

Federal Court



Cour fédérale

Date: 20130130

Docket: IMM-4453-12

Citation: 2013 FC 102

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 30, 2013

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

SARA CRUZ TELEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (RPD) dated April 19, 2012, rejecting the applicant's refugee claim.

I. Issue and standard of review

[2] The only issue in this case concerns the allegation of a breach of the rules of natural justice arising from the RPD's refusal to grant the applicant a postponement of the hearing. In this respect, the RPD's decision is not entitled to deference and the applicable standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paragraph 43, [2009] 1 SCR 339, *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraphs 52-54, [2006] 3 FCR 392).

II. Analysis

[3] For the following reasons, I am of the opinion that the RPD's decision to deny the postponement request was unreasonable and that the denial resulted in a breach of the rules of natural justice.

[4] The applicant is represented by Stéphane Handfield. The hearing for the claim was initially scheduled for November 15, 2011. It was then adjourned on a peremptory basis to March 26, 2012. The morning of the hearing, Éric Taillefer appeared before the RPD and requested that the hearing be postponed on the ground that Mr. Handfield was unable to attend.

[5] The Board member denied the postponement, but adjourned the hearing for around an hour to give Mr. Taillefer time to review the file and prepare. The hearing continued. Mr. Taillefer then asked the Board member permission to make written submissions after the hearing, which was granted.

[6] In its decision, the RPD explained why it did not grant the postponement request. The RPD indicated that Mr. Taillefer raised the unavailability of Mr. Handfield without providing a specific reason. It added that Mr. Taillefer never mentioned that Mr. Handfield was ill, contrary to the allegations in the written submissions that Mr. Taillefer sent to the RPD after the hearing, and that it was therefore an “untruth”. The RPD accepted that it was a second postponement request based on Mr. Handfield’s unavailability and that the hearing date had been scheduled on a peremptory basis. The RPD then made the following statement:

[6] . . . The panel is of the opinion that the reasonable attitude of a man skilled in the art should have been to corroborate his allegations by means of a medical certificate, if what his representative stated in his submissions were true, which the panel does not believe, because, at the hearing, he never alluded to impediments for health reasons.

[7] I am of the opinion that, in the specific circumstances of the evidence in the record, the RPD’s decision to not grant the postponement was unreasonable and the Board member’s comments were unjust.

[8] It is clear from the decision that the Board member was of the opinion that Mr. Taillefer had provided no reason to justify Mr. Handfield’s unavailability. It is also clear from the decision that the Board member did not believe that Mr. Handfield was unable to attend the hearing for health reasons.

[9] The hearing transcript makes it possible to review the submissions Mr. Taillefer made at the beginning of the hearing:

[TRANSLATION]

BY COUNSEL: (to the presiding member)

- Yes, thank you Mr. Board member. So, you see that I am not Mr. Handfield. He is the lawyer indicated in Ms. Cruz's record. He contacted me yesterday afternoon and asked me to come and postpone this case.
- In short, for personal reasons, Mr. Handfield is indisposed today and even possibly for the rest of the week and is unable to attend. He apologizes, of course.
- Good, myself I am certain that I am not ready to proceed because anyway, I do not have the file, it is currently in Mr. Handfield's possession.
- This is the second postponement in this case, to my knowledge, today. However, I will suggest dates that are relatively soon so that we can proceed without the case being held up (inaudible). I would, however, like to mention that Mr. Handfield was ready to proceed this morning, there was actually an emergency at the end of the week that resulted in him being unable to attend today.
- ...
- Of course, Mr. Board member (I apologize for interrupting) you are not required to respect the choice of counsel for Ms. Cruz and I understand that it is (inaudible), I understand completely. However, there are really circumstances beyond Mr. Handfield's control that make (inaudible)

[10] The applicant's record includes an affidavit of Mr. Taillefer in which he specifies that he informed the Board member, upon returning from a break, that Mr. Handfield was unavailable for health reasons. His affidavit contains the following paragraphs:

[TRANSLATION]

2. On the telephone, on March 26, 2012, Mr. Handfield told me that he was ill and could not attend his hearing with the applicant. He asked me to represent him to obtain a postponement and gave me early dates for the hearing;

...

4. On record, I told the panel that I was requesting a postponement. I explained the situation by indicating that this was beyond the applicant's control. Originally, I explained that Mr. Handfield could not be present for personal reasons;

5. The panel denied the postponement request based on the fact that the hearing date was peremptory and that the applicant knew that, and Mr. Handfield too. I asked for a 10-minute adjournment to speak with Mr. Handfield and the applicant about what was to follow. The adjournment was granted;

6. Upon returning from the adjournment, I told the Board member that the postponement was for a medical reason. However, after listening to the recording, the fact is that we were not being recorded at the time.

[11] The record also includes an affidavit of the applicant's friend Mélanie Da Silveira Correia, who was present at the hearing and who confirmed that, upon returning from the break, Mr. Taillefer informed the Board member that Mr. Handfield was ill.

[12] In the written argument that Mr. Taillefer submitted to the RPD after the hearing, he indicated that Mr. Handfield had been unable to attend the hearing on March 26, 2012, for health reasons.

[13] In the circumstances, I am of the opinion that it was unreasonable and unjust for the Board member to call into question the truthfulness of the ground for the postponement request raised by Mr. Taillefer on behalf of Mr. Handfield. I agree that, during his initial intervention, Mr. Taillefer did not specify that Mr. Handfield was ill. However, he clearly told the Board member that Mr. Handfield was indisposed and that it was an emergency and circumstances beyond his control. I

therefore believe that it was unreasonable for him to find that Mr. Taillefer gave no reason to justify Mr. Handfield's absence. If the Board member found that Mr. Taillefer's submissions were too vague, he had only to ask him to further specify the nature of Mr. Handfield's unavailability.

[14] Also, nothing enables me to call into question the sworn statements of Mr. Taillefer and Ms. Da Seilveira Correira that confirm that Mr. Taillefer specified, upon returning from the break, that Mr. Handfield was ill. However, it seems that this intervention was done before the recording of the hearing had resumed after the break.

[15] Finally, I am of the view that the Board member went a little bit too far by stating that Mr. Handfield should have submitted a medical certificate to justify his absence.

[16] I acknowledge that the RPD has discretionary authority to determine whether or not to grant a postponement and that it must consider the relevant elements, including those listed in section 48 of the *Refugee Protection Division Rules*, SOR/2002-228. I also acknowledge that the RPD is master of its procedure. However, I am of the opinion that, in the particular circumstances of this case, by rejecting the reasons raised in support of the postponement request, the RPD failed to consider all of the factors that were relevant for the purposes for determining whether or not to grant a postponement.

[17] I also agree with the principles advanced by the respondent. The denial of a hearing postponement is not sufficient in itself to set aside the RPD's decision. The applicant must demonstrate that the denial of the hearing postponement resulted in a breach of the principles of

natural justice or fairness rules (*Wagg v Canada*, 2003 FCA 303 at paragraph 19, [2004] 1 FCR 206; *Javadi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 278 at paragraph 25 (available on CanLII); *Julien v Canada (Minister of Citizenship and Immigration)*, 2010 FC 351 at paragraph 28, 366 FTR 160). Furthermore, the right to counsel is not absolute and the mere fact of having been represented by a lawyer with less experience does not necessarily lead to a breach of the principles of natural justice.

[18] The applicant must demonstrate that the fact that she had to proceed with a different lawyer than the lawyer she chose to represent her had an impact on her ability to submit her evidence or arguments.

[19] In this case, the applicant maintains that, in Mr. Handfield's absence, she was unable to fairly argue her interests and arguments, namely with respect to the component of her claim on her fear relating to the fact that she is a woman. The applicant submits that Mr. Taillefer was not prepared to represent her, did not know the file, did not have the entire file in his possession, had very little experience and had no experience in a case like hers.

[20] The respondent argues that the refugee claim and evidence do not clearly demonstrate that the applicant wanted to raise a fear of return based on the fact that she is a woman. He also contends that the applicant did not specify the evidence that she wanted to submit in that respect and that could have led the RPD to recognize that her personal situation as a woman could lead to a risk for her if she had to return to Mexico.

[21] I agree that the applicant's account attached to her Personal Information Form (PIF) focuses only on a fear of retaliation for having identified fraud committed by a colleague.

[22] Furthermore, the applicant specified in question 28 of her PIF that she claimed refugee protection because she feared persecution by reason of her political opinion and membership in a social group. The documentary evidence she submitted also contains documents that address the violence against women in Mexico in a general manner. However, the applicant did not testify on this aspect of her claim in that there is no evidence that connects the general documentation to her personal situation. In the written submissions filed after the hearing, however, the applicant argued her fear related to the fact that she is a single mother and identified certain elements of the documentary evidence addressing violence against women.

[23] In paragraph 17 of its decision, the RPD stated that the applicant did not testify regarding the threats or risks related to the fact that she is a woman. That is exactly what Mr. Handfield indicated by claiming that Mr. Taillefer had insufficient knowledge of the applicant's file and that, if he had been present at the hearing, that component of the fear would have been addressed in the applicant's testimony.

[24] In light of the record, I believe that it is not impossible that, in the presence of Mr. Handfield, the applicant would have been asked to testify on the part of her claim on her fear as a single mother. It is impossible for me to assume the content of such a testimony and I prefer to err on the side of caution as the case contains certain elements that suggest that the applicant intended to raise a fear based on the fact that she is a woman. As this component was not described in the

applicant's PIF, it is not impossible that Mr. Taillefer did not think to question the applicant on this point. I therefore am of the opinion that, in being obliged to proceed in the absence of Mr. Handfield, the applicant was perhaps deprived of the opportunity to submit evidence to support her allegation of fear based on the fact that she is a single mother.

[25] For all of these reasons, the application will be allowed. I would also like to note that, despite Mr. Handfield's absence, the applicant had the opportunity to testify in detail on her fear based on a risk of retaliation for having identified fraud committed by a colleague of the Institutional Revolutionary Party. That component of the decision is not at issue. The matter is therefore referred back to the RPD for the applicant's fear based on the fact that she is a woman to be assessed by a new panel.

[26] The parties have not proposed any questions for certification and none arise.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The decision is set aside in part and the matter is referred back to the Refugee Protection Division of the Immigration and Refugee Board for the applicant's allegation of risk based on the fact that she is a woman to be assessed by another panel. No question is certified.

“Marie-Josée Bédard”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4453-12

STYLE OF CAUSE: SARA CRUZ TELEZ
v MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 29, 2013

REASONS FOR JUDGMENT: BÉDARD J.

DATED: January 30, 2013

APPEARANCES:

Stéphane Handfield

FOR THE APPLICANT

Émilie Tremblay

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphane Handfield
Montréal, Quebec

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada

FOR THE RESPONDENT