

Federal Court



Cour fédérale

Date: 20140711

Docket: IMM-5391-13

Citation: 2014 FC 684

Ottawa, Ontario, July 11, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SANAL VANKAYEV

demandeur

et

**LE MINISTRE DE LA CITOYENNETÉ
ET DE L'IMMIGRATION**

défendeur

JUDGMENT AND REASONS

[1] Mr. Sanal Vankayev seeks judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [Board], dated July 11, 2013, whereby it determined that he did not qualify as a Convention refugee or a person in need of protection, within the meaning of section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] Two principle issues are at stake in this judicial review. First, the applicant argues the Board committed a breach of the principles of natural justice by failing to provide him with specific notice that it was going to raise the issue of subjective fear. Basing itself on the fact that the applicant did not seek asylum from a European Union member country prior to seeking it in Canada, the Board held that his attitude was not compatible with someone who fears for his life. This breach alone is sufficient to allow the judicial review and to remit the file back for redetermination by a different member of the Board. Alternatively, the applicant submits that the Board failed to consider the totality of the evidence before it when concluding that he failed to demonstrate his Russian identity.

[3] For the reasons discussed below, I find that the determinative issue is the breach of natural justice and that, for this reason alone, this application for judicial review will be granted.

Issues and Standard of Review

[4] At the hearing, two principle issues were submitted :

1. Did the Board violate the principles of natural justice in not providing specific notice to the applicant that it was going to raise the issue of subjective fear?
2. Did the Board fail to consider the totality of the evidence when concluding that the applicant failed to demonstrate his Russian identity?

[5] As indicated above, I will solely address the issue of the breach of the principles of natural justice. As this case will be sent back for reconsideration, a new member of the Board

will be tasked with reviewing the totality of the evidence regarding the applicant's identity and nationality.

[6] That said, questions involving the principles of natural justice are reviewed under the correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50). As a general rule, a breach of natural justice voids a hearing and so requires a new one to be held.

Analysis

[7] The applicant argues that the Board violated the principles of natural justice by failing to provide him with specific notice that it was going to assess his "subjective fear." In the Board's document *Assessment of Credibility in Claims for Refugee Protection* (January 31st 2004) at point 1.4, it is suggested that "subjective fear" is an issue that the Board must clearly identify before broaching it:

The Federal Court has stated that credibility is always an issue in refugee hearings and that no special notice needs to be provided to the claimant. Some cases have held, however, that issues such as identity, delay or failure to claim elsewhere require specific notice. Moreover, the Board acts at its peril when it isolates some concerns and draws those to the attention of the claimant, but actually decides the case on the basis of others, which are not identified as issues. . . [Emphasis added]

[8] In *Ali v Canada (Minister of Citizenship and Immigration)*, 2001 CFPI 405, the issue of subjective fear was not raised during the hearing, yet the Board ultimately used it to reject the claimant's claim. As such, Justice Dawson found, at para 11, that the claimant had been "denied the opportunity to answer the case against her and that a breach of natural justice occurred."

[9] While, during the April 30th hearing, the Board briefly questioned the applicant as to why he had not claimed asylum elsewhere in Europe, subjective fear, as such, was never mentioned as a contentious issue. Nonetheless, the Board ultimately finds that he lacked it.

[10] The defendant submits that the Board did in fact question the applicant as to why he did not claim refugee status in the countries where he transited before coming to Canada, and so the applicant should have been aware of the issue raised by the Board. In any event, says the defendant, the Board is not obliged to confront the applicant with the issue, as subjective fear is an essential ingredient in the analysis of the fear of persecution and its presence or absence is fundamentally a finding of fact.

[11] I agree with the applicant that the claim should be sent back because of this procedural fairness issue. Having read through the transcript of the hearings, it is clear that the applicant was not expecting his subjective fear to be questioned by the Board; the Board largely seemed preoccupied with the issue of his alleged dual citizenship. Had it been known that this was at issue, his lawyer could have made submissions as to why it was not required for the applicant to put forward the reasons as to why he did not claim refuge in any European Union country. The lawyer likely would have had much to say in this respect as I note that, in its decision, aside from dwelling on why the applicant did not claim asylum in Estonia, despite never having been there, the Board's finding at para 29 of its decision—that the applicant could have alternatively claimed asylum in France—was particularly egregious in this respect. As it stood, the applicant's lawyer did not make any such submissions, and the Board drew its negative conclusions in spite of this

omission. A new hearing would allow the applicant and his counsel to more fully flesh out the issue of his subjective fear.

Conclusion

[12] This breach alone is sufficient to warrant the intervention of the Court and so the application for judicial review will be granted. No question of general importance was proposed by the parties for certification and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the file is remitted back for redetermination by a different member of the Refugee Protection Division of the Immigration and Refugee Board; and
2. No question of general importance is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5391-13

STYLE OF CAUSE: SANAL VANKAYEV v LE MINISTRE DE LA
CITOYENNETÉ ET DE L'IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: APRIL 30, 2014

JUDGMENT AND REASONS: GAGNÉ J.

DATED: JULY 11, 2014

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