Date: 20080624

Docket: IMM-4-08

Citation: 2008 FC 792

Ottawa, Ontario, June 24, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DEA LORENA TOLOSA CARRANCO
KAREN LORENA REYES TOLOSA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The respondent's motion dated June 19, 2008, acknowledges the situation created by the decision-maker at first instance, and therefore the respondent requests that the decision at first instance be set aside. The motion was brought less than two working days before the hearing, which had been scheduled for April 9, 2008, and, given that the applicants do not accept the respondent's offer contained in that motion, the Court must automatically intervene between the parties. This is a situation where the decision-maker at first instance committed a flagrant breach of procedural fairness or natural justice. A situation where the decision-maker at first instance acts contrary to public order transcends the interests of the immediate parties. Public order, which by the very fact of

the respondent's motion is acknowledged by the respondent, demands that the Court intervene on behalf of the well-being and integrity of the justice system itself. For all of these reasons, without interfering with the merits of the substantive matter of the case as the respondent requested, the Court will render a decision not on the merits of the case, which is reserved for the specialized tribunal at first instance as the trier of fact, but on behalf of the integrity of the justice system and public order. Otherwise, its silence would condemn it as an accomplice to the breach of natural justice and procedural fairness committed by the decision-maker at first instance.

II. Introduction

[2] "Would you please, please, please, please, please, please, please stop talking". Ernest Hemingway's seven "pleases" in *Hills Like White Elephants* may be excessive, but the repetition makes it plain that it is time to stop talking and to start listening. The decision-maker at first instance, as the trier of fact, must listen in order to decide on what has been testified and demonstrated. The hearing transcript points to the contrary.

[3] The art of active listening is the essence of a trial judge's work. Every word, every gesture, every silence is an encyclopaedia of references, a dictionary of terms and a gallery of portraits tracing the living history of the person before him or her.

III. Judicial procedure

[4] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (IRPA) of an oral decision of the Immigration and Refugee

Board (the Board) dated November 5, 2007, rendered at the hearing. The Board ruled that the applicants were not "refugee[s]" as defined in section 96 of the IRPA or "person[s] in need of protection" as defined in section 97 of the IRPA, and consequently rejected their refugee protection claim.

IV. Facts

[5] This Court's judgment follows the decision in *Jonathan Reyes Tolosa v. the Minister of Citizenship and Immigration* (docket IMM-3-08), after the files were separated by the member at first instance.

[6] The principal applicant, Dea Lorena Tolosa Carranco, arrived in Canada on August 15, 2006, accompanied by her son, Jonathan Reyes Tolosa, and her daughter, Karen Lorena Reyes Tolosa. All are citizens of Mexico.

[7] In support of her refugee claim, the applicant alleged that she fears a teacher at her son's school, named José Martinez Mejia, who had allegedly threatened her and her family with death and abduction. The applicant's daughter based her claim on that of her mother.

V. Issues

[8] Although the applicants are raising several issues, the only issues to determine in this matter are the following:

(1) Did the Board err in separating the files of the three applicants?

(2) Did the Board err in rendering a decision that breached a principle of natural justice or procedural fairness?

VI. Analysis

[9] As a preliminary observation, the applicants submit that the Board raised no questions of credibility or truthfulness of the facts alleged against their claim.

(1) Did the Board err in separating the files of the three applicants?

[10] The mother and her two children filed their refugee protection claims jointly in accordance with subrule 49(1) of the *Refugee Protection Division Rules*, SOR/2002-228 (the Rules), which states that "the Division must join the claim of a claimant to a claim made by the claimant's spouse or common-law partner, child, parent, brother, sister, grandchild or grandparent".

[11] Notwithstanding rule 49 of the Rules and counsel's submissions that the three files are connected (Tribunal Record at page 409), at the hearing, the member decided to separate Jonathan Reyes Tolosa's file from that of his mother and sister and rendered two decisions: one for Dea Lorena Tolosa Carranco and her daughter Karen Lorena Reyes Tolosa (Tribunal Record at pages 3–14) and another for Jonathan Reyes Tolosa (Tribunal Record at pages 15–34).

[12] In this case, the subject matter of the three claims is the same because the agent of persecution is pursuing mother, daughter and son for the same reasons. The children based their claims on that of their mother in the sense that, in their Personal Information Forms (PIFs), they

refer to the narrative of their mother, who had been appointed as representative for her son, a minor child, and her daughter, who had been a minor when she arrived in Canada, but has since reached the age of 18. This fact makes it clear that separating the files would not be helpful in analyzing the issues raised by the three claimants (Tribunal Record at page 435).

(2) Did the Board err in rendering a decision that breached a principle of natural justice or procedural fairness?

[13] The applicants have a right to a hearing during which every word, every gesture and every silence is, in fact, heard. A decision-maker at first instance, as the trier of fact, must listen in order to decide on what has been testified and demonstrated. The hearing transcript points to the contrary.

[14] The history of this case demonstrates that the claimants did not have an opportunity to have their stories assessed in a way that is conducive to the conduct of a hearing.

[15] The art of active listening is the essence of a trial judge's work. When a decision-maker fails to listen actively, he or she deprives the person who is testifying of the right to tell his or her story and make the decision-maker understand it.

VII. Conclusion

[16] For all of these reasons, the Board's decision is set aside, and the matter is referred to a differently constituted panel for rehearing and redetermination by a decision-maker at first instance other than the one who rendered the decision that is set aside.

JUDGMENT

THE COURT,

Considering that the respondent presented a motion for judgment;

Sets aside the decision of the Refugee Protection Division, which found that the applicants are not "Convention refugee[s]" or "person[s] in need of protection";

Refers the matter back to the Refugee Protection Division so that the applicants' refugee protection claim can be reheard and redetermined by a member other than the one whose decision is set aside;

Without costs.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4-08
STYLE OF CAUSE:	DEA LORENA TOLOSA CARRANCO KAREN LORENA REYES TOLOSA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
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