Federal Court  Cour fédérale

Date: 20140512

Docket: IMM-12723-12

Citation: 2014 FC 453

Ottawa, Ontario, May 12, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MILAN CIPAK, KVETA KUKUCKOVA, NICOLE HELENA CIPAK AND JAKUB LADISLAV CIPAK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) released on November 20, 2012. The application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The dispositive issue in this case is whether or not there exists a reasonable apprehension of bias on the part of the Panel. The respondent has argued that the evidence is overwhelming that state protection is adequate and the protection under sections 96 and 97 of the IRPA should not be granted. However, before one reaches the actual merits of the case, it must be determined if the process followed meets the requirement of procedural fairness. If the process was defective, the matter will have to be sent back to a different panel for a new determination. I have come to the conclusion that, in the peculiar circumstances of this case, there is a reasonable apprehension of bias.

I. Facts

[3] Milan Cipak is a citizen of the Slovak Republic. His spouse, Kveta Kukuckova, is a citizen of the Czech Republic. They met in the United States and their children were born there.

[4] In September 2004, they moved back to the Slovak Republic. They claim that they experienced discrimination and physical violence because they are an inter-ethnic couple. They also alleged being the victims of extortion, as the owners and operators of a grocery store.

[5] They sought the protection of sections 96 and 97 of the IRPA on October 9, 2007. Mr Cipak received a Canadian visa in April 2007 and he arrived in Canada on August 2, 2007. Mrs Kukuckova received her Canadian visa in August and arrived in Canada, with the couple's children on September 21, 2007.

[6] Given the conclusion I have reached about the procedural fairness issue, it would not be appropriate to comment on the evidence in this case other than to set the context in which the apprehension of bias issue arose.

II. Reasonable apprehension of bias

[7] The whole matter turns on the Personal Information Form (PIF) that was prepared with the assistance of the applicants' original counsel. The applicants would have been advised to limit their narrative; they would be able to supplement it at a later date they were told. The inconsistencies or contradictions between the testimonies and the PIF were explained by the inadequacy of the translation and to some extent, the advice that was given to the applicants.

[8] Because of their lack of proficiency in English, their narrative had to be translated. The translation was originally presented as having been done by a third party, a relative of the claimants. It seems that this person was in fact less than capable to provide a translation. It emerged that the translation would have been made by the applicants' former counsel who is fluent in Slovak. The applicants were thus trying to explain why their PIF contained omissions, inconsistencies, contradictions. In other words, they tried to address credibility issues through an explanation involving their counsel acting as an interpreter, but with the certificate guaranteeing the quality of the translation signed by a third party.

[9] The panel chose to delve into the issue. Over an issue like credibility, the panel spent months seeking to get to the bottom of the issue.

[10] New counsel was retained by the applicants in June 2009. Hearings were scheduled and postponed four times before this panel was finally seized of the case on June 4, 2010. On that day, credibility was identified as an issue. There were hearings on August 17, 2010, December 20, 2010, March 21, 2011, and April 16, 2012.

[11] It came to light that the former counsel was counsel to the relative, who was presented as the interpreter in this case, in his own refugee proceedings in Canada. The panel inquired of the applicants why a complaint had not been made to the Law Society against counsel. It appears that the panel showed a significant interest in having the former counsel testify at the hearing in order to clarify the translation issue.

[12] The suggestion made by counsel for the applicants to call before the RPD the person presented as being the translator was rejected by letter dated September 17, 2010. Instead, counsel was invited to write to the former counsel to provide an opportunity to respond, having set out the allegations that had transpired. The former counsel responded on October 19, 2010 that he is prevented from commenting on the allegations by the Rules of Professional Conduct to which he is subjected.

[13] In a letter dated October 28, 2010, the panel asserted that due to the fact that the manner in which the PIF had been completed had already been discussed, the solicitor-client privilege did not apply anymore. Accordingly, the former counsel was not prohibited from providing evidence.

[14] In the alternative, the RPD suggested that the applicants may consider waiving the privilege. That incitation was made again at the hearing of March 21, 2011. Counsel for the applicants had indicated in his letter of November 18, 2010 to the RPD the reluctance of his clients, the applicants, to waive the privilege, but felt under pressure to do so in view of the insistence of the panel.

[15] Indeed, the RPD had not left the matter standing. In a letter dated December 1, 2010, the panel ordered former counsel "to disclose whatever information is necessary to answer the specific allegations". The deadline was extended and former counsel responded on June 26, 2011 by refusing to comply with the order; authorities were offered by former counsel in support of the refusal to comply.

[16] The matter escalated some more. On November 16, 2011, the RPD summoned former counsel to appear before it on January 26, 2012. Counsel was summoned:

> (1) to give evidence relevant to the claim, and
>
> (2) to bring with you any document that you have under your control.

[17] The January 26, 2014 hearing was adjourned to April 16, 2012. It is at that point that counsel for the applicants raised the apprehension of bias issue. The RPD rejected the motion on August 16, 2012.

III. The RPD decision

[18] The reasons for dismissing the reasonable apprehension of bias argument were delivered on November 20, 2012, together with the reasons for dismissing the rest of the claim under sections 96 and 97 of the IRPA.

[19] The RPD reasoned that a serious allegation had been made concerning "a member in good standing of a regulated profession", with significant impacts on the lawyer, the profession and society. Because of the credibility concerns about the applicants that would be left inadequately addressed, the panel was seeking an explanation.

[20] In the view of the panel, "[a]llowing an opportunity for explanation cannot be seen as bias. I was simply giving the claimants an opportunity to establish their allegations."

[21] As for the method chosen, in the end, to compel the attendance of former counsel, the RPD wrote at paragraph 24:

> The Board may compel any witness, particularly when they would otherwise be unwilling. I summonsed [*sic*] former counsel as a method to compel him to provide his respond [*sic*]. In that response former counsel could have either confirmed or denied any of the allegations. As such, this cannot be seen as bias…

[22] Finally, the RPD seems to dismiss the impression the claimants may have that they would not be believed without the evidence of their former counsel by noting that "former counsel was open to providing his response which would have supported or opposed the claimants' account." (para 25).

IV. Analysis

[23] It is not disputed that the standard of review for alleged infringements of the duty of fairness is correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404; [2006] 3 FCR 392 [*Sketchley*]). No deference is owed the decision-maker. As the Court of Appeal put it at paragraph 54 of *Sketchley*, "If the duty of fairness is breached in the process of decision making, the decision in question must be set aside."

[24] In this case, the issue is not so much whether the decision-maker was biased against the applicants, but rather whether there is an appearance that there was a lack of impartiality. The inquiry does not focus on the subjective state of mind of the decision-maker; it focuses on the existence of a reasonable apprehension of bias, of an appearance of unfairness. The value that needs to be protected is the public confidence in the integrity of the decision-making process. Lord Denning MR stated in *Metropolitan Properties Co (FGC) Ltd v Lannon*, [1969] 1 QB 577:

> The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The Judge was biased."
>
> (Page 599)

[25] In those circumstances, it will not matter that the decision-maker is convinced that he is not biased against one party or another (*Grand Rapids First Nation v Nasikapow* (2000), 197 FTR 184).

[26] In Canada, the test for determining reasonable apprehension of bias was stated in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369:

> [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. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude'.
>
> …
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.
>
> (Pages 394-395)

[27] It has been said that the duty of fairness will vary with the different circumstances that present themselves. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] stands for the proposition that the duty of procedural fairness is flexible and variable. Similarly, *Baker* finds that procedural fairness implies an absence of a reasonable apprehension of bias.

[28] Several factors must be weighed in making a determination as to the context of a duty of fairness in a particular case. The list, although not exhaustive, is illustrative of issues that must be considered:

1) the nature of the decision and the process followed in making it;

2) the statutory scheme;

3) the importance of the decision to the persons affected;

4) the legitimate expectations of the persons affected;

5) the choices of procedure made by the decision-maker.

[29] Although the standards for reasonable apprehension of bias may vary (*Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623), it seems to me that the nature of the decision (refugee status or person in need of protection) and the importance of the decision to the persons affected militate in favour of a rather strict application of the test. The person who fears for her safety if returned to her country of nationality has a lot at stake.

[30] Furthermore the decisions are obviously individualized, as opposed to general. They require a careful examination of the very personal circumstances of the applicant. The nature of the decision is such that it is based on facts, including an assessment of the credibility of witnesses. On the old spectrum that was used in administrative law context, from judicial decisions to political ones, we are clearly situated much closer to the judicial end of the spectrum. As in *Baker*, these kinds of decisions, which are critical to the well being of applicants, require a recognition of diversity and an openness to differences between people.

[31] In the case at bar, the RPD insisted in getting to the bottom of an incident which, in the grand scheme of things, did not require that kind of attention. In my view, a well-informed member of the community would ask herself why such an issue was followed to that extent. Indeed, the RPD suggested that the solicitor-client privilege, one of the most sacred privileges in

our law, be waived. It even summoned counsel to appear before the RPD in spite of what appeared to be a well-placed reluctance on the part of counsel, especially after his former clients, the applicants, declined to waive the privilege as "strongly suggested" by the RPD.

[32] That insistence on the part of the RPD must be contrasted with the issue's importance. The RPD wanted to test the credibility of the applicants with regards to discrepancies between the translated PIF and testimonies. Obviously, this is just one element that could have been used to assess credibility; indeed there may have been room to draw some negative inferences, if appropriate, from the whole episode.

[33] The well-informed person, acting reasonably and viewing the matter realistically and practically, would question such insistence: what was the decision-maker trying to achieve? There may be a perception of bias in that the decision-maker is pursuing aggressively what is presented as a credibility issue, beyond what this incident was worth. I am concerned that such behaviour creates a perception that there was some bias, in the nature of something resembling a vendetta, against the applicants or their chosen counsel. As I have already pointed out, the issue is not whether there was such bias in this case, but rather whether there is that perception leading to a reasonable apprehension of bias.

[34] The suggestion that the RPD sought to address credibility concerns would be more plausible if the RPD had not exerted the kind of pressure over many months on the applicants to waive the solicitor-client privilege, thereby leaving the impression that their claim hung in the

balance. Whatever was the evidence, the perception of a well-informed person would be that, on that sole basis, the case had been decided against the applicants.

[35] As a result, the Court concludes that a reasonable apprehension of bias exists in this case. The application for judicial review is therefore granted. The matter will have to be sent back to a different panel for re-determination. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter sent back to a different panel for re-determination. There is no question for certification.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-12723-12
STYLE OF CAUSE:	MILAN CIPAK, KVETA KUKUCKOVA, NICOLE HELENA CIPAK AND JAKUB LADISLAV CIPAK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 26, 2014
JUDGMENT AND REASONS:	ROY J.
DATED:	MAY 12, 2014

APPEARANCES:

Howard C. Gilbert	FOR THE APPLICANTS
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT