

Federal Court



Cour fédérale

**Date: 20161128**

**Docket: IMM-1027-16**

**Citation: 2016 FC 982**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, November 28, 2016**

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

**BETWEEN:**

**NADIA CHIKHI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**AMENDED JUDGMENT AND REASONS**

I. Background (summary)

[1] The applicant alleges the following facts. On September 22, 2000, the applicant left for Algeria with her husband to attend his brother's wedding. However, once they were in Algeria, her husband left her and her child. He also took her Canadian residence documents.

[2] The applicant claims she has taken a number of steps with the Canadian embassy in Algiers and in Paris to return to Canada. However, in March 2001, the applicant stopped taking steps with the Canadian embassies following a threat of reprisal from her husband. He told her that if she continued her efforts to return to Canada, he would take away her custody of their child. [Emphasis in the original.]

[3] The evidence on file, including doctors' notes, indicates that the applicant has a hearing problem. The evidence on file also shows that the applicant told the Immigration Appeal Division (IAD) that she wanted legal representation, but that she was unable to obtain it because of her disability, the short time frame between her arrival in Canada and her hearing, and the fact that it was impossible for her to find a lawyer while she was in Algeria.

[4] The Court acknowledges, as submitted by the respondent, that the IAD has discretionary power to adjourn its hearings and that the right to counsel is not absolute. A decision-maker's decision to adjourn a hearing in the absence of counsel is invalidated only if the absence of legal representation results in denial of the right to a fair hearing (*Galamb v. Canada (Citizenship and Immigration)*, 2014 FC 563, at paragraph 18 [*Galamb*]; *Wagg v. Canada (Attorney General)*, 2003 FCA 303, at paragraph 19 [*Wagg*]).

[5] Mr. Justice de Montigny, a Federal Court judge at the time, stated in paragraph 26 of *Galamb*, cited above: "There is no doubt that in order to fulfil the duty of fairness, an applicant must be able to participate in a meaningful way at the hearing. This capacity must be assessed in light of the particular circumstances of each applicant." [Emphasis in the original.]

## II. Introduction

[6] This is an application for leave to seek judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, chapter 27, regarding an IAD member's decision dismissing the appeal filed by the applicant on humanitarian and compassionate grounds, following a refusal to adjourn the hearing.

## III. Facts

[7] The applicant, Nadia Chikhi, age 47, is a citizen of Algeria and a permanent resident of Canada. The evidence on file shows that the applicant has a hearing problem that makes it difficult for her to communicate by telephone.

[8] On October 28, 1996, the applicant married a Canadian citizen, who sponsored her to become a permanent resident under the spouse and common-law partner class. Their son, a Canadian citizen, was born on October 13, 1998.

[9] The applicant alleges the following facts. On September 22, 2000, the applicant left for Algeria with her husband to attend his brother's wedding. However, once they were in Algeria, her husband left her and her child. He also took her Canadian residence documents.

[10] The applicant claims she has taken a number of steps with the Canadian embassy in Algiers and in Paris to return to Canada. However, in March 2001, the applicant stopped taking steps with the Canadian embassies following a threat of reprisal from her husband. He told her

that if she continued her efforts to return to Canada, he would take away her custody of their child. [Emphasis in the original.]

[11] On December 26, 2005, the Sidi M'hamed court in Algiers issued a divorce order for the applicant and her husband. The divorce order described the divorce as an arbitrary divorce on the part of the husband.

[12] The applicant, who said she was awaiting a response to her previous undertakings with the Canadian embassy in Paris, did not take any further steps until August 19, 2010.

[13] In March 2012, the applicant went to a Canadian embassy and applied for a permanent resident visa. That application was denied by the Immigration Division of the Canadian embassy in Paris on April 3, 2012. On June 27, 2012, the applicant filed an appeal of that decision with the IAD. Given her hearing problem and the fact that she could not communicate by telephone, the applicant was granted a visa so that she could participate in her hearing before the IAD. The applicant arrived in Canada on December 29, 2015.

[14] The IAD heard the applicant's case on January 7, 2016, and rendered a decision on February 24, 2016. At the hearing, the applicant said she had been unable to find a lawyer while she was in Algeria because of her hearing problem and the short time frame between her arrival in Canada and her hearing before the IAD.

IV. Issues in dispute

[15] This application for judicial review raises the following issues:

1. Did the IAD member breach his duty of procedural fairness?
2. Is the IAD's decision reasonable?

V. Analysis

[16] The parties agree that the reasonableness standard of review applies to the IAD's findings of fact and of mixed fact and law, whereas the standard of correctness applies to the question of procedural fairness.

[17] The evidence on file, including doctors' notes, indicates that the applicant has a hearing problem. The evidence on file also shows that the applicant told the IAD that she wanted legal representation, but that she was unable to obtain it because of her disability, the short time frame between her arrival in Canada and her hearing, and the fact that it was impossible for her to find a lawyer while she was in Algeria.

[18] The evidence on file also shows that her desire for legal representation at her hearing was sincere, given that she retained her current counsel, Vincent Desbiens, to represent her on February 8, 2016, almost one month after her hearing. Mr. Desbiens filed an application with the IAD to suspend its decision making to allow the applicant to make written submissions. This request was denied.

[19] A review of the IAD hearing transcript shows that the applicant did not understand the purpose of the IAD proceedings and the burden of proof that was on her. She asked several times if it was her turn to speak and she did not know whether she should allow her son to testify; she thought it was up to the member to decide for her. It seems the member was informed of the applicant's difficulties and also asked the Minister's counsel whether he should go over the factors that would be reviewed as part of the assessment. The Minister's counsel refused on the grounds that it would take too much time.

[20] The Court acknowledges, as submitted by the respondent, that the IAD has discretionary power to adjourn its hearings and that the right to counsel is not absolute. A decision-maker's decision to adjourn a hearing in the absence of counsel is invalidated only if the lack of legal representation results in denial of the right to a fair hearing (*Galamb*, above, at paragraph 18; *Wagg*, above, at paragraph 19).

[21] Mr. Justice de Montigny, a Federal Court judge at the time, explained in paragraph 26 of *Galamb*, cited above: "There is no doubt that in order to fulfil the duty of fairness, an applicant must be able to participate in a meaningful way at the hearing. This capacity must be assessed in light of the particular circumstances of each applicant." [Emphasis in the original.]

[22] The factors in this case support the conclusion that the applicant was not able to participate in a meaningful way at the hearing. These include, but are not limited to, the applicant's hearing problem; her lack of understanding of the goal, role and procedure of the IAD; the fact that she told the IAD that she wanted legal representation; and the fact that the

applicant provided reasonable explanations as to why she had been unable to find a lawyer before the hearing. Moreover, at the start of the hearing, the member asked the applicant if she was comfortable representing herself. Although the applicant did not explicitly answer this question in the affirmative, the member continued the hearing.

VI. Conclusion

[23] The Court finds that the duty of procedural fairness was breached. There is no need to address the other point raised in this judicial review.

[24] Consequently, the application for judicial review is allowed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review be allowed and that the case be set aside and referred back to the Immigration Appeal Division for redetermination by a different member. There is no question of importance to certify.

“Michel M.J. Shore”

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Judge



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

**DOCKET:** IMM-1027-16

**STYLE OF CAUSE:** NADIA CHIKHI v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** AUGUST 24, 2016

**JUDGEMENT AND REASONS:** SHORE J.

**DATED:** AUGUST 30, 2016

**DATE REASONS AMENDED:** NOVEMBER 28, 2016

**APPEARANCES:**

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