Federal Court  Cour fédérale

Date: 20120502

Docket: IMM-3336-11

Citation: 2012 FC 511

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 2, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

REYNOLD SAINT-EUSTACHE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review, submitted pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of the decision by the Immigration and Refugee Board (IRB) dated May 11, 2011, that Reynold Saint-Eustache

(applicant) is not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA.

[2] For the following reasons, this application for judicial review is allowed.

II. Facts

[3] The applicant is a citizen of Haiti.

[4] In 1973, he ran a crafts and electronics business. He bought these products in Haiti and the Dominican Republic and then resold them at profit. His work involved doing business and travelling in the two countries.

[5] He was informed that certain people wanted to kill him.

[6] The applicant then decided to leave Haiti to settle in the Dominican Republic. He nonetheless alleges that he was still in danger because he could have easily been found.

[7] He left the Dominican Republic to settle in the United States of America, but passed through Haiti before going there. The applicant’s brother, an American citizen, filed a permanent residence application in the applicant’s name. The applicant claims that he is still waiting for a reply from the American authorities.

[8] Because the applicant feared removal from the United States, he decided to claim refugee protection in Canada.

[9] He claimed refugee protection on January 16, 2008, in Saint-Armand.

[10] The panel found that the applicant is not a refugee or a person in need of protection under sections 96 and 97 of the IRPA.

[11] At the beginning of the hearing, counsel for the applicant asked the IRB member to recuse himself because of extreme hostility between them. The member refused this request. The applicant maintains that the existence of extreme hostility between the member and his counsel raises a reasonable apprehension of bias in his case.

III. Legislation

[12] Sections 96 and 97 of the IRPA specify the following:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la

themself of the protection of that country,	protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d’une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

IV. Issue and standard of review

A. Issue

a. Does the Board member's conduct at the hearing raise a reasonable apprehension of bias?

B. Standard of review

[13] Procedural fairness issues are reviewed on the standard of correctness (see *Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 at paragraph 51).

V. Position of the parties

A. Position of the applicant

[14] At the beginning of the hearing on March 8, 2011, counsel for the applicant asked Board member Diop to recuse himself on the basis of what might be considered extreme hostility that has existed between them since she filed a complaint with the IRB against the Board member in 2009. The Board member refused the request without reasons and decided to proceed.

[15] Counsel for the applicant alleges that the refusal of her recusal request and the Board member's comments raise an apprehension of bias.

[16] She also contends that the Board member had decided the outcome of the refugee claim of her client, Mr. Saint-Eustache, in advance.

B. Position of the respondent

[17] The respondent replies that the applicant has the correlative burden of proving that the Board member was biased in this case and that he did not submit any convincing evidence in support of his position.

[18] He also points out that the parts of the application to reopen that address the conflict between Ms. Iannicelo and the Board member since 2009 are inadmissible in evidence because Mr. Saint-Eustache, who filed the application in support of his affidavit, had absolutely no personal knowledge of this, which is contrary to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106.

[19] The respondent submits that if the Court allows the applicant's arguments, the decision would result in the incorporation into Canadian law of the concept of automatic disqualification, which the Supreme Court rejected in *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 at paragraphs 69 to 71 (*Wewaykum*).

[20] The respondent also claims that the IRB's administrative independence could be called into question if the Court allows this application.

VI. Analysis

[21] The Supreme Court reminds us that it is impossible to determine the precise state of mind of a decision-maker (see *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at page 636).

[22] Regarding bias, it has also taught us that it " . . . is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality" (see *Wewaykum*, above, at paragraph 76).

[23] An inquiry on bias remains, of course, fact-specific (see *Wewaykum*, above, at paragraph 77). "Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts." (see *Wewaykum*, above, at paragraph 77).

[24] Because the applicant alleges the existence of a reasonable apprehension of bias and "[t]he matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit" (see *Wewaykum*, above), the Court determines that, in this case, there are sufficient elements to find that there is a reasonable apprehension of bias on the part of the Board member.

[25] "Parties are not normally able to complain of a breach of the duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment. A party cannot

wait until it has lost before crying foul." (*Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at paragraph 66).

[26] However, the hearing transcript is very telling.

> [TRANSLATION]
>
> BY COUNSEL (to the panel member)
>
> \- I would just like to finish telling you what I want to tell you, if you let me. I know that you know what I want to tell you in any event. It is that, from what I have understood, we were no longer going to work together you and me.
>
> A. Counsel, I have no questions, I have no answers to give you on that. If you have . . .
>
> \- But I, I, I cannot proceed with you because . . .
>
> A. If you have reasons for not wanting to work with me, you will go and provide them to the Immigration and Refugee Board.
>
> \- Exactly.
>
> A. So then, here we are . . .
>
> \- And we are not . . .
>
> A. . . . .to proceed.
>
> \- No.
>
> A. I am in the room. I initiated the hearing. If someone told you that I will not work with you or that you will not work with me, that is your problem.
>
> \- No, but it is not a problem. Myself, I will ask you . . .
>
> A. Myself, I am assigned, I am assigned files and I do not consider the counsel with whom I have to process them.
>
> \- No, that I understand but . . .

A. So then, please, I will proceed with my hearing. If you would like to leave the room, leave. I am proceeding; let me be absolutely clear.

- Myself, I will ask you . . .

A. And I will not permit you, I do not permit you to interrupt me at this stage.

- I did not interrupt you, I am making a preliminary request . . .

A. OK, let me . . .

- . . . for you to recuse yourself from the case.

A. Listen, I will not recuse myself for you, let me be absolutely clear. I do not choose the counsel I work with.

- No, that I understand.

A. I do not have to answer that question as far as I am concerned. OK. So . . .

- No, you have a recusal request that is very clear.

A. Counsel.

- I cannot work with you because of what you know.

A. Counsel, there is no, counsel . . .

- And myself, I was told that we had no more cases, you and me together.

A. Counsel, I do not . . .

- So I will ask you to adjourn for five (5) minutes.

A. I . . .

- Time to resolve this issue because I was told that we would no longer be working together.

A. Counsel.

- And you see, I cannot even talk to you without you interrupting me. I asked you to recuse yourself because of what you know.

  The two (2) of us have a very bad relationship. We are unable to work together, you know that.

A. I hear you, yes. Finish what you have to say.

- No. So, I do not see how we can work together, you are well aware of that.

A. Counsel, I do not work with you.

- But I, I work [with] you when I am here.

A. Please, please. You are finished talking. I will reply to your recusal request. And if you [want] to put it in writing, you will put it in writing, and I will reply in writing.

  So I will not recuse myself as per your wishes.

  . . .

BY THE PANEL MEMBER (to the person in question)

- So, she should accept her responsibilities, but she should not ask me to leave the room as per her wishes. Therefore, we will proceed with the hearing. I refuse her recusal request. My reply is very clear.

  Now, I will provide you with some direction. This hearing will proceed as follows: I asked her to present you with your Personal Information Form. If she does not do so, I will present it to you myself and ask you if you recognize it and if the information contained therein was written by yourself. That is the first thing.
  (see the hearing transcript at pages 190, 191, 192 and 196 of the Tribunal Record)

[27] First, it was noted that the Board member refused the recusal request by counsel for the applicant without providing explanations. He then accused counsel of disrupting the conduct of the hearing and asked that she, in turn, recuse herself. She explained to him, in her own words, that the

code of conduct does not permit her to do so. This exchange in the presence of the applicant created a highly sensitive context. For example, the applicant stated the following: [TRANSLATION] “I do not feel good if counsel representing me does not get along with my Board member” (see the hearing transcript at page 201 of the Tribunal Record). However, the Board member provided him with the following reply: [TRANSLATION] “The harmony that must prevail in the courtroom consists in respect for the institution, for the Canadian justice system” (see the hearing transcript at page 201 of the Tribunal Record).

[28] The Board member placed the applicant and his counsel in an unacceptable position. First, he had to explain the reasoning behind his refusal of the recusal request by counsel instead of attacking her. His conduct created an untenable environment for the applicant, who was forced, ultimately, to choose between his counsel and run the risk of offending the Board member who had to decide his fate.

[29] The Court, after more than one reading of the hearing transcript, believes that, despite the assurances of impartiality that the Board member tried to give the applicant, the damage was already done, as stated by the saying *jacta alea est*. In fact, the Board member had already accused counsel for the applicant of being at the source of the ongoing hostility between them. In these circumstances, the average person may have an apprehension of impartiality. Furthermore, the applicant’s reply to the Board member’s question on the conduct of the hearing is very eloquent.

> [TRANSLATION]
>
> Q. In your opinion, did this hearing go smoothly?
>
> R. Yes, very well, very tranquil. I like that very much and I agree.

> (see the hearing transcript at page 231 of the Tribunal Record).

[30] It is noted that the applicant referred to the tranquil atmosphere in contrast to the animosity that existed at the beginning of the hearing, but avoided answering the substantial question.

[31] Consequently, the Court finds that a well-informed person, viewing the matter realistically and practically, and having thought the matter through, would think it more likely than not that the Board member, despite his assurances, could have been biased.

VII. Conclusion

[32] The Court allows the application for judicial review, sets aside the IRB decision and refers the matter back to a differently constituted panel.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;

2. The IRB decision is set aside and the matter is referred back to another Board member; and

3. There is no question of general interest to certify.

"André F.J. Scott"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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