Date: 20060727

Docket: IMM-7630-05

Citation: 2006 FC 927

Ottawa, Ontario, July 27, 2006

Present: The Honourable Mr. Justice Harrington

BETWEEN:

EDISON COLORADO TORRES

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

HARRINGTON J.

[1] Edison Colorado Torres fled from Columbia because he feared persecution from a group of paramilitary forces. At a private party, which he attended with his two cousins, he defended his cousin's girlfriend when a member of the paramilitary forces treated her with disrespect.

[2] The next day, a group of paramilitaries showed up at the applicant's residence. They told his mother that they wanted to kill not only him, but also his cousins. The paramilitaries also went to the home of one of his cousins to make death threats against him as well.

[3] Colorado Torres and his two cousins left Columbia for Venezuela. They lived there for approximately four months. The applicant subsequently stowed away on ship bound for the USA. His cousins returned to Columbia and were apparently killed by paramilitaries. Colorado Torres remained in the USA for two years. His mother advised him that the paramilitaries were still looking for him. He then left the USA for Canada on November 30, 2004. He claimed refugee protection on the same day.

[4] The Board determined that the applicant was not a member of a social group within the meaning of the Convention but that he had problems with personal vendettas.

[5] At the hearing, there was considerable confusion caused by, on the one hand, the applicant and, on the other, by the Board's questions, concerning the identity of the persons the applicant feared, that is, the paramilitaries, the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) or "guerrillas". In any event, the Board concluded that the applicant's behaviour was inconsistent with that of a person who fears persecution. He remained in Venezuela for approximately four months and in the United States for more than two years without having claimed protection of any kind. The applicant explained that he did not claim protection in Venezuela, which is a signatory to the *United Nations Convention Relating to the Status of Refugees*, because he entered this country without

identification papers and was afraid of being removed. The Board was of the view that the applicant's explanations were unacceptable.

ISSUES

[6] The issues are as follows:

1. What is the standard of review applicable in this case?
2. Is the Board's decision patently unreasonable?
3. Was there a breach of the principles of natural justice at the applicant's hearing because of the application of Guideline 7, which provides that, at a hearing, counsel for the claimant will generally question the claimant last?

ANALYSIS

Standard of review

[7] It is trite law that the standard of review applicable to matters of credibility is that of patent unreasonableness: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at paragraph 38; *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 at paragraph 4.

Credibility

[8] Although there is some confusion about the precise identity of the group the applicant feared, about his knowledge concerning this group and whether with his nine years of schooling he should be expected to know all the distinctions between the FARC, the paramilitaries and the "guerrillas", the Board's conclusion to the effect that the applicant did not have any subjective fear

is unimpeachable. He had ample opportunity to claim protection in Venezuela and in the United States. He did not offer any objective reason for believing that he would be pursued in Venezuela because of the country's proximity to Columbia, not to mention his stay in the United States, which is much farther away. The Board was entitled to reject his explanation to the effect that he was afraid of claiming protection in the United States.

Guideline 7

[9] In the recent decision in *Hossain v. The Minister of Citizenship and Immigration*, 2006 FC 892, I summarized the current situation of Guideline 7, as well as the recent case law in which it has been considered. In short, in *Thamotharem v. Canada*, 2006 FC 16, [2006] F.C.J. No. 8 (QL), Mr. Justice Blanchard stated that, in certain circumstances, the reverse order of questioning and more specifically Guideline 7 had the effect of hindering the Board's discretionary power and was an infringement of the principles of natural justice. After *Thamotharem*, *supra*, Mr. Justice Mosely heard several applications for judicial review concerning Guideline 7. In an order rendered in *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] F.C.J. No. 631 (QL), he concluded that there was no infringement of natural justice if counsel for the claimant does not have the opportunity to ask questions first.

[10] The Minister submits that the applicant waived the opportunity to contest the order of examination, since the only objections made came after the hearing in the application for leave and the application for judicial review.

[11] In *Benitez*, *supra*, Mosley J. wrote the following at paragraph 237:

> The common law principle of waiver requires that an applicant must raise an allegation of bias or a violation of natural justice before the tribunal at the earliest practical opportunity. If counsel were of the view that the application of Guideline 7 in a particular case would result in a denial of their client's right to a fair hearing, the earliest practical opportunity to raise an objection and to seek an exception from the standard order of questioning would have been in advance of each scheduled hearing, in accordance with Rules 43 and 44, or orally, at the hearing itself. A failure to object at the hearing must be taken as an implied waiver of any perceived unfairness resulting from the application of the Guideline itself. If the objection was made in a timely manner at or before the hearing, the applicants are entitled to raise it as a ground for judicial review in their applications for leave. If the applicants failed to cite a denial of procedural fairness in their applications for leave, judicial review of the applications should be confined to the grounds on which leave was sought.
>
> [Emphasis added]

[12] In deciding this case, it is not necessary for me to identify the precise moment when it became too late to complain about the order of questioning specified in Guideline 7 and request that counsel for the claimant be the first to ask questions. It suffices to say that I agree with Mosley J. that the failure to raise this issue within the proper time limit or before the hearing constituted a waiver. For these reasons, the application for judicial review must be dismissed.

QUESTION CERTIFIED

[13] The applicant suggested five questions to be certified. I note that they are similar if not identical to the questions certified by Mosley J. in *Benitez*, *supra*, and by Blanchard J. in *Thamotharem*, *supra*. It is perfectly permissible to certify the same questions that were certified in preceding cases. Having said this, taking into consideration my conclusion to the effect that the failure to raise the issue of Guideline 7 at or before the hearing constituted a waiver of the right to raise it now, I will not certify the suggested questions.

JUDGMENT

THE COURT ORDERS THAT:

1. The application for judicial review of the IRB's decision dated November 30, 2005, be dismissed.

2. No question will be certified.

"Sean Harrington"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7630-05
STYLE OF CAUSE:	EDISON COLORADO TORRES v. MCI
PLACE OF HEARING:	Montréal, Quebec
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