

Federal Court



Cour fédérale

Date: 20120629

Docket: IMM-9120-11

Citation: 2012 FC 838

Ottawa, Ontario, June 29, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**JOSE MANUEL RODRIGUEZ VIEIRA
MARIA FATIMA DOS SANTOS DE RODRIGUEZ
JONATHAN JOSE RODRIGUEZ DOS SANTOS
FATIMA ANDREINA RODRIGUEZ DOS SANTOS**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] José Manuel Rodriguez Vieira and his wife Anabella Rodriguez Vieira (the principal applicants), as well as their two adult children, Jonathan José Rodriguez Dos Santos and Fatima Andreina Rodriguez Dos Santos, claim to fear political persecution in Venezuela. The Refugee Protection Division of the Immigration and Refugee Board (the Board) rejected their refugee claim, finding that the applicants have access to Portuguese citizenship by mere formality, and that the family could live safely in Portugal without any fear of persecution.

[2] The applicants do not challenge the substance of the Board's decision. They conceded at the judicial review hearing that they are entitled to Portuguese citizenship. They argue instead that the Board's decision should be set aside because the Board denied them the opportunity to be heard concerning the persecution they experienced in Venezuela and the reasons they cannot live in Portugal today.

[3] For the reasons that follow, the applicants have not persuaded me that the process followed by the Board was unfair. As a consequence, their application for judicial review will be dismissed.

Background

[4] The applicants are Venezuelan nationals. They came to Canada on January 21, 2007, fleeing political persecution in Venezuela resulting from their involvement with the *Acción Democrática* party and their opposition to the Hugo Chavez government. They claimed refugee protection shortly after their arrival, saying that, as owners of a food-retailing and a dry-cleaning business, they faced threats, violence and extortion by the *Circuitos Bolivarianos*, which are security and police cooperatives subsidized by the Venezuelan government. The incidents allegedly began in 2000 and continued through early 2007, when the applicants finally fled to Canada.

[5] Both of the principal applicants were born in Venezuela to Portuguese parents. At an initial hearing on March 17, 2010, the Board asked the Refugee Protection Officer (RPO) (with the consent of the applicants) to inquire into the applicants' eligibility for Portuguese citizenship and the

process that they would need to follow to obtain it. The hearing was adjourned to allow the RPO to gather that information, which the Board saw as potentially determinative of the applicants' claim.

[6] The hearing resumed on September 15, 2010, to address the dual citizenship issue. At that time, the Board explained that if it became apparent that the applicants did not in fact have access to Portuguese citizenship, it would schedule a further hearing in order to address the applicants' allegations of persecution in Venezuela.

[7] The RPO's correspondence with Portuguese consular authorities revealed that both the principal applicants and their children had access to Portuguese citizenship by way of a mere formality. As already noted, the applicants did not challenge this finding before the Board and have now conceded that this is indeed the case.

[8] For the applicants' refugee claim to succeed, then, they were required to demonstrate not only that they have a well-founded fear of persecution in *both* Venezuela and Portugal, and that they are unable or unwilling to avail themselves of the protection of both countries: see paragraph 96(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] and *Williams v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126, [2005] 3 F.C.R. 429 at para. 27.

[9] The applicants took the position before the Board that they faced a risk of persecution in Portugal. The applicants' adult daughter, Fatima Andreina, is both blind and deaf. She requires a specialized education program that is publicly available in Canada but not in Portugal. The

applicants argued before the Board that the denial of these specialized services to Fatima Andreina would breach her right to education, and constitute discrimination amounting to persecution.

[10] The Board rejected this argument, however, concluding that the lack of publicly-available educational facilities in Portugal for students who are both deaf and blind did not amount to persecution. The Board accordingly denied the applicants' claim for refugee protection in Canada.

Analysis

[11] As previously explained, the applicants do not challenge the substance of the Board's conclusions, including its finding that Fatima Andreina would not face persecution in Portugal. However, they contend that they were treated unfairly during their hearing before the Board. They say they were unable to properly present their evidence concerning their fear of persecution in Venezuela and the reasons why they cannot live in Portugal. They also contend that they were denied the opportunity to respond to the Board's concerns on account of the Board's hostility, impatience and lack of sensitivity.

[12] Where issues of procedural fairness arise, the task for the Court is to determine whether the process the Board followed satisfied the level of fairness required in the circumstances: see *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43. If the process adopted was unfair, the Court will not defer to the Board, but will set aside the decision: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 661.

[13] I have carefully reviewed the transcript of the September 15, 2010, hearing in light of the parties' written and oral submissions as well as the affidavit that Mr. Rodriguez filed in support of this application. While I accept that in some cases, intimidating, harassing or insensitive behaviour or interventions by a Board member may give rise to a reasonable apprehension of bias or render a hearing unfair, the transcript does not demonstrate such behaviour or interventions were present in this case. Although it is apparent that the Board did intervene at several points in the hearing, it did so to ensure that the applicants answered the questions asked of them, and to encourage applicants' counsel to confine her questions to matters relevant to the refugee claim. In my view, there was nothing improper in the way the Board conducted the hearing.

[14] The Refugee Protection Division of the Immigration and Refugee Board is a specialized tribunal and the master of its own procedure. As long as it respects the rules of fairness, the Board may control its own process: see *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25 (QL) at para. 16. This principle is reflected in Rules 68, 69 and 70 of the *Refugee Protection Division Rules*, SOR/2002-228, which accord the Board flexibility in determining how to proceed in a given case. Rule 68, in particular, reads:

68. In the absence of a provision in these Rules dealing with a matter raised during the proceedings, the Division may do whatever is necessary to deal with the matter.

68. Dans le cas où les présentes règles ne contiennent pas de dispositions permettant de régler une question qui survient dans le cadre d'une affaire, la Section peut prendre toute mesure nécessaire pour régler la question.

It is, therefore, properly part of the Board's role to identify which issues to deal with first, in order to secure the most just, fair and expeditious determination of the claim coming before it.

[15] It was entirely reasonable in the circumstances of this case for the Board to proceed with a hearing on the issue of Portuguese citizenship before turning to the merits of the applicants' claim to fear persecution in Venezuela as the citizenship issue was potentially determinative of the applicants' refugee claim. In Canadian law, "where citizenship in another country is available, an applicant is expected to make attempts to acquire it and will be denied refugee status if it is shown that it is within his power to acquire that other citizenship": *Williams*, above at para. 27. It would make no sense to spend a half-day hearing evaluating issues of credibility, objective fear, and state protection in Venezuela, if the applicants' dual nationality precluded the applicants from claiming protection in Canada in the first place.

[16] I would also observe that during the course of the September 15, 2010 hearing the Board explained why it felt that the Portuguese citizenship issue could be determinative of the applicants' claim. As already noted, the Board also advised the applicants that if it became clear that they had no right to Portuguese citizenship, a further hearing would be held in order to address their claim of persecution in Venezuela.

[17] The Board evidently did not have all the information before it at the September 15, 2010 hearing concerning the merits of their fear of persecution in Venezuela. It was not, however, an error for the Board to proceed with the hearing in the absence of that information, given that it was not relevant to the citizenship issue being determined.

[18] Moreover, the applicants confirmed at the hearing of their application for judicial review that they were not prevented from placing any information before the Board relevant to the issue of their Portuguese citizenship. While the applicants also point to the brevity of the September 15, 2010 hearing, the applicants were nonetheless fully able to address the Board concerning the citizenship issue. After considering their submissions, the Board explained why it was satisfied that the applicants could live safely in Portugal without any fear of persecution. The applicants have not challenged these findings, and I see no reason to interfere with them.

[19] I understand that the applicants are frustrated by the fact that the Board rejected their claim without hearing their evidence on the persecution they say they suffered in Venezuela, especially in light of the fact that the Board had accepted certain of their family members' claims in the past. I also understand their concerns about their lack of family support for the family and their daughter in Portugal. However, these are humanitarian and compassionate considerations, and do not go to the issue that the Board was called upon to decide at the refugee hearing. While I am sympathetic to the applicants' circumstances, I am nevertheless satisfied that their right to be heard was respected in the circumstances of this case.

[20] Finally, even if I were to accept the applicants' submission that the manner in which the Board proceeded rendered their hearing unfair (which I do not), it would be futile to remit their claim to the Board for re-determination. This is because, as a matter of law, the outcome of their refugee claim is inevitable: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228; *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2003] 2

F.C. 317 at para. 31; *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 135, 172 N.R. 308 (F.C.A.).

[21] The applicants concede that they are entitled to citizenship in Portugal and have not challenged the finding that they would not face persecution in that country. As a result, the Board would be bound by law to reject their claim for surrogate protection in Canada.

Conclusion

[22] For these reasons, the application for judicial review is dismissed. Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9120-11

STYLE OF CAUSE: JOSE MANUEL RODRIGUEZ VIEIRA ET AL v. MCI

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

DATED: June 29, 2012

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