Federal Court  Cour fédérale

Date: 20121218

Docket: IMM-6088-11

Citation: 2012 FC 1495

Edmonton, Alberta, December 18, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

VASILE COSTENIUC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2001, Mr Vasile Costeniuc arrived in Canada from Romania as a stowaway. He filed a claim for refugee protection that was unsuccessful. Mr Costeniuc now admits that his allegation of religious persecution in Romania was false.

[2] After his refugee claim was dismissed, Mr Costeniuc married a Canadian citizen who sponsored his application for permanent residence. He obtained permanent resident status on June 17, 2005 and separated from his spouse less than two weeks later. They later divorced. Mr Costeniuc now resides with his common law spouse and their two-year-old daughter.

[3] In 2006, Ms Costeniuc's estranged spouse informed Citizenship and Immigration Canada (CIC) that their marriage was one of convenience. CIC interviewed Mr Costeniuc and referred the matter for a hearing before the Immigration Division (ID).

[4] Mr Costeniuc's lawyer, Ms Patricia Ritter, failed to appear at a number of ID hearings due to illness. For one, she arranged for a consultant to take her place. For others, she asked a colleague to appear for her. Ultimately, in 2009, the ID concluded that Mr Costeniuc was inadmissible to Canada for misrepresenting material facts.

[5] Mr Costeniuc appealed the ID's decision to the Immigration Appeal Division (IAD). Ms Ritter remained counsel of record. However, she told Mr Costeniuc that her health might prevent her from attending the hearing of his appeal. In fact, she was unable to attend a hearing scheduled for February 2011. The hearing was adjourned to June 3, 2011. Again, the day before the hearing, Ms Ritter sent an email to the IAD stating that it was "unclear if I will be available tomorrow morning". The subject line of her email read, "Request for postponement". Ms Ritter did not notify Mr Costeniuc.

[6] At the hearing, the IAD asked Mr Costeniuc if he was prepared to proceed without counsel. He said yes. The hearing proceeded. The IAD heard evidence from Mr Costeniuc and his common-law spouse, and permitted Mr Costeniuc to supply additional documentary evidence after the hearing.

[7] The IAD rejected Mr Costeniuc's appeal, finding that he had not shown that the decision of the ID was invalid, or that he merited humanitarian and compassionate (H&C) relief.

[8] Mr Costeniuc argues that the IAD's decision should be quashed because he was either denied a fair hearing, or was the victim of a miscarriage of justice due to the incompetence of counsel. He asks me to order a re-hearing before a different panel.

[9] I find that the hearing was unfair. Therefore, I need not deal with the question of whether the incompetence of Mr Costeniuc's counsel resulted in a miscarriage of justice. She intervened in this application for judicial review but, as her submissions related solely to the issue of incompetence, I need not address them specifically.

II. Was the hearing before the IAD fair?

[10] At the hearing, while stating that he was ready to proceed, Mr Costeniuc informed the IAD that he had not spoken to counsel, had not seen or reviewed the 300-page record (except during the five-minute adjournment the IAD afforded him), had not brought any witnesses with him other than his common-law spouse (Ms Ritter had planned to call ten witnesses), did not understand the

difference between challenging the merits of the ID decision and raising H&C grounds, and did not know what to say on his own behalf. In his closing submissions, he simply stated that he was hurt by the critical submissions presented by counsel for the Minister. He tried to explain why, but the panel told him "it is not the time for that." However, the Board did give Mr Costeniuc a chance to submit additional documentary evidence after the hearing.

[11] In my view, the circumstances here are comparable to those in *Mervilus* v *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206, and *Nemeth* v Canada *(Minister of Citizenship and Immigration)*, 2003 FCT 590, where the Court recognized an overarching responsibility to ensure a fair hearing for unrepresented applicants.

[12] Here, the IAD did not expressly address the possibility of an adjournment. Ms Ritter had requested one in writing, but the IAD never considered that request. It simply asked Mr Costeniuc if he was prepared to proceed without her.

[13] In addition, the matter before the IAD was a serious one. Mr Costeniuc's continued residence in Canada with his spouse and child was at stake.

[14] Further, there were complex legal issues involved, including the validity of the ID's decision, as well as the various H&C factors that were in play: Mr Costeniuc's establishment in Canada, including his business and financial circumstances; the best interests of a Canadian-born child; and the overall hardship to each of the family members if Mr Costeniuc were removed from Canada.

[15] Based on my reading of the transcript, Mr Costeniuc was ill-prepared to address those issues in any serious way. He had not had any meetings with counsel. He had been expressly led to believe, based on several undertakings to him, that she would either be present at the hearing or would find someone to replace her. Not having heard anything to the contrary, he naturally expected her or her proxy to be there. Because she had missed several other hearings, Mr Costeniuc would not have been surprised that she was unavailable. At the same time, he could not have assumed, without specific notice, that she would not appear that day. While Ms Ritter appears to have made efforts to inform the IAD and counsel for the Minister of her circumstances, there is no evidence that she alerted Mr Costeniuc.

[16] Therefore, Mr Costeniuc is entitled to a new hearing. While he had no absolute right to counsel, he had an undeniable right to a fair hearing. Looking at the proceedings as a whole, I am satisfied he was denied that right.

[17] Accordingly, I need not address Mr Costeniuc's alternative argument that Ms Ritter was incompetent, and that her conduct resulted in a miscarriage of justice.

III. Conclusion and Disposition

[18] Based on his counsel's communications, Mr Costeniuc reasonably expected that she would either appear for his hearing before the IAD or arrange a replacement. She had done so on numerous occasions in the past. She gave him no express indication to the contrary. Further, it should also

have been apparent to the IAD that Mr Costeniuc had a poor understanding of the issues he had to address and the evidence that might be relevant to those issues. In the circumstances, I am satisfied that Mr Costeniuc did not have the benefit of a fair hearing before the IAD and must, therefore, allow this application for judicial review and order a new hearing before a different panel.

[19] Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. A new hearing before a different panel is ordered.

3. No question of general importance is stated.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6088-11
STYLE OF CAUSE:	VASILE COSTENIUC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 10, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	O'REILLY J.
DATED:	December 18, 2012

APPEARANCES:

Robert I. Blanshay	FOR THE APPLICANT
Asha Gafar	FOR THE RESPONDENT
Yehuda Levinson	FOR THE INTERVENER

SOLICITORS OF RECORD:

Blanshay & Lewis Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
Levinson & Associates Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENER