Federal Court Cour fédérale

Date: 20100218

Docket: IMM-3517-09

Citation: 2010 FC 179

Montréal, Québec, February 18, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MIRIAM ARACELI DENA HERNANDEZ
ALEJANDRO CERVANTES DENA
DIANA CAROLINA DENA
LAURA HERMINIA DENA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Hernandez and her three minor children, Diana, Laura and Alejandro, are Mexican nationals. Their claim for refugee protection was refused on June 19, 2009, by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the tribunal), hence this application for judicial review.

I. ALLEGATONS OF THE APPLICANTS

[2] Ms. Hernandez states that she fears her former spouse, Raul Tapia Rangel, who not only abused her physically and psychologically, but also allegedly threatened her life after she filed a paternity complaint with respect to Diana and Laura. The twin sisters are both severely physically handicapped. Not only do they face discrimination, but their chances of being accepted into and studying in a Mexican school are practically non-existent according to Ms. Hernandez, who is the designated representative of the three minor children.

[3] As for at the factors for subjective fear, Ms. Hernandez stayed with Mr. Rangel until the month of July 2002. At that time, he allegedly beat her while she was pregnant with the twins. That was when she decided to leave him. After the twins were born, Ms. Hernandez needed financial assistance to meet their special needs, but Mr. Rangel refused to help.

[4] In December 2003, Ms. Hernandez met Javier Atahualpa Cervantes Macias. Her new spouse agreed to pay the twins' medical expenses. On June 2, 2005, Ms. Hernandez gave birth to a third daughter (who remained in Mexico with her father, Mr. Macias). The situation turned sour after Mr. Macias lost his job and Ms. Hernandez became pregnant with a fourth child, Alejandro. Ms. Hernandez and Mr. Macias decided to separate in August 2006.

[5] Ms. Hernandez then began looking for a school for the twins, who were almost four years old. The only school that accepted the twins, given their physical problems, was Multiple Attention

Center 5, a school for mentally disabled children. However, because the twins suffer exclusively from motor difficulties, they were notified in May 2007 that their enrolment had been terminated.

[6] Ms. Hernandez tried unsuccessfully to find a new school for the girls. One of the schools she contacted informed her that the girls [TRANSLATION] "could not be accepted into this group because of their motor difficulties, as it would be difficult for them to perform some of the activities that would be expected of them". Unable to find another school, Ms. Hernandez complained to the Secretary of Public Education; all she did was to provide Ms. Hernandez with a list of schools to contact. None of these schools accepted the twins, according to Ms. Hernandez.

[7] In January 2007, Ms. Hernandez filed a paternity complaint against Mr. Rangel. Not only did he refuse to recognize the twins as his own, but he once again threatened Ms. Hernandez. In August 2007, she went to the police to file a complaint against Mr. Rangel, but they did nothing.

[8] In the meantime, in June 2007, Ms. Hernandez left Aguascalientes with her children to go live with her sister in Leon Guanajuato, a city about 200 kilometres from Aguascalientes.
Ms. Hernandez continued to try to find a school for the twins, still without success. Furthermore, she had not succeeded in escaping Mr. Rangel, who called her to tell her that she would not be able to outrun him if she did not withdraw her complaint. That is when she decided to return to Aguascalientes.

[9] On September 10, 2007, Ms. Hernandez, a physician, the twins' tutor and Mr. Rangel had to appear before a judge for DNA testing. Neither the physician nor the tutor appeared. After the hearing, Mr. Rangel went to Ms. Hernandez's workplace to threaten her, telling her that it would not be the least time that the physician and tutor would fail to appear. Again he told her to withdraw the complaint or he would kill her. After this incident, Ms. Hernandez left Mexico with her three children.

II. CONCLUSIONS OF THE TRIBUNAL

[10] The tribunal decided that the applicants were neither refugees within the meaning of the Convention nor persons in need of protection. The tribunal essentially found that Ms. Hernandez was not credible and that she had failed to rebut the presumption of state protection. Also, while the tribunal recognized that the twins were discriminated against, it did not conclude that they were persecuted.

[11] The reasonableness of each and every one of the tribunal's conclusions is challenged by the applicants, who also call into question the conduct at the hearing by the member who heard the case. The respondent, on the other hand, submits that the decision in question was reasonable and that there has been no denial of justice, nor is there a reasonable apprehension of bias.

III. ANALYSIS

[12] For the reasons that follow, the impugned decision must be overturned and the claim for refugee protection returned to the tribunal for a new hearing and redetermination by a different member.

A. GENERAL FINDING OF NON-CREDIBILITY

[13] First, the Personal Information Forms (PIFs) and transcript of Ms. Hernandez's oral testimony show that the truth of the principal facts outlined above by the Court and supporting the applicants' claim for refugee protection has not really been questioned by the tribunal in its decision, except perhaps obliquely, as explained below. In the decision under review, the tribunal has not pointed to any implausibilities, inconsistencies or contradictions in Ms. Hernandez's written narrative or her testimony at the hearing.

[14] The general finding of non-credibility is based solely on Ms. Hernandez's failure to file supplementary documents. The tribunal's reasons are succinct. First, the tribunal criticizes Ms. Hernandez for not having tried to obtain a letter from her lawyer about the complaint she had filed with the office of the General Prosecutor. As for the twins' personal situation, the tribunal criticizes Ms. Hernandez for not having submitted [TRANSLATION] "evidence corroborating the claim that the two girls could not be accepted by a regular school, a school that would meet their needs".

[15] However, the tribunal does not, in its decision, question the fact that Ms. Hernandez filed a paternity complaint or that, before leaving Mexico, she filed a complaint with the police with respect to Mr. Rangel's threats. The existence of the complaint corroborates Ms. Hernandez's testimony. The mere failure to follow up on the complaint to the police does not taint Ms. Hernandez's claim of subjective fear, but is instead relevant to whether she was able to demonstrate to the tribunal's satisfaction that she could not benefit from the protection of the Mexican state.

[16] The medical evidence in the file clearly establishes that as a result of a respiratory problem at birth, the twins suffer from encephalopathy in the form of diplegia, and one of the consequences of their diplegia is incontinence. In support of the claim for refugee protection, the applicants submitted several medical documents from Mexico and Canada. Among the most recent documents are various letters and reports from specialists (social worker, physiotherapist, physiatrist, occupational therapist, psychologist) describing in considerable detail the twins' motor functions and the assistance they require (see in particular Exhibits P-14 to P-20).

[17] Moreover, Ms. Hernandez's testimony regarding her unsuccessful attempts in Aguascalientes and Leon Guanajuato to register the twins in a school is corroborated by the single letter she received from a school refusing to register the twins. Finally, the general documents filed in evidence by the applicants deal with the difficulties experienced in Mexico by persons with physical disabilities both in the job market and in accessing education (see the newspaper articles filed as Exhibit P-13 and the documents in the National Documentation Package on Mexico).

[18] Although he saw the twins in their wheelchairs before the hearing began and was provided with a diagnosis by a physician explaining that the twins suffered from encephalopathy in the form of diplegia and were incontinent, the member seemed determined to deny the limitations suffered by the twins.

[19] In fact, when Ms. Hernandez attempted to explain at the hearing that the documents already filed were the only ones she had, but that she could demonstrate to the member the twins' physical limitations, the member dryly responded,

> [TRANSLATION]
>
> - That it not how I wish to proceed. I expected reports from physicians or specialists explaining exactly this kind of things, what they can and cannot do. A physician telling me, for example, that they need to wear diapers in the classroom. Now you are telling me that you have nothing in writing, and it could have been obtained, because this is a medical condition.

[20] Not only that, the member even seems to have expressed doubts during the hearing about the twins' incontinence, or worse, not understood the meaning of the word "incontinent". Although he had already seen the diagnosis indicating that the twins were incontinent, when Ms. Hernandez explained that the twins needed diapers, he seemed surprised:

> [TRANSLATION]
>
> A. They require special care.

- OK.

Q. What kind of special care? Do you, do you mean the building must be accessible to children in wheelchairs?

A. Yes, that's right, but I'm also talking about other special needs, that is—and children who wear diapers.

BY COUNSEL (to the person concerned)

Q. Why do they use diapers?

A. Because of their incapacity.

BY THE PRESIDING MEMBER (to the person concerned)

- OK. But that's the kind of thing I'm not seeing mentioned.

[21] In short, no document seemed to satisfy the member. When Ms. Hernandez testified about the contents of a psychologist's report on the twins, the member said that he would have preferred a report prepared by a physician. And when Ms. Hernandez referred the member to a report prepared by Dr. Marois, a physician specializing in physiatry and rehabilitation, the member asked her for letters from a neurologist.

[22] The following exchange between the member and Ms. Hernandez is particularly revealing:

[TRANSLATION]

A. A doctor of physiatry. That means a medical doctor specializing in physiatry and rehabilitation.

Q. And letters from a neurologist or—follow-ups in writing, you have nothing from the neurologist Fernandez?

A. No.

Q. He never gave you anything in writing?

A. Everything was given to the physiatrist so that he could make a diagnosis.

Q. And you never received anything?

A. No, it was only when I asked for a letter about the children's incapacities that they gave me this. It was the same here in Canada, I asked, I asked for a certificate for—in writing, saying that the children were handicapped and they gave me this document as evidence that they were handicapped. Normally, doctors don't, they generally don't give anything in writing, just a diagnosis.

Q. But now, are you talking about Mexico or Canada?

A. Both.

[23] The member clearly seems to be in bad faith. The twins were seen by several specialists in Montréal, through the physiatry clinic's Cerebral Motor Deficits Program. In his report dated May 29, 2008, Dr. Pierre Marois, physiatrist, provides a thorough description of Laura's handicap, adding that her condition requires specialized equipment:

[TRANSLATION]

There were several complications during the neonatal period and, like her sister, she presented neurological complications. Eventually, neonatal encephalopathy with diplegia was diagnosed. This is a young patient who a few years ago underwent bilateral lengthening of the triceps surae and an adductor tenotomy possibly combined with an obturator neurectomy. She currently has no specialized equipment. She does not walk. She is able to move herself with hand support. It seems that she previously had a back support walker that she was able to propel over short distances.

[24] As for Diana, who is more severely affected than Laura, Dr. Marois noted the following on the same day in a separate report:

> [TRANSLATION]
>
> She presented a serious neurological lesion and is somewhat more affected than her sister Laura. She cannot move herself in the vertical position. She has some mobility on the ground. She has previously undergone hip surgery, specifically, an adductor tenotomy possibly combined with an obturator neurectomy. She has also undergone bilateral lengthening of the triceps surae.
>
> . . .
>
> This is a little girl presenting encephalopathy with quadriparesis. She was born of a twin pregnancy. Her sister has problems that are relatively similar. She is a little girl who cannot move autonomously in a vertical position. She crawls.

[25] Having read the transcripts attentively, the Court notes that Ms. Hernandez's testimony was never hesitant or confused at any point during the hearing, which lasted several hours. Again, she admitted that she did not have any additional evidence regarding the steps taken with the various schools, which should have satisfied the member's appetite, but he continued to insist, for no useful purpose. Pushed to the limit, Ms. Hernandez replied in desperation:

> [TRANSLATION]
>
> A. What kind of proof do you need? My word, my word is good. I'm a mother—
>
> - I am aware of that.
>
> A. —and every day, I went out looking for an education for my children.
>
> - OK—

A. —and that I was pos—

- But apart from your word, there would have been evidence available from the Department of Education, which could have attested, in writing, to what was available for those two (2) girls.

A. First of all, Sir, they do not give that out.

- But Madam, you say—Wait a moment Madam, when I am speaking, please stop.

A. All right.

[26] As my colleague Mr. Justice Pinard recently pointed out in *Mejia v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1091 at paragraph 18, the panel "can raise the absence of relevant documentary evidence if it finds contradictions or inconsistencies" in a claimant's testimony and find that it is not credible. However, that is not the case here. This case is properly distinguished from other cases in which the claimants' numerous credibility problems had already been developed by the panel in substantial, clear and well-articulated reasons (for example, *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 136).

[27] The Court is therefore of the view that that it was unreasonable in the case under review to require documentary evidence other than that already filed by the applicants, which in this case constitutes a determinative error justifying the setting aside of the general finding of non-credibility (*Zheng v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 974 at paragraph 9).

B. OBJECTIVE BASIS OF CLAIM

[28] To rebut the presumption that states are able to protect their citizens, a claimant must provide the tribunal with clear and convincing evidence of the inability of the state in question to provide adequate protection. Also, had it not been for the other fundamental errors affecting the validity of the decision under review, the tribunal's analysis of state protection may have enabled the Court to uphold the legality of the finding that Ms. Hernandez was neither a refugee within the meaning of the Convention nor a person in need of protection. However, this is not just about whether the Mexican state can offer adequate protection in cases of conjugal violence, indeed, when a woman has received death threats from an ex-spouse and has complained to the police as is the case here.

[29] Here, in the case of the claim made on behalf of the twins, the tribunal first had to determine whether they were persecuted, and that is where we run into difficulty.

[30] The Court has already discussed above the pernicious and unreasonable nature of the tribunal's finding that the record contained no [TRANSLATION] "corroborating evidence to the effect that the two minor girls could not receive the particular education and care they required in Mexico."

[31] On this point, Marie-Ève Morin, a social worker with the Centre de santé et de services sociaux of Ahuntsic and Montréal-Nord who saw the twins, provided a helpful summary, in a letter

dated April 6, 2009, of the extent of their day-to-day needs, which require that they be placed in a specialized educational institution:

> [TRANSLATION]
>
> Ms. Hernandez and her two daughters have been known to the ID-PDD program at the Ahuntsic CLSC since December 2008 given the handicaps of the girls, Laura-Herninia and Diana-Carolina (DOB: 2002-12-22). They have cerebral palsy and are paralyzed from the lower limbs to the pelvis. They therefore require assistance with mobility and day-to-day activities.
>
> . . .
>
> The twins have integrated well in school and are doing very well. Unfortunately, the services Laura-Herninia and Diana-Carolina are receiving here (technical assistance and inclusive education) would not be available to them in their country of origin; their development would therefore be seriously compromised, and they would also run a significant risk of suffering from discrimination.

[32] Ms. Hernandez confirmed at the hearing before the tribunal that the twins were registered at the Victor-Doré school in Montréal. This institution provides adapted educational services for children with physical handicaps and accommodates children in wheelchairs and those who wear diapers, like the twins.

[33] In her testimony, in addition to her own experience and in response to a question from her counsel asking whether she knew of any persons with handicaps who were unable to access educational resources in Mexico, Mrs. Hernandez said the following:

> [TRANSLATION]
>
> A. . . . In the town where I live, a town without very many resources, there is a handicapped child, who—he does not get

> medical education or education services, because the parents lack the resources. He has not been accepted by any government institutions. Therefore, the child does not study and is not receiving an education, because the lists are very long.

[34] Despite Ms. Hernandez's testimony and the extrinsic evidence corroborating the fact that it is practically impossible for the twins to be accepted into a school in Mexico, the tribunal nevertheless found that they were not victims of "persecution" within the meaning of the Convention. The tribunal's sole justification for this was the following terse reasoning found at paragraph 31 of the impugned decision:

> [TRANSLATION]
>
> Document P-12, from the rehabilitation centre at Sainte-Justine in Montréal at dated September 24, 2008, mentions a non-inflammatory brain condition and degenerative conditions and brain lesions that complicate certain intoxications, namely, encephalopathies, with the result that the young girl cannot hold in her urine. The fact that this is a difficult situation and that they might be the target of a certain amount of discrimination does not necessarily mean that they will be persecuted.

[35] It goes without saying that the characterization of what constitutes discrimination as opposed to persecution is a highly complex exercise that naturally falls within the specialized expertise of the tribunal. However, the reasoning underlying the tribunal's conclusion must be clear, which is not the case here. As a result of the effective lack of analysis of the evidence, including the documentary evidence related to the condition of persons with handicaps and their access to education in Mexico, the Court is justified in returning this case to the tribunal.

[36] Moreover, with respect to the burden of proof that must be met by the applicants, the member mentioned more than once during the hearing that the twins' physical handicap must make their lives [TRANSLATION] "intolerable" in Mexico. There is no universally accepted definition of "persecution". It is only in certain circumstances that "discrimination" will be equivalent to "persecution". It is therefore necessary that a tribunal not approach a claim for refugee protection with prejudices or preconceived opinions, especially since the personal situation of a claimant may vary considerably from one country to another.

[37] Speaking of prejudices or preconceived opinions, the member said the following at the hearing:

> [TRANSLATION]
>
> . . . I can see people in wheelchairs who can attend normal classes. I mean, with other students, I've seen it before.

[38] The intolerable nature of a discriminatory situation certainly falls under the category of "persecution". However, this finding does not depend on the objective severity of the handicap, but rather the discriminatory treatment experienced by the person suffering from the handicap.

[39] It is also important to remember that "cumulative grounds" can give rise to a valid claim for refugee status within the meaning of the Convention: "This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities." (*Handbook on Procedures and Criteria for*

Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the Handbook) reedited, Geneva, January 1992, at paragraphs 53 and 54).

[40] It is well established in the jurisprudence that persecution may be caused by discriminatory acts that are sufficiently serious and occur over such a long period of time that it can be said that the claimants' physical or moral integrity is threatened (*N.K. v. Canada (Solicitor General)*, [1995] F.C.J. No. 889 at paragraph 21 (TD) (QL); *Soto v. Canada (Minister of Citizenship and Immigration)*, 2002 CFPI 768 at paragraph 12). Thus, a person may be the victim of persecution if, because of a Convention ground, he or she is prevented from continuing his or her education (*Alfredo Manuel Oyarzo Marchant v. Minister of Employment and Immigration)*, [1982] 2 F.C. 779 (F.C.A.) at paragraph 5; *Ali v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1392 at paragraph 4 (QL)).

[41] The tribunal should at least have clearly explained its conclusion and considered all of the evidence, which includes the uncontradicted allegations in the PIFs, Ms. Hernandez's testimony at the hearing, the letters and reports filed by the applicants, and documentary evidence regarding the situation of persons with handicaps in Mexico.

[42] For example, in the 2008 document "U.S. Department of State. 'Mexico'. Country Reports on Human Rights Practices for 2007" says the following:

> Although the law prohibits discrimination against persons with physical and mental disabilities in employment, education, access to health care, and the provision of other services, the government did not effectively enforce all these provisions.

[43] While the tribunal is not required to refer to every piece of evidence in its decision, it must at least deal with any evidence that is relevant to the outcome of the case (*Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 CFPI 429 at paragraph 45). Without necessarily finding that the twins were victims of persecution, the lack of effective analysis in the impugned decision renders unreasonable the tribunal's finding that the twins were not persecuted.

C. MEMBER'S CONDUCT

[44] Justice must of course be rendered, but it is equally important that justice appear to be rendered without bias. It goes without saying that members must, at all times, be above reproach and objective, especially because, in practice, this is often a claimant's only opportunity to be heard in person (*Guermache v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 870 at paragraphs 5 and 6).

[45] With all due respect to the member, who had a difficult task, and without wishing to disparage him, it seems to me that the member did not pay sufficient attention to the applicants' personal situation, nor was he very interested in hearing Ms. Hernandez's testimony. First, he clearly showed unjustified aggressiveness and impatience toward Ms. Hernandez and her counsel. Second, it seems that the member had a preconceived idea of the outcome of the case, making one impossible demand after another and cutting Ms. Hernandez's explanations short.

[46] At one point, Ms. Hernandez, frustrated that the member would not let her speak, politely requested that he grant her [TRANSLATION] “five (5) minutes” to explain the origin of a highly relevant document written in Spanish explaining why Diana’s enrolment in a school for handicapped children had been terminated. Rather than listen to her explanations, the member put forward another interpretation of the same document.

[47] Half way through the hearing, Ms. Hernandez objected to the member’s interruptions and aggressive tone, but he did not respond and preferred to continue his questioning:

> [TRANSLATION]
>
> A. —Would you allow me, Sir, to make an objection?
>
> Q. An objection to what, Madam?
>
> - You wish to object as well, OK.
>
> Q. What is your objection, Madam?
>
> - I am listening to your objection.
>
> A. That you not get angry. It’s because you won’t let me explain myself.
>
> - But—
>
> A. Is it, it’s because you get angry before I can explain and—
>
> - I don’t understand—
>
> A. —and I am embarrassed to—
>
> - —what you are objecting to. I am trying to understand your objection.
>
> A. I am asking, I am begging you.

- Madam, I am asking you questions the answers to which I need to render my decision. I am asking about the complaint you filed, in writing, that I have a copy of here.

Q. What did the authorities do with this?

[48] Worse still, counsel for Ms. Hernandez made an objection when he noted that his client did not understand the meaning of the word [TRANSLATION] "supervisor" being used by the member, whose irritation level was rising by degrees. The following exchange is particularly symptomatic of the malaise that was progressively invading the hearing:

[TRANSLATION]

BY COUNSEL (to the presiding member)

- Mr. Member, objection.

BY THE PRESIDING MEMBER (to the person concerned)

- You are not answering my question. I want a yes or a no.

Q. Do you ask the person to whom you made the complaint, to see the supervisor, yes or no?

BY COUNSEL (to the presiding member)

- Objection—

A. No.

- —Mr. Member.

A. No, I want to hear the answer.

BY THE PERSON CONCERNED (to the presiding member)

- Yes, I asked.

. . .

BY COUNSEL (to the presiding member)

- Mr. Member, I object, because you are talking about a supervisor, but within the office of the General Prosecutor, there is no supervisor, Mr. Member.

A. There is a hierarchy.

- It is—if you, if you look at the documentary evidence, it is clear that the General Prosecutor is the sole authority for the laying of information, so there is no hierarchy to speak of. Ms. Hernandez is not a professional, we don't know, you are talking about a supervisor, but there is no supervisor in the office of the General Prosecutor.

A. OK, you can save that for your arguments.

- No, but just, objection because you keep asking about supervisors, supervisors, but Ms. Hernandez does not know the word supervisor.

A. So, that's all she has to say, that she doesn't know what a supervisor is.

[49] Here is another example of an objection, apparently fully justified, from counsel for Ms. Hernandez, regarding a supposedly deficient translation, which did not get very far with the member:

[TRANSLATION]

BY COUNSEL (to the presiding member)

- Excuse me, Mr. Member, there were some problems with the translation in the sense that I, that the question was not really clear. It's, perhaps the question could be asked again with a bit more explanation.

BY THE PRESIDING MEMBER (to counsel)

Q. Do you have an objection, Counsel? Is that an objection or a comment?

A. Yes, it's an objection.

Q. An objection to what?

A. The objection, the translation was not right. Could the question simply be repeated and explained—

- If you have an objection—

A. That's right.

- —with respect to the translation, there are ways to object, as you know.

A. Mr. Member, I am simply objecting because there has been a translation error. All I am asking is that the question be—

Q. So you want an expert opinion? Do you want an expert opinion?

A. No, Mr. Member, it's not to waste time, I'm just asking that the question be reformulated.

- I told Hs. Hernandez, if you don't understand the question, don't hesitate to have it reformulated.

BY THE PRESIDING MEMBER (to the person concerned)

Q. Did you make the complaint to your persecutor, the father of your two (2) children?

BY THE INTERPRETER (to the presiding member)

- Make the complaint to the persecutor.

A. Yes.

BY COUNSEL (to the presiding member)

- I am asking, Mr. Member, the question is not clear, it just means, means—in the sense that Ms. Hernandez have you—

BY THE PRESIDING MEMBER (to counsel)

Q. Counsel, do you have an objection?

A. Yes, because the question was not clear—

- I heard you.

A. —Mr. Member.

- Ms. Hernandez will tell me if she does not understand the question. If you have an objection, say so.

A. Yes, Mr. Member.

[50] At the end of the marathon of questioning to which Ms. Hernandez was subjected, the member acquiesced, though not without making his impatience known, to her counsel's request to ask a few additional questions, reminding him that the facts had already been submitted in Ms. Hernandez's narrative, so she did not need to repeat the whole story. Therefore, one might think that after hours of questioning by the member, Ms. Hernandez would finally have the opportunity to answer her counsel's questions fully, subject to the possibility that the tribunal would later in its decision point to any contradictions between her answers and what she stated in her PIF. However, the following exchange illustrates particularly well the vicious nature of the member's interruptions:

BY COUNSEL (to the person concerned)

Q. Madam, you have been the victim of conjugal violence?

A. Yes.

Q. Could you please tell us about the first time that your—

BY THE PRESIDING MEMBER (to counsel)

- Counsel, we already have all that in the, in the facts. I said I was taking for granted that everything—

A. OK.

- —would be the same—

A. OK.

- —as what's already there, in writing. I don't see—

A. So as far as the tribunal is concerned, there are no issues of credibility.

- I did not say that.

A. But if you—

- But what Ms. Hernandez has already written, she has in her narrative.

A. OK.

- She talked about

A. But—

- —of her, of the rape, she talked about death threats.

A. Rape, no, there was no rape Mr. Member.

- Wait, she talked about—

BY COUNSEL (to the person concerned)

Q. Was there rape, Madam, rape?

BY THE PRESIDING MEMBER (to counsel)

- Physical.

A. Ah.

- Excuse me.

BY THE PERSON CONCERNED (to counsel)

- Physical, physical assault.

BY COUNSEL (to the person concerned)

- Physical assault.

A. Yes.

- Yes, but not rape.

[51] It is surprising, to say the least, that at the end of the hearing, the member would suggest that Ms. Hernandez had been raped, when she never claimed to have been. Either the member had simply not read her narrative attentively, or he wanted to trip her up by asking a question that was certainly not warranted in the circumstances.

[52] The member is always entitled to ask questions to clarify a claimant's responses, even if those questions come across as abrupt and repetitive (*Moualek v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 539 at paragraphs 54 and 55; *Mahendran v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 549 (F.C.A.) (QL)). However, in this case, the member's question about "rape" was not asked in order to clarify a point, since Ms. Hernandez never once mentioned rape in her PIF or in her testimony.

[53] The questionable choice of certain descriptive terms by the member during the hearing is equally troubling. Twice, the member compared the twins with persons he described as "normal". The fact that the member immediately corrected himself indicates that he himself was aware of the inappropriateness of his choice of words.

[54] The language used by the member during the hearing is a way of measuring whether justice is both done and seen to be done. The member must at all times be attentive and sensitive to

claimants, and it is not clear that this was the case here. That each member speak impeccably and respectfully toward the persons appearing before the tribunal is the price to pay to have reviewing courts grant the latitude requested on behalf of the tribunal for assessing the credibility of each claimant.

[55] The respondent submits to the Court that the member was very patient and that he even allowed the applicants to file evidence after the deadline. The fact that the tribunal was not obliged to receive this additional evidence does not compensate for the member's reprehensible conduct at the hearing. In this case, it is reasonable to doubt the member's mindset and impartiality.

[56] The respondent also submits that it is not open to the applicants to argue a reasonable apprehension of bias, as the law requires that this be invoked at the earliest possible opportunity. Such an argument cannot succeed here.

[57] As this Court noted in *Khakh v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 548 at paragraph 31 (T.D.), we must not be too quick to infer a waiver of the applicants' rights. Although the applicants' previous counsel made no written submissions on the possibility of a reasonable apprehension of bias, Ms. Hernandez herself raised an objection at the hearing to the member's conduct, and he did nothing to address the situation.

[58] Overall, it is clear that there has been a denial of justice. In this case, the member's conduct at the hearing falls outside of the reasonable limits (*Ramirez*, above, at paragraph 5). The next

question is whether the member's conduct at the hearing raises a reasonable apprehension of bias. Having read the transcripts attentively, an informed person, applying himself to the question and viewing the matter realistically and practically, would conclude that the member's general conduct at the hearing raised a reasonable apprehension of bias (*Committee for Justice and Liberty v. Canada (National Energy Office)*, [1978] 1 S.C.R. 369 at pages 394 and 395).

IV. CONCLUSION

[59] For the reasons above, the application for judicial review is allowed. Given that no serious question of general importance has been submitted by the parties, the Court shall not certify any.

JUDGMENT

THE COURT ORDERS that:

1. The application for judicial review is allowed;

2. The decision rendered on June 19, 2009, is set aside and the matter returned to the tribunal for a redetermination of the claim for refugee protection and a new hearing by a different member;

3. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3517-09
STYLE OF CAUSE:	**MIRIAM ARACELI DENA HERNANDEZ ALEJANDRO CERVANTES DENA DIANA CAROLINA DENA LAURA HERMINIA DENA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	JANUARY 27, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	FEBRUARY 18, 2010

APPEARANCES:

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