Federal Court  Cour fédérale

Date: 20100108

Docket: IMM-2132-09

Citation: 2010 FC 22

Ottawa, Ontario, January 8, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SHAUN XENON KHAN

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 (Act) for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board dated April 1, 2009 (Decision), in which the Board dismissed the Applicant's appeal from the removal order issued against him. The oral review conducted by the Board occurred as a result of an application of the Canadian Border Services Agency (CBSA) pursuant of section 26 of the Act on the basis that the Applicant had breached numerous conditions of his stay of removal.

BACKGROUND

[2] The Applicant is a citizen of the United Kingdom (U.K.) who became a permanent resident of Canada in 1990. The Applicant came to Canada with his father, mother and siblings.

[3] The Applicant was convicted of armed robbery in 1999 and ordered deported from Canada. He appealed this deportation to the Immigration Appeal Division (IAD). He was granted a five year stay of the deportation order with terms and conditions.

[4] Much later, the Applicant received a phone call from the IAD advising him of a scheduled review for his stay on March 26, 2009. The Applicant attended this hearing and was informed shortly thereafter that his appeal had been dismissed.

DECISION UNDER REVIEW

[5] The Board listed the conditions of the stay of removal that the Applicant had allegedly breached. These conditions included:

a. Not providing evidence of compliance of his stay of removal when requested, as required by conditions 7 and 8;

b. Failing to produce a copy of a valid passport, contrary to condition 2;

c. Failing to provide evidence of a serious attempt to resolve the Applicant's outstanding charge in Alberta and to "clarify the disposition with respect to the fail to comply charge in British Columbia," as required by condition 13;

d. Failing to report to the Bond Reporting Centre on April 4, 2008 and October 3, 2008, as required by condition 9;

e. Failing to report his new and outstanding charges, as required by condition 5;

f. Failing to attend a counsellor to "address his unresolved psychological issues and maximize his rehabilitation," pursuant to condition 10.

[6] The Board noted that the Applicant had requested either an extension of his stay of removal (in order to comply with its terms and conditions) or, in the alternative, that the appeal be allowed. The Minister asked that the Applicant's appeal be dismissed.

[7] The Board noted that the Applicant had previously been ordered deported because he had stolen a motor vehicle and robbed a convenience store at knifepoint. The Applicant had been granted a five year stay in 2003 because of the consideration of the best interest of a child directly affected by the proceedings.

[8] The Board noted that the Applicant has not had any full-time employment in the last five years. He lives with his mother and her friend, and is supported by his mother and his siblings.

[9] Based on section 68.3 of the Act, the Board can, at any time, reconsider an appeal of a removal order. In so doing, the Board must consider the factors listed in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] S.C.R. 84. Such factors include:

a. The seriousness of the offences leading to the deportation order;

b. The possibility of rehabilitation;

c. The length of time spent in Canada and the degree to which the appellant is established here;

d. The appellant's family in Canada and the dislocation to the family that deportation would cause;

e. Support available to the appellant within the family and within the community; and

f. Potential foreign hardship the appellant will face in the country of removal;

[10] The Board noted that its assessment was guided by subsection 3(1)(*h*) of the Act which includes the objective to "protect the health and safety of Canadians and maintain the security of Canadian society." The Board also explained that it was "alert, alive and sensitive" to the best interests of any child directly affected by the removal of the appellant, as required by *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL).

[11] The Board considered the Applicant's argument that he had not supplied a letter of compliance because he had not received such a request. The Board noted that the notice sent to the Applicant had been returned to the sender. The Board concluded that the Applicant had moved within the period of the five-year stay of removal and had not informed the appropriate authorities

of his change of address. Consequently, the Applicant had breached conditions 7 and 8 of his stay of removal.

[12] Moreover, the Applicant had not brought his passport to the hearing to prove that he had extended it. The Applicant argued that he had given copies of his passport to the CBSA and the IAD. However, there was no copy on the Applicant's file; nor did the Minister's counsel have a copy. The Board doubted the truth of the Applicant's explanation of submitting copies of his passport because he was unable to explain when and where these copies were submitted. Consequently, the Board doubted the Applicant's credibility with regard to this portion of his testimony. The Board concluded that the Applicant had breached condition 2 of his stay of removal.

[13] The Applicant testified that he had given his previous counsel the documents which demonstrated that his outstanding issues in British Columbia and Alberta had been stayed. The Applicant said that his counsel then provided these documents to the IAD and CBSA. However, the Applicant did not keep a copy of this documentation for himself.

[14] Again, the Board could not find a copy of these document's on the Applicant's file, nor were they in the possession of the Minister's counsel. The Board determined the Applicant's testimony was not credible because he was unable to discuss the contents of these documents and had neglected to secure a copy for the hearing.

[15] With regard to the outstanding warrant in Alberta, the Applicant conceded that he had not taken any action other than to contact a lawyer who demanded $5,000 to proceed. Consequently, the Board found that the Applicant had breached condition 13 of his stay of removal.

[16] The Board concluded that the Applicant's "inaction and disregard" to this condition of his stay was "the most damaging" to his request to extend his stay or allow his appeal, especially since the Applicant had "**five** years to settle this matter and provide evidence as such" (emphasis in original).

[17] The Board noted that there was no evidence to support the Applicant's claim that he had reported in writing on April 4, 2008 and October 3, 2008. The Board was unconvinced that the Applicant had reported because the Applicant had not provided any supporting documents and he was found to be lacking in credibility in other parts of his testimony. Consequently, the Board concluded that the Applicant had breached condition 9 of his stay.

[18] The Applicant admitted that he had not reported his new criminal charges to the CBSA because he did not know it was required. However, the Board noted that the Applicant stated that he had "read the conditions outlined in his stay of removal many times." Therefore, the Board found that the Applicant had breached condition 5 of his stay.

[19] The Applicant claimed he had attended some counselling sessions, but that he had stopped attending because the sessions were "not helping." The Applicant was unable to provide any

documentary evidence that he had attended counselling. Moreover, he was unable to provide the Board with a name or address of the counsellor he had allegedly visited. The Board found that the Applicant had breached condition 10 of his stay.

[20] The Board noted that the Applicant lacked plausible explanations for many of the breaches of conditions of his stay, and that in some instances he had attempted to avoid responsibility.

[21] The Applicant requested that the Board allow his appeal because he had not incurred any further convictions. However, the Board concluded that the Applicant had failed to understand that he had rendered the stay ineffective because of his disregard of the conditions of the stay. The Board found that "in the five years he has been on the stay, he has [not] changed or rehabilitated himself." Moreover, the Board determined that "his blatant disregard of the generosity of the Court is indicative of a person who does not respect authority and an extension of his stay in my view would serve no purpose."

[22] The Board considered the time the Applicant has spent in Canada, his family in Canada, his establishment in Canada, and the hardships he and his family would endure if he was removed. However, the Board found insufficient humanitarian and compassionate grounds to warrant allowing the appeal or extending the Applicant's stay.

[23] The Board noted that the Applicant had "never held a long-term job," and had been unemployed for the past five years. The Board noted the Applicant's interest in starting a family

business, but found that “actions speak more than words.” The Board determined that in the five year reprieve granted to the Applicant he had failed to become established and to become a contributing member of society.

[24] The Board also considered the Applicant’s student loan debt and the debt he owed to his counsel. It also noted that the Applicant was being audited by Revenue Canada for irregularities on his tax return. The Board found that the Applicant’s “disregard of his financial responsibilities… [is] evidence of the fact that the appellant has not demonstrated that he is a good citizen.”

[25] The Board took note of the Applicant’s family in Canada, and found it “telling” that they were not present at his review hearing and had not submitted any documentary support for him, as they had done in the past. As a result, the Board inferred that the Applicant was not as close with his family as he had led it to believe. Although the Board accepted that the Applicant’s removal may cause some emotional difficulties for his family, it noted that no evidence had been presented as to why the Applicant’s family could not visit him in the U.K.

[26] The Board determined that the Applicant would suffer some hardship due to the separation from his family, but that this was not sufficient to outweigh his breach of conditions of his stay and his lack of rehabilitation. Moreover, the Applicant had no children and was not in a relationship, so there were no children whose interests would be directly affected by the Board’s decision.

ISSUES

[27] The Applicant submits the following issue on this application:

1. Did the Board breach the principles of procedural fairness by conducting the hearing without providing fair notice to the Applicant;

STATUTORY PROVISIONS

[28] The following provision of the Act is applicable in these proceedings:

Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

> child directly affected, or by
> public policy considerations.

STANDARD OF REVIEW

[29] A standard of correctness is the appropriate standard for the review of issues involving procedural fairness and natural justice. See *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, 263 D.L.R. (4th) 113 at paragraph 46, and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 126 and 129. As such, correctness is the appropriate standard when considering whether the Board breached procedural fairness by: a) not providing fair and reasonable notice to the Applicant; b) depriving him of the opportunity to respond; and c) depriving him of the chance to be represented by counsel.

ARGUMENTS

The Applicant

Procedural fairness

[30] The Applicant submits that he was handed a copy of the CBSA's letter at the start of the hearing. He had not previously seen this letter and informed the hearing officer of this fact. With the letter was an envelope addressed to the Applicant upon which was stamped "Returned Mail," which had been received by the CBSA. As a consequence of not having received this letter, the Applicant says he only became aware of the hearing when he phoned his case officer.

[31] The Applicant contends that he reported his change of address to the CBSA, but that he was unaware that he needed to report his change of address to the IAD as well. Accordingly, the Applicant says he was not aware of the nature of the proceedings that occurred. The Applicant testified that he did not know what a “Statement of Compliance” was, and he did not understand what the Member was referring to from the outset of the hearing.

[32] The Applicant says his lack of comprehension became obvious during the course of his testimony. He submits that the lack of family support at the hearing and his lack of documentation at the hearing to support his claim demonstrate that he did not understand the seriousness and formality of the hearing.

[33] Once the Applicant informed the Board that he had not received the notice of hearing, the Board gave him a copy of the document and gave him “a couple of minutes” to look it over. He was then told that he would be given an opportunity to respond to what the Board had written.

[34] The Applicant submits that procedural fairness was breached because he was not given adequate or reasonable notice of the purpose of the hearing. Furthermore, the Applicant contends that the Board’s failure to notify him of its intention resulted in his being denied the opportunity to respond to the Minister’s concerns.

[35] The Applicant submits that the case at hand is similar to that of *Stocking v. Canada (Minister of Citizenship and Immigration)*(1998), 153 F.T.R. 198, 47 Imm. L.R. (2d) 104 in which it was held that:

> If the Board wishes to review the original stay it has the jurisdiction to do so, however, the rules of natural justice require that the applicant be notified of the Board's intent and be given the opportunity to respond.

[36] The Applicant concedes that the facts of *Stocking* and the case at bar are somewhat different, but submits that the principle from *Stocking* also applies to his case. As in *Stocking*, the Applicant's failure to object to the oral review at the hearing does not deprive him of his right to raise procedural fairness and natural justice concerns as part of this application. The Applicant submits that this is compounded by the fact that he was not represented by counsel at the hearing and had no understanding of any expectations the Board had for him at the review.

[37] The Applicant submits that the Board should have adjourned the hearing once he indicated that he was not represented by counsel. The Applicant cites and relies on *Mallette v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1400, 51 Imm. L.R. (3d) 267 for the proposition that although the right to counsel is not absolute, refusing a postponement is reviewable if certain factors exist, including: a) the case is complex; b) with serious consequences; and c) the applicant does not have the resources – either intellect or legal knowledge - to properly represent himself.

[38] The Applicant submits that these factors are present in the case at hand, as they were in *Mallette*. The Applicant says his case is complex, and includes the issue of outstanding charges and warrants in Alberta and B.C. Moreover, the consequences of this hearing are clearly serious, since a negative decision would likely lead to deportation. Finally, the Applicant submits that he did not have the legal knowledge to represent himself. This is demonstrated by the fact that the Applicant did not adduce any documentary evidence at the hearing and directed his family not to attend.

[39] The Applicant believes that the Board's failure to provide an adjournment in order for him to retain counsel deprived him of a fair hearing. He submits that this finding can be made even when the Applicant has not requested an adjournment, as in *Mallette*. Accordingly, the Board should have offered this option to him when it realized that he had not received written notice of the hearing and was unrepresented by counsel.

[40] These procedural breaches impacted the outcome of the hearing. The Applicant says he made numerous steps to comply with the conditions of his stay, including: a) having his passport extended; b) providing documents to his previous counsel; c) reporting as required in April and October; and d) attending counselling. However, the Board rejected what the Applicant said because he could not supply documentary evidence to corroborate these claims and he was unable to provide details. The Applicant submits that the Board discredited him because of his failure to produce documents regarding his compliance with the terms of his stay.

[41] The Applicant argues that the outcome of the hearing would likely have been different if the Board had followed the requirements of procedural fairness and the Applicant had: (1) been given reasonable notice of the purpose of the hearing; (2) been given the opportunity to respond to the Minister's concerns; and (3) been represented by counsel.

The Respondent

[42] The Respondent notes that the Applicant does not take issue with the Board's finding that he breached the conditions of his stay. While the Applicant attempts to give some explanation for these breaches, the Board found these explanations were not credible, based on an absence of documentary evidence.

[43] If the Applicant did not receive the letter informing him of the purpose of the hearing, it was because he had breached the conditions of his stay and failed to inform the authorities of his current address. The Respondent submits that the Applicant's failure to comply with this condition of his stay now precludes him from raising lack of formal written notice as an issue.

[44] The Respondent further submits that the Applicant either knew, or ought to have known, of the purpose of the hearing. The Applicant admits that he received a telephone call in which he was told that he was "required to attend at the IAD for a review of my stay." Furthermore, in his affidavit, the Applicant swears that he met with a lawyer the day previous to the IAD hearing regarding his new criminal charges.

[45] Moreover, no evidence has been adduced to show that the Applicant asked the IAD for an adjournment or that he lacked the intellect necessary to represent himself.

[46] Consequently, the Respondent submits that the Applicant knew or should have known that the hearing could result in the dismissal of his appeal. He should not now be allowed to have the Decision reconsidered because he did not act with due diligence or, in the alternative, was wilfully blind. The Respondent submits that such a finding would create an incentive for applicants to treat IRB hearings with a lack of seriousness.

ANALYSIS

[47] As Justice Tremblay-Lamer pointed out in *Mallette* at paragraph 14, the right to counsel is not absolute and the relevant jurisprudence suggests that a decision is only invalid should the absence of counsel deprive the applicant of his or her right to a fair hearing.

[48] In the present case, the Applicant says he did not receive notice of what he would be faced with at the hearing and that, although he understood he was attending a review of his stay, he did not understand the process of the hearing, nor the potentially serious consequences. He also now says he did not understand that he might have to produce evidence to demonstrate his compliance with the terms of the stay and that:

> Had I appreciated the seriousness of the proceeding, I would certainly have sought an adjournment in order to retain counsel and/or to obtain documentary evidence of all the steps that I have taken to abide by the conditions of my stay.

[49] It is clear that the application by the Minister from October 2008 to bring the Applicant to an oral hearing was sent to the Applicant, although he claims not to have received it. A copy was sent to the Applicant's address but, in breach of one of the conditions imposed for the stay, the Applicant had failed to notify the IAD that he had changed his address. The letter was returned. It seems that the Applicant did not receive this notice of the hearing and information regarding its purpose because he breached one of the conditions for the granting of the stay.

[50] However, besides this attempt to communicate with the Applicant, there are various other ways that the Applicant may have had notice of what would be dealt with at the hearing to review the stay:

a. The terms of the stay itself gave the Applicant notice that the IAD would reconsider his case and that it "may change or cancel any non-prescribed conditions imposed, or it may cancel the stay and then allow or dismiss the appeal.";

b. A new notice signed and dated October 27, 2008 was prepared with the Applicant's current address on it, but the statement that the document was provided only shows that it was hand-delivered to the Minister's counsel. However, there is insufficient evidence for the Court to conclude whether the Applicant actually received this notice or, indeed, whether it was even sent to him;

c. The Applicant had two telephone conversations with officers to tell him about the meeting although we have no evidence of whether he was told about what would, or could, transpire at the hearing;

d. The Applicant has also provided evidence of what he understood about the hearing. At the hearing itself, there were various exchanges about what was taking place.

[51] The issue of notice is complicated in this case by the fact that the Applicant failed to receive formal notice of the hearing because he changed his address and, in breach of his stay conditions, failed to inform the IAD. There is some evidence that he informed Greater Toronto Enforcement Centre of his change of address and failed to understand that he should have notified both agencies of any such change.

[52] The Applicant states in his affidavit that he did not understand he had to bring documentary evidence with him to the hearing and that he thought he simply had to update the Board. At some point in the hearing he says that "[i]t was evident to me at this point that I did not appreciate the seriousness of the review" and "[a]t this stage of the proceeding I became extremely nervous as I began to understand that this proceeding was not at all what I expected."

[53] These post-decision assertions were not supported by any request during the hearing for an adjournment to allow the Applicant to provide documents and secure the assistance of legal counsel. However, he says that it should have been obvious to the IAD that he was out of his depth and was unable to represent himself.

[54] This assertion is by no means clear on the evidence and it is difficult to determine whether the Applicant needed legal counsel at the time, or has simply made such an assertion following the decision to remove the stay.

[55] Justice Harrington summarized the relevant jurisprudence in *Mervilus v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1206, 262 F.T.R. 186 at paragraphs 20-25:

> **20** The right to counsel is not absolute; what is absolute, however, is the right to a fair hearing. Le Dain J. explains the importance of a fair hearing as follows in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643:
>
> > ... 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. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing. [page 661]
>
> **21** The case law of our Court and of the Federal Court of Appeal in immigration matters is to the effect that when the absence of counsel results in depriving the individual of his right to a fair hearing, the decision is invalid (see *Castroman v. Canada (Secretary of State)*, [1994] F.C.J. No. 962 (F.C.T.D.); *Nemeth*, *supra*; *McCarthy v. M.E.I.*, [1979] 1 F.C. 121 (F.C.A.); *Gargano v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1385 (F.C.T.D.); *De Sousa v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 569 (F.C.A.)).
>
> **22** In *Gargano*, *supra*, the applicant, a drug addict, had a very lengthy criminal record. A deportation order had been issued against him; at the appeal hearing he asked for yet another adjournment (the second) to retain counsel. The Board refused.

Cullen J. determined that considering the applicant's incapacity to represent himself and considering the seriousness of a deportation order, it had been unfair to deny him the adjournment to retain new counsel.

23 *Glen Howard v. Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*, [1984] 2 F.C. 642 (F.C.A.) is a prison law case cited in many immigration decisions. In that case, Thurlow J.A. sets out the elements which must be considered in determining if the absence of counsel gives rise to procedural unfairness:

> ... it appears to me that whether or not the person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its gravity, its complexity, the capacity of the inmate himself to understand the case and present his defence. The list is not exhaustive. And from this, it seems to me, it follows that whether or not an inmate's request for representation by counsel can lawfully be refused is not properly referred to as a matter of discretion but is a matter of right where the circumstances are such that the opportunity to present the case adequately calls for representation by counsel.

24 In certain cases, the right to counsel can be likened to the right to be heard. Again in *Glen Howard, supra*, Thurlow J.A. writes:

> In this context, any right a person may have to the assistance of counsel arises from the requirement to afford the person an opportunity to adequately present his case. This particular point was observed by Goodridge J. in In re Prisons Act and in re Pollard et al. [Supreme Court of Newfoundland, February 20, 1980, unreported.] when he noted in parenthesis: "Jeopardy, of course, is not the full test, in a broader sense one is really talking about a person having the right to be heard by a tribunal."

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.

[56] I am mindful of the fact that this was the first review of the stay conditions that the Applicant had faced. In *Mallette,* Justice Tremblay-Lamer granted an application for judicial review in a situation where the applicant had already gone through a review hearing in which a breach of conditions has been clearly established by the Minister, and the Board decided that cancelling the stay would be too harsh.

[57] In the present case, however, the Applicant has not been able to establish all of the factors that Ms. Mallette established before Justice Tremblay-Lamer:

> **16** While she was formally notified twice that the Board intended to review the applicant's compliance with the conditions attached to the stay of execution of her deportation order, it is evident that she understood the purpose of the hearing to be a yearly review of her progress in recovery, similar to her monthly stay interviews. It is for this reason, she says, that she did not bring a lawyer to represent her.
>
> **17** In her affidavit, the applicant states that about 10 minutes into the hearing, she began to feel nervous and confused. She did not understand several of the questions being asked of her and was surprised at being asked about her past convictions and past immigration hearings.
>
> **18** Approximately 27 minutes into the hearing, the following exchange took place between Ms. Julie Ryan, counsel on behalf of the Minister, and the applicant:
>
> > Ms. Ryan: On page 5 we have the Certificate of Conviction for that charge. Did you get this, the Record? It was sent to your old address.

> Applicant: No I did not. If I had known this, I would have brought a lawyer.
>
> **19** Moreover, a review of the transcript indicates that she had trouble with her memory, did not understand basic questions asked of her and that she broke down on a number of occasions. She was not able, in any way, to argue her case. The consequences of the decision are very serious. If she is deported, the applicant, after having lived in Canada for the better part of almost 20 years, will be deported to Scotland where she has no relatives that she knows of, at the age of 61 years old. This will also interrupt any progress she has made with her drug addiction and general rehabilitation.
>
> **20** The Board's failure to provide an adjournment in order that the applicant might retain counsel deprived her of the right to a fair hearing.
>
> [Emphasis added throughout]

I do not believe that the Applicant faced similar struggles to those experienced by the applicant in *Mallette*.

[58] Applying the principles set out by Justice Harrington in *Mervilus*, I have come to the following conclusions on the facts of this case:

1. The consequences of the Decision are serious because the Applicant faces deportation;
2. The case which the Applicant had to make before the IAD was not complex. As the transcript shows, he merely had to answer questions about what he had done to fulfill the conditions of the stay and, for the most, he was able to answer the questions put to him at the IAD hearing;

3. There is nothing to suggest that the Applicant was lacking the capacity to represent himself in terms of answering the questions and addressing the conditions of the stay or did not understand what was being asked of him or its significance;

4. The Applicant did not request an adjournment to retain counsel. He has merely asserted after the Decision that, had he appreciated the seriousness of the proceeding, he would have sought an adjournment in order to retain counsel and obtain documentary evidence. In the full context of this case, I cannot accept that the Applicant could have failed to appreciate what might happen as a result of a review of his stay conditions. The terms of the stay itself make it clear that the stay may be cancelled and the appeal dismissed;

5. There is no evidence before me that the Applicant has any support from his family;

6. Bearing in mind what the Applicant must be taken to have known about his case, I cannot accept that he did not know enough to ask for an adjournment to retain counsel at the hearing. In his affidavit, the Applicant appears more concerned to retain counsel so that he can try to avoid the consequences of facts that are clearly established. Also, bearing in mind the way the Applicant conducted himself at the hearing (as revealed by the answers he gave in the transcript) I cannot accept that, reasonably speaking, the IAD should have realized he could not address the conditions of his stay on his own behalf and needed counsel. Even now, it is not clear how the Applicant takes issue with any of the IAD's findings. He was able to give explanations for the breaches, although the IAD did not find his answers credible;

7. The Applicant has not produced sufficient evidence to show me that if this was sent back for reconsideration, he could produce anything in terms of documentation and/or family support that, reasonably speaking, would make any difference to the IAD's decision.

[59] In sum, I cannot say that procedural fairness has been breached in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2132-09
STYLE OF CAUSE:	SHAUN XENON KHAN v. MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 3, 2009
REASONS FOR ORDER:	RUSSELL J.
DATED:	JANUARY 8, 2010

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