Date: 20080624

Docket: IMM-3-08

Citation: 2008 FC 791

Ottawa, Ontario, June 24, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JONATHAN REYES TOLOSA

Applicant

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] In addition to not listening, the trier of fact had rendered its decision at the hearing before the case was closed, even before he received the written submissions of one of the parties that he himself had requested.

[4] 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

[5] 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 (see paragraph 29 below). The Board ruled that the applicant was not a "refugee" as defined in section 96 of the IRPA or a "person in need of protection" as defined in section 97 of the IRPA, and consequently rejected his refugee protection claim.

IV. Facts

[6] This Court's judgment follows the decision in *Dea Lorena Tolosa Carranco and Karen Lorena Reyes Tolosa v. the Minister of Citizenship and Immigration* (docket IMM-4-08), after the files were separated by the member at first instance.

[7] The applicant, Jonathan Reyes Tolosa, arrived in Canada on August 15, 2006, accompanied by his mother, Dea Lorena Tolosa Carranco, and his sister, Karen Lorena Reyes Tolosa. All are citizens of Mexico.

[8] Since the applicant is a minor child, his story was explained in his mother's narrative. He is alleging that he fears a teacher named José Martinez Mejia, who had allegedly threatened him and his family with death and abduction.

[9] In addition, the applicant has alleged in support of his refugee claim the failure of the Mexican education system to provide specialized education that would meet his special needs caused by epilepsy and hyperactivity.

[10] In August 2001, Jonathan started his first year of elementary school at the Miguel Hidalgo school in Metepec, State of Mexico. Jonathan was mistreated despite the fact that Ms. Tolosa had informed the principal and Jonathan's teacher of his problems caused by epileptic seizures that he suffered in his sleep, as well as of his problems with hyperactivity, difficulty concentrating and distraction. Jonathan's teacher often pulled his ears and was rude to him because he was inattentive. At the end of the school year, in June 2002, Ms. Tolosa was informed that Jonathan could not continue attending that school. This happened every year after that until 2005.

[11] In September 2005, Jonathan started grade five at the public school Alfonso Gomez de Orozco Suarez in Toluca, State of Mexico. As she had done before, Ms. Tolosa explained Jonathan's problems to the principal and Jonathan's teacher, José Martinez Mejia. The principal assured her that Jonathan would be in very good hands, but also that she should know that there would be 35 to 40 students in every class.

[12] At the start of October 2005, Ms. Tolosa started noticing changes in her son, Jonathan. He did not sleep well at night, woke up very often, had nightmares, cried out and mumbled incoherently a great deal in his sleep. In addition, at the beginning of October 2005, Ms. Tolosa had an accident. She broke her right ankle and was almost unable to go out for six weeks.

[13] Ms. Tolosa consulted a neurologist, who prescribed a tranquillizer for Jonathan in addition to the medication he was already taking for epilepsy (carbomazepin).

[14] In November, Ms. Tolosa had an opportunity to talk to one of Jonathan's classmates. That young man told her that the teacher, José Martinez Mejia, was very hard on them: he hit them on the head with books, he called Jonathan [TRANSLATION] "an idiot", he ridiculed him in front of the other children, and he did not want him to participate in class activities. The teacher sent him to sit alone at the back of the classroom; he was not allowed to go for recess or to eat because, according to the teacher, Jonathan did not do his homework and was lazy.

[15] On December 15, 2005, Ms. Tolosa confronted the teacher, José Martinez Mejia, about the way he treated her son, Jonathan. The teacher told her that Jonathan deserved it and that he had nothing to discuss with her. Ms. Tolosa went to see the principal, but the principal told her that she had no time to discuss the matter.

[16] Ms. Tolosa went to the State of Mexico's Human Rights Commission to file a complaint against the teacher, José Martinez Mejia, concerning the abuse suffered by her son.

[17] On December 30, 2005, having obtained the information requested, Ms. Tolosa returned to the Human Rights Commission to file a complaint against the teacher, José Martinez Mejia. The

complaint was filed under number 5234/2005-1. Lawyer Sergio Jimenez told Ms. Tolosa that, if her complaint were admissible, she would receive a letter in January.

[18] On January 5, 2006, Ms. Tolosa received a letter stating that her complaint was admissible.

V. Issues

[19] Although the applicant is 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

[20] As a preliminary observation, the applicant submits that the Board raised no questions of credibility or truthfulness of the facts alleged against his claim.

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

[21] 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”.

[22] 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 the applicant'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 the applicant, Jonathan Reyes Tolosa (Tribunal Record at pages 15–34).

[23] 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?

[24] At the end of the hearing, the member rendered his decision orally. At the beginning of the decision he stated the following:

> This is my decision in the claims for refugee protection filed by **Dea Lorena TOLOSA CARRANOE** and her daughter, **Karen Lorena REYES TOLOSA**.
>
> As for the claimant's son, **Jonathan REYES TOLOSA**, the panel asked counsel to make written submissions because counsel had raised important points regarding the operation of section 97 and also section 96 of the Act.
>
> (Reasons, Tribunal Record at page 17.)

[25] In fact, the member rendered the decision concerning the applicant orally without waiting for the written submissions that he had himself requested at the end of the hearing (according to the transcript at the hearing itself). This is clear from reading the decision.

[26] It is important to note that, at that time, the member had not yet heard counsel's submissions concerning the applicability of sections 96 and 97 of the IRPA to the claim of the applicant, Jonathan.

[27] The applicant points out that the standard of review applicable to matters of procedural fairness and natural justice is correctness. (*Morales v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1220, 163 A.C.W.S. (3d) 820 at para. 7.)

[28] As the Supreme Court of Canada reminded us, procedural fairness requires that "decisions be made free from a reasonable apprehension of bias by an impartial decision-maker" (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 45). In the case under study, the member had not received the submissions of the applicant's counsel, but he had already rejected the applicant's claim, a fact that becomes clear on reading the decision:

> **CONCLUSION**
>
> For all the reasons given in the foregoing analysis, the panel has no choice but to dismiss the claims for refugee protection.

> In light of the foregoing, the following is in response to counsel's written submissions . . . (Emphasis added.)
>
> (Reasons, Tribunal Record at page 25.)

[29] It is also relevant to note that the decision concerning the child Jonathan was rendered orally at the hearing despite the fact that his counsel made his written submissions only after the oral decision had already been rendered by the member at first instance. It does not matter when the member signed the written decision, since we know that he had already rendered it orally at the hearing (Tribunal Record at pages 15 and 317).

[30] The applicant submits that the Board's **written** decision is nine pages longer than the **oral** decision. However, some elements of Jonathan's claim had already been analyzed and rejected in the oral decision dated November 5, 2007, which was already rendered at the hearing, and therefore an established fact.

[31] It is important to also remember that, at the time of the oral decision, the member addressed issues of state protection and the existence of an internal flight alternative. Because he did this, at the time of the written decision, he had already decided the outcome of Jonathan's claim – well before analyzing the arguments pertaining to sections 96 and 97 of the IRPA, which also include the examination of issues that concern state protection and the existence of an internal flight alternative.

[32] Thus, a reasonably well informed bystander could perceive bias, as the Federal Court has reminded us many times.

[33] The test for reasonable apprehension of bias, which has long been endorsed by the Supreme Court of Canada, was set out by Mr. Justice Louis-Philippe de Grandpré in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716: "whether or not an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision-maker would consciously or unconsciously decide an issue fairly". (*Chung v. Canada (Minister of Citizenship and Immigration)*, [1998] 161 F.T.R. 146, 46 Imm. L.R. (2d) 220 at para. 8.)

[34] Having determined that the decision-maker at first instance had erred in separating the files and because the member apparently rendered his decision in the case of the mother and daughter orally, in light of the circumstances, this Court is led to believe that there is a reasonable apprehension of bias warranting this Court's intervention.

VII. Conclusion

[35] The applicant, Jonathan Reyes Tolosa, has the right to a fair hearing during which all of the evidence required could be considered and taken into account by the decision-maker. Since I found that the applicant's case is closely linked to that of his mother and sister, the oral decision rendered by the member at the hearing was binding on the applicant before the decision-maker at first instance had been able to take advantage of the written submissions he himself had requested from the applicant's counsel.

[36] 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 applicant is not a “Convention refugee” or “person in need of protection”;

Refers the matter back to the Refugee Protection Division so that the applicant’s 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-3-08
STYLE OF CAUSE:	JONATHAN REYES TOLOSA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 23, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	June 24, 2008

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