Federal Court  Cour fédérale

Date: 20100614

Docket: IMM-5714-09

Citation: 2010 FC 640

Ottawa, Ontario, June 14, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALEXEY GOLBOM, NADIA GOLBOM,
MARINA GOLBOM, YULIA GOLBOM,
(by her litigation guardians ALEXEY GOLBOM and MARINA GOLBOM)
and STANISLAV GOLBOM
(by his litigation guardians ALEXEY GOLBOM and MARINA GOLBOM

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") of the decision of the Refugee Protection Division of the Immigration and Refugee Board ("Board"), dated October 14, 2009, wherein the applicants' claim to refugee status pursuant to section 96 and 97 of the *IRPA* was refused.

[2] The applicants raised several issues regarding the Board's findings that they would not face persecution if they were to return to Israel and that they were not persons in need of protection. I advised counsel during the hearing that I would not interfere with the Board's decision on those grounds. Applying the standard of review of reasonableness, the Board's decision on those issues "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] S.C.J. No. 9, at paras.47 and 53; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 46; *Kaur v. Canada (Minister of Citizenship and Immigration),* 2010 FC 417, [2010] F.C.J. No. 487, at para. 14.

[3] In addition, the applicants contended in their written submissions that their rights to procedural fairness had been violated by the refusal of an adjournment of the hearing and inadequate interpretation when the hearing proceeded over their objections. Such matters are to be reviewed under the standard of correctness: *Sketchley* v. *Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056, at para.53-54; *Canadian Union of Public Employees* v. *Ontario (Minister of Labour)*, 2003 SCC 29, [2003] S.C.J. No. 28, at para. 100.

[4] Counsel for the applicants did not press the interpretation issue at the hearing of this application. I note that a request for Hebrew interpretation was expressly waived prior to the Board hearing and the hearing proceeded with Russian interpretation. Having read the transcript of the proceedings, I am satisfied that the interpretation services were adequate and that there was no breach of natural justice on this ground.

[5] The issue that is determinative of this application is whether the Board member violated the duty of natural justice by failing to adjourn the hearing so that the applicants could be represented by counsel.

BACKGROUND

[6] The principal applicant Alexey Golbom, his mother Nadia Golbom, his wife, Marina Golbom, his daughter, Yulia Golbom and his son, Stanislav Golbom, were all born in the former USSR, in what is now the Ukraine. They are Orthodox Christians and ethnic Russians. Alexey's father was ethnically Jewish and, therefore, the applicants were seen as Jews and they alleged to have been subjected to anti-Semitic hatred in the Ukraine. They immigrated to Israel in 1992, except Nadia who did so in 1994, and became citizens of that country by the effect of the law of return.

[7] In Israel, the applicants claimed to have experienced discrimination, humiliation, verbal and physical abuse because of their Russian ethnicity and Orthodox Christian religion. Their decision to leave Israel crystallized when Yulia finished her military service and when Stanislav was considered fit to serve after a medical examination in July 2006 following a second notice for mandatory military service. The applicants left Israel and arrived in Canada on August 31, 2006. They made an asylum claim shortly after arrival.

[8] Their hearing before the Board was originally set for June 16, 2009. Only their former counsel appeared on that date to request a postponement for medical reasons relating to two of the applicants. The hearing was rescheduled to be heard on a peremptory basis to October 14, 2009.

[9] The applicants say that a few days before the date of the postponed hearing they were told by their counsel that they were no longer covered by legal aid and that he would not represent them unless he was paid a substantial amount of money in advance. There is no indication that the lawyer requested to be removed from the record or notified the Board that he would no longer be acting for the applicants.

[10] The applicants attended the scheduled hearing without counsel and requested another postponement in order to raise funds, possibly with a partial payment arrangement with Legal Aid Ontario, and hire a lawyer. The Board member ruled that the ample time the applicants had been given to prepare for their hearing, their prior preparation by their counsel, their prior disclosure of evidence and the presence of an experienced Tribunal Officer were sufficient to proceed with the applicants' hearing without prejudicing them.

ANALYSIS

[11] While the right to counsel is not absolute in immigration matters and tribunals are masters of their own procedures, administrative tribunals have to respect procedural fairness when deciding an adjournment request based on the absence of counsel: *Austria v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 423, [2006] F.C.J. No. 597, at para. 6; *Siloch v. Canada (Minister of Employment and Immigration)*, (1993) A.C.W.S. (3d) 570, [1993] F.C.J. No. 10 (F.C.A.); *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25, at 568-269.

[12] Factors to be considered in deciding an adjournment application are set out in subsection 48 (4) of the *Refugee Protection Division Rules (*SOR/2002-228), which reads as follows:

Factors	***Éléments à considérer***
(4) In deciding the application, the Division must consider any relevant factors, including	(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment:
(*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.	*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 causerait vraisemblablement une injustice; *k*) la nature et la complexité de l'affaire.

[13] In addition to these factors, other considerations have been identified as relevant in the jurisprudence, such as the effort made by an applicant to be represented and whether the applicant can be faulted for not being ready: *Siloch, supra*; *Modeste v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027, [2007] F.C.J. No. 1290, at para.15; *Sandy v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468, [2004] F.C.J. No. 1770, at para.52. The failure to regard all of the relevant factors, whether negative or positive, in deciding upon an adjournment in the absence of counsel has been held to constitute a breach of natural justice: *Sandy, supra*, at para. 54; *Modeste, supra*, at paras.18-19; *Siloch, supra.*

[14] The respondent submits that in reviewing whether the Board took all relevant factors into consideration in denying an adjournment request due to the absence of counsel, the Court should assess the decision on the basis of the entire record. The member's reasons may not have to be as detailed if, for example, the transcript of the hearing allows the reader to understand the Board's decision: *Canada (Minister of Citizenship and Immigration) v. Shwaba*, 2007 FC 80, [2007] F.C.J. No. 119, at paragraph 15.

[15] In the present case, a reading of the member's reasons and of the transcript does not show that the member took into consideration all of the relevant factors. There does not appear to have been any consideration of the effort made by the applicants to be represented by counsel and whether they could be blamed for his absence. The applicants explained that they had found out about the unpredicted Legal Aid issue three business days before the hearing and were not in a position to retain new counsel.

[16] The member did not inquire about the length of the adjournment sought by the applicants or the length of time it would take for them to work out some arrangement with the Legal Aid Plan, such as a repayment scheme, as they had suggested. She was reasonably concerned that the applicants had been waiting for almost three years to schedule their hearing.

[17] There is no indication that the member considered the nature and complexity of the matter to be heard. This was a combined claim of five persons, all of whom wanted to testify, raising issues such as religious and ethnic persecution and conscientious objector status. Counsel would have organized the testimony and argument. The importance of this consideration is confirmed by a reading of the transcript. On several occasions, the member expressed her concern and apparent irritation about the difficulty in dealing with five claimant witnesses.

[18] The member placed considerable weight on the presence of a tribunal officer at the hearing. This was not, in my view, a relevant consideration in determining the adjournment request. The officer's role, as accurately stated by the member herself, was to ensure that she had all the information necessary in order to make a decision in the applicants' case, whether counsel were there or not: see *Sanchez v. Canada (Minister of Citizenship and Immigration),* 2009 FC 101, [2009] F.C.J. No. 101, at para. 47.

[19] I am left with the impression, from reading the transcript, that the refusal to grant the adjournment stemmed largely from the member's serious doubts about the explanation given with respect to the previous postponement sought and granted in June 2009. Although this is a relevant

factor pursuant to subsection 48(4)(h) of the *Refugee Protection Division Rules*, a refusal to adjourn must take into account all the other relevant factors, which was not done here.

[20] In the result, I am satisfied that the duty of natural justice owed to the applicants was breached as a result of the failure to adjourn the Board hearing to allow the applicants to retain counsel. Accordingly, this application will be granted and the matter remitted to the Board for a new hearing to be scheduled before a differently constituted panel. No serious questions of general importance were proposed and none are certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is granted and the matter is remitted to the Board for a new hearing to be scheduled before a differently constituted panel. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5714-09
STYLE OF CAUSE:	Alexey Golbom, Nadia Golbom, Marina Golbom, Yulia Golbom (by her litigation guardians Alexey Golbom and Marina Golbom) and Stanislav Golbom (by his ligation guardians Alexey Golbom and Marina Golbom**)**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	June 14, 2010

APPEARANCES:

Andrew Brouwer	FOR THE APPLICANTS
Adrienne Rice	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ANDREW BROUWER Jackman & Associates Toronto, Ontario	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT