasons:

> [7] The panel must specify that, after that date, the undersigned Member received notification from the Minister that his term would not be renewed, although there were still some 4 years left to reach the usual limit of 10 years. The panel mentions this fact because it causes a particular problem in relation to the perceived independence of this panel. Indeed, in light of his age and the negative impact of the Minister's decision on his career plans and pension, the Member must consider returning to private practice in the near future. One of the possibilities that the Member will have to explore is obviously returning to private practice, as Supreme Court and various provincial court judges have done after reaching retirement age. Unfortunately, there is a marked difference between their situation and that of the undersigned Member, not just from a material standpoint, but also from the standpoint of perceived independence, since they have a guarantee of independence through their life appointments, whereas this Member is limited to a short career of some six years. It is thus possible that one of the avenues to explore would be returning to private practice and that the Member could find himself associated with or in a business relationship with counsel for the appellant.
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> [8] Clearly, one can easily see that the Minister might regard that situation as potentially having an influence over this decision. In light of that, the undersigned Member informed the IRB's legal department of the issue and asked for instructions as to whether it was better to withhold a decision and hear the appeal on a *de novo* basis.
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> [9] The undersigned Member received an opinion from the assistant to the Coordinating Member for this Division in Montréal indicating that the legal department was of the opinion that the

> Member should render a decision. The following is therefore the panel's decision. [Emphasis added.]

[7] Mr. Grandmont objected to the Minister's request. To his respondent's motion record, he attached the affidavit of his counsel before the panel. Under oath, his counsel denied having discussed with the panel (before, during or after the hearing on December 24, 2008) the possibility that it might become associated with him or his firm in an immigration law practice.

[8] For the reasons below, I find in the Minister's favour on his first point, that there is a reasonable apprehension of bias and a breach of procedural fairness, in that the Minister's representative before the IAD had no opportunity to comment on the situation or, perhaps, to request that the panel disqualify itself, depending on the circumstances. Therefore, it would not be prudent to rule on whether or not the panel's decision was reasonable on the merits. That task shall fall within the jurisdiction of a differently constituted IAD panel.

Case law on reasonable apprehension of bias

[9] The parties cite the same decisions on this issue, which are found in two Supreme Court of Canada lead-cases: (1) *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394; and (2) *R. v. R.D.S.*, [1997] 3 S.C.R. 484 (*R.D.S.*). The parties are divided on the outcome of applying the principles laid down to the facts of this case and the inferences that the Court can reasonably draw from the evidence. Counsel for Mr. Grandmont also emphasizes that the panel benefits from the presumption of judicial integrity. Counsel for Mr. Grandmont argues that there is a double onus on the Minister, namely, (1) to show that, on a

balance of probabilities, there is a reasonable apprehension of bias; and (2) to bring forward clear and convincing evidence that the presumption of judicial integrity is rebutted.

[10] I quote the relevant passage from the reasons by Justice L'Heureux-Dubé and Justice McLachlin, as she then was, in *R.D.S.* at paragraph 111:

> **111** The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
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> > [T]he apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. . . ." [Emphasis added.]
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, supra, at pp. 54-55; *Gushman*, supra, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, supra, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

[11] The circumstances surrounding *R.D.S.* are as follows. While delivering her oral reasons, the trial judge commented, in response to a rhetorical question from the Crown, that police officers had

been known to mislead the Court in the past and had been known to overreact, particularly with non-white groups. The judge acquitted the appellant, who was a young person charged with assault on a police officer. The Crown challenged the comments as raising a reasonable apprehension of bias. The Nova Scotia Court of Appeal allowed the Crown's appeal and ordered a new trial. R.D.S. was successful before the Supreme Court of Canada, and R.D.S.'s acquittal was restored.

[12] I draw the following principles laid down by the Supreme Court in respect of reasonable apprehension of bias:

1. In such a case, actual bias on the part of the tribunal need not be established; it is sufficient to demonstrate that, on a balance of probabilities, there is a real likelihood or probability of bias, since a mere suspicion is not enough.

2. Bias denotes a state of mind, an attitude of the tribunal in relation to the issues—a state of mind predisposed to decide an issue, a closed mind.

3. The onus of demonstrating bias lies with the person who is alleging its existence. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case, that is, the circumstances of the case.

4. Context is important: Was the decision delivered orally immediately after counsel had finished their arguments? What was the nature of the arguments before the tribunal—a

question of law, an issue of credibility or question of fact, or an assessment of contradictory evidence? Was the judge sitting on appeal or *de novo*?

5. Courts have recognized that there is a presumption of judicial integrity, but the presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial (*R.D.S.*, at paragraph 117).

Absence of standard of review

[13] When a party, in a judicial review, raises the issue of a breach of procedural fairness, as in the case at bar, case law establishes that the issue falls squarely within the Court's jurisdiction and the standard of review does not apply (see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at paragraph 74).

Parties' submissions

[14] In his written and oral submissions, counsel for the Minister cites cases in which a reasonable apprehension of bias was acknowledged when, during a trial or arbitration hearing, a business relationship existed between the tribunal and a party (see (1) *Ghirardosi v. British Columbia (Minister of Highways)*, [1966] S.C.R. 367; and (2) *Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board*, 2006 NBCA 61).

[15] Counsel for the Minister adds another factor. Concerned by the risk of bias that it perceived, the panel sought the opinion of the IRB's legal department and "asked for instructions" as to whether or not it was better to withhold a decision and hear the appeal on a *de novo* basis. The panel

decided to render a decision, given that the IRB's legal department "was of the opinion that the Member should render a decision." The Minister maintains that, in the circumstances of the case at bar, the panel treated the response of the IRB's legal department not as an opinion, but as a duty or requirement to render a decision. The Minister submits that the Member thereby failed to act with an appropriate degree of independence.

[16] The Minister spent more time showing that the panel's decision was unreasonable, the panel having acknowledged that this case involves (1) an arranged marriage; (2) an exchange in which the Canadian man gets a Chinese wife who is docile and attentive to his needs, and she gets a husband who can help her supplement her 16-year-old son's education and provide her with the opportunities that go with immigrating to Canada; and (3) her aunt's search for a husband for Ms. Feng in Canada, "obviously to facilitate her entry into Canada," citing the decision of Justice Frénette in *The Minister of Citizenship and Immigration v. Norman J. Champagne*, 2008 FC 221, at paragraphs 25 and 26.

[17] As for the absence of a transcript of the hearing on December 24, 2008, counsel for Mr. Grandmont acknowledges that determining whether there is an apprehension of bias focuses on the panel's state of mind; however, he submits that the question of whether or not there is a reasonable apprehension of bias is not limited to the panel's written decision, but includes the panel's questions and comments at the hearing. In those circumstances, the absence of a transcript deprives Mr. Grandmont of evidence.

[18] As for the basis of the Minister's allegation on the issue of reasonable apprehension of bias, counsel for Mr. Grandmont submits that the context of the decision is significant and this Court must extend its review beyond paragraphs 7 to 9. He suggests that a broader examination shows no reasonable apprehension of bias on the part of the panel, since, up to paragraph 37 of its decision, the panel is merely establishing facts and circumstances. In that context, it can be appreciated that the panel's decision was in no way influenced by what the panel wrote.

[19] Moreover, its comments include a purely hypothetical element. They express only the possibility of exploring employment with Mr. Grandmont's former counsel. They express nothing concrete as to whether the panel will contemplate a business relationship with Mr. Grandmont's former counsel, who denies any contact with the panel on that subject. Counsel argues that the possibility of a relationship is not enough to provide a basis for a reasonable apprehension of bias in the circumstances.

Conclusions

[20] I consider that the intervention of this Court is warranted in the circumstances. Upon reading paragraphs 7 and 8 of the panel's reasons in Mr. Grandmont's favour, it appears to me that the panel was very disappointed by the decision of the Minister—one of the parties in the case before it—not to renew its term as a member of the IRB. That decision, according to the panel, significantly affects the Member's life and finances. He is considering returning to the practice of law and a potential business relationship with the law firm of the appellant's former counsel, among others. In the panel's mind, "[c]learly, one can easily see that the Minister might regard that situation as potentially having an influence over this decision."

[21] It is therefore the panel itself that acknowledges that the circumstances raise the possibility of a reasonable apprehension of bias, to the point that it informed the IRB's legal department and asked for instructions as to whether it was better to withhold a decision.

[22] Moreover, the fact that the Member's mandate would not be renewed raises a specific issue in the panel's mind with respect to its perceived independence—the Member is not appointed for life, as are higher-court judges, but "is limited to a short career of some six years," which could reasonably lead the panel to decide in favour of Mr. Grandmont, to ensure that its independence was not compromised.

[23] For the following reasons, I believe that the panel did not act fairly in the specific circumstances of the case at bar.

[24] It is clear that, in the panel's mind, the Minister's decision not to renew the Member's term would lead to problems if the Member had to render a decision in the case at bar. The Member felt that he should disqualify himself, but the legal department was of the opinion "that the Member should render a decision."

[25] The panel erred in treating the legal department's opinion as an instruction, rather than a recommendation that could be followed or not.

[26] In my opinion, the panel erred a second time by failing to inform the parties involved that it saw a potential problem, which would have given the parties a chance to make submissions and possibly disabuse the panel of its reluctance.

[27] The panel erred a third time by rendering a decision even though it was convinced that the circumstances raised the possibility of a reasonable apprehension of bias or undermined the panel's independence.

[28] Lastly, regarding Mr. Grandmont's argument that he was prejudiced because the transcript of his appeal was not available, his counsel acknowledged, as did the Court, that the transcript would have no bearing on the proceeding because at the time the panel heard the case, it did not know that its term would not be renewed.

[29] For these reasons, the judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, the panel's decision is set aside and the matter is referred back for redetermination by a differently constituted panel. There is no question to be certified.

"François Lemieux"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1057-09
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