

Federal Court



Cour fédérale

Date: 20120801

Docket: IMM-8823-11

Citation: 2012 FC 956

Ottawa, Ontario, August 1, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MIRIAM CHANTAL SALAZAR NINO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2009, Ms Miriam Chantal Salazar Nino claimed refugee status in Canada out of fear of her ex-boyfriend, Garcia, in Mexico. Garcia asked Ms Salazar Nino to deliver a package for him, and she agreed. However, she then refused to deliver more. She later learned that Garcia was a drug dealer with connections to police, and that he had killed people, including young women, who refused to help him distribute drugs. Fearing repercussions for defying Garcia, Ms Salazar Nino

stopped going to work. Garcia looked for her at her workplace and at home and, when he found her, he threatened and raped her. After she fled to her grandparents' home, Garcia visited her parents' house and threatened her father. Ms Salazar Nino then fled to Canada.

[2] A panel of the Immigration and Refugee Board rejected Ms Salazar Nino's refugee claim. The Board found that her claim was not connected to a ground recognized by the Refugee Convention. It also concluded that Ms Salazar Nino had not sought the protection of state authorities in Mexico, and that she could have lived safely in Mexico City.

[3] Ms Salazar argues that the Board's conclusions were unreasonable. In addition, she maintains that the Board treated her unfairly at her hearing by effectively forcing her to proceed without the assistance of counsel. Her counsel sent a last-minute fax indicating that he could not attend the hearing. The Board told Ms Salazar Nino that she had a choice – either proceed without counsel or abandon her claim. She opted to go ahead.

[4] I agree with Ms Salazar Nino that the Board treated her unfairly. In effect, the Board denied her an adjournment without balancing the relevant factors.

[5] Given my conclusion on the issue of fairness, I need not deal with Ms Salazar Nino's suggestion that the Board's decision was unreasonable.

[6] The sole issue, therefore, is whether the Board unfairly refused an adjournment.

II. The Board's decision to deny an adjournment

[7] At the outset of the hearing, the Board informed Ms Salazar Nino that her counsel had sent a last minute fax stating that he had a conference and could not attend; he did not provide alternative dates for a hearing. The Board felt this was not a reasonable amount of notice. It also noted that this was the second request for a postponement in this case. The Board stated: "I have basically decided to proceed with your hearing." The Board then asked Ms Salazar Nino whether she wished to proceed without counsel. If she did not, the Board would declare her claim abandoned. She stated that she would go ahead without counsel.

III. Did the Board treat Ms Salazar Nino unfairly?

[8] The Minister concedes that the Board denied Ms Salazar Nino an adjournment, but argues that the Board accorded her a fair hearing of her claim, even in the absence of counsel. The Board spoke slowly and informed her of the issues that arose in her case – these included identification, countries of reference, subjective fear, delay, nexus, state protection, internal flight alternative, generalized risk, and credibility.

[9] In addition, the Minister submits that, even if Ms Salazar Nino was treated unfairly, the Board's decision should not be overturned because the outcome of the hearing was "inevitable": *Yassine v Canada (Minister of Employment and Immigration)*, 27 Imm LR (2d) 135 (CA).

[10] I disagree.

[11] According to the *Refugee Protection Division Rules*, SOR/2002-228, the Board must consider any relevant factors in deciding whether to grant an adjournment, 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 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;
- (e) the knowledge and experience of any counsel who represents the party;
- (f) any previous delays and the reasons for them;

- (g) whether the date and time fixed were peremptory;
- (h) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and
- (i) the nature and complexity of the matter to be heard.

[12] These factors are mandatory: *Sandy v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468; *Siloch v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 10 (FCA).

[13] Here, the Board considered the timing of the request and the fact that there had been a previous postponement of the hearing. Had it considered the other relevant factors, it would have noted that Ms Salazar Nino was to blame for neither adjournment. The first resulted from her counsel's illness, and the second was due to his unavailability. Ms Salazar Nino was also present and ready to proceed. In addition, hers was a fairly complex case, raising difficult legal issues such as nexus, state protection and internal flight alternative. She could not have been expected to make any meaningful submissions on those issues, especially through an interpreter. Proceeding in the absence of counsel created a risk of injustice.

[14] It was unfair, therefore, for the Board to have proceeded without considering the consequences for Ms Salazar Nino.

[15] Generally speaking, when an applicant has been treated unfairly, a new hearing is required, unless the outcome is a foregone conclusion: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, at paras 201-202; *Mobil Oil Canada Ltd et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202; *Yassine*, above.

[16] Here, I am not persuaded that the outcome of a new hearing is inevitable. The issues before the Board were complex. Legal submissions on them could have made a real difference in the outcome. Therefore, a new hearing is required.

IV. Conclusion and Disposition

[17] The Board erred by failing to consider the relevant factors when it denied an adjournment of Ms Salazar Nino's hearing. In doing so, it treated her unfairly. Accordingly, I must allow this application for judicial review and order a new hearing before a different panel of the Board. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is referred back to the Board for a new hearing before a different panel;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8823-11

STYLE OF CAUSE: MIRIAM CHANTAL SALAZAR NINO
v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 11, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: August 1, 2012

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