Date: 20051118

Docket: IMM-855-05

Citation: 2005 FC 1544

Ottawa, Ontario, November 18, 2005

PRESENT: THE HONOURABLE MR. JUSTICE FRANÇOIS LEMIEUX

BETWEEN:

ALI BOUASLA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

LEMIEUX J.

[1] Ali Bouasla (the "applicant" or "claimant"), an Algerian citizen, claimed refugee status in Montréal on May 11, 2000. On January 20, 2005, a member of the Refugee Protection Division (the "panel") determined that the claimant was excluded under subparagraphs 1F(a) and 1F(c) of the Convention. The panel did not rule on his inclusion.

[2] In the panel's view, "Ali Bouasla, who was active in the national security headquarters as a police inspector, and as an official at the headquarters of the penitentiary administration in Algeria, has been guilty of human rights violations, contrary to the purposes and principles of the United Nations".

[3] The applicant raised a number of grounds opposing the panel's decision, including the following:

- Member Handfield's decision of July 7, 2004 not to proceed with the case, following the other member's illness, and the holding of a *de novo* hearing before one member;
- the filing of transcripts of testimony from two sessions before Members Handfield and Bacon into the record of the *de novo* hearing before Member Jobin;
- the order in which the evidence was introduced in the *de novo* hearing*;*
- the four-and-a-half-year delay between the referral of the claim to the Refugee Division and the date of decision;
- the absence of findings on inclusion;
- incorrect assessment of the evidence on exclusion.

FACTS

[4] Mr. Bouasla's claim was initially reviewed under the *Immigration Act* ("the former Act") on November 20, 2001 before two members, as required under subsection 69.1(7) of the former Act unless the applicant has consented to his claim being heard and determined by one member, which is not the case here. Member Handfield chaired the hearing and was supported by Member Guy Bacon. At the close of the hearing, Chairperson Handfield asked the representative of the Minister of Citizenship and Immigration ("the Minister") to send three documents to the Department's laboratory for expert analysis.

[5] The review of the claim resumed on March 27, 2002, before the two members. Mr. Bouasla was examined in turn by the refugee claims officer ("the RCO"), the Minister's representative, the two members and, finally, the claimant's counsel at the time. The RCO then presented his submissions and was followed by the Minister's representative, who argued that the claimant should be excluded. Counsel for Mr. Bouasla requested permission to file her written submissions. At that point, the Chairperson raised the issue of the expert report on the three documents, giving the Minister's representative until April 16, 2002 to deliver the expert report and counsel for the applicant until the same date to file her written submissions.

[6] Addressing the claimant, the panel Chairperson made the following decision (stenographic notes, volume 3, page 1073):

> [TRANSLATION]
>
> If the expert reports are not prejudicial to you . . . then the panel will reserve judgment on your claim, I will discuss it with my fellow member and we will review

> our notes, reread the evidence in the record and then make our decision as quickly as possible.
>
> Should the expert reports raise any problem whatsoever, you will be summoned to reappear before us to provide an explanation, if necessary.
>
> [7] In his report on the outcome of the March 27, 2002 hearing, this same member wrote that judgment in the case was under reserve.
>
> [8] Counsel for the applicant filed her submissions in writing, but the Minister's representative did not forward the expert report to Chairperson Handfield until two years later, on April 29, 2004. It appears that the report in question confirmed the existence of two signs of alteration visible even to the naked eye on one of the three documents, but noted that [TRANSLATION] "it was not possible to determine from the examination whether the alteration was fraudulent or administrative in nature". In the case of the other two documents examined, the report confirmed that no significant signs of alteration could be identified from the examination.
>
> [9] When she was informed of the expert opinion filed on May—5, 2004, counsel for the applicant informed the panel in writing that she had ceased representing the claimant over two years earlier.

[10] For reasons that were not communicated to him, the claimant was subsequently summoned to a hearing before the panel on June 30, 2004. That hearing was postponed, owing to the absence of Member Bacon. Richard Bruneau, a deputy clerk with the Board, filed an affidavit in the record, indicating [TRANSLATION] "that the applicant was summoned to a continuation of the investigation in order to provide explanations concerning the forensic laboratory report".

[11] On July 7, 2004, Member Handfield made the following notation on the Hearing Disposition Record:

> [TRANSLATION]
>
> Further to discussions with the co-ordinator, Stéphane Hébert, and in view of the absence of Guy Bacon, my colleague in this matter, I find myself obliged to order a *DE NOVO* hearing in this case. [Emphasis added.]

[12] On July 29, 2004, the co-ordinating member in turn delivered a *de novo* order worded as follows:

> [TRANSLATION]
>
> Whereas Member Guy Bacon is absent for an indefinite period;
>
> Whereas the administration of justice and the interests of the person before the panel require that a decision be rendered as quickly as possible;
>
> THE PANEL ORDERS A DE NOVO AND ASKS THAT THE REGISTRY RESCHEDULE THIS CASE WITH A NEW MEMBER. [Emphasis added.]

[13] On August 9, 2004, Mr. Bouasla informed the Immigration and Refugee Board ("the Board") that he was no longer represented by counsel.

[14] On December 20, 2004, the panel composed of a single member, Michel Jobin, heard the applicant's claim. Mr. Bouasla represented himself.

ANALYSIS

[15] The former Act was repealed with the coming into force on June 28, 2002 of the *Immigration and Refugee Protection Act* ("IRPA").

190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.	190. La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.
	Anciennes règles, nouvelles sections
Convention Refugee Determination Division	191. Les demandes et procédures présentées ou

191. Every application, proceeding or matter before the Convention Refugee Determination Division under the former Act that is pending or in progress immediately before the coming into force of this section, in respect of which substantive evidence has been adduced but no decision has been made, shall be continued under the former Act by the Refugee Protection Division of the Board. [Emphasis added.]

introduites, à l'entrée en vigueur du présent article, devant la Section du statut de réfugié sont, dès lors que des éléments de preuve de fond ont été présentés, mais pour lesquelles aucune décision n'a été prise, continuées sous le régime de l'ancienne loi, par la Section de la protection des réfugiés de la Commission. [*je souligne*]

[16] The IRPA contains a number of transitional provisions, including sections 190 and 191:

(a) Standard of Review

[17] In *Harb v. Canada (Minister of Citizenship and Immigration*), [2003] F.C.A. 39, Décary J.A. sets out the standards of review applicable to the case before us:

¶ para. 14] In so far as these are findings of fact, they can only be reviewed if they are erroneous and made in a perverse or capricious manner or without regard for the material before the Refugee Division (this standard of review is laid down in s. 18.1(4)(*d*) of the *Federal Court Act*, and is defined in other jurisdictions by the phrase "patently unreasonable"). These findings, in so far as they apply the law to the facts of the case, can only be reviewed if they are unreasonable. In so far as they interpret the meaning of the exclusion clause, the findings can be reviewed if they are erroneous. (On the standard of review, see *Shrestha v. The Minister of Citizenship and Immigration*, 2002 FCT 887, Lemieux J. at paras. 10, 11 and 12.)

(**b) Findings**

(i) Hearing and Decision by a Single Member

[18] Section 163 IRPA enacts that matters shall be conducted by a single member before the Refugee Protection Division unless the Chairperson is of the opinion that a panel of three members should be constituted.

[19] Notwithstanding that provision, in my opinion, upon the coming into force of IRPA on June 28, 2002, Refugee Protection Division officials should have administered the applicant's claim in accordance with the provisions of the former Act, as required by section 191 IRPA, a transitional provision.

[20] According to the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998]—1—S.C.R. 27, section 191 IRPA should be interpreted as follows:

¶ 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côte, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[21] It is beyond question that as of June 28, 2002, considerable substantive evidence had been adduced before the two members in connection with Mr. Bouasla's refugee claim and that no decision had been made.

[22] Parliament expressed itself clearly and unambiguously in such circumstances. All the necessary conditions for the application of section 191 IRPA had been met. Mr. Bouasla's application should have been dealt with under the former Act by the Refugee Protection Division of the Board.

[23] The former Act required a quorum of two members for the purpose of determining a refugee claim.

[24] Furthermore, subsection 69.1(10) of the former Act stipulated that, in the event of a split decision, the decision favourable to the person who claims to be a Convention refugee shall be deemed to be the decision of the Refugee Division, an advantage recognized by the Federal Court of Appeal in *Weerasinge v. Canada (Minister of Employment and Immigration),* [1994]—1—F.C.—330.

[25] I cannot endorse the claims by counsel for the respondent that section 190 IRPA and not section 191 IRPA is applicable (relying on the immediate application of the procedural provisions of a new statute) or that section 191 is inapplicable because this is a *de novo* hearing, not a continuation of the hearing.

[26] While section 190 IRPA sets out the principle of immediate application of the procedural aspects of an Act, Parliament has created an exception to that section.

[27] The fact that a *de novo* hearing was ordered is immaterial in this case. The *de novo* hearing had to comply with the provisions of the former Act, because

substantive evidence had been adduced. The applicant was entitled to have two members hear and determine the *de novo* hearing unless the applicant had consented to the claim being heard and determined by one member.

[28] I find that the co-ordinating member erred in law by ordering on July 29, 2004 that Mr. Bouasla's file be reviewed by one new member without obtaining Mr. Bouasla's consent.

(ii) Legality of the Decision Not to Proceed with the Case

[29] The application of the former Act to the applicant's claim has another consequence, that is, with respect to the legality of the withdrawal of the initial panel (composed of Mr. Handfield and Mr. Bacon).

[30] As was noted, on July 7, 2004, Chairperson Handfield made the following decision: [TRANSLATION] "Further to discussions with the co-ordinator, Stéphane Hébert, and in view of the absence of my colleague in this matter, Guy Bacon, I find myself obliged to order a *DE NOVO* hearing in this case".

[31] Counsel for Mr. Bouasla argued that the decision by Member Handfield was silent on the reasons why Member Handfield found himself "obliged" to order a *de novo* hearing when close to six months remained in his term as a member.

[32] We must assess the specific circumstances surrounding Member Handfield's decision of July 7, 2004 not to proceed with the case, which was confirmed by the co-ordinating member on July 29, 2004.

[33] The following factors are relevant:

(1) the parties were not consulted on the decision;

(2) as a result of the decision, a new decision maker was introduced, notwithstanding the fact that Mr. Bouasla had filed his claim on May 11, 2000, that a review of that claim had been initiated on November 20, 2001, and that the expert reports requested by the panel on November 20, 2001, were not received by it until April 29, 2004;

(3) although no explanation was provided for the delay, the deadline for filing the expert reports had apparently been extended as a result of *ex parte* administrative extensions;

(4) the applicant, through new counsel, Mr. Conté, had written to the registry of the Refugee Protection Division on June 3, 2004, to determine the object and purpose of the hearing scheduled for June 30, 2004, (supplementary affidavit by the applicant) but never received a response; and

(5) Mr. Handfield never explained why he found himself obliged to order a *de novo* in the case, when the former Act provided safeguards (see section 63 concerning impediments and subsection 69(7) regarding resumption of a hearing following an adjournment).

[34] The circumstances set out in the preceding lead me to the conclusion that the decision not to proceed with the case either was unlawful because, if section 63 of the former Act was inapplicable, the potential safeguard described in subsection 69(7) of the former Act should have been considered, or should be set aside because it was made without regard for the principles of procedural fairness, an extremely variable concept dependent on the circumstances.

(iii) Legitimate Expectation

[35] I will conclude by addressing another concept related to procedural fairness—that of legitimate expectation, as set out by the Supreme Court of Canada in *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

[36] Counsel for the applicant pointed out that, in many procedural matters, the panel or board had undertaken to act in a certain manner, for example:

(1) to settle the issue of the filing of transcripts before the hearings resumed;

(2) to settle the issue of inclusion rather than restricting itself to dealing with exclusion.

[37] Assuming, as was argued by counsel for the Minister, that the panel or board was under no obligation to act one way or the other, it nevertheless undertook to do so. In the present case, the applicant had a legitimate expectation that the panel or board would fulfil its undertakings.

[38] Under the circumstances, I will refrain from adjudicating the issue raised by the applicant to the effect that the panel, having ruled strongly in favour of the applicant's credibility, rendered a decision based on perverse findings that flew in the face of the evidence. I will likewise refrain from ruling on the issue of unreasonable delay in adjudicating his claim.

ORDER

The application for judicial review is granted, the decision of the panel dated December 20, 2004, ordering that the applicant be excluded is set aside, and the applicant's claim is referred to a differently constituted panel for review under the former Act. Both parties will have until November 25, 2005, to submit a question or questions for certification. Both parties will be entitled to file a response in Court on or before December 2, 2005.

"François Lemieux"

Judge