

Federal Court



Cour fédérale

**Date: 20131114**

**Docket: IMM-10952-12**

**Citation: 2013 FC 1158**

**Ottawa, Ontario, November 14, 2013**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**GIFT TJITANDJEWAWA KURIJAWA  
by his litigation guardian SHAYNA SINGER**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**1. Introduction**

[1] Mr. Kurija's claim for asylum in Canada was rejected by the Immigration and Refugee Board, Refugee Protection Division [RPD] on May 25, 2012. He applied to have his claim reopened, and this too was rejected on September 20, 2012. In the present application pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], he contests the decision to refuse to reopen his claim.

[2] For the reasons which follow, the application is granted.

## **2. Factual background**

[3] Gift Tjitandjewa Kurija testifies that he was born in Namibia on July 15, 1995. Fifteen years and nine months later, he arrived in Canada on April 29, 2011. His father's whereabouts are given as unknown. The applicant's mother Flowrens Kurija died in 2005 when he was 10.

[4] The applicant claims that he was targeted as a witness to a murder. After his location of hiding was disclosed, with the help of his grandmother he procured an air ticket and in early 2011 fled to Canada. He traveled with a passport indicating that his date of birth was January 20, 1993. His grandmother and his aunt had instructed him to claim to be 18 years old as otherwise they said that he would not be allowed to travel alone.

[5] Upon arrival in Canada, Mr. Kurija continued to claim to be 18 years old. However, his social worker at Covenant House, where he was initially housed, did not believe from his appearance that he could be that old. He eventually admitted his real age to her. He was referred to Delisle Youth Services in August 2011 and his social worker there, Shayna Singer, obtained documents from Namibia showing his real date of birth. Ms Singer was chosen as Mr Kurija's designated representative before the Immigration and Refugee Board.

[6] At the hearing on May 11, 2012, counsel informed the Board member that Mr Kurija was under 18 and had difficulty understanding English (although an interpreter had not been requested). However, the Board member made a finding that Mr Kurija spoke adequate English and a finding

that he was of age based on his passport documents and other evidence, and ordered the designated representative to leave the proceedings. The Board member found that Mr Kurija was not a refugee or person in need of protection.

[7] Mr Kurija then applied to have his claim reopened on the ground that the hearing had been procedurally unfair.

### **3. Contested Decision**

[8] The applicant's new counsel concluded that rather than proceed with judicial review Mr Kurija should seek to have his claim reopened on the basis that he should have been assigned a Designated Representative pursuant to section 167(2) of the *IRPA*. In support of his application for reopening, Mr Kurija provided the following documentation:

- (a) An original copy of his Abridged Certificate of Registration of Birth indicating the place of birth and giving the date of birth as July 15, 1995. During the hearing, he only had a copy of this document, as he did not have the original. The Board member accorded no weight to the document because it was a copy. The original was sent by Mr Kurija's aunt and a copy of it was presented to the Board at the reopening hearing. It has all the appearances of an official document, being on coloured paper bearing the crest of the Republic of Namibia, in two print colours, with a certification stamp of the Ministry of Home Affairs, Department of Civil Affairs dated January 24, 2004 and affirming that it is a true extract from the birth register. It is dated long before the applicant fled to Canada.

- (b) An affidavit by the applicant explaining why he originally stated that he was 18, based upon instructions from his grandmother. He also explained how the social worker had attended all of his meetings with his lawyer and how she had explained to the applicant matters which he found confusing, emphasizing his trust for her and comfort provided when she was available. He also testified to his confusion and inability to understand most of the events occurring during the hearing.
  
- (c) An affidavit by his social worker explaining how she found out his age and the efforts that she went to so as to obtain documentation proving his real age. Of some import was the fact that she did not believe that the applicant was 18 because he looked much younger. She also testified that she found the Board member to be “extremely aggressive” and dismissive of what she was saying. She states that she was not given an opportunity to explain the situation or why she had believed that the applicant was under 18. In addition she testified to the applicant’s difficulties with the English language and his ability to understand matters involved in the legal proceedings, as well as her belief that she could have played a helpful role as his Designated Representative at the hearing.
  
- (d) Email correspondence between the social worker and the embassy pre-dating the hearing and demonstrating attempts by the applicant to obtain proper documentation.

- (e) Email correspondence between the social worker and his aunt. In this correspondence the aunt explains why the applicant's relatives told him to lie about his age.

[9] On September 20, 2012, another Board member reviewed the initial reasons for decision and noted that the previous decision-maker had provided reasons for finding on a balance of probabilities that the applicant was not a minor. The member declined to rely on the new evidence of the applicant's date of birth and accompanying evidence. The new Board found there was insufficient evidence put forth during the original hearing demonstrating that there had been sufficient inquiries or that the new information could not have been obtained prior to the first hearing with due diligence.

[10] The Board further commented that "one of the documents suggests that the applicants' [*sic*] parents, on his behalf could have obtained official documents regarding his date of birth from the Namibia Home Affairs office". It would appear that the Board was not aware that the applicant's mother was deceased and his father's whereabouts unknown.

[11] The Board also concluded that it was bound by the former Rule 55 of the *Refugee Protection Division Rules*, SOR/2002-228 [the *Rules*] to determine whether or not there had been a "failure to observe a principle of natural justice" by the RPD. It found that the previous decision-maker had considered the submissions regarding the need for a designated representative and had found that the applicant was competent to proceed without one. The applicant had been represented

by legal counsel. Therefore, there had been no failure of procedural fairness, and the request to reopen the claim was dismissed.

[12] The Board did not address the application of section 167(2), although referring to it. It noted that the (former) *Rules* at section 15 addressed the circumstances in which the designation of a representative is required during RPD proceedings.

#### **4. Issues**

[13] The issue is whether the Board's decision refusing to reopen the claim was reasonable in light of section 167(2) of the *IRPA*.

#### **5. Standard of review**

[14] The applicant proposes that correctness is the applicable standard for this judicial review because it involves both procedural fairness and a legislated requirement to appoint a designated representative, a question of pure law. The respondent argues that the deferential standard of reasonableness applies because the decision being reviewed is the one to reopen, or not, the claim, and not the decision to appoint, or not, a designated representative.

[15] I agree with the respondent to the extent that in respect of the Board's decision to reopen a refugee claim the standard is one of reasonableness. See *Boguzinskaite v Canada (Minister of Citizenship and Immigration)*, 2012 FC 779, at paras 8-9:

**8** The only issue in this application is whether the Board's decision not to reopen the refugee claims was reasonable. The standard of review is reasonableness: *Castillo v Canada (Minister*

*of Citizenship and Immigration*), 2010 FC 1185 and *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 133.

9 The reinstatement of withdrawn refugee claims is dealt with in subsection 53(3) of the *Refugee Protection Division Rules*, SOR/2002-228, which provides that the reinstatement must be allowed "if it is established that there was a failure to observe a principle of natural justice or if it is otherwise in the interests of justice to allow the application."

[16] However, the standard of review relating to the interpretation of section 167(2) of the *IRPA*, the objective of which provision is to ensure procedural fairness in the conduct of refugee procedures, is one of correctness.

## 6. Analysis

[17] I conclude that the Board misdirected itself by failing to consider the mandatory nature of section 167(2) on the requirement to determine on the basis of new evidence before it whether the applicant was under the age of 18 at the time of the first Board hearing. Section 167 reads as follows:

**167.** (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.  
[Emphasis added]

**167.** (1) L'intéressé qui fait l'objet de procédures devant une section de la Commission ainsi que le ministre peuvent se faire représenter, à leurs frais, par un conseiller juridique ou un autre conseil.

(2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

[Je souligne]

[18] The Federal Court of Appeal in *Stumpf v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 148, had occasion to consider the similar predecessor provision to section 167(2), that being section 69(4) of the *Immigration Act*, RSC 1985, c I-2, which read as follows:

69 (4) Where a person who is the subject of proceedings before the Refugee Division is under eighteen years of age or is unable, in the opinion of the Division, to appreciate the nature of the proceedings, the Division shall designate another person to represent that person in the proceedings.

[19] The Court of Appeal concluded that the provision was mandatory and the failure to designate a representative of the minor was an error that vitiated the decision, requiring it to be set aside, as described at paragraph 6 of its decision:

[6] It is our view that subsection 69(4) of the *Immigration Act* imposes on the Board an obligation to designate a representative for any refugee claimant who meets the statutory criteria, and that the obligation arises at the earliest point at which the Board becomes aware of those facts. In this case, the age of the minor claimant was apparent from the outset, and the matter of designating a representative for her should have been considered at least at the point at which abandonment proceedings were in contemplation, and certainly should have been done before the motion to re-open the claim was considered. The failure of the Board to do so was an error that vitiates the decision to refuse the motion.  
[Emphasis added]

[20] I am aware that the case has not been applied for its wider principle on the basis of the distinguishing fact that the age of the minor claimant was apparent to the Board. However, it has been noted in several cases that this Court has adopted a strict interpretation of the Board's obligations and that failure to designate a representative for a minor has consistently resulted in an order for a new hearing or redetermination. See generally *Vashee v Canada (Minister of Citizenship*



*and Immigration*), 2005 FC 1104; *Duale v Canada (Minister of Citizenship and Immigration)*, 2004 FC 150 [*Duale*].

[21] I am similarly aware that there are cases that conclude there may be circumstances under which the failure to appoint a designated representative will not vitiate the underlying decision. See for example *Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 134, where Justice Noël concluded that the failure to appoint such a representative will not always be fatal to the RPD decision, stating as follows at paragraph 34 of his reasons:

[34] [...] In the case at bar, I do not think the RPD's decision is vitiated, in view of the following facts:

- The applicant was 17 years and 10 months at the time of the hearing, 16 years and 5 months at the time he completed his PIF, and he was at all times able to understand the proceedings that were in progress;
- A representative was assigned to him before the hearing and he was allowed to meet with a social worker on the eve of the hearing;
- The improbabilities in his story are too numerous and significant to conclude that the RPD decision is vitiated because he had not yet reached the age of 18.

In view of the circumstances of this case, I do not think it is necessary to overturn the RPD decision. However, I do stress the importance of compliance with subsection 167(2) of the IRPA and the Guidelines, as this Court has stated many times.

[22] With the greatest respect for my colleagues' views on this issue, it is my opinion that section 167(2) is a mandatory provision, without exceptions, which allows no derogation by the effect of extraneous circumstances that might mitigate its requirements. I conclude that Parliament's intention was to enact what I would describe as a "bright line" fundamental fairness provision,

relating to a widely recognized concern about the capacity of minors to interact with a legal system tasked with determining their rights. Similar expressions of legislative concern pertaining to the capacity to properly defend the rights of minors or the assignment of liability for their conduct using 18 as a bright line age-boundary are found in various versions in a wide number of legal contexts in Canadian law, be it in criminal, contract, or family law.

[23] I place the proper representation of young immigrant claimants in refugee proceedings on the same plane as concerns over bias of a decision-maker. By this I mean that it is a “knock-out” issue requiring the decision to be set aside, and furthermore an issue on which new evidence is admissible after the fact for the purpose of determining the partiality of the decision-maker, or in this case, the age of the claimant.

[24] By analogy to the situation where concerns develop relating to the bias of the decision-maker, the issue of the ability of the minor to fully participate in the proceedings is of the same fundamental significance. Be it in relation to understanding the proceedings, or in relation to properly communicating the applicant’s thoughts, views and directions to his lawyer or the Board, the appointment of the representative has a fundamental impact on the fairness of the proceeding themselves. The impact of its absence cannot be second-guessed after the fact, because one cannot tell what the outcome would have been with the insertion of an informed and pro-active representative to ensure that the client fully participated in the proceedings. Where minors are concerned, there is also an apprehension of unfairness if they are not fully engaged in the process.

[25] Moreover, while I recognize that regulations cannot be employed in order to interpret statutes, I nonetheless note that the current section 20 of the *Refugee Protection Division Rules*, SOR/2012-256, which replaced section 15 of the *Rules* which were before the Board in this case, would support a more strict approach to the application of the mandatory rule of the Designated Representative. The duties assigned to this person are described as follows:

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| <p>(10) The responsibilities of a designated representative include</p>  | <p>(10) Les responsabilités d'un représentant désigné sont notamment les suivantes :</p>   |
| <p>(a) deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel;</p>       | <p>a) décider s'il y a lieu de retenir les services d'un conseil et, le cas échéant, donner à celui-ci des directives, ou aider la personne représentée à lui donner des directives;</p> |
| <p>(b) making decisions regarding the claim or application or assisting the represented person in making those decisions;</p>                                    | <p>b) prendre des décisions concernant la demande d'asile ou toute autre demande ou aider la personne représentée à prendre de telles décisions;</p>                                     |
| <p>(c) informing the represented person about the various stages and procedures in the processing of their case;</p>   | <p>c) informer la personne représentée des diverses étapes et procédures dans le traitement de son cas;</p>  |
| <p>(d) assisting in gathering evidence to support the represented person's case and in providing evidence and, if necessary, being a witness at the hearing;</p> | <p>d) aider la personne représentée à réunir et à transmettre les éléments de preuve à l'appui de son cas et, au besoin, témoigner à l'audience;</p>                                     |
| <p>(e) protecting the interests of the represented person and putting forward the best possible case to the Division;</p>  | <p>e) protéger les intérêts de la personne représentée et présenter les meilleurs arguments possibles à l'appui de son cas devant la Section;</p>  |

(f) informing and consulting the represented person to the extent possible when making decisions about the case; and

f) informer et consulter, dans la mesure du possible, la personne représentée lorsqu'il prend des décisions relativement à l'affaire;

(g) filing and perfecting an appeal to the Refugee Appeal Division, if required.

g) interjeter et mettre en état un appel devant la Section d'appel des réfugiés, si nécessaire.

[26] Similarly, section 20(7) of the current *Rules* also confirms the bright line aspect of the protections afforded young persons, by their termination on the minor becoming an adult.

(7) The designation of a representative for a person who is under 18 years of age ends when the person reaches 18 years of age unless that representative has also been designated because the person is unable to appreciate the nature of the proceedings.

(7) La désignation d'un représentant pour une personne âgée de moins de dix-huit ans prend fin lorsque celle-ci atteint cet âge, à moins que ce représentant ait également été désigné pour elle parce qu'elle n'est pas en mesure de comprendre la nature de la procédure.

[27] I therefore conclude that section 167(2) speaks in mandatory terms without exceptions or limitations, as a direction to Board members not to engage in, for instance, analysis of whether the claimant is nearing the age of 18, being represented by a lawyer, or has given testimony which may raise credibility issues, as rationales excusing the need to appoint a Designated Representative. Given that such determinations can only be overturned on a deferential standard of review of reasonableness, such an interpretation of the provision would significantly debilitate its purpose, as it has in this case.

[28] Nor do I see this as too onerous a requirement to impose on the RPD. In this instance the Designated Representative was present and was in a position to assist the applicant and the Board. Rather than making an adverse credibility finding to the effect that the applicant had provided a false birth certificate, a finding which colours all of the Board's decision and which appears to be incorrect in light of the additional evidence, why should the Board not exercise its discretion liberally and permit the social worker to remain and assist the claimant?

[29] Section 167(2) being a mandatory statutorily directed fundamental fairness provision, the reopening Board misdirected itself in failing to consider whatever evidence was introduced before it to determine whether the applicant was a minor at the time he appeared before the RPD. In the present case, therefore, it misdirected itself not only in failing to give consideration to the section 167(2) factors in its decision, but also in not considering the highly probative new evidence produced to support the applicant's submission that he was a minor at the time of the hearing.

[30] Moreover, on the point of the insufficiency of effort to obtain evidence, which is the crux of the reopening Board's decision, it is just because the claimant was a minor that it is not possible to attribute blame or negative credibility findings for failures to procure evidence establishing that he was under 18 years of age. Section 167(2) is based upon a recognition that a minor in the extraordinary circumstances of participating in proceedings regarding his or her own refugee claim lacks sufficient capacity to participate fully without special assistance and guidance from a Designated Representative, to whom this task is assigned by the *Rules*. That is why the statute imposes on the Board the necessity to appoint a Designated Representative to ensure that a minor can properly participate in the proceedings and not be blamed for failures such as not procuring

evidence or even making untruthful statements if in an appropriate context such as flying to Canada on the necessary false pretence of being 18 years old.

[31] The reopening Board should have assessed not merely the record before the tribunal but all of the evidence old and new, in order to determine whether the applicant was a minor. Having made a finding on the applicant's age, it needed to pronounce on the correctness of the first Board's finding, rather than pronouncing on whether that finding had been reasonable in light of the evidence available at the original hearing.

[32] Even if I am wrong in my characterization of the mandatory character of section 167(2) of the *IRPA*, in the present case I conclude that the designated representative would have been able to assist the applicant in understanding the questions put to him, advocate for him when he appeared confused, and point out the language difficulties, thus providing assistance to the Board. Credibility was the major issue at the hearing, and the social worker, who was to be the designated representative, would have been able to present relevant testimony about her conversations with the applicant's aunt and grandmother which would have supported his claim.

[33] I find that I am in a similar situation as Justice Dawson, in *Duale*, above, where at para 20, she allowed a similar application of an under aged refugee decision on the basis that she could not "safely conclude that the failure to appoint a designated representative could not have had an adverse effect on the outcome of the claim."

## **8. Conclusion**

[34] The application is granted and the file is remitted to a new member of the Immigration and Refugee Board for reconsideration, which should consider the additional evidence filed at the reopening hearing, to determine whether the applicant was a minor at the date of the hearing. If an affirmative decision is made, a new hearing should be directed before a different Board member with a Designated Representative appointed for the applicant at that hearing in accordance with section 167(2) of the *IRPA* despite his being 18 years of age or older.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted and the matter remitted to another Board member for redetermination;
2. The applicant's name in style of cause is amended to Gift Tjitandjewa Kurija; and
3. The parties have indicated that there is no question of general importance to be certified.

"Peter Annis"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-10952-12

**STYLE OF CAUSE:** GIFT TJITANDJEWA KURIJA by his litigation guardian  
SHAYNA SINGER v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 17, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** ANNIS J.

**DATED:** NOVEMBER 14, 2013

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