Date: 20070119

Docket: IMM-2102-06

Citation: 2007 FC 49

Ottawa, Ontario, January 19, 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

ANNE ROSE-MARIE CONSEILLANT

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] In some cases, the absence of legal counsel or the refusal to grant an adjournment so that a person can obtain counsel has been considered to be a breach of natural justice. For example, in *Austria v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 423, [2006] F.C.J. No. 597 (QL), Madam Justice Danièle Tremblay-Lamer states the following:

> [6] As it is clear from the decision, which provides that state-funded legal aid is only constitutionally mandated in some cases, the right to counsel is not absolute. In immigration matters specifically, this Court has repeatedly held that the right to counsel is not absolute: *Mervilus v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206 (CanLII), 2004 FC 1206, [2004] F.C.J. No. 1460 (F.C.)(QL) at paras. 17-25 where Justice Sean Harrington reviews the law regarding the right to counsel. What 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": *Canada (Minister of*

Citizenship and Immigration) v. Fast (T.D.), 2001 FCT 1269 (CanLII), 2001 FCT 1269, 2001 FCT 1269 (CanLII), [2002] 3 F.C. 373 (F.C.) at paras. 46-47.

NATURE OF THE JUDICIAL PROCEEDING

[2] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision by the Immigration and Refugee Board (Board) dated March 13, 2006, that the applicant is not a Convention refugee or a person in need of protection (sections 96 and 97 of the Act).

FACTS

[3] The applicant, Anne Rose-Marie Conseillant, is a citizen of Haiti. She submits that on September 15, 2002, thieves broke into her home to steal her belongings. They also raped her daughter and tortured Ms. Conseillant as well as her daughter.

[4] This event prompted Ms. Conseillant to leave her country. She arrived in Canada on September 18, 2002, and claimed refugee status on September 27, 2005.

[5] The Minister alleged that Ms. Conseillant sent a “notification of counsel” dated October 30, 2005, in which she indicated that her counsel was Barthélémy Séjour. This information was also reiterated in her Personal Information Form (PIF), signed on November 2, 2005. In a notice to appear dated January 10, 2005, the applicant had been informed that her hearing would take place on February 27, 2006. Ms. Conseillant had four months to find counsel after she signed her PIF.

[6] The Board heard the refugee claim on February 27, 2006. At the beginning of the hearing, Ms. Conseillant, accompanied by Barthélémy Séjour, sought an adjournment in order to be represented by counsel rather than her immigration advisor. She testified that she had not known that she could retain the services of counsel, that she was illiterate and did not understand the procedural rules applicable for appearing before the Board.

[7] The refugee protection officer (RPO) then recommended that the member grant the adjournment given that Ms. Conseillant was not represented by counsel and that she had not properly filled out the PIF. The Board nevertheless refused the adjournment.

IMPUGNED DECISION

[8] The Board determined that the persecution feared by Ms. Conseillant is a risk faced by other individuals in her country and, accordingly, it refused the applicant's refugee claim *viva voce* that same day.

ISSUE

[9] Did the Board breach the principles of natural justice and procedural fairness in refusing Ms. Conseillant's request for an adjournment?

STANDARD OF REVIEW

[10] With regard to the issues involving the principles of natural justice, the pragmatic and functional analysis does not apply. However, the Court will intervene if the Board's determination was unreasonable, if there was a breach of the duty to act fairly or if there was an error of law

(*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL), at paragraphs 52-55).

ANALYSIS

[11] Ms. Conseillant argued that the Board breached the principles of natural justice and procedural fairness based on the fact that her right to counsel had been denied as a result of the Board's refusal to adjourn the hearing so that she could be represented by counsel.

(1) Refusal of the request for adjournment

[12] It is well established in law that the decision whether or not to allow an adjournment is a discretionary decision which must be made fairly. There is no presumption that would automatically entitle the applicant to an adjournment. The Court will not intervene with the refusal to grant an adjournment barring **exceptional circumstances** such as those described in *Siloch v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1993] F.C.J. No. 10 (QL). (See also: *Wagg v. Canada*, 2003 FCA 303, [2003] F.C.J. No. 1115 (QL), at paragraph 19).

[13] As such, even though it involved a show cause hearing, the principles raised by Madam Justice Carolyn Layden-Stevenson in *Ramadani v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 211, [2005] F.C.J. No. 251 (QL), apply to this case:

> [10] However, the RPD did not consider any of the other factors identified by the Federal Court of Appeal in *Siloch v. Canada (Minister of Employment and Immigration)* (1993), 151 N.R. 76 (F.C.A.) - whether the applicants had done everything in their power to be represented by counsel at the hearing; the number of previous adjournments granted (none in this case); the fault or blame to be placed on the applicants for not being ready; whether any previous adjournments were granted on a peremptory basis. The decision not to adjourn affected the applicants' ability to be represented by counsel at the show cause hearing. The consequences of an abandonment decision are not insignificant. It terminates a claim without consideration of its merits; a

> conditional removal order becomes effective; and, a claimant is barred from seeking refugee protection in the future.
>
> [11] **In my view, the RPD must, at a minimum, indicate that it has had regard to the relevant factors enumerated in *Siloch, supra*, before arriving at a negative decision. Its failure to do so constitutes a reviewable error.** I note that my colleagues Madam Justice Heneghan and Mr. Justice O'Keefe arrived at a similar conclusion in *Dias v. Canada (Minister of Citizenship and Immigration)* 2003 FC 84 and *Sandy v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1468 (CanLII), 2004 FC 1468.
>
> [12] Regarding the allegation that the refusal amounts to a denial of a right to counsel, I am persuaded that the circumstances in this matter fall within the reasoning of the Federal Court of Appeal in *DeSousa v. Canada (Minister of Employment and Immigration) (*1988), 93 N.R. 31 (F.C.A.) and Mr. Justice Rothstein, then of the Trial Division as it was then constituted, in *Afrane v. Canada* (Minister of Employment and Immigration) (1993), 64 F.T.R. 1 (T.D.). Broadly speaking, in those cases, the claimants were advised by counsel (in letters given to them shortly before the hearing or on the day of the hearing) that counsel would be unavailable for the hearing. The claimants presented these letters to the board at their respective hearings in support of their requests for adjournment. In each case, the requests were denied and the hearings proceeded without counsel. The decisions were subsequently quashed by the reviewing Courts on the basis that the claimants were denied their right to counsel and that the denial constituted a breach of procedural fairness and the principles of natural justice.
>
> [13] I would not go so far as to say that in all cases the mere production of a letter from counsel requesting an adjournment gives rise to a right to an adjournment. The RPD is the master of its own house and has the right to control its proceedings. However, it must, in its deliberations, weigh the factors militating in favour of and against the granting of the requested adjournment. That did not happen here. It is evident from the transcript that the applicants required representation, that they wished to be represented, and that they wanted to obtain representation through legal aid or otherwise. While the respondent's counsel valiantly tried to defend the decision by providing various reasons as to why the RPD could have decided as it did, as I have stated in other matters, the explanations for the decision must somehow be found to exist within the reasons of the decision maker. The manner in which the RPD approached this case amounted to a denial of the right to counsel.
>
> [Emphasis added.]

[14] On reviewing the transcript of hearing and the Board's decision, it appears that the Board did not examine all of the factors set out in *Siloch, supra*. While the Board did ask Ms. Conseillant and Mr. Séjour whether steps had been taken to find counsel, the other factors were disregarded. Further, the Board presumed that Mr. Séjour knew to explain to Ms. Conseillant what steps to follow based on the information received from Immigration Canada, even though he was not acting as counsel on the applicant's behalf. (Transcript of hearing, at page 5).

[15] Moreover, even though Ms. Conseillant had four months after signing her PIF to find the help of counsel, the Board ought to have weighed the factors such as those described above. On this point, in *Modeste v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027, [2006] F.C.J. No. 1290 (QL), Mr. Justice Michael A. Kelen states the following:

> [20] All of these factors may weigh in favour of granting an adjournment. The Board does not appear to have taken these factors into account.
>
> [21] In my decision *Antypov v. Canada (Minister of Citizenship and Immigration)* (2004), [2004] F.C.J. No. 1931, 135 A.C.W.S. (3d) 300 (F.C.), I considered whether the denial of an adjournment by the Board so that the applicant could obtain counsel constituted a breach of the rules of natural justice. In that case, and in much of the jurisprudence where the denial of an adjournment for this purpose was not considered a breach of the rules of natural justice, the applicant had demonstrated a pattern of delaying the proceedings and had already been granted adjournments on previous occasions. In the case at bar, this is the first time the applicant has sought an adjournment. **While the applicant had ample time to make arrangements for counsel and was negligent in doing so the Board is still obliged to consider and weigh these other factors.**
>
> [Emphasis added.]

(2) Right to counsel

[16] Ms. Conseillant properly argued that in refusing a request for adjournment, she was in indeed deprived of the right to have the assistance of counsel.

[17] There is ample case law on the issue of the right that an individual has to the services of counsel. Moreover, the right to be represented by counsel during administrative proceedings is widely acknowledged. The right to counsel is included among the principles of fundamental justice guaranteed under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter). In fact, this right exists when the life, liberty or security of the person is in play. The right to counsel is recognized once the decision-making

process is engaged. Paragraph 10(*c*) of the Charter also provides that everyone has the right on arrest “to retain and instruct counsel without delay and to be informed of that right”.

[18] Furthermore, subsection 30(1) of the former Act also confers to every person with respect to whom an inquiry is to be held “[the] right to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel at the inquiry and . . . a reasonable opportunity, if the person so desires, to obtain such counsel at the person's own expense.” Similarly, subsection 30(2) has a similar provision through which a person may be represented by counsel who is willing and able to act in a reasonable time, at the Minister’s expense.

[19] Finally, certain provisions contemplate the assistance of counsel for a minor child or an individual under guardianship (subsections 69(1) and 69(4) of the former Act; *Stumf v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 148, [2002] F.C.J. No. 590 (QL), at paragraph 6; *Espinoza v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 385 (QL), at paragraph 25).

[20] In *Wagg*, *supra*, at paragraph 19, Mr. Justice J.D. Denis Pelletier restated the principle that the right to assistance of counsel is not absolute, although it is in both the Court's and the litigant's best interests to have parties represented by counsel. In fact, as stated by Mr. Justice Marcel Joyal in *Asomadu- Acheampong v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 984 (QL), at paragraphs 7 and 8, the applicant must also establish that prejudice resulted from absence of counsel. In some cases, the absence of a counsel or the refusal to grant an

adjournment or to allow a person to obtain the services of counsel may be considered a breach of natural justice. For example, in *Austria, supra*, Tremblay-Lamer J. states the following:

> [6] As it is clear from the decision, which provides that state-funded legal aid is only constitutionally mandated in some cases, the right to counsel is not absolute. In immigration matters specifically, this Court has repeatedly held that the right to counsel is not absolute: *Mervilus v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206 (CanLII), 2004 FC 1206, [2004] F.C.J. No. 1460 (F.C.)(QL) at paras. 17-25 where Justice Sean Harrington reviews the law regarding the right to counsel. What 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": *Canada (Minister of Citizenship and Immigration) v. Fast (T.D.)*, 2001 FCT 1269 (CanLII), 2001 FCT 1269, 2001 FCT 1269 (CanLII), [2002] 3 F.C. 373 (F.C.) at paras. 46-47.
>
> [7] Therefore, in certain circumstances, the absence of counsel may result in such unfairness during the hearing that Court intervention is warranted. I am not satisfied, however, that the matter at hand represents such a case. I believe that the applicant was indeed afforded a fair hearing.

[21] In this case, it appears from the evidence in the record that Ms. Conseillant suffered genuine prejudice mainly as a result of her misapprehension of the procedure to follow before the Board, since she is illiterate. Accordingly, it resulted in a breach of natural justice for the applicant.

[22] Ms. Conseillant testified at the beginning of the hearing that she was not represented by counsel, that she did not know she could retain the services of counsel and that she did not understand what procedures to follow because she did not know how to read or write:

> BY THE MEMBER
>
> The claimant is present and is not represented by counsel or by an immigration counsellor.
>
> BY THE MEMBER (addressing the claimant)
>
> Q. Is that correct, Madam?
>
> A. Yes.
>
> - And I also note that you do not have . . . you were never represented by counsel in this matter.
>
> A. No, no, I haven’t any money.
>
> Q. Has anyone suggested that you go to legal aid, anything like that, Madam?
>
> A. Not (inaudible), but my friend there helped me, he was with me.

Q. Okay. So, someone explained to you that you could go to legal aid and you decided not to go to legal aid. Is that correct?

A. No, I didn't decide, I don't know, I don't know anything.

Q. But Madam, you said that you were told you could go to legal aid?

A. Yes, but I did not understand anything at legal aid, I know nothing, I do not know how to read or write. I know this friend that is there, he helped me and that's all, I did not understand anything.

- Okay. So you decided . . . not to be represented by counsel.

A. Yes, I could choose a lawyer if they gave me the opportunity to choose one, I would take it.

- Okay, Madam, your claim was scheduled a long time ago for hearing today.

A. Yes.

Q. You chose instead to come with this Mr. Barthélémy who is here today?

A. Well, I don't know, he helps me but I do not know how to read or write and I do not know how these lawyer things work.

. . .

. . . In this matter, the RPO filed exhibits bearing numbers A-1 to A-2, I would like to add exhibit A-3 . . .

. . .

Madam, I see that you have not filed any exhibits?

A. Well, I don't know, I don't know.

- Well, Madam, you are before a panel today . . .

A. Yes.

- . . . it is a duly mandated panel, you . . .

A. Yes.

- . . . you do not seem at all aware of what you are here for today.

A. Yes.

- Well now . . .

A. I know that I'm going before the judge.

- Well, Madam, yes, going before the judge, you must be prepared, you have to know what we are here to do.

. . .

BY THE MEMBER (addressing the RCO)

Q. What do you think, Mr. Toupin?

A. **Well, Mr. Chairperson, I . . . we know that the right to counsel is not an absolute right, that's one thing. However, natural justice provides that individuals appearing before you have at least a chance to argue their . . . their case.** I admit that the claimant has been in Canada for a long time, however, the claim was first scheduled, if I am not mistaken and correct me if I'm wrong, on February 27, 2006.

- Well, this is February 27, 2006.

A. Ah yes, that's true because I added March 13. So, this is the first hearing in the case, excuse me.

- I thought you had a problem.

A. The . . . the claimant stated that she is illiterate; she has not filed any documentary evidence. Although we do have a passport that was seized by Immigration which is in the file which attests to her point of . . . her citizenship and to a certain extent the dates of her arrival in Canada, I'm referring to the passport. However, in my record at page 8 requesting . . .

- Yes.

A. . . . all of the information regarding the trips to Canada and the refugee claims and all that, in mine nothing has been filled out. **In my opinion, this is information that is crucial most of the time. So, honestly, Mr. President, I would suggest giving a chance to the claimant to give her a . . . the time to verify, perhaps with the help of this gentleman or others, whether or not she could qualify for legal aid in that case.**

I don't believe legal aid does refugee claims anymore, I think.

[Emphasis added by the Court.]

[23] The hearing transcript indicates that Ms. Conseillant had no knowledge whatsoever about the procedure to follow at the hearing or the requirements that had to be respected. In fact, she did not file any documentary evidence to support her case. Further, the information given by the applicant in her refugee claim, including her PIF, is incomplete.

[24] In these circumstances, all of these factors overwhelmingly establish that the applicant suffered real prejudice because of her lack of understanding of the rules of form and substance for presenting her claim. How can an illiterate individual who informs the Board of her inadequacy,

who asks to be represented by counsel and whose request for adjournment is refused despite the fact that an RPO recommended this measure, then benefit from a fair and equitable hearing?

[25] While it may be dangerous to grant adjournments in cases where the procedure is used for abusive purposes to delay the administrative process, thereby leading to “legal anarchy”, that is not the case here. This is the applicant’s first request for an adjournment and, considering all of the foregoing, she deserved adequate representation. (*Edumadze v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 49 (QL); *Rajkowski v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1291, [2006] F.C.J. No. 1624 (QL)).

CONCLUSION

[26] In short, considering the foregoing, the Board breached the principles of natural justice and procedural fairness when it did not adjourn the hearing on Ms. Conseillant’s request, so that she could find counsel. Accordingly, this Court’s intervention is warranted. For all of these reasons, the matter is referred to the Board for predetermination before a differently constituted panel.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and the matter be referred for redetermination before a differently constituted panel.

"Michel M.J. Shore"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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