

Federal Court



Cour fédérale

**Date: 20101026**

**Docket: IMM-971-10**

**Citation: 2010 FC 1052**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, October 26, 2010**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**CÉSAR AGUSTO CASTANEDA ESCATE**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 28, 2010, which rejected the applicant's claim for refugee protection and found that he was neither a refugee within the meaning of section 96 of the IRPA or a "person in need of protection" within the meaning of section 97 of the IRPA.

## **Background**

[2] The applicant is a Peruvian citizen. While he lived in Peru he worked as a garbage collector. He alleged that on May 17, 2008, he was accosted by individuals who suspected that, a few days earlier, he had picked up a package belonging to them which contained drugs, and thrown it into his garbage truck. The individuals allegedly threatened the applicant to get him to return the package and forced him to take them to his apartment, which they searched for the package. The individuals allegedly gave him one week to return the package. The applicant stated that he filed a complaint with the police.

[3] On May 24, 2008, the applicant was allegedly again accosted by the same individuals, who took him to a remote location near a beach. They beat him and held his head under water. Following this event, the applicant was allegedly hospitalized for three days. When he was released from hospital, he quit his job and left the country. The applicant claimed refugee protection on August 29, 2008.

## **Impugned decision**

[4] The Board rejected the applicant's claim for refugee protection on the grounds that he had not provided credible evidence to support his narrative. The Board questioned the applicant's credibility because of the omissions and implausibilities in his testimony and the lack of documentation to corroborate his allegations.

[5] Before the hearing, the applicant had denied a postponement to allow him to obtain documents in support of his allegations. The Board refused the postponement request.

### **Issue**

[6] The applicant contested the Board's decision to deny the requested postponement. He also contested its findings regarding his credibility, but this ground was withdrawn by his counsel at the judicial review application hearing. This application therefore raises only the following issue: was the failure to grant a postponement a breach of procedural fairness?

### **Analysis**

[7] The applicant submitted that it was unfair in this case for the Board to deny his request for a postponement. The applicant submitted that he provided reasonable explanations to justify his request for a postponement and that the documents in question, that is, a copy of the complaint he filed and a document confirming his hospital stay, were important. In this respect, the applicant submitted that the Board based its decision on his credibility and his failure to file documents in support of his allegations.

[8] The applicant also submitted that, at the hearing, the Board member stated that she would determine at the end of the hearing whether it was relevant for the applicant to file the documents in question, but that she had failed to do so.

[9] The respondent submitted that the Board had discretion as to whether or not to grant the request for postponement and that its refusal was based on an appropriate analysis of the circumstances of the case and the applicable criteria.

[10] It is well established that the power to grant a postponement is within the Board's discretion.

[11] In *Wagg v. Canada*, 2003 FCA 303, [2003] F.C.J. No. 1115, the Federal Court of Appeal noted that the decision as to whether or not to grant an adjournment is within the discretion of the decision maker, who must exercise this power fairly. The Court specified that not everyone was entitled to an adjournment and that the Court would not interfere in the refusal to grant an adjournment unless there are exceptional circumstances (para. 19). The Court also pointed out that the ultimate test to be considered concerned the fairness of the trial:

[22] One could argue about whether the issue is the refusal to grant an adjournment or whether the adjournment which was offered was reasonable in the circumstances. However, in both cases, the test is the same. Was the applicant denied a fair trial when the trial judge refused to set the matter down for another day so as to allow the applicant to consult counsel once the trial judge had explained the ramifications of his position to him? In my view, he was not.

[12] Section 48 of the *Immigration and Refugee Protection Regulations* (the RPD Regulations), SOR/2002-228, as amended by S.C. 2002, c. 8, paragraph 182(3)(a), sets out the procedure for dealing with applications for changing the date of a proceeding and provides a decision-making framework for the Board:

**48.** (1) A party may make an application to the Division to change the date or time of a proceeding.

Form and content of application

(2) The party must

(a) follow rule 44, but is not required to give evidence in an affidavit or statutory declaration; and

(b) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.

If proceeding is two working days or less away

(3) If the party wants to make an application two working days or less before the proceeding, the party must appear at the proceeding and make the application orally.

Factors

(4) In deciding the application, the Division must consider any relevant factors, including

(a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

(b) when the party made the application;

(c) the time the party has

**48.** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.

Forme et contenu de la demande

(2) La partie :

a) fait sa demande selon la règle 44, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;

b) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.

Procédure dans deux jours ouvrables ou moins

(3) Si la partie veut faire sa demande deux jours ouvrables ou moins avant la procédure, elle se présente à la procédure et fait sa demande oralement.

Éléments à considérer

(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :

a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

had to prepare for the proceeding;

(d) the efforts made by the party to be ready to start or continue the proceeding;

(e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;

(f) whether the party has counsel;

(g) the knowledge and experience of any counsel who represents the party;

(h) any previous delays and the reasons for them;

(i) whether the date and time fixed were peremptory;

(j) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and

(k) the nature and complexity of the matter to be heard.

b) le moment auquel la demande a été faite;

c) le temps dont la partie a disposé pour se préparer;

d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;

e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;

f) si la partie est représentée;

g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

h) tout report antérieur et sa justification;

i) si la date et l'heure qui avaient été fixées étaient péremptoires;

j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;

k) la nature et la complexité de l'affaire.

[13] These factors are not exhaustive or conjunctive, and each case must be assessed based on its circumstances. In *Gittens v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 373, [2008] F.C.J. No. 473, the Court wrote that subsection 48(4) should not be interpreted as a direction to systematically provide a formulaic consideration of each enumerated point whether relevant or not.

[14] In this case, it appears from the Board's decision that it considered the grounds relied on by the applicant and that it made its decision in regard to the relevant factors.

[13] From the outset, at the start of the hearing, the claimant wanted to obtain a postponement and get an additional two months to receive the evidence in support of his claim.

[14] The claimant had from August 29, 2008, the request for a hearing, until January 11, 2010—more than 16 months to obtain these documents. He requested the exhibits only in December 2009; the explanations he provided for not having attempted to request them earlier were to the effect that he did not want to worry and compromise his family—explanations that he was unable to clarify—except by adding that there is corruption and bureaucracy in his country. As the claimant is represented by experienced counsel and made this request for postponement at the last minute (less than 48 hours), and it is a non-complex case for a single person, the panel is not satisfied with the efforts made by the claimant, because the panel finds that he was passive in the process of requesting exhibits. The panel rejects the request for postponement and will proceed with the hearing.

[15] I read the transcript of the hearing and note that the Board was correct not to be satisfied with the applicant's efforts and explanations to justify his delay in acting. When questioned about the reasons why he waited until December 2009 to attempt to obtain documents corroborating his allegations, the applicant gave the following explanations:

[TRANSLATION]

...

Q. So, in your last sentence, you told us that you requested your documents in December?

A. In December.

Q. Can you tell us on what date?

A. The first week, the first days, I called my family because, explaining my problem, I wasn't going to say, look, this is what's happening to me, send me such and such. I did it gradually, so as not to worry them.

...

Q. Why did you wait until December 2009 to ask for these documents?

A. Because, I'll repeat myself, because of the problem I have, I do not want to involve my family.

– Sir, your family knows that you left the country in 2008.

A. Yes, but it was sudden. I only told them that I was going to Canada as a tourist.

Q. How could asking members of your family for these documents compromise them?

A. Well, in my country, it's a corrupt country, with a lot of bureaucracy, a lot of corruption and, they tell me that a lot of people call to know how I'm getting along, if I'm working somewhere else.

...

– Sir, I understand that there may be bureaucracy, it's not the only country, and if you had requested your documents at the time—shortly after your claim for refugee protection, you maybe would have had them today.



- A. Of course, you're right, but I did not want to get my family involved. I did not tell them anything, and I—I told them from November 26 onwards, when I received the request, a little at a time. Little by little, I asked them whether they could request, get the documents and . . .

[16] In addition, the record shows that on September 29, 2008, the immigration officer at the port of entry told the applicant that it would be in his best interest to have more documents in support of his claim. The applicant did not establish that he had acted diligently.

[17] The applicant submitted that it was unfair for the Board to deny his application for a postponement because it then relied on his failure to file the documents to question his credibility.

[18] With respect, the applicant has not satisfied me that the documents he intended to file would have been determinative and would have led the Board to deem his narrative credible.

[19] First, the Board did mention that the applicant had not provided a copy of the complaint he had filed with the police but it did not draw a negative inference from that. Indeed, the Board stated that because the applicant did not submit evidence in support of his claim, it questioned him on how he went about filing his complaint. The Board then found that the applicant's answers demonstrated that he did not have proper knowledge of the complaint process, which he nevertheless claimed to have followed.

[20] As to the lack of documents concerning the applicant's hospital stay, the Board pointed out that the applicant had not submitted any, but its conclusion on this point does not appear to have been determinative.

[21] The Board did not believe the applicant's narrative, but this finding was based on a number of reasons. First, the Board did not believe that the May 24, 2008, incident actually happened, because the applicant had not mentioned the incident, the most significant one in his narrative, in his personal information form. The Board was not satisfied with the applicant's explanations to justify this omission.

[22] The Board then questioned the applicant's credibility because he demonstrated during his testimony that he was not familiar with procedure for filing a complaint with the police. As far as his hospital stay was concerned, the Board did not believe the applicant because he was unable to specify what type of examinations he underwent, what kind of care he received or what medication he had been prescribed.

[23] I therefore find that the documents in question were not determining factors in the assessment of the claim for refugee protection.

[24] The applicant also criticized the Board member for not having dealt with the matter of the documents at the end of the hearing as she had promised to do at the beginning of the hearing.

[25] The hearing transcript shows that after denying the request for postponing the hearing, the Board member did state that, if necessary, it would be possible to deal with the matter of the evidence at the end of the hearing. However, she did in fact not readdress the matter, as she undoubtedly considered that she did not need the evidence in question to render her decision.

[26] I also note that the applicant did not ask the Board member for permission to submit his documents after the hearing. Considering the Board member's comments at the beginning of the hearing, I am of the opinion that the applicant could have asked her for permission to submit his documents after the hearing if he considered them to be so important. He also could have relied on subsection 37(1) of the RPD Rules and made a formal application to submit documents after the hearing, which he did not do.

[27] For all of these reasons, I find that in refusing the applicant's request for a postponement, the Board acted within the parameters of its discretion and did not breach the rules of procedural fairness or natural justice.

[28] No question of general importance was posed for certification, and none will be certified.

**JUDGMENT**

**THIS COURT ORDERS** that the application for judicial review be dismissed. No question is certified.

“Marie-Josée Bédard”

---

Judge

Certified true translation  
Johanna Kratz, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-971-10

**STYLE OF CAUSE:** CESAR AUGUSTO CASTANEDA ESCATE v. MCI

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** October 12, 2010

**REASONS FOR JUDGMENT  
BY:** BÉDARD J.

**DATED:** October 26, 2010

**APPEARANCES:**

Oscar Fernando Rodas FOR THE APPLICANT

Tony Abi Nasr FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Oscar Fernando Rodas FOR THE APPLICANT  
Montréal, Quebec

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada