Federal Court  Cour fédérale

Date: 20141210

Docket: IMM-5114-13

Citation: 2015 FC 90

Toronto, Ontario, December 10, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

VLS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS
(Amended by Order dated January 7, 2015)

[1] This is a judicial review of a decision of the Immigration Appeal Division refusing an application made pursuant to section 71 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, to reopen the applicant's appeal under subsection 63(3) of the Act of a removal order made against him.

[2] These are the reasons for the conclusion stated at the close of argument, that this application must be allowed.

[3] VLS came to Canada with his parents when he was 12 years old. He had a daughter with a common law partner. He was convicted and sentenced to 18 months less 12 days for pre-trial custody, for the sexual assault of his daughter when she was a minor.

[4] On April 30, 2012, an admissibility hearing was held while he was incarcerated and he was issued a removal order. The applicant submitted a notice to appeal in May 2012, approximately five months before his release. The hearing date was scheduled for February 5, 2013.

[5] At the hearing the applicant was not represented. He requested a postponement. He testified that he had recently spoken to a lawyer (whom he named), and that he "asked me to get an adjournment, to ask for an adjournment, so that he can have ample time to prepare. He said that the minimum time it takes is a month for him to properly prepare so I should come in and ask for an adjournment, and then call him back and let him know if I got it that way he could help me." He further testified that the lawyer was not going to commit to represent him until he informed him whether the adjournment has been obtained.

[6] VLS testified that he had tried "desperately" to obtain a lawyer following his release from detention in late October 2012, but had been unable - they told him they did not take legal aid, or were booked up, or were on vacation.

[7] The Board Member asked the Minister's counsel for his position. He said that he was of two minds. He noted that if the applicant was going to seek humanitarian and compassionate relief, the Minister had received no disclosure from him. He also noted that just at the commencement of the hearing the Minister had given the applicant a copy of the reasons for sentence and it was "very important in terms of the Minister's case." Importantly, he noted that the appeal was a "fairly important matter" and that the applicant "probably should have a lawyer to assist him" but that he was opposing the adjournment request because he was ready to proceed.

[8] The Board Member refused the adjournment request and stated the following at the hearing: "I am not satisfied that you have made reasonable efforts to retain counsel. You've had since May 2012 to do so, and I do not accept that each and every counsel that you contacted was unavailable to represent you today or on some other occasion and would have obtained an adjournment for you. So I am dismissing your application for an adjournment and we are going to proceed."

[9] The Board Member expanded his reasons in the written decision dismissing the appeal:

> The appellant has done virtually nothing since he launched an appeal to be represented by counsel until the week before this hearing and that effort would appear to have been much too little. The appellant proposes a postponement to an indefinite date but it was clear he would not be able to retain counsel without the financial support of his stepmother and stepsiblings which had not been forthcoming to date. No family members were present for this hearing, though the appellant said they were aware of it. He said that he had been turned down for employment insurance and for social assistance and lost both appeals from those refusals. In these circumstances, the fault for not having retained counsel lies with the appellant and I was of the view that postponing this

> hearing regarding a removal order grounded on a conviction for a serious offence would amount to needless delay.

[10] The evidence before the Panel on the application to reopen showed that the applicant had obtained a legal aid certificate in April 2012; therefore he did not need his family's financial support. It also showed that his stepmother tried to obtain counsel for him while he was incarcerated and it details his efforts following release.

[11] The Panel refused the application to reopen with brief reasons:

> The only ground to reopen this appeal is if the panel is satisfied that the IAD in February 2013 failed to observe a principle of natural justice. The IAD heard the appellant's oral application for postponement, dismissed it, and included reasons for that dismissal in its written reasons for dismissal of the appeal. Having reviewed the Application materials, the panel finds that the applicant has not provided persuasive evidence that the IAD failed to observe a principle of natural justice.

[12] This Court has stated on many occasions that a failure to consider all of the factors set out in Rule 48(4) of the *Immigration Appeal Division Rules*, SOR/2002-230, constitutes an error of procedural fairness: See for example *Sandy v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468, *Modeste v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027, and *Vazquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 385.

[13] Rule 48(4) provides as follows:

48. (4) In deciding the application, the Division must consider any relevant factors, including	48. (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 for allowing the application;

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 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) the knowledge and experience of any counsel who represents the party;

f) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

(g) any previous delays and the reasons for them;

g) tout report antérieur et sa justification;

(h) whether the time and date fixed for the proceeding were peremptory;

h) si la date et l'heure qui avaient été fixées étaient péremptoires;

(i) whether allowing the application would unreasonably delay the proceedings; and

i) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;

(j) the nature and complexity of the matter to be heard.

j) la nature et la complexité de l'affaire.

[14] I agree with the applicant that there is no evidence that the Board Member gave any consideration to at least two mandatory factors listed in that Rule: The "nature and complexity of the matter to be heard" (which were significant given the impact of the decision on the applicant would result in his removal from Canada), and "any previous delays" (of which there were none). Moreover, the Board Member was clearly in error in assuming that he required family financial support to obtain counsel, as he had previously obtained a legal aid certificate. He was also in error in stating that the applicant was seeking an indefinite postponement. He was not. It was open to the Board Member to grant a postponement to a fixed date, preemptory to the applicant.

[15] The Panel's decision to refuse the request to reopen the appeal was unreasonable. It failed to consider Rule 48(4) or its jurisprudence, and failed to examine whether the Board Member refusing the adjournment had done so. Frankly, I am perplexed by the Panel's statement that the applicant failed to provide "sufficient persuasive evidence that the IAD failed to observe a principle of natural justice." In my view, the failure is obvious on the face of the decision itself.

[16] In circumstance such as these where a person appears before the Board without counsel seeking a postponement, a Member would be well-advised to ask pointed questions relating to each of the mandatory factors set out in Rule 48 and then, if the request is to be refused, provide reasons that show that these responses to those mandatory factors were obtained, considered, and weighed.

[17] This application must be allowed. The decision to dismiss the application to reopen is unreasonable because the decision refusing the postponement of the appeal hearing was a breach of the applicant's right to natural justice and a fair hearing because the Board Member failed to consider and weigh all of the mandatory factors in Rule 48(4).

[18] No question was proposed to be certified.

[19] The Certified Tribunal Record contains the Reasons for Sentence delivered by Mme. Justice Kiteley which was tended by the Minister's counsel at the initial Board hearing. Those Reasons are stated to be subject to a non-publication order to protect the interests of the minor child. Accordingly, the Court will order that the Certified Tribunal Record filed in this application be sealed and treated as confidential without a further express order of the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed; the decision of the Immigration Appeal Division dismissing the application to reopen the applicant's appeal is set aside and is to be heard by a different Panel in keeping with these Reasons; no question is certified, and the Certified Tribunal Record is ordered to be sealed and treated as confidential.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5114-13
STYLE OF CAUSE:	VLS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2014
JUDGMENT AND REASONS:	ZINN J.
DATED:	DECEMBER 10, 2014

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