Federal Court  Cour fédérale

Date: 20130429

Docket: IMM-6337-12

Citation: 2013 FC 444

Ottawa, Ontario, April 29, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

CLARKE, PURNELL
(a.k.a. CLARKE, PURNELL ELLIOT)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review is granted.

[2] The Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) denied the applicant an adjournment of his hearing to obtain legal representation.

[3] The evidence before the Board was that the applicant has a mental illness and is incapable of representing himself. At the hearing, his sister, who had been designated his representative, stated that she had consulted with a lawyer and expected that he would be present. She learned just prior to the hearing that the lawyer had a scheduling conflict and requested an adjournment. The Board gave extensive reasons for denying the adjournment. The Board stated that the applicant had been represented by an immigration consultant until recently and had since been advised by a lawyer. It noted that there had been no notice filed to change the counsel of record. Based on statements from the designated representative, the Board assumed, through his failure to appear, that the lawyer considered the Board best suited to take care of the case.

[4] The absence of legal representation may render an immigration proceeding unfair if the case is complex, the consequences of the decision are serious and the individual is unable to properly represent himself.

[5] In the refugee context, there is also Rule 48(4) of the *Refugee Protection Division Rules*, SOR/2002-228 which required the Board to 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 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.

[6] Though it has since been repealed, this rule governed at the time of the hearing. It is a reviewable error for the Board to fail to consider any relevant factors: *Vazquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 385, para 13; *KCC v Canada (Minister of Citizenship and Immigration)*, 2011 FC 852, para 22.

[7] Of the above factors, it is most notable that the Board did not consider the nature and complexity of the proceeding. The Board ultimately found that the applicant had failed to rebut the presumption of state protection, a legal matter that neither the applicant nor his designated representative was qualified to address. The Board also failed to consider that the hearing had not been fixed peremptorily. Furthermore, there was no basis in the record for the Board to conclude

that the applicant had received adequate legal advice, let alone infer from the failure of the lawyer to appear that the lawyer concluded that the Board was best situated to look after the applicant's legal interests. This is sheer speculation. The lawyer could have equally failed to appear because of a scheduling error.

[8] While the issue was framed as whether the decision not to adjourn was a reasonable exercise of discretion, the controlling question must be whether the decision to proceed, in light of all the circumstances, rendered the hearing unfair. In my view, it did. The designated representative was not capable of representing the applicant. It was clear that the representative did not understand what it was to make submissions, which, at best, amounted to a plea for mercy.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6337-12
STYLE OF CAUSE:	**CLARKE, PURNELL (a.k.a. CLARKE, PURNELL ELLIOT) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 8, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	April 29, 2013

APPEARANCES:

Mr. Luis Antonio Monroy	FOR THE APPLICANT
Ms. Aleksandra Lipska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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