Federal Court  Cour fédérale

Date: 20110725

Docket: IMM-6842-10

Citation: 2011 FC 927

Ottawa, Ontario, July 25, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TESHEL K. MEDICA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] After two days of hearing, Immigration and Refugee Board Member Donald G. McSweeney determined that the applicant was neither a Convention refugee nor a person in need of protection. The sole issue raised in this application for judicial review is whether the conduct of the applicant's representative before the Board, Dunstan Munro, a member of the Canadian Society of Immigration Consultants (CSIC), resulted in a breach of the principles of natural justice. The applicant submits

that Mr. Munro's acts and omissions constituted incompetence and that as a result of his actions there was a miscarriage of justice that warrants a re-hearing of her claim for protection.

[2] The applicant is a 23-year-old woman from St. Vincent and the Grenadines. When the applicant was 12 years old her mother moved to England to escape her husband's physical abuse. She promised to send for the applicant but never did. The applicant was left in the care of the abusive husband, her father Hudson Collins. The applicant says that her father is a drug addict; that he physically abused her; and that he forced her to have sex with drug dealers when he owed them money he was unable to pay. She left home temporarily but upon her return the abuse continued. She says that she reported the abuse to the police, but that when they questioned her father, he denied everything and no further action was taken. The applicant came to Canada with the assistance of a friend of her mother. The Member denied the claim because he found the claimant's allegations not to be credible.

[3] In *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196, Justice Crampton reviewed the principles applicable where there is an allegation that counsel's incompetence caused a denial of natural justice in a proceeding under the *Immigration and Refugee Protection Act*, SC 2001, c 27. Although Mr. Munro is not legal counsel, he is a certified immigration consultant, and the same principles apply. In light of *Memari* and *R v GDB*, 2000 SCC 22, if the applicant is to succeed in her application for judicial review, she must establish "first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted."

[4] The Supreme Court, at para. 27 of *GDB*, instructed that incompetence is to be determined using the reasonableness standard, with there being a strong presumption that the conduct complained of fell within the wide range of "reasonable professional assistance." In my view, this caution is particularly relevant because the former representative is not before the Court to explain his actions. Although the applicant has made a complaint to CSIC concerning Mr. Munro's representation, the record does not contain any response he may have filed or any affidavit from him either explaining, admitting, or justifying the acts and omissions of which the applicant now complains; such an affidavit was before the Court in *Memari*. The Court is left to assess whether the acts and omissions constitute incompetence based on the facts disclosed in the record, including the transcript of the hearing, the decision, and the applicant's affidavit.

1. Was the applicant's representative incompetent?

[5] Mr. Munro's impugned conduct falls under five headings: (1) his conduct with respect to tendering documentary evidence; (2) his failure to seek procedural accommodation for his client; (3) his conduct towards Member McSweeney on the first day of the hearing; (4) his failure to follow-up on his promises to seek the removal of the Member after the first day of hearing; and (5) his failure to provide any submissions to the Member.

Conduct in failing to tender documentary evidence

[6] The applicant submits that "apart from the psychological report which was submitted on the day of the hearing (well outside the 20 day disclosure rule), Mr. Munro failed to submit any personal or country documents." It has not been established that there are any country condition documents not already before the Board that may have been relevant to the applicant's claim;

however, the same cannot be said for the absence of documents directly related to and supportive of the applicant's claim.

[7] The Member noted that the psychological report which Mr. Munro did produce contained several serious allegations which were not included in the Personal Information Form (PIF) narrative, including allegations that her father beat her with a stick after she tried to run away, that on at least three occasions she was gang raped by three or more men, that one drug dealer threatened her with a knife during a sexual assault, that one man cut her face with a knife in one assault, and that she had been forced to use cocaine. The Member noted that Ms. Medica had been represented by Mr. Munro throughout and that it was reasonable to expect such serious allegations to be included in her PIF. He assigned little weight to the psychological report and "assigned a significant negative inference to the claimant's disclosure of serious allegations of abuse which were not included in her PIF."

[8] It is not uncommon for a claimant to file an amended PIF narrative prior to the hearing when new facts become known. However, that assumes that there is sufficient time to do so. Here, the psychological report dated June 8, 2010 was based on a meeting with the psychologist on June 3, 2010. The hearing was held on June 9, 2010. Accordingly, Mr. Munro had the report in hand no more than 24 hours prior to the hearing; – hardly sufficient time to properly prepare an amended PIF.

[9] There is no evidence before the Court indicating that Mr. Munro was aware of these "new" allegations of abuse until he received the psychological report; the applicant's affidavit filed in

support of this application is silent in this respect. There is nothing to suggest that the applicant had previously disclosed the new allegations to Mr. Munro or that he was negligent in failing to include them in the PIF that had been filed. I cannot find that Mr. Munro's conduct fell outside the range of reasonable professional assistance on this basis.

[10] In addition to the new evidence disclosed in the psychological report, the Member found that the applicant had failed to tender documents to support her story. This included her failure to establish with documentary evidence that Mr. Hudson Collins was her father. Given that he was the alleged agent of persecution, this finding substantially impacted her claim. The Member found that the applicant "did not present a birth certificate from St. Vincent [and] made no efforts to obtain documents from St. Vincent to prove that Mr. Collins existed and was her father."

[11] Another document that the Member noted was not provided was the police report relating to the applicant's complaint against her father and the ensuing police investigation. The Member noted a minor inconsistency in the applicant's evidence as to when she lodged the complaint: whether it was September 2007 or June 2007. The Member held: "The claimant did not provide a police report. Given the inconsistency, the panel finds the claimant's allegations of turning to police for protection were not credible." Had the report been available, it would most likely have been a complete answer to the minor inconsistency noted. It would most certainly have established that the applicant had sought police protection, to no avail.

[12] The Member also noted the failure to provide any documents relating to or an affidavit from the woman who helped the applicant escape from her father and travel to Canada. The Member

found that "if she existed, it would be reasonable for the claimant to have requested documents from the woman in England." The Member also found it to be "unreasonable that the claimant [did] not make efforts to obtain evidence from her neighbour or any others in her community who were aware of her allegations."

[13] The Member concluded that "the claimant has not provided sufficient credible evidence or trustworthy evidence to support the existence of her father; the abuse she allegedly experienced under his care; and the failure of police to provide her protection."

[14] When a claimant retains a representative it is his or her duty to advise the client as to what evidence will be required. In this case, there is no evidence that Mr. Munro failed to so advise the applicant. There is also no evidence that any of the documents the Member noted to be missing were available or could have been obtained. The Court cannot find that Mr. Munro failed his client or was negligent absent evidence that such documentary evidence was available and that he failed to instruct his client to obtain it.

Failure to seek procedural accommodation for the applicant

[15] The applicant submits that Mr. Munro "failed to make written or oral application to declare the Applicant to be a vulnerable person and/or to reverse the order of questioning pursuant to Guideline 8 and 7." In light of the applicant's life of sexual abuse from a very young age by many men with the consent and direction of her father, and given that her psychological report concluded that the "traumatic events have left her devastated psychologically," it is submitted that a reasonably

competent counsel would have made such an application. Counsel might also have asked for a female member to preside at the hearing.

[16] Mr. Munro failed to seek any accommodation for his client. His conduct at the hearing may raise questions as to whether he appreciated the Chairperson's *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB* and, in particular, Section 4 dealing with procedural accommodation.

[17] On the first day of hearing, Member McSweeney and Mr. Munro had the following exchange:

> MEMBER: In terms of the procedures for today, I've read the documents and I will be assessing the claim based on the gender – Chairperson's Guidelines on Gender. Counsel, other than that are there any other accommodations required?
>
> COUNSEL FOR CLAIMANT: I don't understand the question, can you repeat?
>
> MEMBER: Other than me assessing the claim based on the gender guidelines are there any other accommodations required for the claimant?
>
> COUNSEL FOR CLAIMANT: In terms of issues you're talking about?
>
> MEMBER: We're not even at issues. Any accommodations required based on the claimant's particular claim where she's alleging gender-based violence?
>
> COUNSEL FOR CLAIMANT: Well the claim is ---
>
> MEMBER: I'm just asking you do we have to do anything different because the claimant is alleging gender-based violence. Do we need to accommodate her in any way?
>
> COUNSEL FOR CLAIMANT: No (inaudible).

MEMBER: Okay.

[18] Notwithstanding that Mr. Munro sought no accommodation for his client, on the second day of the hearing Member McSweeney decided of his own accord to proceed with reverse-order questioning by asking Mr. Munro to examine his client before the Member asked his questions. Mr. Munro responded as follows: "Normally the member goes first so you threw me off a bit. I'm not objecting. I'm just getting ready because I was not prepared to go first."

[19] The Chairperson's Guideline is intended to assist vulnerable claimants in presenting their evidence. The difficulties addressed are stated to be as follows:

> (a) a person's vulnerability may affect memory and behaviour and their ability to recount relevant events;
> (b) the vulnerable person may be suffering from symptoms that have an impact on the consistency and coherence of their testimony;
> (c) vulnerable persons who fear persons in a position of authority may associate those involved in the hearing process with the authorities they fear;
> (d) a vulnerable person may be reluctant or unable to talk about their experiences.

[20] Generally a court ought not to second-guess decisions made by counsel. Not every claimant who appears from his or her narrative to be a vulnerable person takes advantage of the Guidelines. The applicant does not mention the alleged failure to seek this accommodation in her affidavit filed in support of this application. The psychological report states that the applicant is "not comfortable speaking about her past" and that she disclosed to the psychologist for the first time some of the events of her life. On the other hand, there is nothing in the report or elsewhere to suggest that the applicant's alleged vulnerability affects her memory or behaviour or leads to inconsistent or

incoherent testimony. Although the Member had credibility concerns with the testimony of the applicant, there is nothing in the transcript of the hearing that leads me to conclude on a balance of probabilities that Mr. Munro was incompetent in failing to seek procedural accommodation for his client.

Mr. Munro's conduct towards Member McSweeney

[21] The focus of the applicant's claim that her representative was incompetent relates to events at and following the first day of hearing.

[22] On the first day of hearing the Member began his questioning of the applicant by focusing on the psychological report dated only one day earlier and which had just been filed. He asked the applicant whether she sought any mental health support prior to June 3, 2010, when she saw the psychologist. She replied "No, because I didn't have any money or anything. I'm not working." The Member responded: "Mental health support is free in community-based agencies and with a special card you can see a psychiatrist." At that point Mr. Munro interjected, objecting to the line of questioning and asserting that the Member had not laid any foundation for it as he had not established whether the applicant knew of these free services. He accused the Member of "playing unfair" and said "you do that all the time." Matters quickly deteriorated with Mr. Munro making a number of intemperate statements directed at the Member and his conduct, including the following:

> Okay, and you're not even following the Chair Guidelines and I have to go on record.
> …
> From the start you have been hostile to my client for no reasons. Very hostile …
> …
> Okay, you can get your question – I mean if you continue I will remove my client from the hearing and ask to see the manager

> because it is detrimental to my client's wellbeing. It's very detrimental.
> …
> I want to file a motion at this point, okay?
>
> [Member: Go ahead, make your motion.]
>
> One, I'm asking you to recuse yourself from this hearing, you're not – you're being very unbiased [*sic*] and hostile for some reason, I don't know why. This client does not deserve it. She's here to state her case, you're not giving her an opportunity; you're asking redundant questions in a manner that does not make any sense.
>
> And there is no reason for you to be so hostile to this client, no reason. She's a girl – she's an innocent lady who's sitting here, came down here. At the start of the hearing she went in to tell how she – she had a gynaecological problem, yet you have no – from what I've seen, I have Googled you on the internet, you have no medical training and you went into probe on what her medical condition which is totally unethical. Totally unethical. I've never heard a member do that in my life. You understand me?
>
> Why, you have your own reason, okay. And in my opinion (a) you're not fit to be a member and number two, you're not fit to hear this hearing and you should recuse yourself.

[23] After dismissing the recusal motion, Member McSweeney continued with his questioning of the applicant; however, when he suggested that the applicant shared the personal details of her assaults with a stranger (the psychologist), Mr. Munro again objected saying that this was not a fair question. There was then a brief exchange between Mr. Munro and the Member as to the line of questioning. The applicant then began to cry. The Member had the following exchange with the applicant:

> BY MEMBER TO CLAIMANT, Continued: Can you please explain to me why – do you want to continue today? You're crying now, your counsel is acting out. Do you want to continue today?
>
> COUNSEL FOR CLAIMANT: No.

> MEMBER: Please be quiet. I'm asking you to be quiet. Do you want to continue today?
>
> CLAIMANT: No.
>
> MEMBER: Do you want to continue with this counsel?
>
> CLAIMANT: Yes, I do.

During the subsequent discussion of dates for rescheduling Mr. Munro had the following exchange with the applicant, and then the Member:

> COUNSEL FOR CLAIMANT: Before Ms. Medica – the member said something I want to explain to you what I'm going to do. I'm going to write a letter (a) to the Board explaining what's going on; ask them to get the transcript of this hearing today; ask for this member to be removed and if possible, I will go to the Federal Court to support it, okay?
>
> CLAIMANT: Yes.
>
> COUNSEL FOR CLAIMANT: This is (inaudible) you aren't the first person he does that with. I just want to let you know that.
>
> CLAIMANT: Okay.
>
> COUNSEL FOR CLAIMANT: No member acts like this. I've been doing this for 24 years, no member ---
>
> MEMBER: Please do not throw allegations. Put your allegations in writing. I will not accept those kinds of allegations in my hearing.
>
> COUNSEL FOR CLAIMANT: I will write to the Board ---
>
> MEMBER: Counsel, control yourself.
>
> COUNSEL FOR CLAIMANT: Why don't you do the same thing?

Mr. Munro reiterated more than once that he would be filing a motion to have Member McSweeney replaced as the panel member hearing the claim. Dates were then finalized and the hearing was adjourned.

[24] In my assessment, there was some merit to Mr. Munro's concern that Member McSweeney was unnecessarily direct and perhaps harsh with the applicant in his questioning; it may well have been appropriate for counsel to intervene to protect his client. However, the conduct of Mr. Munro in addressing this issue was rude, unprofessional, and hostile. It appears to have negatively impacted his client's ability to continue and it most certainly interfered with the proper conduct of the hearing.

[25] I find the conduct of Mr. Munro in this regard to fall outside the range of "reasonable professional assistance."

The failure to seek the removal of the Member

[26] The applicant filed an affidavit in this application in which she attests that following the hearing Mr. Munro "assured me that he would ensure that Member McSweeney would not hear my claim on the next day of the hearing. He indicated that he would file some papers with the IRB to have a different Member appointed to hear my claim." She goes on to state that this information relieved her "as I would not be comfortable with Member McSweeney after [the first hearing day's] events."

[27] Contrary to the statements he made to the Member at the hearing and contrary to the assurances he gave to his client, Mr. Munro took no steps to have Member McSweeney removed. The applicant was unaware of this until the second day of hearing when she arrived to find Member McSweeney ready to hear her claim. She describes her reaction as follows:

> On August 26, 2010, when I arrived for my second day of hearing, I was shocked to find out that Member McSweeney would be hearing my claim. Mr. Munro arrived late and I was unable to ask him why, despite his assurances, another Member had not been appointed. Mr. Munro and Member McSweeney spoke privately and the hearing quickly commenced.

[28] The applicant was alone when she learned that Member McSweeney was continuing to preside at the hearing because Mr. Munro was late in arriving. He had not previously informed her of his decision not to seek Member McSweeney's recusal. There are circumstances where counsel owes a duty to his or her client to explain matters before the client learns of them with no warning; this was one such circumstance.

[29] The private conversation between Mr. Munro and Member McSweeney was at the request of Mr. Munro and was on the record. Mr. Munro spoke, in part, of the impact his conduct on the previous hearing day had had on his client, as follows:

> What happened at the last hearing left my client shattered. I have been in contact with her and her family since the last hearing and I really – it hurt my heart. I will accept 90 percent of the blame. … She suffered certain degrees of trauma after the last hearing, for days after she was shattered. I owe her better; I think the Board owes her more than that. …

[30] In my view, there was nothing untoward in Mr. Munro not following through on his statement at the hearing that he would be seeking the Member's removal. He clearly reflected on his conduct on the first day of the hearing and made the decision that it was he that was mostly at fault, not the Member.

[31] However, it is difficult to comprehend why Mr. Munro had no discussion with his client prior to the second hearing day to inform her that he had not taken the promised action and to inform her that Member McSweeney would continue to be the presiding member. This is all the more surprising given that he was fully aware of the impact the first hearing day had on his client – to use his own words, she was "shattered."

[32] In her affidavit, the applicant states that she was "shocked" to find out that Member McSweeney would be hearing her claim and that this impacted her testimony on the second hearing date:

> While I tried to concentrate on the hearing, the events of June 9, 2010 lingered in my mind and I was fearful that Member McSweeny [*sic*] would not believe my story despite its truth. This feeling inhibited my ability to respond to his questions and I felt nervous and afraid throughout the hearing.

[33] I find that Mr. Munro's failure to inform his client prior to the second day of the hearing of his decision not to seek the recusal of the Member – essentially a failure to prepare her for the second day of hearing – fell outside the wide range of behaviour reasonably expected of a competent representative.

Failure to provide submissions

[34] Towards the end of the second day of hearing the Member questioned the applicant regarding details in her psychological report that were not in her Port of Entry Notes. A discussion between the Member and Mr. Munro followed which ended with the Member saying: "I'm trying to clarify her responses because they don't make sense to me so far. So that is what I'm doing." Mr. Munro responds: "Okay. I'll address it on submission and I'll leave it there." The hearing

ended and Mr. Munro was given a month, until September 28, 2010, to provide written submissions on the applicant's claim, including the point mentioned above. He provided nothing. He did not seek an extension of time and he did not indicate to the Board why he was making no submissions.

[35] It is impossible to say whether written submissions would have resulted in the Member reaching a different conclusion; however, the very issue raised above which Mr. Munro said he would address in submissions was clearly an issue that troubled the Member and it was noted in the decision. I find that the failure to make any submissions or to provide any explanation to the Board for not doing so fell outside the wide range of reasonable professional assistance.

Summary

[36] For the reasons set out above, I am satisfied that the following acts or omissions constituted incompetence on the part of Mr. Munro:

(a) his extremely offensive conduct towards the Member on the first day of hearing;

(b) his failure to inform his client that, contrary to his previous assurances, he had not sought the removal of Member McSweeney and that Member McSweeney would therefore be hearing the claim on the second day; and

(c) his failure to provide written submissions following the hearing.

2. Did the incompetence result in a miscarriage of justice?

[37] The respondent submits that the applicant "has not shown that there is a reasonable probability that but for the conducts [*sic*] of previous counsel the result of the original hearing would have been different."

[38] The Board's determination that the applicant was neither a Convention refugee nor a person in need of protection was based on its credibility finding. The Board stated: "Given the significant credibility concerns related to the claimant's overall testimony, the panel finds that there is no credible or trustworthy evidence upon which it could have made a favourable decision."

[39] In my view, the reliability of the Board's credibility finding is compromised by counsel's incompetence. Mr. Munro's attack on the Member's conduct and integrity and his failure to advise his client that the Member would not be replaced affected her demeanour and distracted her from the task at hand: being a forthright witness. She attests that she "felt nervous and afraid throughout the hearing."

[40] I am also of the view that the failure of Mr. Munro to provide any written submissions, as he had undertaken to do, compromises the reliability of the decision under review. In very similar circumstances this Court found that it was incompetent of a representative not to file written submissions to the Board on the issue of credibility when the representative had undertaken to do so and was aware that credibility was a concern of the Board: *Shirwa v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1345 (TD). In *Shirwa* Justice Denault found that the failure to provide written submissions prejudiced the client in that he was "unable to fully demonstrate his case before the tribunal." In my view, this applicant has been similarly disadvantaged.

[41] The applicant has filed a complaint with CSIC concerning Mr. Munro. The respondent suggested that this was her remedy if her counsel was incompetent and that her remedy is not to have a re-hearing of her claim. I disagree. If CSIC finds Mr. Munro incompetent, that will be small comfort to the applicant who has lost her claim for protection in Canada. Her complaint to the CSIC does nothing to address the miscarriage of justice found here.

[42] Justice requires that the applicant's claim for protection be sent back for a re-hearing before a different Member. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that: this application is allowed; the decision of the Board is quashed; the applicant's claim for Convention refugee status is referred back to the Board to be determined after a full hearing by a different member; and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-6842-10**
STYLE OF CAUSE:	**TESHEL K. MEDICA v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**JUNE 23, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**ZINN J.**
DATED:	**JULY 25, 2011**

APPEARANCES:

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