

Date: 20090224

Docket: IMM-3329-08

Citation: 2009 FC 192

Montréal, Quebec, February 24, 2009

PRESENT: The Honourable Mr. Justice Maurice E. Lagacé

BETWEEN:

TRIXIA MELINA TRUJILLO FERNANDEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), the applicant is seeking judicial review of a decision rendered on July 8, 2008, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board, rejecting her claim for refugee protection on the basis that her narrative was not credible.

II. Facts

[2] The applicant, a citizen of Mexico, alleges that she fears persecution by her former spouse, a commanding officer in a federal investigation agency (FIA).

[3] The applicant submits that, after refusing to transport cocaine for her former spouse and being abused by him, she left him and filed a complaint with the authorities before taking refuge at a friend's home and then at a cousin's home, where each time her former spouse found a way to locate her.

[4] In March 2006, the applicant moved away and went back to live in Mexico City, but her former spouse allegedly tracked her down and tried to extort money from her by threatening to kill her. After filing a second complaint against him, the applicant decided to leave Mexico on November 25, 2006, and come to Canada to claim refugee protection.

[5] On July 8, 2008, the RPD rejected the claim for refugee protection on the ground that the applicant was not credible with regard to her subjective fear and that she had therefore not discharged her burden of proving that she had a well-founded fear of persecution in Mexico.

III. Issues

[6] These proceedings raise the following issues:

- a. Is the RPD's decision unreasonable?
- b. Did the RPD breach the rules of procedural fairness?

IV. Analysis

Standard of judicial review

[7] Since the RPD's decision mainly involves an assessment of the facts and the applicant's credibility, the *reasonableness* standard applies in this case, which means that the Court must show deference to the decision (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[8] If, as the applicant submits, the RPD breached the rules of natural justice or procedural fairness, the RPD's decision will not be entitled to any deference by this Court, which will set it aside (*Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, at paragraph 44).

Procedural fairness

(i) *Preliminary inquiry report*

[9] The applicant alleges that the RPD deprived her of the right to a fair hearing by basing its conclusion on a preliminary report by an immigration officer at the Canadian mission of the

Immigration and Refugee Board of Canada (CIC) in Mexico City even though the report directed the RPD to obtain additional information from the applicant.

[10] Following a hearing that was cut short so the RPD could conduct its own inquiry into the complaints allegedly filed by the applicant against her former spouse, the parties left each other after the presiding member stated the following:

[TRANSLATION]

. . . When I receive the document (*inquiry report ordered from the CIC in Mexico City*), I will send it to your counsel and, if necessary, we will meet again, but otherwise he (*i.e. counsel for the applicant*) will provide us with written submissions, and that will end the hearing, and I will give you a decision thereafter. The file might be reopened. When I receive the document, I will decide whether to reopen or simply to end the hearing.

(Panel's record, page 153)

[Emphasis added.]

[11] The RPD then took the initiative of asking the Canadian authorities in Mexico City to verify the "authenticity, provenance and content" of a document filed in evidence by the applicant concerning a complaint she had laid against her former spouse. The RPD finally received the following reply to its verification request on May 1, 2008:

I've been trying to confirm the validity of the document you sent. Up to this moment it does not seem to be genuine based on the number of Acta Especial which is not consistent with the place where the situation took place, and it should. However, they have advised me that to verify validity I should first ask the person [the claimant] in what office (fiscalia o delegacion) did she start the process. If she is able to answer this, I will call the office to verify validity, however, there are any incongruencies in the number of the document that indicate this might be counterfeit...The number should read FAO instead of ITZ, according to the place where the situation happened. Nevertheless, the people at the fiscalia could have made a mistake and accepted to deal with a problem that was not within their "territory".

[Emphasis added.]

[12] This was a preliminary report that required the RPD to continue its hearing of the claim, which it had adjourned to verify what the applicant had said. The report required some additional information to be obtained from the applicant so the Canadian authorities could complete the verification inquiry ordered by the RPD. It was certainly not a conclusive report that allowed the RPD to reach the conclusion it did, and certainly not before having the applicant answer the questions suggested by the CIC in Mexico City.

[13] It will be recalled that the RPD decided to order the inquiry and adjourn the hearing in the meantime, while reserving the right to continue the hearing after receiving the results of the inquiry, in order to find out the truth about the applicant's allegations. After receiving the preliminary report and entering it in the file, the RPD notified counsel for the applicant of the following on May 6, 2008:

[TRANSLATION]

The IRB panel hearing the above-mentioned matter requests that you be informed of the following:

After the conclusion of the hearing into your client's claim for refugee protection, the tribunal officer filed the following additional exhibit:

A-4 SIRU Reply of May 1, 2008

A copy of the additional exhibit is attached to this letter.

Given the nature of the information found in this additional exhibit, you are entitled to make submissions at a hearing called for this purpose.

If you wish to exercise this right, written notice to this effect must be filed with the IRB Registry by May 16, 2008. If no written notice is received on or before May 16, 2008, you will be presumed to have waived your right to make submissions at a hearing called for this purpose and the matter, including the additional exhibit, will be reserved for decision after that date.

However, if you wish to make submissions in writing, they must be filed with the IRB Registry by May 16, 2008. If no written submissions are received on or before May 16, 2008, the matter, including the additional exhibit, will be reserved for decision after that date.

[Emphasis added.]

[14] Based on what was stated by the presiding member when he adjourned the hearing on December 20, 2007, and what was stated in the above-mentioned notice, the applicant and her counsel were entitled to expect to be called to a continuation of the hearing that had been adjourned so the RPD could inquire into certain allegations made by the applicant. Continuing the hearing was all the more necessary given that the preliminary report submitted by the Canadian authority in Mexico City suggested that the RPD ask the applicant certain questions so it could continue and complete the inquiry ordered by the RPD.

[15] The hearing never resumed; the RPD never asked the applicant the questions suggested by the CIC in Mexico City, the applicant was expecting to be called to a continuation of the hearing to answer those questions, and the RPD relied on a preliminary report that was not conclusive to impugn the applicant's credibility.

[16] Since the RPD decided to conduct its own inquiry, it had to complete it and give the applicant an opportunity to answer the questions raised at the preliminary stage of the inquiry. Since the RPD suggested that it would set a date for the continuation of the hearing it had decided to adjourn for a very specific reason, it had to respect its own procedure before deciding the applicant's claim for refugee protection.

[17] How can it not reasonably be concluded that procedural fairness was breached?

(ii) *Psychological report*

[18] The RPD found that the applicant was not credible and thus did not accept her allegations of subjective fear.

[19] To corroborate her allegation that she was a woman crushed by a former spouse's physical and psychological abuse, the applicant, at the start of the RPD hearing and thus after the time limit, filed a report signed by a psychologist, who concluded, following a technical test, that the applicant had significant symptoms of post-traumatic stress, anxiety and depression.

[20] At the start of the brief hearing on December 20, 2007, the presiding member stated the following to the applicant about the report:

[TRANSLATION]

So we had a short conference before the hearing began to discuss the psychological report. Mr. Centurion explained to me all the details of the report, which he has just received. He also explained to you that you were filing that document after the time limit. Listen, I have not read it. I will accept the document conditionally, and we will deal with it during the hearing.

(Panel's record, page 128)

[Emphasis added.]

[21] In saying this, the presiding member of the RPD was thus undertaking to read the expert report or at least to decide whether he would accept it as evidence and, if so, to determine the weight he would give it after reading it. There was all the more reason for this given that, let us not forget,

the RPD in its decision cast doubt on the applicant's credibility with regard to her allegation that she feared physical and psychological abuse by a former spouse who was also a commanding officer in the FIA.

[22] Yet nowhere in the decision or during the hearing did the RPD or the presiding member discuss the relevance of the psychological report received subject to its late filing. The RPD completely ignored the report and acted and made its decision thereafter as if the report did not exist.

[23] Yes, the RPD stated in its decision that it had "analyzed all of the evidence", and yes, it must perhaps be presumed that it read the report. However, if this is truly the case, why did the RPD, during the hearing or in its decision, not come back to the fact that it had accepted the report conditionally at the start of the hearing?

[24] No decision was made on this report accepted conditionally, no mention was made of it even having been read, and no comment was made on its relevance and the weight it was to be given. The report was an important piece of evidence for the applicant, yet the RPD seems to have completely ignored it after accepting it subject to a decision on its late filing, a decision that has still not been made.

[25] How can it not reasonably be concluded once again that procedural fairness was breached?

IV. Conclusion

[26] Given the combined effect of these breaches of procedural fairness, the applicant is right to conclude that the decision is unreasonable and that she was not given a fair hearing. The Court must therefore intervene and set aside the RPD's decision.

[27] Since no serious question of general importance was proposed, no question will be certified.

JUDGMENT

FOR THESE REASONS, THE COURT:

ALLOWS the application for judicial review, **SETS ASIDE** the decision dated July 8, 2008, and **REFERS** the matter back to a differently constituted panel of the Board for reconsideration.

"Maurice E. Lagacé"

Deputy Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3329-08

STYLE OF CAUSE: TRIXIA MELINA TRUJILLO FERNANDEZ v. MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: February 3, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: February 24, 2009

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