

**Date: 20070508**

**Docket: IMM-5668-04**

**Citation: 2005 FC 791**

**Ottawa, Ontario, this 8th day of May, 2007**

**PRESENT: THE HONOURABLE MR. JUSTICE JOHN A. O'KEEFE**

**BETWEEN:**

**S.E.B.**

**Applicant**

**- and -**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**AMENDED REASONS FOR ORDER AND ORDER**

**O'KEEFE J.**

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated May 13, 2004, wherein it was determined that the applicant is not a Convention refugee nor a person in need of protection.

[2] The applicant seeks an order quashing the Board's decision and remitting the matter back for redetermination by a differently constituted panel.

**Background:**

[3] The applicant, S.E.B. (the “applicant”) is a citizen of the People’s Democratic Republic of Algeria. Several members of the applicant’s family have served in the Algerian armed forces. In 1996, his brother who had been in the air force, was killed by terrorists after refusing to join their ranks.

[4] The applicant alleged that in November 1997, on his way home from school, some terrorists approached him and asked him to join them or else he would suffer the same fate as his brother. Once he arrived home, he spoke with his father who told him that he should leave the country.

[5] The applicant obtained a student visa from the United States Embassy in Tunisia, to enable him to study at the University of St. Louis. Before he obtained the U.S. visa, he went into hiding in Batna where he stayed until he left.

[6] The applicant lived in the U.S. from January 1998 to April 2002 as a student. He alleged he was arrested at the university on December 10, 2001 and taken away by security officers who questioned him about what he knew about the terrorist attacks of September 11, 2001. He was held for eleven days then released but not deported.

[7] The applicant did not apply for refugee protection while in the U.S. as his student advisor had told him that as he was in the country to study he could not claim refugee status. He voluntarily left for Canada and made a claim for refugee protection here. The applicant’s immediate family all continue to live in Algiers.

[8] The applicant alleged that he was afraid to go back to Algeria because he feared he would be killed by terrorists since he comes from a military background. He alleged that all members of his family are targeted by terrorists, but he did not know whether they are currently having problems with the terrorists.

[9] At the hearing, the applicant's counsel attempted to have the Board admit a package of approximately eighty-seven pages of documentary evidence that had not previously been disclosed by the applicant. Counsel advised the Board that the applicant had given his counsel the materials in time to provide them to the Board at least twenty days before the hearing as required, but the documents had been inadvertently placed in a different file in counsel's office. The documents included country condition documents and identity documents. The Board initially refused to accept any of the documents, but ultimately agreed to accept only the identity documents.

[10] The Board dismissed the applicant's claim. This is the judicial review of that decision.

### **Reasons of the Board**

[11] The Board accepted the applicant's identity and citizenship.

[12] The Board did not question the applicant's credibility, but dismissed the claim on the basis that the documentary evidence cited in the reasons showed that he can safely return to Algeria and live with his parents in Algiers, or in another city such as Constantine, Oran or Mostaganem, which were relatively calm and under government

control. The Board also noted that the applicant's immediate family members are all living in Algiers without any apparent difficulties.

### **Issues**

[13] The applicant framed the issues as follows:

1. Did the Board err in law by failing to consider the mandatory factors set out in Rule 30 of the *Refugee Protection Division Rules* SOR/2002-228 ("Rule 30") before deciding whether to accept evidence that had not been disclosed in advance of a refugee hearing?

2. Did the Board deny the applicant natural justice by fettering its discretion in stating that the country documentation could not be accepted because the package was too big, and in particular, that the package was more than 50 pages?

### **Applicant's Submissions**

[14] Issue 1

The applicant submitted that the Board erred in failing to properly weigh the evidentiary importance of the document against the due diligence requirement for timely disclosure of documents as required under Rule 30. The only factor the Board considered was the number of pages sought to be introduced by the applicant. The Board failed to follow the three factors set out in Rule 30.

[15] The country condition documents the applicant's then counsel sought to enter were relevant and probative, and more current than the documentation that was before the Board. The documentation that was excluded was particularly critical in this case as the Board relied entirely on less current country documentation in reaching its conclusion.

[16] The applicant submitted that he made every reasonable effort to ensure that the documents were disclosed in compliance with Rule 29. His counsel at the hearing accepted full responsibility for having misplaced the documentation. The applicant should not be required to bear the consequences of such an error or negligence (see *Mathon v. Canada (Minister of Employment and Immigration)* (1988), 28 F.T.R. 217).

[17] Issue 2

The applicant submitted that the Board fettered its discretion by limiting its considerations to the size of the documentation package, and by stating that it could not accept a package greater than 50 pages. Such a rule is not mandated by the Rules which instruct the Board to consider all "relevant" factors. The Board thus violated the rules of procedural fairness.

### **Respondent's Submissions**

[18] The respondent submitted that at the hearing, counsel for the applicant agreed to separate the package into two parts, and to file only the documents that related directly to the documents. The applicant, through his counsel, agreed to the procedure suggested

by the Board. The applicant therefore waived any objection to the procedure adopted by the Board.

[19] The respondent submitted that in the alternative, the applicant has not put before the Court any of the evidence that he proposed to file before the Board, despite his evidence that he gathered many of the documents himself from publicly available sources. There is no independent evidence upon which the Court could conclude that the failure to file the applicant's documents affected the outcome of the case, or resulted in any prejudice to the applicant. In the absence of any such evidence, there is no reason for the Court to set aside the Board's decision (see *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172 N.R. 308).

### **Relevant Statutory Provisions**

[20] The *Refugee Protection Division Rules* 29 and 30 state as follows:

29. (1) If a party wants to use a document at a hearing, the party must provide one copy to any other party and two copies to the Division, unless these Rules require a different number of copies.

(2) If the Division wants to use a document at a hearing, the Division must provide a copy to each party.

(3) Together with the copies provided to the Division, the party must provide a written statement of how and when a copy was

29. (1) Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie, le cas échéant, et deux copies à la Section, sauf si les présentes règles exigent un nombre différent de copies.

(2) Pour utiliser un document à l'audience, la Section en transmet une copie aux parties.

(3) En même temps qu'elle transmet les copies à la Section, la partie lui transmet également une déclaration écrite indiquant à quel

provided to any other party.

moment et de quelle façon elle en a transmis une copie à l'autre partie, le cas échéant.

(4) Documents provided under this rule must be received by the Division or a party, as the case may be, no later than

(4) Tout document transmis selon la présente règle doit être reçu par son destinataire au plus tard:

(a) 20 days before the hearing; or

a) soit vingt jours avant l'audience;

(b) five days before the hearing if the document is provided to respond to another document provided by a party or the Division.

b) soit, dans le cas où il s'agit d'un document transmis en réponse à un document reçu de l'autre partie ou de la Section, cinq jours avant l'audience.

30. A party who does not provide a document as required by rule 29 may not use the document at the hearing unless allowed by the Division. In deciding whether to allow its use, the Division must consider any relevant factors, including

30. La partie qui ne transmet pas un document selon la règle 29 ne peut utiliser celui-ci à l'audience, sauf autorisation de la Section. Pour décider si elle autorise l'utilisation du document à l'audience, la Section prend en considération tout élément pertinent. Elle examine notamment:

(a) the document's relevance and probative value;

a) la pertinence et la valeur probante du document;

(b) any new evidence it brings to the hearing; and

b) toute preuve nouvelle qu'il apporte;

(c) whether the party, with reasonable effort, could have provided the document as required by rule 29.

c) si la partie aurait pu, en faisant des efforts raisonnables, le transmettre selon la règle 29.

## **Analysis and Decision**

[21] The standard of review on questions of procedural fairness is correctness.

[22] I would restate the issue as – Did the board breach the rules of natural justice by failing to accept the applicant’s package of documents which the applicant requested to file at the hearing?

[23] Rule 29 of the *Refugee Protection Division Rules*, supra, requires that documents such as the applicant’s documents, be received by the Division twenty days before the hearing. Rule 30, however, permits the Board to allow the late filing of any documents. According to Rule 30, the Board, in deciding whether to allow the late filing, must consider any relevant factors including:

1. The documents’ relevance and probative value;
2. Any new evidence it brings to the hearing; and
3. Whether the party, with reasonable effort, could have provided the documents as

required by Rule 29.

[24] The following exchange took place between counsel, the presiding member and the RPO at pages 337 to 339 of the tribunal record:

COUNSEL: I have sent only the PIF, sir, and I have an explanation, if I may please. I do have a package of personal identity documents and country conditions. However, that has unfortunately not been disclosed, forwarded within the 20 day, requisite period, and that was, I do not want any of that blame to fall upon the applicant, because I take or my office takes responsibility for that.

What happened was that we simply misplaced and lost, ultimately it was found in other file, it was found just a few days ago when the applicant brought in some more country condition documents, and that of course was too late to be submitted.

I therefore beg the Chair, the panel’s pardon, and respectfully request that that package of ID and country condition documents be accepted into evidence at this time, and if that is acceptable, I will fill out the, the exhibit sheet of the claimant.

PRESIDING MEMBER: The package that you are talking about, you have it here?

COUNSEL: Yes, sir, yes, sir.

PRESIDING MEMBER: It’s too big, I see it’s a very big package ---

COUNSEL: Well ---



PRESIDING MEMBER: --- and you said, Counsel, it's too late to receive it, because it's not a question of a document of one page, it's a big package, as you say, the, it's very very late, (inaudible) at this step of the procedure.

COUNSEL: That, unfortunately that is true, but if I may point out, please, the vast, vast portion of this document is country conditions, but there are five pieces of, at the start, of ID type of documentation, and I can and I plan to, elicit from the applicant the current situation, best of his knowledge, in Algeria, and again, I would respectfully ask the panel if they would have, if the panel would have a look at the, the package, and confirm, the panel will find that what I say is correct, that the first few pages are the ID and items and that go directly to the ---

PRESIDING MEMBER: I'm sorry, Counsel, when you have a package, it's how many pages, maybe 40 to 50 pages ---

COUNSEL: Oh, It's lengthy, it's lengthy, yes.

PRESIDING MEMBER: --- yeah, I can't look at only the first three pages, I have to look all the, the documents, it's completely impossible, today, this afternoon, to, to read more than 50 pages of documents.

COUNSEL: I understand. Well, I'm at, at the Chair's pleasure. Can, can the Chair accept the package insofar as is concerned the first five items, first (inaudible) five items.

PRESIDING MEMBER: No no, because it's not the question of five items, it's a package. When you put a package of more than 50 pages before the tribunal, the tribunal is supposed to, to be engaged to, to read all of the content of the documents. I can't do it right now, it's impossible, it's too late.

COUNSEL: Well, I understand that, I do understand that.

PRESIDING MEMBER: So I refuse your, your package, and (inaudible) in fact the Board Member, the tribunal, also the RPO, can't read more than 50 pages of documents right now.

COUNSEL: Yeah, I understand, and I do regret --- if I may be so bold to ask for a five minute recess, I would take the package apart, remove everything, and just leave the first five items, which would then make it much more manageable, if the Chair would be so kind.

PRESIDING MEMBER: What, do you have any comments with that, Mr. Bernard?

RPO: Well, just, I think the lateness, given that I think the documents came in three days ago or something and we're just hearing about it today, that's questionable, but I guess if they're probative to the claim, and they, it would (inaudible) be worth it to take a look at them.

PRESIDING MEMBER: You're talking about three or four pages?

COUNSEL: Sorry?

PRESIDING MEMBER: You talk about three pages?

COUNSEL: I'm speaking of five items.

PRESIDING MEMBER: Five items of how many pages?

COUNSEL: Eight, in total, eight pages.

PRESIDING MEMBER: How many?

COUNSEL: Eight.

PRESIDING MEMBER: Eight?

COUNSEL: Yeah, five items, in total eight pages. Perhaps I could, well, all right.

PRESIDING MEMBER: Okay, I'll give you five minutes, if you could ---

[25] The parties are in agreement that in coming to a decision whether to allow the late filing of the documents the Board must consider the factors outlined in Rule 30. I have reviewed the transcript of the hearing and I cannot find where the Board considered these factors. The only reasons given by the Board for not allowing the late filing was the size of the package of documents and the lateness of the request. In my view, it was a denial of natural justice for the presiding member not to take the listed factors into consideration when deciding whether to allow the late filing of the documents in question.

[26] The respondent submitted that the applicant waived the request to file the other documents when counsel agreed to separate the documents and put in the five items relating to identity. I do not agree with this conclusion as a reading of the transcript indicates to me that the presiding member first refused to allow the applicant to file the total package because it was too long and very late, and then the applicant's counsel attempted to have the part of the package relating to identity (eight pages) filed. This is not a waiver of the request to file the remaining documents, but an attempt to get some of the documents filed.

[27] I am also of the view that the failure of the applicant to include with this application the documents not allowed to be filed late, should not lead to the conclusion that the documents would not affect the outcome of the case. The applicant, in his affidavit, stated that documents would have countered the presiding member's finding that the applicant could safely return to Algeria.

[28] I do not know what the presiding member's decision on late filing the remaining documents would have been if the factors contained in Rule 30 had been considered.

[29] The application for judicial review is therefore allowed.

[30] Neither party wished to submit a serious question of general importance for consideration for certification.

**ORDER**

[31] **IT IS ORDERED that** the application for judicial review is allowed and the matter is remitted back for redetermination by a differently constituted panel of the Board.

“John A. O’Keefe”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-5668-04

**STYLE OF CAUSE:** S.E.B.

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** May 24, 2005

**REASONS FOR ORDER AND ORDER:** O'KEEFE J.

**DATED:** May 8, 2007

**APPEARANCES:**

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