Federal Court  Cour fédérale

Date: 20070326

Docket: IMM-3255-06

Citation: 2007 FC 317

[ENGLISH TRANSLATION]

Montréal, Quebec, March 26, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

CARLOS ARNOLDO REYES RIVAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) that the applicant is not a Convention refugee or a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), and indeed that he is

excluded because he falls under Articles 1F(*b*) and 1F(*c*) of the *United Nations Convention Relating to the Status of Refugees* (the Convention).

[2] This decision also disposed of the refugee claims of the applicant's aunt, Myrna Rivas (IMM-3257-06), as well as the applicant's daughter, Michelle Anaïs Reyes (IMM-3256-06).

The facts

[3] The applicant, Carlos Arnoldo Reyes Rivas, born in 1969, is a citizen of Guatemala.

[4] He alleges the following facts in support of his claim.

[5] In September 1992, he married a French citizen, Isabelle Auclair, in France. They had two children in Guatemala, Michelle Anaïs Reyes, born in 1998, and Nicholas Xavier Reyes Auclair, born in 2000.

[6] The applicant allegedly made a significant loan ($86,000 in American dollars) to his father-in-law in 1997, which was never repaid. This situation caused financial problems that led to major problems between the couple.

[7] In September 2001, the applicant allegedly learned that his wife intended to leave the country with the children, but that the events of September 11, 2001, forced them to remain in the country.

[8] On September 20, 2001, Ms. Auclair allegedly attempted to leave the matrimonial home with the two children. Ms. Auclair left only with Nicholas, as the applicant's mother had prevented her from taking Michelle; the applicant has not seen his son since that day.

[9] On September 27, 2001, the applicant filed a complaint letter with the Guatemalan authorities, accusing his in-laws in France, as well as senior French and Guatemalan officials, his wife's lawyers and those of the French embassy in Guatemala, of corruption and embezzlement.

[10] The applicant alleges that after filing that letter, he was pursued and threatened by the Guatemalan National Police. The applicant's aunt, Myrna Rivas (IMM-3257-06), allegedly had the same problems with the police because of her association with her nephew.

[11] Because of his problems with the police, the applicant left his country for El Salvador with his daughter Michelle in June 2002, where they were joined by the applicant's aunt. The three of them came to Canada on September 8, 2002, where they claimed refugee protection shortly after their arrival.

[12] On March 13, 2003, the Solicitor General intervened in the refugee claim to raise the applicant's possible exclusion under section 98 of the Act, based on the application of Article 1F (*b)* of the Convention. The exclusion was based on the fact that there were serious grounds to

believe that the applicant committed a serious non-political crime outside of Canada with regard to the alleged abduction of his daughter**,** Michelle Anaïs Reyes.

[13] Meanwhile, the applicant filed an application for separation as to bed and board with the Superior Court of Québec (No.: 500-04-033044-034) and a motion for custody of Michelle as an interim measure. On April 21, 2004, the Court granted custody of Michelle to the applicant. In its decision, the Court accepted the version of the facts submitted by the applicant, and dismissed the version submitted by his ex-wife, Ms. Auclair. The Court determined that Ms. Auclair lacked credibility, and rejected her testimony. The Court determined that Ms. Auclair had prepared to leave Guatemala with the two children unlawfully and therefore that the applicant fled with their daughter Michelle was not unreasonable.

[14] After this order by the Superior Court of Québec, on May 11, 2004, the Solicitor General withdrew the Notice of Intervention regarding the applicant's exclusion.

[15] On June 3, 2004, the RPD Member informed the applicant that notwithstanding that the Solicitor General withdrew, the RPD intended to consider the application of the exclusion clauses according to Articles 1F (*b*) and 1F(*c*) of the Convention. The Minister was not notified of this.

[16] A motion for the member's recusal was filed in July 2004 with the IRB**,** and then was raised by the applicant during the hearing before the RPD. This motion was dismissed by the member in an interlocutory decision on October 6, 2004.

The RPD's decision

[17] In dealing with the applicant's refugee claim, the RPD also disposed of the claims of his daughter Michelle Reyes, and of his aunt Myrna Reyes.

[18] The RPD described the applicants' story as [TRANSLATION] "fraught with inconsistencies, implausibility, and contradictions, for which they could not provide explanation that could be found reasonable and satisfactory" and that they were [TRANSLATION] "hesitant, vague, and unclear" when confronted. It found that the applicants' testimony was not [TRANSLATION] "credible with regard to important and major aspects tied to their refugee claim". Accordingly, the RPD found that the applicants' refugee claims, which were all connected, had to be denied.

[19] The RPD also found that the applicant is excluded from the protection afforded by the Act pursuant to Articles 1F (*b*) and 1F(*c*) of the Convention, because he had abducted his daughter Michelle.

Issues

1. Did the RPD breach the rules of procedural fairness in showing bias at the hearing?

2. Did the RPD err in law in the application of 1F (*b)* and 1F(*c)* of the Convention?

Analysis

Preliminary issue

[20] The respondent submits, first, that given that the applicant did not raise the issue of the tribunal's bias at the first opportunity, namely at the hearing, it is prevented from doing so in this case.

[21] The obligation to raise a reasonable apprehension of bias at the earliest opportunity is a principle that is well established in the jurisprudence (*Canada v. Taylor*, [1990] 3 S.C.R. 892; *Hernandez v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 607 (F.C.T.D.) (QL); *Singh v. Canada*, 2005 FC 35, [2005] F.C.J. No. 59 (QL)).

[22] Yet, after reviewing the evidence in the record as well as the hearing transcript, I am satisfied that the motion for recusal was made by the applicant at the earliest opportunity and that this motion was dismissed by the member at the hearing on October 6, 2004.

1. The reasonable apprehension of bias

[23] When addressing issues involving a breach of procedural fairness or natural justice, the Court is not bound to carry out a pragmatic and functional analysis to determine the appropriate standard of review (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour*, [2003] 1 S.C.R. 539; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249). The Court must examine the specific circumstances in order to determine whether the tribunal respected procedural fairness and natural justice and, if it finds that there was a breach, the Court must refer the decision back to the tribunal in question.

[24] My colleague, Mr. Justice Michel Shore, in *Metuku v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 827**,** [2006] F.C.J. No. 1044 (QL) at paragraph 51, summarized the applicable principles as follows:

> In fact, the test for assessing impartiality is that of an informed person, viewing the matter realistically and practically and having thought the matter through. The grounds for an apprehension of bias must be serious, especially when, as in the case at bar, an administrative tribunal is involved. A serious allegation cannot be founded on mere suspicions (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at paragraphs 40-41 (Mr. Justice Louis de Philippe de Grandpré, dissenting); *R. v. Valente*, [1985] 2 S.C.R. 673, at paragraphs 11-12.)

[25] Further, I would add that tribunals benefit from a strong presumption of impartiality, and the party who argues it has the burden of establishing that the circumstances support a finding of a reasonable apprehension of bias (*Wewaykum Indian Band v. Canada*, [2003] S.C.R. 259, 2003 SCC 45).

[26] If the Court finds that there is a reasonable apprehension of bias, the decision must be set aside even if that decision does not appear to be patently unreasonable on the issue of inclusion. As Le Dain J. stated in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at para. 23:

> … the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision.

[27] Chief Justice Allan Lutfy recently reiterated this principle in *Jonas v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 398, [2006] F.C.J. No. 501(QL) where he stated at paragraph 9:

> Despite the member's negative finding concerning the genuineness of the hospital records, it is not "pointless" (*Yassine v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 949 (QL) (C.A.) at paragraph 10) to order a new hearing. Indeed, it is necessary to do so. In the words of my colleague, Justice Michel Shore: "Even, if the ultimate conclusion is the same as that of the Board, the means do not necessarily justify the ends and the ends do not necessarily justify the means." (*Nahimana v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 161 at paragraph 35).

[28] In this case, the applicant submits that the member showed his bias primarily through his hostile behaviour toward the applicant, his approach to the evidence in deciding to raise exclusion without the Minister's involvement, and in assigning little weight to the judgment and to the Superior Court's findings of fact.

(i) *The member's attitude*

[29] The applicant refers to some passages from the hearing transcript to demonstrate the member's adverse and hostile attitude.

[30] With respect to the hearing of May 31, 2005, it is true that a review of the transcript indicates that there was a confrontational atmosphere. However, the impatience betrayed by the member's words tends to indicate that he was trying to limit the applicant's questions to what was relevant to his refugee claim, and keep him within a reasonable timeframe.

[31] With respect to the hearing on June 21, 2005, it again reveals a degree of impatience from the member, caused by his perception that the applicant was intentionally delaying the RPD's work.

[32] With regard to impatience in a context like this, Madam Justice Judith Snider in *Martinez v. Canada ((Minister of Citizenship and Immigration)*, 2005 FC 1065**,** [2005] F.C.J. No. 1322 (QL) at paragraph 19 stated the following**:**

> … Members of the Board are entrusted with the responsibility of making decisions that have a profound impact on claimants who appear before them. With that responsibility comes a duty on Board members to conduct themselves according to high standards. Patience, respect and restraint should be components of best practices of the Board. …

[33] However, I recognize that in this case the hearings took place over an extended period of time and that the atmosphere was sometimes tense and difficult for all of the parties involved. I do not approve of the member's comments at certain times during this hearing but, considering

them in their context, I am not persuaded that they reach the level required to raise a reasonable apprehension of bias.

(ii) *The approach to the evidence*

[34] The applicant submits that the fact that the RPD decided to examine the issue of exclusion after the Solicitor General withdrew on May 11, 2004, without notifying the Minister as provided under the *Refugee Protection Division Rules,* SOR/2002-228 (the Rules), is problematic and that this approach was condemned by this Court in *Kanya v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1677, [2005] F.C.J. No. 2074 (QL).

[35] The relevant provision in the Rules is rule 23 that states:

23. (1) If the Division believes, before a hearing begins, that there is a possibility that sections E or F of Article 1 of the Refugee Convention applies to the claim, the Division must notify the Minister in writing and provide any relevant information to the Minister.	23. (1) Si elle croit, avant l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur les réfugiés s'appliquent à la demande d'asile, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents.
(2) If the Division believes, at any time during a hearing, that there is a possibility that section E or F of Article 1 of the Refugee Convention applies to the claim, and the Division is of the opinion that the Minister's participation may help in the full and proper	(2) Si elle croit, au cours de l'audience, qu'il y a une possibilité que les sections E ou F de l'article premier de la Convention sur les réfugiés s'appliquent à la demande d'asile et qu'elle estime que la participation du ministre peut contribuer à assurer une

hearing of the claim, the Division must notify the Minister in writing and provide the Minister with any relevant information. (Emphasis added.)	instruction approfondie de la demande, la Section en avise par écrit le ministre et lui transmet les renseignements pertinents. (Je souligne.)

[36] First, I note that this case is different from *Kanya*, *supra*, because the member raised the application of the exclusion during the hearing, contrary to *Kanya*. Further, the applicant does not allege that he was not given time to prepare in view of the fact that one or several exclusion clauses were being considered.

[37] When an issue of exclusion is raised during the hearing, Rule 23(2) allows a certain discretion for the RPD to determine whether the Minister's participation will help it deal with the issue of the applicant's exclusion.

[38] On this point, in *Arica v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 670 (C.A.)(QL) at paragraph 8, Mr. Justice Joseph Robertson, for the Federal Court of Appeal, referring to the Rules that applied at the time, found:

> … Rule 9(2) dictates that if the refugee hearing officer or members of the panel hearing the claim are of the opinion that Article 1F might be applicable, the former shall notify the Minister of such. If the matter of exclusion should, however, arise during the hearing then, pursuant to Rule 9(3), the presiding member has … discretion as to whether to direct the refugee hearing officer to notify the Minister. Should the presiding member decide against giving notice to the Minister then it is clear in law that the Board can make a determination with respect to the exclusion clause based on the evidence presented.
> (Emphasis added.)

[39] I agree that it may be problematic for the tribunal to proceed without the Minister since the Minister usually has the burden of proof. As the applicant argues, it is a situation that can force the member to [TRANSLATION] "descend into the arena". As Lorne Waldman states in Immigration Law and Practice, Vol. 1, looseleaf (Markham, Ont.: Butterworths, 1992), at paragraph 8.511:

> … Since the burden of proof falls squarely on the Minister, it is certainly arguable that it is not appropriate for tribunal members themselves to engage in an investigation with respect to the exclusion matters. For the tribunal members to do so would result in their becoming prosecutors seeking to establish if the claimant falls within the exclusion clauses. …

[40] Despite all of this, the jurisprudence recognizes that the Board may make a decision on the issue of exclusion without the Minister's participation.

[41] In this case however, I cannot help but note that the member, knowing that the Minister considers that the exclusion is no longer an issue because he withdrew his intervention, decides of his own accord (*proprio motu*) to serve the notice on the applicant without advising the Minister. In such a situation, proceeding alone, the member had to be cautious in his approach to the evidence to avoid any appearance of bias.

[42] Yet, the member called his own witness, Ms. Auclair, to testify against the applicant and only on the issue of exclusion.

[43] I recognize that according to Section 165 of the Act, and the related provisions of the *Inquiries Act*, R.S.C. 1985, c. I-11 (see relevant provisions in the Appendix), a member has the authority to summon witnesses that the member considers necessary to conduct the investigation thoroughly.

[44] It is clear that the tribunal has broad discretion in its hearings. Waldman, *supra*, says at paragraph 9.331:

> The decisions of the court to date have indicated that the courts are prepared to give broad latitude to the tribunal in its conduct during the course of the hearing, and that the court will only intervene in the most obvious cases of inappropriate conduct.

[45] In *Martinez, supra,* at paragraph 12, after considering the jurisprudence relating to bias, Snider J. states the following**:**

> A unifying thread that one can draw from the jurisprudence is that the Board is afforded considerable latitude in how it conducts its hearings. A review of the cases also demonstrates that, where an allegation of this nature is raised, "[t]he dividing line between permissible and impermissible behaviour is one of fact" (*Hundal*, at para. 10) . . .

[46] First of all, it is disconcerting to note that Ms. Auclair's testimony, which allegedly could have been relevant to the applicant's claim, did not come into play until the member himself decided to raise exclusion.

[47] Further, the Superior Court found that Ms. Auclair's testimony was not credible. Although the RPD is not bound by the Superior Court judgment, the fact remains that Ms.

Auclair, as well as the applicant, testified in person before the Superior Court. Kirkland J. therefore had the opportunity to examine both parties *de visu*. Following the testimony, the Superior Court accepted the applicant's version of the facts and awarded him interim custody of Michelle. Contrary to the Superior Court, the member, who only heard Ms. Auclair on the telephone, found her testimony [TRANSLATION] "credible and trustworthy".

[48] Another disturbing detail is that the tribunal allowed Ms. Auclair to submit evidence to the tribunal, including some evidence that it considered relevant to the outcome of the case that had been summarized in his claim by the refugee protection officer (RPO), assisted by the interpreter. In my opinion, this evidence could not have probative value since the tribunal could not verify whether the summary was consistent with the documents filed.

[49] Further, from the outset he accepts Ms. Auclair's detailed affidavit filed with the Superior Court, taking the facts as proven, even though Kirkland J. had found that Ms. Auclair's version was not credible.

[50] Moreover, Ms. Auclair submitted a version of the facts to the RPD that was not consistent with the one submitted to the Superior Court. However, the member accepted all of Ms. Auclair's testimony and her explanations for all of the contradictions as well as the irregularities in her documentary evidence.

[51] He disregarded all of the contradictions, accepting Ms. Auclair's explanation to the effect that she trusted her lawyers, and that she was preoccupied with getting her daughter back, and that given the circumstances and that four years had gone by between the events at issue and her testimonial evidence before the tribunal, that it was understandable she would get the details mixed up. Despite this, I think that her concerns as well as the passage of time cannot satisfactorily explain why she submitted two different versions in the two proceedings.

[52] With respect to one of the significant documents submitted by Ms. Auclair, namely the order dated September 20, 2001, by the Guatemalan family court trial judge (ordering the applicant to return his daughter Michelle to Ms. Auclair), Ms. Auclair filed two different versions of this document with the Superior Court and with the Court of Appeal. Both versions were before the RPD. One of them contained an addition authorizing entrance into the home, the other not. The orders do not have the same seals, and the judge's signature is clearly not the same on both versions. The member recognized that there were two different versions of the document. However, he considered the issue of the addition between the lines and found that it was only a clerical error that did not cast doubt on the authenticity of the document.

[53] I cannot accept such a cavalier approach to the evidence when addressing a document of capital importance in the case. At the very least, if he did not want to authenticate the document, the member should not have assigned it any probative value since it was impossible, on its face, to determine whether the document had been altered.

[54] With respect to the cheque for 250,000 Quetzales that Ms. Auclair allegedly gave to Ms. Myrna Rivas on September 20, 2001, this piece of evidence was paramount before the Superior Court to assess Ms. Auclair's credibility. Ms. Auclair denied that she signed it and stated that it was forged. However, when she was confronted with the original of the cheque as well as an expert who authenticated her signature at the hearing, Kirkland J. stated that she [TRANSLATION] "is visibly distraught and must recognize her signature". According to Kirkland J., [TRANSLATION] "this is a turning point in the investigation held before the Court" (at para. 47 Superior Court decision, *supra*).

[55] Before the RPD, Ms. Auclair gave explanations that were radically different from those given to the Superior Court. She stated that it was a blank cheque that she had given to her husband and that it he had typed in the amount and the name of the aunt. Once again, rather than accept the Superior Court finding with regard to Ms. Auclair's credibility on this point, the RPD accepted her explanation.

[56] I recognize the RPD's expertise in credibility matters and that it has considerable latitude in conducting its hearing. However, considering all of the factors mentioned above, it is my opinion that the applicant met his burden and shifted the presumption of impartiality that was in the RPD's favour. In my opinion, the RPD's approach to the evidence in this case raises a reasonable apprehension of bias and its decision must be set aside.

2. The application of Articles 1F(*b*) and 1F(*c*)

[57] In its decision, the RPD notes the applicant's submissions that he is not subject to the exclusion set out in Article 1F(*b*), because in Guatemala a parent cannot be criminally liable for having possession of his child without the consent of the other parent.

[58] On this point, the tribunal recognizes that the documentary evidence supports the applicant's position, and shows that a parent can only be charged with the abduction of his child if that parent is deprived of parental authority in accordance with subsection 209(1) of the [TRANSLATION] *Criminal Code of Guatemala.*

[59] The RPD accepts that the applicant has always had parental authority with respect to Michelle Anaïs, that he was never deprived of parental authority and that [TRANSLATION] "… could not be criminally charged with abduction under the laws of Guatemala…".

[60] However, the RPD finds [TRANSLATION] "that the legislative situation of the country of asylum is the one that must be taken into account in the assessment of whether or not to apply the exclusion set out in Article 1F(*b*)".

[61] It then determined that under sections 282 and 283 of Canada's *Criminal Code*, the applicant would be charged with abduction, a serious non-political crime, referred to in Article 1F(*b*).

[62] At paragraph 6 in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1180, the Court of Appeal refers to the following passage by Professor Hathaway:

> The common law criminality exclusion [Article 1F(b)] disallows the claims of persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status. This exclusion clause is not a means of bypassing ordinary criminal due process for acts committed in a state of refuge, nor a pretext for ignoring the protection needs of those whose transgressions abroad are of a comparatively minor nature. Rather, it is simply a means of bringing refugee law into line with the basic principles of extradition law, by ensuring that important fugitives from justice are not able to avoid the jurisdiction of a state in which they may lawfully face punishment . . ..
> Second, the extradition-based rationale for the exclusion clause requires that the criminal offence be justiciable in the country in which it was committed.
>
> (Emphasis added.)

[63] Also, a criminal offence must be justiciable in the country where it was allegedly committed for it to fall under Article 1F(*b*). In this case, the RPD clearly found that the crime of child abduction was not committed by the applicant in Guatemala in the circumstances of this case, but it nevertheless found that he was a person referred to in Article 1F(***b)***.

[64] In my opinion, the RPD clearly erred in its analysis and its finding regarding the applicant's exclusion under Article 1F(*b*).

[65] With respect to its analysis of Article 1F(*c*), according to the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at

paragraphs 66 and 67, there are two categories of the acts contemplated by paragraph F(*c*) of Article 1 of the Convention:

- Those for which there is a reasonable consensus of the international community, in a widely accepted international agreement or a United Nations resolution, or in other international law sources such as determinations by the International Court of Justice;
- Those that a tribunal can itself recognize as serious, sustained and systemic violations of fundamental human rights constituting persecution.

[66] In this case, the member's analysis under Article 1F(*c*) was based on the first category.

[67] The factual cornerstone of his analysis regarding the applicant's exclusion under Article 1F(*c*) of the Convention is based on his finding of fact that the applicant had abducted his child Michelle Reyes in violation of the restitution order by the family court of Guatemala dated September 20, 2001.

[68] On this point, referring to the [TRANSLATION] "original" order, which was filed with the RPD by Ms. Auclair, the member stated at paragraph 286 of his decision:

> [TRANSLATION]
> According to the evidence, the applicant was well aware that his wife, Isabelle Auclair, assisted by her lawyers and the Guatemalan National Police were looking for Michelle Anaïs to be returned to her, in accordance with the restitution order issued on September 20, 2001.

[69] And again, at paragraph 287:

> [TRANSLATION]
> … the applicant's physical custody of Michelle Anaïs violated the restitution order dated September 20, 2001, which he was aware existed, although he claims the contrary. The applicant, who was in the possession of his daughter Michelle Anaïs, was the subject of the restitution order, but he used every possible means available to him to avoid its service and enforcement.

[70] From this evidence, the member determined that the fact that he had his daughter Michelle with him, after the order in question was issued, made him guilty, as it appears in paragraph 292 of the decision:

> [TRANSLATION]
>
> The tribunal considers that the applicant's situation since September 20, 2001, satisfies the elements of the criminal offense of the abduction of a child under fourteen set out in sections 282 and/or 283 of Canada's *Criminal Code*. In fact, as of September 20, 2001, the applicant could no longer claim that he had legal custody of her. The applicant took, concealed, harboured, and detained the child Michelle Anaïs, with the intent to deprive the mother Isabelle Auclair, who was to have custody of the child as of September 20, 2001, of her possession.

[71] Yet, it was established at the hearing before the RPD that different versions of this order were filed by Ms. Auclair with the Superior Court of Québec, and with the Court of Appeal. As I stated earlier, the judge's signature, the added text, as well as the seals on the documents, distinguish the two versions of this document.

[72] Despite the critical importance of this order and the egregious issues with it, the member did not seek to authenticate it.

[73] In my opinion, given the importance of this evidence and the nature of the issues associated with it, it was patently unreasonable to find that Article 1F(*c*) applied on this basis alone.

[74] I find that the RPD erred in its analysis on this point, and its finding is therefore set aside with respect to the exclusion under Article 1F(*c*).

[75] For all of these reasons, the application for judicial review is allowed. The decision is set aside and the matter referred back for redetermination by a differently constituted panel.

JUDGMENT

The application for judicial review is allowed. The decision is set aside and the matter referred back for redetermination by a differently constituted panel.

"Danièle Tremblay-Lamer"
Judge

APPENDIX

Immigration and Refugee Protection Act, S.C. 2001, v. 27	***Loi sur l'immigration and la protection des réfugiés***, S.C. 2001, ch. 27
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**96.** A qualité de réfugié au sens de la Convention -- le réfugié -- la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : *a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; *b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
…	**[…]**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : *a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes

person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) la menace ou le risque ne résulte pas de sanctions légitimes – sauf celles infligées au mépris des normes internationales – et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

…

[…]

98. A person referred to in section E and F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

…

[…]

165. The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing.

165. La Section de la protection des réfugiés et la Section de l'immigration et chacun de ses commissaires sont investis des pouvoirs d'un commissaire nommé aux termes de la partie I de la *Loi sur les enquêtes* et peuvent prendre les mesures que ceux-ci jugent utiles à la procédure.

Inquiries Act,
R.S.C., 1985, v. I-11

Loi sur les enquêtes,
R.S.C. (1985), ch. I-11

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to

(*a*) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(*b*) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which

4. Les commissaires ont le pouvoir d'assigner devant eux des témoins et de leur enjoindre de :

a) déposer oralement ou par écrit sous la foi du serment, ou d'une affirmation solennelle si ceux-ci en ont le droit en matière civile;

b) produire les documents et autres pièces qu'ils jugent nécessaires en vue de procéder d'une manière approfondie à l'enquête dont ils sont chargés.

they are appointed to examine.

5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

5. Les commissaires ont, pour contraindre les témoins à comparaître et à déposer, les pouvoirs d’une cour d’archives en matière civile.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3255-06
STYLE OF CAUSE:	CARLOS ARNOLDO REYES RIVAS v. M.C.I.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 13, 2007

REASONS FOR JUDGMENT AND JUDGMENT: TREMBLAY-LAMER

DATED: March 26, 2007

APPEARANCES:

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Daniel Latulippe	FOR THE RESPONDENT

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