Date: 20070705

Docket: IMM-4145-06

Citation: 2007 FC 709

Vancouver, British Columbia, July 5, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

CRISTHIAN ANDRES RODRIGUEZ CHEVEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by a delegate of the Minister of Citizenship and Immigration Canada (the Delegate), dated July 10, 2006, whereby an exclusion order was issued against the Applicant (the Exclusion Order), for his failure to leave Canada at the end of his authorized period of stay.

[2] Cristhian Andres Rodriguez Chevez (the Applicant) is a citizen of Costa Rica.

[3] The Applicant entered Canada as a visitor on January 25, 2004, and was authorized to remain until April 26, 2004. Prior to the expiration of this visa, his authorized stay was extended until May 28, 2004. He did not apply to further extend his stay in Canada beyond that time.

[4] On July 8, 2006, the RCMP detained the Applicant for causing a disturbance. Realizing he had no status in Canada, an Enforcement Officer of Canada Border Services Agency (the CBSA Officer) was contacted.

[5] While still detained by the RCMP, the CBSA Officer interviewed the Applicant. He told her that he had been convicted of rape in Costa Rica, and had been incarcerated for a period of time before finally being exonerated. The CBSA Officer arrested the Applicant in anticipation of an immigration proceeding, believing that he was otherwise unlikely to appear. He was transferred to the CBSA detention facility on July 8, 2006. The CBSA Officer prepared a "Subsection 44(2) and 55 Highlights" document as well as a separate declaration outlining her exchanges with the Applicant, both dated July 8, 2006.

[6] On July 10, 2006, after reviewing the CBSA Officer's documents, the Delegate interviewed the Applicant at the CBSA detention facility. The Applicant asked to speak with a lawyer, but the Delegate responded that duty counsel was unavailable, and asked the Applicant if he wished to

contact another lawyer; not knowing of any lawyers, and not having the means to afford one, the Applicant did not contact counsel.

[7] Whether or not the Delegate issued the Exclusion Order on July 10, 2006, is disputed by the parties.

[8] The following day, on July 11, 2006, the Delegate met with the Applicant again and requested that he sign the written Exclusion Order that had been prepared. The Applicant refused to sign the Exclusion Order without first speaking to a lawyer; not being informed that duty counsel was available, he did not sign the order.

[9] The Applicant did not meet with a lawyer until shortly before his detention hearing on July 11, 2006, when he met with duty counsel. At that time, the lawyer informed the Applicant that because the Exclusion Order had already been issued, he was precluded from claiming refugee status. The Applicant was released from detention later that day.

[10] The Applicant challenges the validity of the issuance of the Exclusion Order due to the circumstances of the matter, and claims that his right to counsel under section 10 of the *Charter of Rights and Freedoms*, Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11 (the Charter) was infringed.

[11] While there is no right to counsel *per se* at an immigration assessment (*Dehghani v.* (Minister of Employment and Immigration), [1993] 1 S.C.R. 1053), where a person's liberty is significantly constrained, for instance over a period of days, he or she has the right to retain and instruct counsel without delay, and to be informed of that right ((*Dragosin v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 81, [2003] F.C.J. No. 110 (QL)*; Huang* v. *Canada (Minister of Citizenship and Immigration)* 2002 FCT 149, [2002] F.C.J. No. 182 (QL); *Chen v. Canada (Minister of Citizenship and Immigration),* 2006 FC 910, [2006] F.C.J. No. 1163 (QL).

[12] The parties do not dispute that the Applicant was detained. Thus, it is clear that his liberty was restrained, such that his section 10 Charter rights were engaged (*R. v. Therens*, [1985] 1 S.C.R. 613 at p. 641) at the time he was interviewed by the Delegate on July 10, 2006.

[13] The Applicant alleges that he asked to speak with a lawyer on July 10, 2006, before the Exclusion Order was issued, but was informed by the Delegate that duty counsel was not available that day. He was not given information with regard to alternatives, such as legal aid, through which he might have been able to access legal counsel, nor was he told they could wait for duty counsel to become available before proceeding.

[14] The Applicant particularly relies on *Dragosin*, above, where it was held that an applicant had the right to counsel the moment he was detained and that immigration officers had an obligation to provide advice about, and to facilitate access to, counsel. In that case, the exclusion order was set aside as the applicant had requested to speak with counsel before the issuance of the order, but

officials had failed to facilitate access. The Applicant submits that the facts of the present matter are indistinguishable from those in *Dragosin*: he repeatedly asked to speak with counsel but was not able to speak with a lawyer until after the Exclusion Order had been issued.

[15] The Respondent submits that the Applicant was read his rights when he was detained by the CBSA Officer, and could have contacted counsel as he had access to a telephone while in detention. He was also asked if he knew particular counsel that he wished to contact for the interview. The Respondent relies on *Rebmann v. Canada (Solicitor General)*, 2005 FC 310, [2005] F.C.J. No. 415 (QL), asserting that it is factually similar to the present matter. Thus, as in *Rebmann*, the Applicant's right to counsel under the Charter was not breached.

[16] Firstly, the present matter is easily distinguished on its facts from *Rebmann*, above. In that case, Mr. Rebmann actually met with duty counsel before the exclusion order was issued. Such was not the case for Mr. Chevez in the circumstances of this matter.

[17] The Applicant emphasizes that CIC's Enforcement Manual (Chapter 7 at sections 16.2 and 16.3) requires that immigration officials inform detained persons of their right to counsel. If he had been properly informed of his right to counsel, and consulted a lawyer, he would have been informed of his rights to formally claim refugee status before the issuance of the Exclusion Order. He also relies upon *Cardinal v. Director of Kent*, [1985] 2 S.C.R. 643 that there should be no causal speculation as to the results or merits of such a claim if such a procedural fairness breach had not occurred; such a breach is a legally sufficient error in itself.

[18] The sections of the CIC's Enforcement Manual cited by the Applicant only require that the detainee be read his or her Charter rights. According to uncontested evidence of the CBSA Officer's affidavit, she did in fact read the Applicant his rights upon arrest. I find no reason to hold that his Charter rights were infringed in this regard.

[19] However, more significantly, the Applicant alleges that he was not able to exercise his right to counsel within a reasonable time; specifically, that he was effectively denied access to counsel until after the issuance of the Exclusion Order.

[20] In *Dragosin*, above, at paragraph 16, Justice Andrew MacKay concluded:

> **16** In my opinion, the applicant's right to counsel in this case arose from the moment he was ordered to be detained at the regional correctional centre. The immigration officers who arranged his detention had the responsibility under s-s. 103.1(14) to provide advice about and to facilitate access to counsel. It was an error in law not to do so, and, without finally determining the matter it appears that failure to facilitate access to counsel in the circumstances was not in accord with the right to counsel upon detention which is assured to everyone in Canada, including the applicant, under s. 10 of the Charter.

[21] I recognize that subsection 103.1(14) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act) specifically provided that a detainee be given a reasonable opportunity to obtain counsel, while the Act in question does not make such a specific reference. Nevertheless, such an obligation is inherent in the right to retain and instruct counsel as guaranteed by subsection 10(b) of the Charter. As such, I believe that Justice MacKay's reasoning in *Dragosin*, above, applies equally to the present matter.

[22] I am persuaded that, on a balance of probabilities, the evidence supports the Applicant's position that his subsection 10(b) Charter rights were infringed. While he was properly informed of his right to counsel, none of the immigration officials adequately facilitated the Applicant's access to legal counsel before the Exclusion Order was issued.

[23] The Legal Services Society of British Columbia funds private immigration lawyers to act as duty counsel before the Immigration Division and part of their responsibilities include providing advice to anyone in detention at the CBSA detention area in question. Duty counsel is normally available for consultation prior to the issuance of exclusion orders at the detention centre.

[24] In the present case, the evidence shows that the Delegate summarily informed the Applicant that despite his request to speak with a lawyer, due to unavailability of duty counsel, they would proceed anyway.

[25] In cross-examination on his affidavit, the Delegate admitted that duty counsel was present on-site at the detention center, though occupied in hearings. However, he also acknowledged that duty counsel is normally available to those in the detention several times during the day, even when tied up in hearings. He similarly admitted that if an individual insists on waiting for duty counsel before proceeding, he would normally wait a reasonable time. He also conceded that where a detained individual has contacted an "outside" lawyer, he is prepared to wait up to several hours for counsel to arrive before proceeding.

[26] Nevertheless, in the circumstances of the present matter, the Delegate failed to wait for duty counsel. He also did not provide the Applicant with any alternative recourse, though admitting that a legal aid number would have been provided if the Applicant had asked. Neither did the Delegate mention to the Applicant that they could wait for duty counsel to become available if the Applicant insisted. There was no explanation given as to why the facilitation of access to counsel should depend on repeated insistence, where an individual has already clearly expressed a desire to speak with legal counsel.

[27] There is no evidence that the Delegate was required to expeditiously issue the Exclusion Order before the Applicant could reasonably access legal advice, which was available on-site and, according to the evidence, accessible to the Applicant within a reasonable period of time. Indeed, the record is clear that the Applicant was able to meet with duty counsel and was represented at his detention hearing on July 11, 2006, demonstrating the availability of such legal advice.

[28] In the circumstances of the present matter, I adopt the conclusions of Justice MacKay in *Dragosin* at paragraph 16 that the Applicant's right to counsel arose from the moment he was ordered to be detained which, in effect, was on July 8, 2006, when he was arrested by the CBSA Officer. This arrest triggered the duty to provide advice about, and to facilitate access to, legal counsel (*Dragosin*, above, at para. 16). Potential access to a telephone in the detention area, or merely asking the Applicant if he knew a particular lawyer that he wished to contact, was insufficient to discharge the obligation to facilitate access to legal counsel. The failure to do so in

the circumstances of this matter was not consistent with the Applicant's section 10(b) Charter rights, and constituted a legal error (*Dragosin*, above, at paras. 16, 20).

[29] I agree with Justice MacKay in *Dragosin*, above, that the failure of the officers to facilitate the Applicant's access to counsel after he was detained must result in the setting aside of the Exclusion Order. Accordingly, this matter is to be remitted to another immigration official for re-determination.

[30] Considering that the matter is to be further considered, and in following the reasoning of my colleague Justice MacKay in *Dragosin*, above, it would be inappropriate and unnecessary in my opinion for the Court to resolve the issues of exactly when the Exclusion Order was issued and whether the Applicant's statements constituted a claim for refugee status.

[31] For these reasons, the application for judicial review is granted, the Exclusion Order is set aside, and the matter referred for re-determination by a different Delegate.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is granted and the Exclusion Order is set aside. The matter is referred for re-determination by a different Delegate.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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