

Federal Court



Cour fédérale

Date: 20100118

Docket: IMM-2816-09

Citation: 2010 FC 47

Ottawa, Ontario, January 18, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

BALVIN SERVICE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Balvin Service (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the “RPD”). In its decision, the RPD determined that the Applicant was not a Convention refugee nor a person in need of protection pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[2] The Applicant is a citizen of Jamaica. He was raised in that country from a young age by an uncle who was a senior member of the Kingston City Police. He alleges that his family in Jamaica was affiliated with the People's National Party (the "PNP") and this association gave rise to violence against him by members of the Jamaica Labour Party (the "JLP"), in light of his uncle's position with the Kingston City Police.

[3] The Applicant first came to Canada from the United States of America in 1972. He was deported from Canada in 1974 and sent back to Jamaica. He returned to Canada in 1975 and was deported a second time, in 1976. He says that upon his return to Jamaica at this time, he was attacked and stabbed by a representative of the JLP. He says that after the first incident, a few months later he was abducted by the JLP, detained and tortured.

[4] In 1978, the Applicant left Jamaica and went to London, England, allegedly to flee the violence and persecution in Jamaica. He stayed in England until 1995. In 1995, the Applicant applied for, and received, a visa to return to Canada, in order to join his pregnant Canadian spouse. He remained in Canada since that time and now has four Canadian-born children.

[5] In 2007, the Applicant was convicted of an offence for the cultivation of marijuana. On August 28, 2008, he was arrested for the offence of possession of crack cocaine. He was detained in custody because the Immigration Enforcement Officer had concerns as to whether he would report for removal.

[6] On August 30, 2008 the Applicant claimed refugee protection. His claim was referred to the RPD on September 5, 2008.

[7] The Applicant applied for legal assistance through the legal aid program of British Columbia. Initially, funding was given to a lawyer to assist in the preparation of the Applicant's Personal Information Form ("PIF"). The PIF was submitted to the Board on November 3, 2008. The Applicant based his claim on membership in a particular social group and political opinions, both grounds relating to the profile of his family in Jamaica and risk at the hands of the JLP.

[8] On January 27, 2009, the Registry of the RPD contacted Counsel for the Applicant concerning proposed scheduling of the hearing of the claim. The Registry proposed February 12 or 13 for the hearing. Counsel for the Applicant advised that he needed 4 to 6 weeks to prepare and the Registry tentatively set the matter down for March 11, 2009.

[9] The hearing was scheduled for March 11, 2009, as an expedited proceeding, to be conducted by video conference.

[10] On February 2, 2009, Counsel for the Applicant requested that the Applicant be allowed to attend in person. This request was denied.

[11] On February 10 and February 18, 2009, the Applicant's Counsel asked for a change in the date and time of the hearing. The requests were made in writing. These requests were denied by the Registrar on February 23, 2009.

[12] The hearing took place, by video conference, on March 11, 2009. The RPD allowed the Applicant to submit further documents and submissions following the hearing. The negative decision was released on May 19, 2009.

Submissions

[13] The Applicant argues that the RPD committed breaches of procedural fairness by denying him an adjournment, thereby compromising his ability to fully, fairly and adequately present his case, and by failing to allow him to attend physically, rather than by video conference.

[14] The Minister of Citizenship and Immigration (the "Respondent") submits that the RPD is master of its own procedures and that no breach of procedural fairness occurred.

Discussion and Disposition

[15] Since the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of administrative tribunals are reviewable upon one of two standards, that is, reasonableness for questions of fact, mixed fact and the exercise of discretion, or correctness for questions of law. Questions of procedural fairness are reviewable upon the standard of correctness; see *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at paras. 52-55.

[16] I am satisfied that, upon reviewing the Tribunal Record and the submissions of the parties, the RPD did commit a reviewable error in the denial of the Applicant's request for an adjournment and that this denial negatively impacted his ability to present his case.

[17] The RPD's discretion to govern its own procedures, in terms of dealing with requests for adjournments, is not open-ended but is subject to the guidance set out in section 48 of the *Refugee Protection Division Rules*, SOR/2002-228 (the "RPD Rules"), which provides as follows :

Application to change the date or time of a proceeding	Demande de changement de la date ou de l'heure d'une procédure
48. (1) A party may make an application to the Division to change the date or time of a proceeding.	48. (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.
Form and content of application	Forme et contenu de la demande
(2) The party must	(2) La partie :
(a) follow rule 44, but is not required to give evidence in an affidavit or statutory declaration; and	a) fait sa demande selon la règle 44, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;
(b) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.	b) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.
If proceeding is two working days or less away	Procédure dans deux jours ouvrables ou moins
(3) If the party wants to make an application two working days or less before the proceeding, the party must	(3) Si la partie veut faire sa

appear at the proceeding and make the application orally.
Factors

- (4) In deciding the application, the Division must consider any relevant factors, including
- (a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;
 - (b) when the party made the application;
 - (c) the time the party has had to prepare for the proceeding;
 - (d) the efforts made by the party to be ready to start or continue the proceeding;
 - (e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;
 - (f) whether the party has counsel;
 - (g) the knowledge and experience of any counsel who represents the party;
 - (h) any previous delays and the reasons for them;
 - (i) whether the date and time fixed were peremptory;
 - (j) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and
 - (k) the nature and complexity of the matter to be heard.

Duty to appear at the

demande deux jours ouvrables ou moins avant la procédure, elle se présente à la procédure et fait sa demande oralement.
Éléments à considérer

- (4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
- a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
 - b) le moment auquel la demande a été faite;
 - c) le temps dont la partie a disposé pour se préparer;
 - d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
 - e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
 - f) si la partie est représentée;
 - g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
 - h) tout report antérieur et sa justification;
 - i) si la date et l'heure qui avaient été fixées étaient péremptoires;
 - j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou

proceeding

(5) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.

causerait vraisemblablement une injustice;

k) la nature et la complexité de l'affaire.

Obligation de se présenter aux date et heure fixées

(5) Sauf si elle reçoit une décision accueillant sa demande, la partie doit se présenter à la date et à l'heure qui avaient été fixées et être prête à commencer ou à poursuivre la procédure.

[18] According to the decision in *Chohan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 390 at para. 13, the RPD is obliged to consider a request for an adjournment in a “principled way” having regard to the factors identified in section 48 of the RPD Rules.

[19] In the present case, the only rationale for refusing the Applicant’s request for a postponement of the hearing is contained in an entry in the Tribunal Record as follows:

Counsel agreed on Jan 27/09 to this date. Moreover, video has been set up already.

[20] In the circumstances of this case, I am satisfied that the RPD committed a reviewable error in refusing the request by Counsel, on behalf of the Applicant for an adjournment, thereby compromising his ability to fully prepare to present his case. The RPD made the following comment concerning the manner in which the Applicant testified:

[23] At the end of the day the panel questions the lucidity of the claimant. For example, he alleges he now fears Jamaican thugs in Canada. He testified this was the reason for him relocating to Nelson, BC. He also testified they tried to kill him when he was in England.

[21] I infer from this remark that even at a subconscious level, the RPD was concerned about the ability of the Applicant to present his case.

[22] This fact, combined with the lack of evidence that the RPD properly considered the factors in section 48 of the RPD Rules, is enough to justify judicial intervention in this case. In the result, the application for judicial review is allowed, the decision of the RPD is quashed and the matter is remitted to a differently constituted panel of the RPD for re-determination. It is not necessary for me to address the other arguments that were advanced by the parties.

[23] There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, the decision of the RPD is quashed and the matter is remitted to a differently constituted panel of the RPD. There is no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2816-09

STYLE OF CAUSE: BALVIN SERVICE v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: December 8, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN J.

DATED: January 18, 2010

APPEARANCES:

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