Federal Court  Cour fédérale

Date: 20130611

Docket: IMM-10209-12

Citation: 2013 FC 638

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, June 11, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ELIE KHALIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant seeks judicial review of a decision by a member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated August 22, 2012, wherein the member determined that the applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The applicant takes issue with the reasons provided by the RPD; specifically, he claims that the member's refusal to grant a postponement of the hearing in light of the absence of his counsel constitutes a breach of procedural fairness.

Application for postponement of hearing

[3] The applicant's hearing was held on May 9, 2012.

[4] An application for the postponement of the hearing was submitted to the RPD on May 2, 2012, on the grounds that the applicant's counsel had been called to appear at an Immigration Appeal Division scheduling conference, by the IAD itself, and therefore had been unable to attend the applicant's hearing. Following the rejection of this first application by a coordinating member on May 4, 2012, on the basis that these were not "exceptional circumstances" within the meaning of subsection 48(4) of the *Refugee Protection Division Rules*, SOR/2002-228, [repealed, SORS/2012-256, s 73] (Rules), counsel for the applicant submitted a second application to postpone the hearing by 90 minutes in order for him to be able to represent his client. That application was rejected by the same coordinating member, on the same grounds.

[5] On May 9, 2012, the member rejected another application for postponement, made at the hearing by the lawyer replacing the applicant's counsel, and decided that the replacement lawyer's name should be added to the record as counsel for the applicant.

II. Issues

[6] (1) Did the member's refusal to allow the application for postponement submitted on the day of the hearing constitute a breach of the principles of procedural fairness?

(2) Did the applicant have a fair opportunity to present his case, as the member contended?

III. Standard of review

[7] The standard of review applicable to questions pertaining to natural justice and procedural fairness is correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 111; *Aguilar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 561, 411 FTR 94 at para 15).

[8] However, with respect to the first issue, it should be noted that part of the case law acknowledges that a reasonableness standard of review is applicable to decisions of the Immigration and Refugee Board, and especially those of the Immigration Appeal Division (IAD), not to grant a postponement because it essentially requires an assessment of the factors of subsection 48(4) of the Rules and such decisions must be considered in light of the Board's discretion (*Omeyaka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 78 at para 13 and *Cleopartier v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1527 at para 4).

IV. Analysis

(1) Did the member's refusal to allow the application for postponement submitted on the day of the hearing constitute a breach of the principles of procedural fairness?

[9] Rule 48 of the Rules sets out the application process for changing the date of a proceeding and establishes a framework within which the IAD may exercise its discretion. Subsection 48(4) provides a non-exhaustive list of factors to be taken into consideration by the RPD depending on the circumstances:

48. (1) A party may make an application to the Division to change the date or time of a proceeding.	**48.** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.
(2) The party must	(2) La partie :
(*a*) follow rule 44, but is not required to give evidence in an affidavit or statutory declaration; and	*a*) fait sa demande selon la règle 44, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;
(*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.	*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.
(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.	(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.
(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	*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

for allowing the application;	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 who represents the party;	*g*) dans le cas où la partie est représentée, les 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.
(5) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.	(5) Sauf si elle reçoit une décision accueillant sa demande, la partie doit se présenter à la date et à l'heure qui avaient été fixées et être prête à commencer ou à poursuivre la procédure;

[Emphasis added.]

[10] The respondent criticizes the applicant for not having approached the IAD in order to have the proceedings submitted to an upcoming scheduling conference rather than requesting the postponement of the hearing before the RPD. The respondent further submits that the applicant was able to count on the services of a competent lawyer who replaced his counsel to represent him and was able to submit written representations to close out his arguments. Further, the respondent argues that given the fact that the previous applications for postponement had been refused, the applicant ought to have expected that the member would insist that the case proceed that same day (*Ruiz v Canada (Minister of Citizenship and Immigration)*, 2008 FC 915 at para 15). Moreover, the respondent, in a more general manner, argues that the right to counsel is not an absolute right and that it is incumbent on the applicant to choose a counsel who is able to appear on the date that has been set for the trial or hearing (*Gapchenko v Canada (Minister of Citizenship and Immigration)*, 2004 FC 427 at para 19).

[11] With respect and in all deference, the elements raised by the respondent, which essentially correspond to the factors considered by the member, were not sufficient to justify refusing a postponement in these particular circumstances.

[12] First, on reading the transcript of the hearing, it is clear that the successor lawyer was not quite prepared to represent the applicant. He told the member several times that he had only been able to review the docket on the eve of the hearing, that he was accompanying the applicant to make an application for postponement and not to proceed in place of the applicant's counsel, and that his lack of experience compared to that of the applicant's counsel was another factor to consider. But the member did not consider either the time the lawyer was given to prepare or his lack of knowledge of the applicant's docket. Even if he stated that the successor lawyer had an adequate knowledge of the docket in the reasons for his decision, the member himself complained about this lawyer not "being ready with the docket" when the latter requested a break of five to ten minutes in order to prepare the questions he was going to ask the applicant.

[13] All of this leads the Court to conclude that, by the refusal of his application for adjournment validly submitted one week prior to the hearing, the applicant suffered prejudice that has more to do with the denial of his right to a fair hearing than with his right, though not absolute, to be represented by counsel. This is particularly true given that there was no apparent reason for the refusal of the application for postponement.

[14] If a refugee claimant must not be deprived of a proper hearing due to his or her counsel's absence, it stands to reason that an application for postponement must not be refused on the sole

basis that the applicant is being assisted by another lawyer for the purpose of submitting the application for postponement.

[15] Furthermore, the member was somewhat insensitive to the applicant's particular circumstances and to the prejudice that could befall him as a result of his lawyer's absence. According to the case law of this Court and that of the Federal Court of Appeal, other factors may be relevant to an analysis based on subsection 48(4) of the Rules, such as the efforts made by the applicant to secure legal representation and whether he or she can be faulted for not being ready to proceed (*Vazquez v Canada (Citizenship and Immigration)*, 2012 FC 385, 407 FTR 167 at para 12; *Golbom v Canada (Citizenship and Immigration*), 2010 FC 640, at para 13; *Siloch v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 10 (QL/Lexis) (FCA); *Modeste v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027 at para 15; *Sandy v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468, 260 FTR 1 at para 52).

[16] To be sure, the fact that the member provided an extension of time to the lawyer to submit his written representations by May 30, 2012, allowed him to conclude his arguments. However, this could not substitute for the applicant's right to fully present his case in these particular circumstances.

[17] The Court concludes that the member erred in refusing the application for postponement submitted by the successor lawyer.

(2) Did the applicant have a fair opportunity to present his case, as the member contended?

[18] The Court acknowledges that "energetic questioning by a Board member and frequent interruptions will not necessarily give rise to a reasonable apprehension of bias, especially if the intervention is to clarify a claimant's or witness' testimony"(*Chamo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1219 at para 12).

[19] The applicant should not have had to endure the pressure and lack of time that resulted from his lawyer's absence and the refusal of the adjournment.

V. Conclusion

[20] For all of the aforementioned reasons, the applicant's application for judicial review is allowed and the matter is remitted for reconsideration before a differently constituted panel. (To avoid additional delays, the Court suggests that the hearing be scheduled on a peremptory basis.)

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and the matter be remitted for reconsideration by a differently constituted panel. No question of general importance arises for certification.

"Michel M.J. Shore"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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