Federal Court  Cour fédérale

Date: 20100211

Docket: IMM-3883-09

Citation: 2010 FC 131

Ottawa, Ontario, February 11, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ESTEFANIA LOPEZ DIAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED REASONS FOR ORDER AND ORDER

[1] Estefania Lopez Diaz came to Canada from Mexico as a teenager. She sought Canada's protection because her mother's lover blamed her for their break-up. He beat her and threatened to kill her.

[2] At her hearing before the Refugee Protection Division she was not only represented by counsel, but also by a designated representative, as she was still under the age of 18.

[3] One of the documents she proffered in evidence was a police report of her complaint. The Panel harboured suspicions as to the provenance of this document, and obtained consent to verify its authenticity. Reports came back from Mexico, including one from the officer who allegedly took the complaint, to the effect that the authorities had no such record thereof.

[4] This fact was brought to the attention of Ms. Lopez Diaz's lawyer and representative. They chose not to bother her with this information. Without seeking instructions, the lawyer took the position that the document had been manufactured by Ms. Lopez Diaz's mother in Mexico, did not reflect upon Ms. Lopez Diaz herself and that she was entitled to Canada's protection.

[5] The Panel dismissed the claim on the grounds of lack of credibility, essentially tied in with what it had determined to be a false report.

[6] The application for leave to seek judicial review of that decision was dismissed.

[7] Thereafter, Ms. Lopez Diaz retained new counsel who obtained another report from the same police officer which appears to confirm that he had indeed received Ms. Lopez Diaz's original complaint. Counsel then applied to have the hearing reopened, but was refused.

[8] This is a judicial review of that decision.

[9] The reopening of a claim or application is subject to Rule 55 of the *Refugee Protection Division Rules*. Subsections 1 and 4 thereof provide:

(1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	(1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
[…]	[…]
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[10] The reasons behind the decision to dismiss the motion to reopen the claim are very short. They read:

> The IRB jurisdiction with respect to reopening the hearing is very limited; in fact, once it has rendered his decision, the IRB has fulfilled his function and is considered *functus officio*. It can return to it a second time in limited circumstances, only when there has been a violation of the rules of natural justice. In the case at bar, following the review of the application, the supporting documents and listening to the tapes of the hearing and all elements contained therein, the undersigned finds that the member responsible of the claim for the RPD rendered a proper decision that fully adhered to legal procedures and the rules of natural justice. The claimant was duly convoked to a hearing, was represented by counsel land a designed representative. A post hearing verification of a document was conducted. The claimant was informed and counsel had the opportunity to respond. The tribunal member therefore pronounced judgement on the basis of the evidence at her disposal. Further, the argument presented by the applicant does not justify the reopening

> under rule 55 of the Rules of Practice because they deal with an interpretation of the facts and law of the case. These arguments are more appropriate for an Application for Judicial review. These are not questions of natural justice.

[11] The case law of this Court clearly establishes that an application to reopen can only be, and must be, allowed if there was a failure to observe a principle of natural justice. The decision of Mr. Justice Mosley in *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153, 258 F.T.R. 226, 44 Imm. L.R. (3d) 4, has been followed time and time again. Many of the cases were set out by Madam Justice Layden-Stevenson, as she then was, in *Lakhani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 612. This point of view has been endorsed, albeit in *obiter*, by the Federal Court of Appeal in *Nazifpour v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35, [2007] 4 F.C.R. 515, 60 Imm. L.R. (3d) 159, which dealt with Section 71 of the *Immigration and Refugee Protection Act*, the language of which differs somewhat from Rule 55.

[12] What we have here is a new fact. Subsequent to the decision of the Refugee Protection Division, the police officer appears to have recanted. However, it is not enough simply to have new facts, unlike the reopening procedure under other statutes. There must be a lack of natural justice.

[13] Counsel for the Minister emphasizes that the original decision of the Refugee Protection Division was unquestionably fair. It was; of that there can be no doubt. Ms. Lopez Diaz was let down by her former counsel and designated representative. Had they told her about the information received by the Refugee Protection Division from Mexico, she would have reiterated that she was personally present before the police officer. This may well have led to further inquiries. Certainly

the lawyer had no mandate to admit that the original police report was fabricated. Based on the latest information, it may not have been.

[14] Although the Minister characterizes the decision of the lawyer and the designated representative not to discuss this matter with their client as tactical, it appears to me that this failure should be characterized as nonfeasance, rather than malfeasance (*Medawatte v. Canada (Minister for Public Safety and Emergency Preparedness)*, 2005 FC 1374, 52 Imm. L.R. (3d) 109).

[15] A case directly on point is Mr. Justice Lemieux's decision in *Bouguettaya v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 3 (T.D.). The gloss thereon by Mr. Justice Mosley in *Parshottam v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 51, 68 Imm. L.R. (3d) 288, is applicable. He said at para. 22:

> The cases cited by the applicant as supporting his claim that reception of the evidence is necessary in the interests of justice are not directly on point. In *Ou v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 235, 48 Imm. L.R. (2d) 131, the Court allowed fresh and highly relevant evidence from a witness who had inadvertently conveyed incorrect information to the Board prior to an abandonment hearing. Similarly, in *Bouguettaya v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 3 , [2000] F.C.J. No. 992, the tribunal had erred in not finding that a breach of natural justice resulted from reliance on factually incorrect information when it was brought to their attention on a motion to reopen the hearing.

[16] So it is in this case. The Panel had every reason to consider the original police report to be forged. Had it had information that it was not forged, Ms. Lopez Diaz may or may not have been found to be credible. It is not for this Court to say (*Cardinal v. Kent Institution*, [1985] 2 S.C.R.

643). If she had been found credible, then the Panel would have been obliged to consider state protection, and perhaps the internal flight alternative.

[17] The Minister submits that the application to reopen is an abuse of process in that an application for leave and for judicial review of the Panel's original decision was dismissed. Reference was made to my decision in *Skandrovski v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 341, 29 Admin. L.R. (4th) 70. However, reliance thereon is misplaced. I said it would not do to have the Board unwittingly and unknowingly in effect review a decision of this Court not to grant leave. That is not what happened in this case. The "new facts" which were put before the Panel on the application to reopen were not before the Court in the application for leave. As I said in para. 16 of *Skandrovski*:

> That is not to say that there is no room for an application to reopen a claim if leave were denied by this Court. New facts could come to light. […]

That is exactly what happened in this case; new facts which were brought to the attention of the Board. The decision under review is wrong in law. These are issues of natural justice.

CERTIFIED QUESTION

[18] My reasons for order as originally issued comprised the foregoing paragraphs. At the hearing I gave each party a delay in which to propose a question for certification, and a further delay for each to respond to the other. As no questions crossed my desk, I assumed neither party had suggested a question, and as I did not see the need to certify a question myself, I granted the application for judicial review without certification.

[19] Regrettably, through a series of internal mishaps, it only came to my attention the day after I issued the order that the Minister had, in fact, proposed a question for certification, and that Ms. Lopez Diaz's counsel had replied. I immediately issued a direction that as the order had been based on an incomplete record I would reconsider in accordance with Rule 397 and following of the *Federal Courts Rules*.

[20] The Minister proposed the following question:

> Is a document that is obtained after a decision of the IRB dismissing an asylum claim, the content of which contradicts the evidence relied upon in the primary conclusion of the IRB, a sufficient basis upon which it can be demonstrated that there has been a violation of the rules of natural justice within the meaning of section 55 of the *Refugee Protection Division Rules?* Is the appropriate recourse in such circumstances a Pre-Removal Risk Assessment as opposed to a motion to reopen before the IRB?

[21] Without a certified question, my decision is final. An appeal to the Federal Court may only be made in accordance with s. 74 of *IRPA* if "…the judge certifies that a serious question of general importance is involved and states the question." According to the Federal Court of Appeal, the question:

a. must be determinative or dispositive of the appeal. (*Zozai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365, 36 Imm. L.R. (3d) 167 and *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, 80 Imm. L.R. (3d) 1 at para. 28);

b. must transcend the immediate interests of the parties to the litigation. (*Canada (Minister of Citizenship and Immigration) c. Liyanagamage* (1994), 176 N.R. 4, *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, 357 N.R. 326, 57 Imm. L.R. (3d) 4 and *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347); and

c. must contemplate issues of broad significance or general application. (*Canada (Minister of Citizenship and Immigration) c. Liyanagamage*, above).

[22] The Minister submits that there are two schools of thought within this Court as to new facts giving rise to a breach of natural justice which would support an application to reopen a refugee hearing. In support of that proposition, a number of cases were cited including *Hurtado v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 270, 324 F.T.R. 192, 70 Imm. L.R. (3d) 142 at paras. 46 to 50 and *Enahoro v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 430 at paras. 19-20 and 26-27.

[23] In my opinion those cases turn on their own facts and are not authority for the proposition that there are two schools of thought as to the circumstances in which a refusal to reopen a hearing on the grounds of "new facts" constitutes a breach of natural justice.

[24] The original evidence, obviously hearsay in nature, was sought, obtained and filed by the RPD itself through the auspices of its Research Directorate and the Tribunal Officer. This is similar to *Bouguettaya*, above, where the incorrect information was provided by the Board itself, in its

National Documentation Package on Algeria, current at the time. The unreliable information in the present case was obtained and introduced by the Tribunal itself.

[25] In the recent decision of *Kunkel*, above, in referring to *Boni*, above, Madam Justice Layden-Stevenson, speaking for the Federal Court of Appeal, said at para. 10:

> Accordingly, by answering the certified question, our Court could only rule on the standard applicable to the decision of the visa officer in this case. It is trite law that a question that does not transcend the decision in which it arose should not be certified, and in such a case the Court of Appeal should not answer it (see *Wong v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1049; *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637, (1994) 176 N.R. 4 at paragraph 4).

[26] That is my own assessment of this case, and so no question shall be certified.

[27] I am further of the opinion that a Pre-Removal Risk Assessment is not an ample substitute for a reopened hearing. The issue before a PRRA Officer is that of “new facts”, not natural justice, and there is no guarantee of a right of audience.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The decision rendered by the Refugee Protection Division of the Immigration and Refugee Board dated July 7, 2009, is quashed.
3. The application to reopen the applicant's refugee claim is referred back to another board member for re-determination.
4. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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