Federal Court  Cour fédérale

Date: 20150728

Docket: IMM-1304-14

Citation: 2015 FC 927

Ottawa, Ontario, July 28, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

FAN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], dated January 28, 2014 [Decision], which found that the Applicant had ceased to be a Convention refugee pursuant to s 108(2) of the Act.

II. BACKGROUND

[2] The Applicant is a Chinese citizen. In June 2004, he was granted refugee protection in Canada based on his fear of persecution as a Falun Gong practitioner.

[3] In September 2013, a Canada Border Services Agency [CBSA] officer noted that the Applicant was returning from his second or third trip to China in two years.

[4] In October 2013, the Respondent sought the cessation of the Applicant's refugee status. He claimed that the Applicant had voluntarily reavailed himself of China's protection.

III. DECISION UNDER REVIEW

[5] On January 28, 2014, the Board found that the Applicant had ceased to be a refugee because he had voluntarily reavailed himself of China's protection.

[6] The Board had several concerns with the Applicant's credibility. It said that he frequently hesitated before answering simple questions; ignored the Board's instructions to pause for accurate interpretation; and failed to provide evidence in a straightforward and compelling manner. The Board also said that the Applicant's evidence had evolved. For example, the Applicant testified that his 2013 trip to China was for his brother's wedding. In his final submissions, he said it was also because his grandfather was ill. The Board found that this was an embellishment which further negatively impacted the Applicant's credibility.

[7] The Board said that the Applicant's reavailment was established in two ways: the Applicant had renewed his Chinese passport twice since receiving refugee protection; and, he had travelled back and forth to China, often staying for long periods. The Board acknowledged that the passport renewal may be insufficient evidence on its own but found that the return trips occurred "often and at great length."

[8] The Applicant's trips to China were established through his oral testimony and the stamps in his passport:

- In 2005, the Applicant spent one month visiting his family. The Applicant thought his refugee status entitled him to protection in China. He learned this was not the case in March 2006.
- In 2007, the Applicant spent three months getting married, honeymooning and spending time with his wife's family.
- In 2009, the Applicant spent two months with his wife.
- In 2011, the Applicant initially travelled to spend time with his sick grandmother. He says his trip was extended to five months because he was waiting for a visa to return to Canada.
- In 2013, the Applicant spent two months attending his brother's wedding.

[9] The Board found that the trips were indicative of the Applicant's voluntary reavailment of China's protection. It said that the only trip that appeared to be an emergency was the trip to visit his sick grandmother. The Board found it difficult to believe that the Applicant actually thought that his refugee status offered him protection in China. It rejected the Applicant's claim that he was ignorant about refugee protection because the Respondent had failed to provide him with a policy handbook when he received his refugee status. The Board said that even if it

accepted the Applicant's misunderstanding, he acknowledged that he learned his belief was mistaken in 2006.

[10] The Board also considered a decision of the Immigration Appeal Division of the Immigration and Refugee Board [IAD] which reviewed a visa officer's decision to deny the Applicant's application to sponsor his wife. The Applicant testified before the IAD that if his sponsorship was unsuccessful, he would return to China to set up a business. The Board said this demonstrated a lack of subjective fear.

[11] The Board concluded that the Applicant ceased to have refugee protection.

IV. ISSUE

[12] The Applicant raises two issues in this proceeding:

1. Whether the Applicant was denied a fair hearing because he did not have legal counsel before the Board; and,
2. Whether the Board breached procedural fairness in failing to adjourn the hearing to permit the Applicant to consult with legal counsel before making his final submissions.

V. STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new

developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[14] The Applicant submits that the issue is reviewable on a standard of correctness: *Costeniuc v Canada (Citizenship and Immigration)*, 2012 FC 1495 [*Costeniuc*]; *Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206 [*Mervilus*]; *Nemeth v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590 [*Nemeth*]. However, the issue before the Court is not particularly amenable to a correctness review. The Court is simply called upon to determine whether or not the Applicant received a fair hearing: *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para 42.

VI. STATUTORY PROVISIONS

[15] The following provisions of the Act are applicable to this proceeding:

Rejection	**Rejet**
108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
(a) the person has voluntarily reavailed themself of the protection of their country of nationality;	a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
[…]	[…]

Cessation of refugee protection

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

Perte de l'asile

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

Effect of decision

(3) If the application is allowed, the claim of the person is deemed to be rejected.

Effet de la décision

(3) Le constat est assimilé au rejet de la demande d'asile.

[…]

[…]

Right to counsel

167. (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

Conseil

167. (1) L'intéressé qui fait l'objet de procédures devant une section de la Commission ainsi que le ministre peuvent se faire représenter, à leurs frais, par un conseiller juridique ou un autre conseil.

Representation

(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.

Représentation

(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.

VII. ARGUMENT

A. *Applicant*

[16] The Applicant submits that he was denied a fair hearing before the Board because he was unrepresented: *Mervilus*, above, at para 17; *Siloch v Canada (Minister of Employment and Immigration)* (1993), 151 NR 76 (FCA). A fair hearing is the fundamental principle of procedural fairness: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643; *Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423. The Court must consider the following factors in determining whether the Applicant was denied a fair hearing: the nature of the proceedings, the complexity of the proceedings, and the seriousness of the allegations.

[17] The Applicant acknowledges that there is no absolute right to counsel: *Costeniuc*, above, at paras 10-14, 16. However, he says the importance of the right to counsel is recognized in the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; the *Canadian Bill of Rights*, SC 1960, c44, s 2(e); and s 167 of the Act. The Applicant also acknowledges that he advised the Board he was prepared to proceed without counsel; however, he says that the Board was obliged to provide him another opportunity to obtain counsel after the complexity of the case and the legal issues became apparent: *Bulut v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1627; *Yusuf v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 629 (CA); *Kumar v Canada (Minister of Employment and Immigration)*, [1988] 2 FC 14 (CA); *Quiroa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 271. The Applicant says that he did

not knowingly, willingly or intentionally waive his right to counsel, and he was not in a position to navigate himself through such complex proceedings on his own.

[18] The Applicant also submits that the Board erred by failing to adjourn the hearing to allow him time to consult with counsel before making his final submissions.

B. *Respondent*

[19] The Respondent submits that there was no breach of procedural fairness. There is no evidence before the Court to suggest that being self-represented impacted the Applicant's right to a fair hearing. The fact that counsel may have been able to advance different arguments does not establish procedural unfairness.

VIII. ANALYSIS

[20] The Applicant says there is only one issue: a breach of procedural fairness by proceeding with the hearing without the Applicant having legal counsel. However, in his written memorandum, the Applicant raises a failure to adjourn as a possible second issue. He may mean the same thing.

[21] For reasons that the Applicant does not explain, he has failed to provide the Court with a personal affidavit. Hence, the Court does not have a full evidentiary basis against which to check the Applicant's assertions of unfairness.

[22] The parties agree that the Applicant had no absolute right to counsel and that the Board member is accurate when he says that "Mr. Li was asked if he was prepared to proceed with this Application without the benefit of counsel and he indicated that he was" (Certified Tribunal Record [CTR] at 4).

[23] There is no evidence before me that the Applicant was confused, did not understand, or was prevented in any way from making his case at the hearing. The Applicant's present counsel merely asserts that (Applicant's Record at 178):

> Regardless, the issue is whether, given the complexity of such a case and the legal issues involved, and given what may have transpired as the hearing progressed, did it behoove the Panel to address the matter further, caution the applicant, ensure he fully understood and appreciated the proceedings, and perhaps adjourn, in the interest of natural justice, to provide one, final, fair opportunity to retain proper, legal Counsel.

[24] Only the Applicant can tell us if he found the case complex, had any problems at the hearing, or needed an adjournment. The Applicant has provided no evidence at all to this effect. Assertions by legal counsel that the hearing could have been unfair are not proof of procedural unfairness.

[25] An application for judicial review is not dismissed outright due to the absence of a personal affidavit from an applicant. Affidavits from third parties may be used so long as they are limited to the deponent's personal knowledge. See, for example, *Wang v Canada (Minister of Employment and Immigration)*, [1991] 2 FC 165 (CA) [*Wang*], where the Federal Court of Appeal held that an applicant must depose to his or her evidence "unless the error said to vitiate

the decision appears on the face of the record" (at 170). In *Wang*, the application was supported by a personal affidavit from the applicant.

[26] The Federal Court of Appeal confirmed *Wang* in *Moldevenau v Canada (Minister of Citizenship and Immigration)* (1999), 235 NR 192 (FCA) where the application was supported only by an affidavit sworn by a paralegal in the applicant's counsel's law firm. The Federal Court of Appeal held (at para 15):

> There is, in our view, much wisdom in the practice suggested by the Court in *Wang v. Canada (Minister of Employment & Immigration)*, and adopted by the judges of the Trial Division to require the evidence of the intended immigrant himself in matters related to visa officers' decisions "unless the error said to vitiate the decision appears on the face of the record.
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> (footnote omitted)

See also *Nelson v Commissioner of Corrections* (1996), 206 NR 180 (FCA) at para 5.

[27] In *Turcinovica v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 164 [*Turcinovica*], Justice Dawson provided the following summary of the law:

> [11] At the commencement of oral argument counsel for the Minister submitted that the application for judicial review should be dismissed because it was not supported by a proper affidavit. Ms. Turcinovica had filed no affidavit and the application was supported by the affidavit of Ms. Turcinovica's lawyer's assistant. This was said to fall short of the obligation on an applicant to produce an affidavit based on personal knowledge. In consequence, it was urged on the Minister's behalf that the application should be dismissed because it was not supported by a proper affidavit.
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> [12] The failure of an application to be supported by affidavits based on personal knowledge has been held not to result automatically in dismissal of an application for judicial review:

> see: *Huang v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 788 (F.C.T.D.); *Moldeveanu v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R 192 (F.C.A.); *Ominayak v. Lubicon Lake Indian Nation*, [2000] F.C.J. No. 247 reversed without comment on this point (2000) 267 N.R. 96 (F.C.A.).
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> [13] In the present case, I am satisfied that the affidavit before the Court is sufficient to establish the fact of the application and its rejection. I am not, therefore, prepared to dismiss the application on this basis.
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> [14] It is important to stress that where there is no evidence based on personal knowledge filed in support of an application for judicial review, any error asserted by an applicant must appear on the face of the record. See: *Moldeveanu*, *supra*, at para. 15.
>
> [15] This reflects the requirement of Rule 81(1) of the *Federal Court Rules, 1998* that, except on motions, affidavits must be confined to facts within the personal knowledge of the deponent.

See also *Zheng v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1152 at paras 4-5 [*Zheng*].

[28] Judicial review was dismissed in both *Turcinovica* and *Zheng*; however, there are several examples where the Court has granted judicial review despite the lack of a personal affidavit from the applicant: see *Koky v Canada (Citizenship and Immigration)*, 2011 FC 1407 [*Koky*]; *Patel v Canada (Minister of Citizenship and Immigration)*, 2006 FC 224 [*Patel*]; *Sarmis v Canada (Minister of Citizenship and Immigration)*, 2004 FC 110 [*Sarmis*]; *Ly v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1184 [*Ly*]. It is apparent in each of the cases that the Court was limiting its review to errors that appeared on the face of the record. For example, in *Patel*, the Court granted judicial review because the decision was not in accordance with Federal Court jurisprudence. In both *Koky* and *Sarmis*, the Court granted judicial review

because the Board applied the wrong legal test. In *Ly*, the Court granted judicial review because the Board made findings of fact that were inconsistent with the applicant's evidence, despite the lack of a negative credibility finding.

[29] In light of the above jurisprudence, I have also examined the transcript of the hearing to see if there is any evidence of confusion, misunderstanding or unfairness apparent on the face of the record.

[30] The general jurisprudence as to whether an applicant has received a fair hearing before the Board was recently summarized by the Court in *Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 274 [*Navaratnam*]:

> [36] Secondly, the applicants submit that the Board failed to meet the greater care and duty owed to self-represented claimants during the refugee hearing. In support, they cite *Nino*, *Austria*, *Mervilus*, *Siloch* and *Nemeth*.
>
> [37] This Court has repeatedly held in immigration matters that the right to counsel is not absolute (*Mervilus* at paragraphs 17 to 25). Madame Justice Danièle Tremblay-Lamer stated in *Austria* at paragraph 6 that "[w]hat is absolute, however, is the right to a fair hearing. To ensure that a hearing proceeds fairly, the applicant must be able to "participate meaningfully"." (see *Canada (Minister of Citizenship and Immigration) v Fast*, 2001 FCT 1269 at paragraphs 46 and 47, [2002] 3 FC 373).
>
> [38] In *Nino*, although this Court ruled an adjournment should be granted, it was based on the fact that counsel for the applicant had requested an adjournment, but the Board proceeded with the hearing in the absence of counsel. Similarly in *Mervilus*, an adjournment was requested due to counsel's unavailability and the Board erred in not granting it. Also, in *Siloch*, this Court found the Board's denial of the applicant's request for adjournment was unreasonable because it erred in penalizing her for her counsel's previous poor behaviour. These cases can be distinguished factually because there was no request for adjournment in the present case.

[39] As for *Austria*, at paragraphs 8 and 9, this Court ruled the Board in that case did not breach procedural fairness in allowing a self-represented claimant to proceed without counsel after the Board confirmed the claimant's readiness and adequately explained the hearing process. The proposition from this case does not help the applicants' argument in any way.

[40] In *Nemeth*, this Court allowed the judicial review and explained in paragraph 10 that "[t]he Board was aware that the Nemeths had been represented up until just prior to the hearing" but it was not "alive to the risk that the claimants were ill-prepared to represent themselves." Mr. Justice James O'Reilly found procedural fairness was breached because "[u]nder the circumstances, [the Board] had an obligation to ensure that the Nemeths understood the proceedings, had a reasonable opportunity to tender any evidence that supported their claim and were given a chance to persuade the Board that their claims were well-founded."

[41] Here, the applicants argue the Board breached procedural fairness: 1) the Board did not explain the proceedings; 2) it did not help them navigate through the process; 3) it was not alert as to whether the applicants comprehended the proceedings; 4) it invited them to make final submissions; and 5) it did not offer an adjournment.

[42] In the present case, I do not find that the Board conducted the hearing in such a way as to breach procedural fairness. First, I am satisfied that the Board did explain the process to the applicants. There are multiple points as shown from the record that the Board helped them navigate during the hearing, such as on page 159 at the beginning of the hearing and on page 201 near the end of the hearing. Second, although there are multiple times during the hearing that the Board required the applicants to clarify and explain their answers, the hearing as an entirety as reflected by the record does not show that the applicants failed to comprehend the proceeding. Third, I see the Board's invitation to the applicants to make final submissions in support of their claim as its attempt in guiding the applicants through the process, as opposed to being inappropriate as alleged by the applicants. Lastly, in the absence of an adjournment request, the Board is not required to offer an adjournment whenever there is a case involving a self-represented claimant. In my view, to find otherwise would result in a tremendous burden on the Board and the refugee claim process. Here, similar to *Austria*, the Board met its obligation by confirming the applicants were ready to proceed without counsel (certified tribunal record, page 158). Therefore, the hearing was fair and the Board's conduct did not breach procedural fairness.

[31] The Applicant relies on a number of cases to establish the Board's obligation to ensure that he had a fair hearing, some of which the Court refers to above in *Navaratnam*. I will review the cases below in some more detail.

[32] In *Mervilus*, above, the Court held that the following factors needed to be considered when refusing an applicant's request for an adjournment to retain counsel:

> [25] The following principles can therefore be drawn from the case law: although the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.
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> [26] All of these factors are present in this case. The purpose of the hearing was to establish that the applicant had met the conditions for the stay. Apparently unbeknownst to the applicant, it was also a hearing to decide the appeal of the deportation order. The member brought out the shortcomings in the file; nobody argued the favourable points. The applicant learned just the day before the hearing that he would appear alone. The consequences are very serious: by removing the applicant from Canada, he is removed from the only family he has, since he no longer has family in Haïti. Moreover, he is removed from his children. The first decision in 1997 referred to the applicant's limited intellect, also an obstacle to his integrating easily in society. Reviewing the transcript, we cannot believe for an instant that the applicant had the right to a fair hearing, since he was unable to argue his case. Moreover, I would add that the applicant had a reasonable expectation of a postponement, since he had always appeared accompanied by counsel.
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> [27] The applicant had taken some measures to settle the social security debt. He had a job, but no evidence. The applicant could not express himself correctly or organize his presentation. He did not have in hand the evidence that he had given to his counsel. For six years, he had the right to a stay of execution of the removal order, in part due to the representation by counsel who had argued his case every year. He was obviously absolutely ill-equipped to deal with the issue of the appeal which was decided, apparently

> without his awareness of it. He did not contact counsel until he received the written decision on October 13 (even though the decision was given orally on September 16). It is difficult to believe that he immediately grasped the meaning of the member's words:
>
> > [TRANSLATION]
> >
> > The stay is therefore set aside and the appeal is dismissed and the deportation order is enforceable. So, I thank you, I hope you have a nice day.
>
> [28] In my view, it is most unfair to close the file definitively without giving him the chance to be heard by an impartial tribunal.

[33] In *Austria*, above, the Court dismissed the judicial review because it found that the applicant had understood the issues at hand and received a fair hearing. The applicant had initially been represented by counsel. His counsel withdrew one day before the scheduled hearing. The applicant was granted an adjournment to obtain counsel. The applicant appeared alone for the rescheduled hearing and said that he was prepared to proceed without counsel. In dismissing the judicial review, the Court noted:

> [8] I would note first that it is clear from the transcript that the applicant unmistakably indicated that he was ready to proceed without counsel at the hearing of April 20, 2005. Moreover, no adjournment was requested and, contrary to the applicant's suggestion, there is no indication that he was under any pressure to proceed. He cannot now complain about his choice when he had every opportunity to do so at the hearing.
>
> [9] Additionally, I am satisfied that the Board took the necessary precautions to ensure that the applicant was able to participate meaningfully and that the hearing proceeded fairly. There was an interpreter present. The presiding member explained the manner of proceeding, the burden of proof, the five Convention refugee grounds and the definition of a person in need of protection as well as the importance of credibility in very straightforward terms. During the hearing, the Board took the necessary time to ensure the applicant understood the materials, for example, his personal information form. The Board noted the

> evidence which was previously submitted by the applicant's former counsel. The Board also gave the applicant the opportunity to introduce his own documentary evidence. Finally, on more than one occasion, the Board asked the applicant if he understood what was asked of him, to which he consistently replied in the affirmative…
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> [10] In sum, the transcript shows that special attention was paid to ensuring that the applicant understood the issues at hand and that, as an unrepresented claimant, he received a fair hearing.

[34] In *Conseillant v Canada (Minister of Citizenship and Immigration)*, 2007 FC 49, the Court granted judicial review because the applicant had been denied a fair hearing. The applicant was illiterate, she had not reviewed any of the documentation, she told the Board that she did not understand the proceeding and been unable to prepare, and said that she would like to have counsel but she did not know how to get counsel and she would take one if legal aid would give her one. The Minister's counsel suggested an adjournment because the applicant had not submitted any documents or even properly filled out her Personal Information Form. The Minister said that the missing information was crucial to the hearing. The proceeding had never been adjourned before. The Board rejected the request and held the hearing. The Court found that the applicant had been denied a fair hearing given how obviously ill-prepared she was and the fact that she did not understand the nature of the proceedings.

[35] In *Costeniuc*, above, the applicant was represented by counsel. The Board had granted an adjournment when counsel was unable to appear for health reasons. On the day before the rescheduled hearing, counsel requested another adjournment because she would, again, be unable to attend for health reasons. The IAD did not respond to the request. It asked the applicant if he

was prepared to proceed without counsel, and he said yes. However, he also advised the IAD that:

> [10] … he had not spoken to counsel, had not seen or reviewed the 300-page record (except during the five-minute adjournment the IAD afforded him), had not brought any witnesses with him other than his common-law spouse (Ms Ritter had planned to call ten witnesses), did not understand the difference between challenging the merits of the ID decision and raising H&C grounds, and did not know what to say on his own behalf. In his closing submissions, he simply stated that he was hurt by the critical submissions presented by counsel for the Minister. He tried to explain why, but the panel told him "it is not the time for that." However, the Board did give Mr Costeniuc a chance to submit additional documentary evidence after the hearing.
>
> [11] In my view, the circumstances here are comparable to those in *Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206, and *Nemeth v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, where the Court recognized an overarching responsibility to ensure a fair hearing for unrepresented applicants.
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> [12] Here, the IAD did not expressly address the possibility of an adjournment. Ms Ritter had requested one in writing, but the IAD never considered that request. It simply asked Mr Costeniuc if he was prepared to proceed without her.
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> [13] In addition, the matter before the IAD was a serious one. Mr Costeniuc's continued residence in Canada with his spouse and child was at stake.
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> [14] Further, there were complex legal issues involved, including the validity of the ID's decision, as well as the various H&C factors that were in play: Mr Costeniuc's establishment in Canada, including his business and financial circumstances; the best interests of a Canadian-born child; and the overall hardship to each of the family members if Mr Costeniuc were removed from Canada.
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> [15] Based on my reading of the transcript, Mr Costeniuc was ill-prepared to address those issues in any serious way. He had not had any meetings with counsel. He had been expressly led to believe, based on several undertakings to him, that she would either be present at the hearing or would find someone to replace her. Not having heard anything to the contrary, he naturally

> expected her or her proxy to be there. Because she had missed several other hearings, Mr Costeniuc would not have been surprised that she was unavailable. At the same time, he could not have assumed, without specific notice, that she would not appear that day. While Ms Ritter appears to have made efforts to inform the IAD and counsel for the Minister of her circumstances, there is no evidence that she alerted Mr Costeniuc.
>
> [16] Therefore, Mr Costeniuc is entitled to a new hearing. While he had no absolute right to counsel, he had an undeniable right to a fair hearing. Looking at the proceedings as a whole, I am satisfied he was denied that right.

[36] Similarly, in *Nemeth*, above, the applicants engaged a lawyer shortly before their hearing and the lawyer was unable to attend. The lawyer requested an adjournment. The Board did not respond. The Court found that the applicants had been denied a fair hearing given how apparent it was throughout the course of the hearing that the applicants were ill-prepared for the hearing.

[37] My review of the case law suggests that a hearing is fair so long as the applicant understands the nature of the proceeding and is prepared to represent him or herself. For self-represented litigants, this may include an obligation on the Board to explain the process to an applicant and to clarify the nature of the decision being made. The consequences of the decision and the complexity of the matter can have an impact in determining whether a hearing is fair.

[38] In my view, a review of the record leads to the conclusion that the Applicant received a fair hearing. While the consequences of the decision may be quite serious for the Applicant, the record reveals that the Applicant was prepared for the proceeding, understood the nature of the issue, and understood the principles that the Board needed to apply in determining whether the Applicant had reavailed himself of China's protection.

[39] The record reveals that there was no real complexity to this proceeding, and no new issues arose throughout the course of the hearing. The Board and Minister's counsel's explained what the Board would be required to consider in determining whether the Applicant had reavailed himself of China's protection. This included a review of the applicable case law, the principles, and policy documents, as well as an explanation in "simple English" (CTR at 250-256).

[40] The Board also provided the Applicant the opportunity to submit documentary evidence even though the deadline had long passed. The Applicant initially declined but ultimately submitted a copy of his passport (CTR at 233-234). He said that he was submitting it because he believed there were errors in the copy provided in the Minister's materials. It is apparent then that the Applicant had reviewed the disclosure package in preparation for the hearing.

[41] The clearest indication that the Applicant understood the proceedings lies in the Applicant's final submissions. The Applicant did not dispute that he had made the trips (they were established through both the stamps in his passport and his oral testimony), so the only issue before the Board was whether the Applicant's return trips to China constituted reavailment. The Applicant made submissions regarding whether his travel history met the test for reavailment (CTR at 258-261). He explained that the trips were not voluntary. He explained the circumstances of each trip, saying that they were all either emergencies or other pressing family matters. He also made submissions to the effect that he continued to fear persecution in China, despite the trips, because he had taken security measures to remain safe while in China. He also responded to the Minister's submissions. This suggests to me that the Applicant understood the

nature of the proceeding, the governing principles, and the evidence upon which the Board would render its decision. It was open to the Board to decide that the trips constituted reavailment of China's protection. The fact that the Applicant disagrees with the outcome does not mean that he was denied a fair opportunity to present his case.

[42] There is no indication, on the transcript, that the Applicant did not understand some element of the proceeding or the issue, or that there was a particular complexity in the case. Unfortunately, without an affidavit from the Applicant, all that the Court can examine is the transcript and it reveals that the Applicant had a good grasp of the proceeding and the particular issue of reavailment.

[43] It is also noteworthy that the Applicant himself did not seek an adjournment or any postponement of the hearing. The suggestion came from the Minister's counsel. After the Board explained why it was not prepared to grant the Applicant an adjournment, the Applicant responded that he totally understood and completely agreed with the Board's suggestion of a short recess instead (CTR at 257).

[44] In addition, there is no indication that the Applicant was ever represented or that he wished to be represented. In fact, when the Board asked the Applicant if he was prepared to proceed without counsel, the Applicant answered with an unequivocal "yes." Later in the hearing, the Applicant told the Board that "Even with the presence of lawyer [*sic*] I will say the same thing" (CTR at 259), suggesting that he did not feel he required counsel to present his case.

[45] The Applicant was prepared, he had clearly reviewed the disclosure package and had considered his own evidence, he answered the questions asked of him, he made final submissions which addressed the legal test and responded to Minister's counsel's submissions. In my view, the Applicant received a fair hearing before the Board.

[46] Of course, the Court shares the concerns of Applicant's counsel that, notwithstanding what the Applicant said and did, he still may not have understood the full nature of the proceedings or received a fair opportunity to make his case. It is my view that applicants are always better-served when they have qualified counsel. It seems intuitive that anyone who really understood the seriousness of the situation would not choose to represent themselves. But in this case, that intuitive concern may have an answer. In his application to sponsor his wife, the Applicant said that if the application failed "he would return to China where he would perhaps start a business with [his wife]" (CTR at 193). At his cessation hearing, the Board asked the Applicant whether the IAD had accurately stated his intentions at the time. The Applicant answered, "Yes" (CTR at 245). So it appears that the Applicant is clearly not someone who fears persecution to the extent that he is not prepared to go back to China for family reasons.

[47] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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