Federal Court  Cour fédérale

Date: 20110708

Docket: IMM-7024-10

Citation: 2011 FC 852

Ottawa, Ontario, July 8, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

KERNAN CLEVE CHARLES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of the decision made orally on November 8, 2010 by the Immigration and Refugee Board, Refugee Protection Division in Toronto, Ontario, finding the applicant not to be a Convention refugee or a person in need of protection.

BACKGROUND

[2] The applicant is a 25-year old citizen of Dominica who came to Canada on a study permit in 2006 to attend George Brown College. While at school he met his future wife, Darlene Peters, who he married on January 31, 2009. He had his first child on March 25, 2009 and graduated from George Brown in April.

[3] In May 2010, the applicant was charged with two counts of domestic assault and three counts of sexual assault. While in detention, he learned of the possibility of making a refugee claim and initiated one in May 2010. He says he was targeted by gangs in Dominica and does not want to be part of the violent, gang lifestyle which is prevalent there. The Refugee Protection Division (RPD) of the IRB received his refugee claim on May 26, 2010. On May 27, 2010, a Notice to Appear on July 7, 2010 was sent to the applicant's home address. The applicant had multiple correct addresses. Some of the materials from the RPD were sent to his wife's address but he was not permitted to contact her. In early July the applicant requested a legal aid certificate from Legal Aid in the name of a lawyer he had heard about in detention – Ms. Roth. Ms. Roth works as part of Bellissimo Law Group. However, Ms. Roth does not have a Legal Aid account and the applicant was not told he could obtain a blank certificate. The applicant submitted Counsel Contact Information for Ms. Roth on July 15, 2010 and on July 19, 2010 the RPD contacted the offices of Bellissimo Law Group. Ms. Roth advised Legal Aid that she had not spoken with the applicant. By letter dated August 23, 2010, the RPD requested that the applicant amend his PIF as it was not

signed. This request was also sent to the applicant's home address as well as to Ms. Roth. She advised the RPD that her offices were not retained.

[4] On September 24, 2010, and while still in detention, the applicant received his first correspondence from the RPD. It sent him the Claimant's Confirmation of Readiness, the Notice to Appear and the remainder of the RPD's disclosure. He was released on October 4, 2010 and made immediate contact with Ms. Roth on October 6, 2010. He was advised to obtain a Legal Aid certificate in Mario Bellissimo's name. He did so and spoke with Ms. Roth again on October 13, 2010. Ms. Roth followed up with the Registrar of the RPD on Monday, October 18, 2010 and was told that a scheduling conference was set for October 21st. At the time of hearing, the applicant had only a Legal Aid certificate for an opinion. The applicant thus attended the hearing of the 21st alone thinking he would only be attending a scheduling conference. At the start of the hearing he provided his Claimant's Confirmation of Readiness to the RPD.

[5] At the beginning of the hearing, the applicant requested that the hearing be postponed. He said he was not prepared to proceed and did not have counsel. He explained he was waiting for the legal aid certificate to come through.

DECISION UNDER REVIEW

[6] The Board decided not to postpone the hearing date and went on to hold that there was no reasonable explanation for the fact that the applicant waited several years after arriving in Canada to make his refugee claim. It noted the admission in the applicant's PIF that he came to Canada for a better life and confirmed that he testified the same. The Board found this indicated that the applicant

is an economic migrant who does not have a well-founded fear of persecution and does not face a risk of torture, a risk to his life or cruel and unusual treatment.

[7] The applicant's fear of gang activity was not found to be related to a Convention ground or substantiated by persuasive testimony. He did not explain how the risk is not one faced by others in Dominica.

ISSUES

[8] The determinative issue raised in this application is whether the Board denied the applicant procedural fairness by not postponing the refugee hearing.

ARGUMENT & ANALYSIS

Standard of Review

[9] Where procedural fairness is in question, the proper approach is to ask whether the requirements of natural justice in the particular circumstances of the case have been met. A standard of review analysis is not required: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at paras 52 and 53. Deference to the decision-maker is not at issue. See: *Ontario (Commissioner Provincial Police) v. MacDonald*, 2009 ONCA 805, 3 Admin L.R. (5th) 278 at para. 37 and *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19, 3 Admin L.R. (5th) 261 at paras. 30-32.

Did the Board deny the applicant procedural fairness by not postponing the refugee hearing?

[10] The applicant claims that in considering the factors set out in Rule 48(4) of the *Refugee Protection Division Rules*, the Board neglected to take into account the totality of evidence surrounding why the applicant was unable to obtain counsel prior to the hearing. Among other things, this included difficulties retaining counsel due to a mix up with Legal Aid and a lack of time to gather evidence. Taken together, this undermined the applicant's ability to properly present his case and thus denied the applicant procedural fairness.

[11] The respondent submits that the Board dealt with the request for a postponement in a fair and reasonable manner, considered all of the necessary factors pursuant to Rule 48(4), weighed these factors and justifiably denied the postponement. The respondent argues that because claimants are not entitled to a postponement this Court should only, interfere with the Board's refusal to grant one in exceptional circumstances.

[12] The respondent points out that the Board did fix a date and time for the hearing and that a letter dated September 24, 2010 was sent to the applicant to indicate that the hearing would take place on October 21, 2010. The applicant was asked to reply to this form by mailing in the Confirmation of Readiness and it was received late from the Board. The respondent submits the applicant was aware that his claim would proceed. Moreover, the applicant applied for refugee protection earlier, in the spring of 2010, and was aware that a hearing would eventually take place.

[13] Rule 48(4) establishes a number of factors that the Board must consider, if relevant, when deciding whether or not to grant a postponement:

(4) In deciding the application, the Division must consider any relevant factors, including	(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(*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;	*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;
(*b*) when the party made the application;	*b*) le moment auquel la demande a été faite;
(*c*) the time the party has had to prepare for the proceeding;	*c*) le temps dont la partie a disposé pour se préparer;
(*d*) the efforts made by the party to be ready to start or continue the proceeding;	*d*) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
(*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;	*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*) whether the party has counsel;	*f*) si la partie est représentée;
(*g*) the knowledge and experience of any counsel	*g*) dans le cas où la partie est représentée, les

who represents the party;	connaissances et l'expérience de son conseil;
(*h*) any previous delays and the reasons for them;	*h*) tout report antérieur et sa justification;
(*i*) whether the date and time fixed were peremptory;	*i*) si la date et l'heure qui avaient été fixées étaient péremptoires;
(*j*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and	*j*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;
(*k*) the nature and complexity of the matter to be heard.	*k*) la nature et la complexité de l'affaire.

[14] In the case at bar, the Board demonstrated its understanding of the applicability of Rule 48 and did make reference to some of the factors. But, I agree with the applicant that it failed to properly consider the totality of evidence so as to apply the relevant factors in a meaningful way.

[15] For example, it did not address the timing of the application for postponement pursuant to 48(4)(a). The applicant made the request orally at the time of the hearing. The applicant was not in a position to know to request this in advance because he was advised by his counsel, who was so advised by the Registrar, that he would only be attending a scheduling conference. Although this information was not raised prior to the Board deciding not to postpone, on a recess towards the end of the refugee hearing the applicant spoke with his counsel and then explained the situation to the Board. The Board had an ongoing obligation to consider this new information and erred by not doing so.

[16] As per 48(4)(d), the Board acknowledged the applicant's efforts to be ready through his attempts to obtain Legal Aid and did show an understanding as to the mix-up the applicant had with Legal Aid. Nonetheless, the Board concluded that the Legal Aid certificate need not have expired. Parts of the transcript provide context:

> **CLAIMANT:** […] And can I just explain something?
>
> **PRESIDING MEMBER:** Please?
>
> **CLAIMANT:** And when I did, when I contacted legal aid I did the interview and when I did the interview I gave her personal name Erin Christine Roth, and apparently her name was not a part of the list of the lawyers that actually take legal aid because she is with that group. **And I only found out when I released [sic] because I kept reapplying while I was in custody and they would not get back to me so I did not know what was going, what exactly was going on.** When I contacted her the office told me that they cannot really do anything about me right now until they get that certificate. So I can explain to them and they told me to contact legal aid but I did not do so until I got released. And then I finally contacted legal aid and they told me that my certification was expired but they could renew it as long as I get the lawyer's name, which Mario Bellissimo. And I finally gave it to them and I think that is why the process has taken a little bit. [Emphasis added.]
>
> **PRESIDING MEMBER:** And when did you do that?
>
> **CLAIMANT:** When did I call Legal Aid?
>
> **PRESIDING MEMBER:** Yes.
>
> **CLAIMANT:** Soon as I came out, soon as I got released, when I got released.
>
> **PRESIDING MEMBER:** And is that when you found out that your certificate had expired?
>
> **CLAIMANT:** Yes when I called, that is when they informed me and told me that my certificate was expired and I was like really. And they said well your lawyer's name is not n file. So I had to get the Mario Bellissimo. I did not know his name was on the file until I telephoned by lawyer and they explained to me and I finally gave that to legal aid. And now it is in the process. But apparently they did not give her the full certification so she has to write a letter saying that she received the certificate that they gave her but it is not eleigible fully to do…so…
>
> **PRESIDING MEMBER:** It will take more time is what you are telling me.

> **CLAIMANT:** Yes, so she said it is going to take a few weeks. I do not know how long, she said probably two weeks.

[17] Had the applicant been more persistent with calling Legal Aid while he was in detention, it is possible that he *may* have been able to obtain the certificate earlier than after his release. However, this is speculative and as the transcript illustrates, the applicant did make a number of attempts. It appears as though the difficulty rested with Legal Aid and it should not be attributed to the applicant, especially as he was in custody and may have had less access to resources than had his situation been different. The applicant's diligence was further reinforced by the immediacy with which he secured counsel after his release. I therefore find that the Board failed to appropriately consider these factors when assessing the request to postpone the hearing.

[18] In considering 48(4)(b), the time the applicant had to prepare for the proceeding, the Board stated the following: "It has been now several months since you commenced the claim so you have had some time to prepare". In reaching this conclusion, the Board failed to appreciate that the applicant was in detention until shortly before the hearing and had difficulty retaining counsel, as discussed above. The Board also ignored the applicant's testimony that he was not prepared:

> **PRESIDING MEMBER:** […] but what you are basically saying is you do not have a counsel, you tried to get legal aid and that you are not prepared.
>
> **CLAIMANT:** Yes.

The applicant stated this also at the beginning of the hearing. Having reviewed the record, I agree with the applicant that in this case, his being in detention had a direct effect on how well he could fully prepare.

[19] Further, the Board failed to even mention whether the applicant had sufficient time to gather evidence pursuant to 48(4)(e). This was a relevant factor, especially given the applicant's detention and considering that the applicant did not submit any documentation or have his own copy of his PIF. Linked to this is the fact that the applicant received notice of the hearing approximately 20 days before the hearing, again while still in detention. As mentioned above, other items of correspondence were sent to other of his addresses where they appear not to have been received by him.

[20] In considering whether the applicant had counsel as per 48(4)(f), the Board correctly noted that the applicant was unrepresented. While this Court has recognized that right to counsel is not absolute (*Sandy v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468 at para. 50), at the hearing, the applicant testified that he was in the process of obtaining the Legal Aid certificate that would take approximately two weeks and that would result in allowing him the representation he clearly sought. The Board erred in not taking into account the timing of the hearing vis-à-vis his release from detention, together with the fact that this was the first time the applicant had requested the adjournment. See: *Modeste v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027 at para. 21; *Golbom v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 640 at para. 13.

[21] The respondent is correct to note that the Board's decision with respect to granting postponements or adjournments is discretionary in nature and there is no presumption of entitlement: *Sierra v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1048 at para. 56. At the same time, however, and as articulated by the Supreme Court of Canada at paragraph 28 in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 243 N.R. 22,

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly […]”.

[22] The Board did not properly consider the totality of evidence or sufficiently analyse all relevant factors so as to ensure that the applicant in this case had the opportunity to present his case fully and fairly. In so doing, the Board engaged in a cursory analysis pursuant to Rule 48(4) and breached procedural fairness. This application must be granted and the matter returned to a differently constituted panel for the applicant to have the hearing with representation that he was denied.

[23] No questions were proposed for certification and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7024-10
STYLE OF CAUSE:	KERNAN CLEVE CHARLES and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 7, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	July 8, 2011

APPEARANCES:

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