

Federal Court



Cour fédérale

Date: 20140324

Docket: IMM-11823-12

Citation: 2014 FC 283

Ottawa, Ontario, March 24, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**ARTAN HULEJ, MARJANE HULEJ,
HENRY JOZEF HULEJ
AND MARSILDA HULEJ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Mr. Artan Hulej and his wife, Mrs. Marjane Hulej, are citizens of Albania. Their two children, Henry Jozef Hulej (5 years old) and Marsilda Hulej (8 years old), were born in, and are citizens of, the United States. The adult applicants unsuccessfully sought asylum in the United States on political grounds following admission to that country in 2001.

[2] The family entered Canada in March 2011 and sought protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Refugee Protection Division of the Immigration and Refugee Board determined on October 26, 2012 that they were neither Convention refugees, nor “persons in need of protection”. They seek judicial review of that decision expressing dissatisfaction of the manner in which the Board conducted the hearing.

[3] The sole issue on this application is whether the Board Member’s conduct breached the rules of natural justice and procedural fairness?

[4] It is well established by the prior jurisprudence that questions of procedural fairness relating to the Board’s conduct are reviewed on a correctness standard: *R.M.Q.M. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1150, [2011] FCJ no 1429 at para 52. See also: *Balasubramanian v Canada (Minister of Citizenship and Immigration)*, 2012 FC 228, [2012] FCJ no 249; *Swaminathan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 86, [2007] FCJ no 106; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. Where procedural fairness is in question, as here, the proper approach is to ask whether the requirements of natural justice in the particular circumstances of the case have been met.

[5] This Court has considered the conduct required of Board Members when hearing a case on several occasions. It has noted, for example, that patience, respect and restraint are required at all times: *Toth v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 149, [2001] FCJ no 305 at para 22. The Court has also recognized that Board Members have a difficult and stressful but essential role to play. At all times they must keep in mind that the rules of natural justice must be

observed, and that their conduct during hearings must be irreproachable and objective. This extends to the questioning that may be required to clarify a claimant's statements: *Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870, [2004] FCJ no 1058 at paras 4-6.

[6] In this matter, the applicants submit that the Board Member's conduct was dismissive and mocking with respect to their claim. They contend that his conduct contaminated the hearing and affected his consideration of the evidence. In the decision, they argue, the Member "cast aspersions" on the applicants because records of their U.S. refugee claim had not been produced, although evidence of efforts to do so had been put before the Board. They also refer to the Member's negative credibility finding based on the answer to a question in a Canadian immigration form (IMM 5611) that was completed in the U.S., prior to their entry in 2011, as illustrating his dismissive treatment of their evidence.

[7] In his decision, the Member commented twice on Mr. Hulej's "notably poor manner of testifying" and failure to answer "responsively".

[8] In his affidavit, Mr. Hulej states that the Board Member asked questions so quickly that both he and the interpreter had difficulty understanding him. According to Mr. Hulej, he was unable to be more responsive to the questions posed because he didn't understand what was being asked. Mr. Hulej also claims that the Board Member's body language and facial expressions throughout the hearing showed that he was not engaged in the hearing and that he would rather be somewhere else. He attempted to watch a video, submitted in evidence to show damage to the family home in Albania, while at the same time listening to Counsel's examination of Mr. Hulej. Finally, Mr. Hulej

claims that when his counsel made submissions, the Board Member turned his chair around and faced the other way.

[9] The respondent submits that the Member's negative credibility findings relating to the U.S. claim and the content of the Canadian immigration form were reasonable, as were several other negative credibility findings relating to the alleged blood feud for which there was no documentary evidence in support. The applicants' allegations with respect to the Board Member's conduct cannot be confirmed or denied on the basis of the Certified Tribunal Record (the "CTR"), but were not commented upon at the time. If this Court were to find that the Member conducted himself in a manner that breached the duty of procedural fairness, the decision should not be remitted for redetermination because the result would be the same: *Yassine v Canada (Minister of Citizenship and Immigration)*, [1994] 172 NR 308 (FCA) [*Yassine*] at paras 9-10.

[10] The applicants' contend that Mr. Hulej's affidavit is the best evidence available with respect to the Board Member's conduct, as the alleged conduct would not be evident in a transcript. Moreover, it was open to the respondent to cross-examine the applicant on his affidavit. The respondent submits in reply that there was nothing to be gained through a cross-examination of Mr. Hulej on his affidavit. The applicants could have obtained an audio recording of the hearing if they had thought it would support their case.

[11] The failure to complain at the hearing can amount to an implied waiver of any breach of natural justice that may have occurred: *Yassine, supra*, at para 7. At one point, counsel says that the

Member is going a little too fast. At another, counsel objects to the Member watching the video while listening to the questioning of his client. The Member responds that he can “multitask”.

[12] The transcript indicates that the Member was, at times, rather abrupt in his comments and some could be interpreted as sarcastic or impatient. At one point, for example, the Member states: “...You know sir, you are either not listening to my questions or you are not understanding them because I am not... I am getting answers which I am having difficulty with [...]”. At another point in the hearing the Member says:

Sir you are going to have to listen to my questions and answer... answer carefully. I am assessing your credibility, I am writing down your answers and if you say all sorts of contradictory things it could lead to me not believing what you say. As I told you before, if you do not understand ask me to repeat or rephrase.

[13] This suggests a level of frustration on the part of the Member with what he evidently perceived to be the principal applicant’s lack of responsiveness. But the transcript, as a whole, does not reveal any glaring misconduct. It appears that the Member was trying to move the case along quickly to be completed within the allocated time. There is no indication that the interpreter expressed any concern about the speed at which the Member asked questions. There is, furthermore, no way to verify the facial expressions and body language allegedly exhibited by the Member.

[14] In the result, I am not satisfied that the applicants have established that they were denied procedural fairness. The adverse credibility findings were open to the Member based on the evidentiary record, including the testimony of the two adult applicants. The decision was within the range of acceptable outcomes justified on the facts and the law, and it is unlikely that any other

Board Member would arrive at a different decision based on this evidence. Accordingly, the application is dismissed.

[15] I can't leave this matter without commenting upon a submission made by counsel for the applicants. In his reply memorandum and oral representations he submits that, as an officer of the Court and a lawyer subject to the Rules of Professional Conduct which govern him, he could not allow an affiant to tender an affidavit raising issues that were not, in his view, true. These comments were offered in support of his client's affidavit evidence.

[16] As I stated at the hearing, I do not believe that it is proper for counsel to rely on such matters to, in effect, bolster the credibility of his client. While it is undoubtedly correct that counsel is bound by his duty to the Court and by his ethical obligations, this breaches the principle that counsel may not also be a witness in the proceeding. Had he wished to give evidence, counsel should have obtained his clients' consent to withdraw from the record and assisted them to retain other counsel to present their case including his evidence.

[17] No question was proposed for certification and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-11823-12

STYLE OF CAUSE: ARTAN HULEJ, MARJANE HULEJ,
HENRY JOSEF HULEJ
and MARSILDA HULEJ

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 29, 2014

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

DATED: MARCH 24, 2014

APPEARANCES:

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