

Federal Court



Cour fédérale

Date: 20100311

Docket: IMM-2708-09

Citation: 2010 FC 278

Toronto, Ontario, March 11, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ALLBA VALENTINA CARDENAS VIGGERS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is an adult female citizen of Mexico. She has worked as a stewardess and has some knowledge of the English language, there are no issues as to her mental capacity.

[2] The Applicant came to Canada claiming domestic abuse, she appears to have a custody issue with respect to her former spouse, who she claims to be abusive, and their children. The

Applicant made a refugee claim upon entering Canada and hired legal counsel who entered into written correspondence with the Immigration and Refugee Board concerning her claim.

[3] The matter came on for an oral hearing before the Board. The transcript of the hearing indicates that the Applicant arrived at the hearing with legal counsel and, at the outset of the hearing, to the apparent surprise of her counsel and everyone else, announced that she had no confidence in her counsel and wished to dismiss her counsel. The Board asked the Applicant how she would like to proceed, she answered “alone” and that she would like to proceed on her own. At the invitation of the Board the Applicant and her dismissed Counsel withdrew and had discussions. When they returned Counsel told the Board that she had advised the Applicant of the frailties of proceeding without her knowing the law and the country evidence.

[4] The Board again adjourned to afford the Refugee Protection Officer an opportunity to explain to the Applicant that the Officer’s role was neutral, and to explain the claim and the procedure that the hearing would follow. The Applicant agreed that this had been done.

[5] The hearing proceeded with the Applicant acting on her own behalf. While Counsel for the Applicant before me took me to places in the transcript where Counsel argued that the Applicant may have been confused or given a better answer, I am satisfied that the Board took reasonable measures to ensure that the hearing was conducted in a manner fair to the Applicant.

[6] Applicant’s Counsel argued before me that the Board had a positive duty to adjourn the hearing or at least afford a clear opportunity for the Applicant to request an adjournment so that

other Counsel could be retained to act on her behalf. The decision of Harrington J. of this Court in *Mervilus v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206 was referred to me and in particular what he wrote at paragraph 25:

25 The following principles can therefore be drawn from the case law: although the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.

[7] I agree with what Harrington J. wrote as far as it went. However this present case is more like that discussed by Tremblay-Lamer J. in her discussion in *Austria v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 423. I repeat what she wrote at paragraphs 6 to 8:

6 As it is clear from the decision, which provides that state-funded legal aid is only constitutionally mandated in some cases, the right to counsel is not absolute. In immigration matters specifically, this Court has repeatedly held that the right to counsel is not absolute: Mervilus v. Canada (Minister of Citizenship and Immigration), 2004 FC 1206, [2004] F.C.J. No. 1460 (F.C.)(QL) at paras. 17-25 where Justice Sean Harrington reviews the law regarding the right to counsel. What is absolute, however, is the right to a fair hearing. To ensure that a hearing proceeds fairly, the applicant must be able to "participate meaningfully": Canada (Minister of Citizenship and Immigration) v. Fast (T.D.), 2001 FCT 1269, [2002] 3 F.C. 373 (F.C.) at paras. 46-47.

7 Therefore, in certain circumstances, the absence of counsel may result in such unfairness during the hearing that Court intervention is warranted. I am not satisfied, however, that the matter at hand represents such a case. I believe that the applicant was indeed afforded a fair hearing.

8 I would note first that it is clear from the transcript that the applicant unmistakably indicated that he was ready to proceed without counsel at the hearing of April 20, 2005. Moreover, no

adjournment was requested and, contrary to the applicant's suggestion, there is no indication that he was under any pressure to proceed. He cannot now complain about his choice when he had every opportunity to do so at the hearing.

[8] I am satisfied having read the transcript of the proceedings in the present case and having heard the submissions of Counsel, that the Applicant was given a fair and reasonable opportunity to proceed without counsel or not. She chose to proceed without counsel. Her clear and deliberate choice cannot now be used to set aside a decision unfavourable to her.

[9] Applicant's Counsel also submitted that the Refugee Protection Officer, in explaining the procedure to the Applicant, acted in a conflict of interest. This argument is clearly without merit. The Officer was giving fair and unbiased assistance in procedural matters.

[10] The other arguments raised by the Applicant's Counsel are without merit.

[11] There is no question for certification.

JUDGMENT

FOR THE REASONS GIVEN:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed;
2. There is no question for certification;
3. No Order as to costs.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2708-09

STYLE OF CAUSE: ALLBA VALENTINA CARDENAS VIGGERS v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 10, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HUGHES J.

DATED: MARCH 11, 2010

APPEARANCES:

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