Federal Court  Cour fédérale

Date: 20210513

Docket: IMM-4079-20

Citation: 2021 FC 441

Ottawa, Ontario, May 13, 2021

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ISMAEL ESTRADA GALLARDO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION AND CANADA BORDER SERVICES AGENCY

Respondent

JUDGMENT AND REASONS

[1] This application is brought by Ismael Estrada Gallardo challenging a decision of the Refugee Appeal Division [RAD] which dismissed his appeal of a decision of the Refugee Protection Division [RPD]. Mr. Gallardo's claim to refugee protection was dismissed by the RPD on the basis that he had a viable internal flight alternative [IFA] in Mexico City.

[2] Mr. Gallardo's appeal to the RAD only challenged the correctness of an RPD ruling denying his request to adjourn the hearing to accommodate a scheduling conflict of his legal

counsel. The RAD upheld that ruling and also the correctness of the RPD's IFA finding. This application only concerns the RAD's decision to confirm the RPD's adjournment ruling. This, Mr. Gallardo says, was wrong and a denial of his right to a fair hearing.

[3] The RPD's decision refusing Mr. Gallardo's adjournment request was made by its coordinating member. The transcript of that part of the hearing gave the following rationale for the decision:

> MEMBFR AZMUDEH: So sir, your counsel keeps saying that you have a right to be represented by counsel, which is partially true, and the partial part is because you have the right of a reasonable opportunity to retain counsel if you wish.
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> In your particular case this matter was actually referred to us on August 14th, 2018, several months ago with a notice to appear with today's date on it. So I understand that you were confused about the Legal Aid process but you've had plenty of opportunities to clarify the confusion or resort to your friends earlier than just a few days ago or a few weeks ago once you knew when the date was, which was from the get go.
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> So the right to counsel is not absolute and had you acted in a more timely fashion, you could have exercised the right if you wanted to. And I put all of this in the context of our Rules and our mandate to proceed efficiently and fairly, so first of all our laws would have set a hearing room -- hearing date within 30 days because you are from Mexico and the only reason we couldn't abide by that legislative mandate was because of how overwhelmed the Board is. So everything had to happen more quickly if the claimant wants to ensure that they're diligent, because technically our laws even allows for the much quicker hearing date with less notice to the claimant.
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> You had many months to prep. Our law is that -- only requires the hearing date to be a month away from the referral.
>
> INTERPRETER: Okay. I'm sorry, can you --
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> MEMBER AZMUDEH: During which time you had to retain counsel and do all of this. You had the luxury of many more months, and our natural justice rules are also satisfied with a much

> quicker action because Rule 54(5) says that you only have five days to apply for a different date after a date is set without a lawyer's calendar being taken into account. So you didn't act within five days. You didn't even act within five months, and the Rules are quite stringent. The date will only be changed in there is an emergency out of the party's control and if they had acted diligently or there is an identified vulnerability. That has not been the case.
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> So under the circumstance you have not satisfied the requirements of Rule 54. I am not allowing the application to change the date. I also note that other than the initial package of Immigration and the basis of claim form, you have not filed additional documents within 10 days of the hearing on your own either.

[4] The RAD considered the above reasons and found they contained "no errors". After reviewing the history of the case, the RAD gave the following explanation for why the RPD's refusal of the adjournment was correct:

> [18] The right to counsel in the context of an administrative proceeding such as an IRB refugee hearing is not an absolute right. The law allows refugees the right to representation but it does not stipulate that every claimant must be represented. Further, the IRB plays no role with respect to who gets representation or how the representation is arranged. What is absolute is the right to a fair hearing.
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> [19] At the hearing of the CDT application, counsel noted that the claim for refugee status was handwritten by the Appellant himself, and counsel advised that it "doesn't seem to address all the issues that need to be addressed", Whether or not a refugee claimant is prepared by counsel, it is the refugee claimant's responsibility to conduct such basic preparation prior to the RPD hearing. The IRB publishes extensive material on its website to assist refugee claimants in preparing their case. To simply state that the appellant had not conducted basic preparation of his case prior to the hearing represents negligence on his part and not a reviewable error by the RPD.
>
> [20] Counsel has provided some case law regarding postponements and obtaining counsel in the Appeal Record. I have reviewed the decisions and do not find these cases represent analogous fact patterns to the present case. For example, in *Calles*, the applicant had done everything in his power to be represented by legal

counsel which is not the case here. In *Ramadani*, in the absence of an acceptable explanation for failing to submit the Personal Information Forms (PIFs) on time, the RPD declared the applicants' claims to have been abandoned. In *Bryndza*, at the time that the PIFs were filed the Applicants were represented by counsel obtained through Legal Aid. In *Singh*, the case dealt with the late withdrawal of counsel.

[21] Counsel also refers to the case of *Siloch*, in which the Federal Court of Appeal, in 1993, prescribed a number of factors administrative tribunals should take into account in responding to a request for a postponement, namely:

> a) whether the applicant has done everything in her power to be represented by counsel;
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> b) the number of previous adjournments granted;
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> c) the length of time for which the adjournment is being sought,
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> d) the effect on the immigration system;
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> e) would the adjournment needlessly delay, impede or paralyse the conduct of the inquiry,
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> d) the fault or blame to be placed on the applicant for not being ready;
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> g) were any previous adjournments granted on a peremptory basis;
>
> h) any other relevant factors;

[22] However, the above enumerated factors are not the only ones to be considered. The Immigration and Refugee Board Chairperson's Guidelines provide guidance on this issue and the RPD Rules regarding a change of date or time of proceeding are to be adhered to.

[23] The *Chairperson's Guideline 6: Scheduling and Changing the Date or Time of a Proceeding* also provides general guidance on the issue. The RPD-specific portion of Guideline 6 states:

> The RPD expects parties and their counsel to be ready to proceed on the date and time scheduled for the hearing. **Applications to change the date or time of the hearing will be granted only in**

> **exceptional circumstances** [RAD emphasis] and, where the application would cause the hearing to be heard outside the statutory timeframes, only if the evidence indicates that it is necessary in order to conform with the principles of natural justice.
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> [24] The regular RPD member hearing the appellant's claim confirmed his readiness to proceed, that his documentation was in order, and that as both the claimant and the interpreter were present, the RPD would proceed directly to hear the claim. I believe this approach was correct.
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> [25] In reviewing the transcript of the RPD hearing, I note the Appellant made clear and lucid replies to the RPD member's questions. The RPD member fully explained to the Appellant what was going to happen and how the hearing would proceed. The RPD member was careful to explain any technical refugee language such as "Internal Flight Alternative". The RPD member, throughout the hearing, ensured that the Appellant was able to understand the interpreter and his questions. It was apparent that the Appellant understood the nature of the proceedings.
>
> [26] While the Appellant stated at the hearing that he would have liked a lawyer to represent him, he has not indicated that any of his replies to the RPD's questions were incorrect or that his answers were misinterpreted by the RPD member. I therefore find that it was correct for the IRB to have proceeded in the absence of counsel and that there was no breach of procedural fairness.

I. Standard of Review

[5] The Minister argues that the standard of review that applies to the RAD decision is reasonableness. Mr. Gallardo contends that, because the issue before the Court is one of procedural fairness, correctness applies. I need not decide this question because, even if the standard of review is reasonableness, the decision cannot stand.

II. Analysis

[6] The RPD adjournment rules are somewhat of a strange amalgam. On the one hand, Rule 54(5) of the *Refugee Protection Division Rules*, SOR/2012-256, provides for a seemingly

presumptive right to an adjournment where the request is made no later than five (5) working days after the day on which the hearing date was fixed and only where counsel is not available on the original date. The timing restriction was presumably imposed because of the strict mandatory timelines for hearings within 30, 45 or 60 days, contained in s 159.9 or the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] (see Article 7.1, Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding).

[7] In contrast to Rule 54(5) is Rule 54(4) which states:

(4) Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as	**(4)** Sous réserve du paragraphe (5), la Section ne peut accueillir la demande, sauf en cas des circonstances exceptionnelles, notamment :
(a) the change is required to accommodate a vulnerable person; or	**a)** le changement est nécessaire pour accommoder une personne vulnérable;
(b) an emergency or other development outside the party's control and the party has acted diligently.	**b)** dans le cas d'une urgence ou d'un autre développement hors du contrôle de la partie, lorsque celle-ci s'est conduite avec diligence.

[8] I accept the Minister's point that the 2012 amendments that brought in Rule 54(4) were intended to make it more difficult to obtain an adjournment of a scheduled RPD hearing. The previous applicable rule listed 11 non-exhaustive factors that the RPD was required to take into account before it granted or refused an adjournment. The listed factors were similar to those identified in *Siloch v Canada (MEI)*, [1993] FCJ No 10 (FCA), 10 Admin LR (2d) 285. The 2012 amendments removed all of the enumerated factors and replaced them with the more restrictive language of "exceptional circumstances".

[9] It is against this regulatory history that the reasonableness of the RAD's decision must be tested.

[10] In my view, the RPD erred when it failed to consider all of the relevant circumstances in determining if "exceptional circumstances" were present. While any one factor may not have tipped the balance, several factors taken together may well have done so. This point was made by colleague Justice James O'Reilly in *Tung v Canada (MCI)*, 2015 FC 1296 at paras 7-10, [2015] FCJ No 1353:

> [7] In my view, the Board failed to take into account the relevant factors cited above and, therefore, unreasonably denied Ms Tung an adjournment. The Board refused an adjournment because Ms Tung had not shown that there were exceptional circumstances, such as vulnerability or an emergency beyond her control. But the latter are merely examples of exceptional circumstances. The Board appeared not to consider whether Ms Tung's personal situation amounted to exceptional circumstances in the broader sense.
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> [8] In addition, the Board did not consider the applicability of Rule 54(5). As mentioned above, there are circumstances where the Board must grant an adjournment under that provision. Where those circumstances do not exist, the Board nonetheless has the discretion to grant an adjournment where the applicant's personal situation warrants it.
>
> [9] Had the Board taken account of Ms Tung's personal situation, it would have considered that:
>
> - Ms Tung had not made any prior adjournment requests;
> - She was requesting a short delay;
> - There was no evidence of any prejudice; and
> - Neither Ms Tung nor her counsel was prepared for the hearing.

> [10] In the circumstances, therefore, I find that the Board's rejection of Ms Tung's request was unreasonable for failure to consider her personal situation.

[11] The Chairperson Guideline 6 dealing with scheduling and adjournments deals explicitly with the issue of the unavailability of counsel. Article 3.6 states:

3.6.1 The IRB recognizes that parties have the right to be represented by counsel, but this right is not absolute. The opportunity to retain counsel is not unlimited. The parties and any counsel they choose to retain must be ready and able to appear and proceed according to the scheduling requirements of the division and the requirements of the legislation.	3.6.1 La CISR reconnaît que les parties ont le droit de se faire représenter par un conseil, mais ce droit n'est pas absolu. La possibilité de recourir aux services d'un conseil n'est pas illimitée. Les parties et tout conseil dont les services sont retenus doivent être prêts à comparaître et à poursuivre la procédure et en mesure de le faire conformément aux exigences de mise au rôle de la section et aux exigences de la loi.
3.6.2 If counsel is retained after a date has already been set for a proceeding, the party is responsible for making sure that counsel is available and ready to proceed on the scheduled date. The IRB does not generally allow applications to change the date or time of a proceeding if a party chooses to retain counsel who is not available on a date that has already been fixed.	3.6.2 Si le conseil est choisi après qu'une date a déjà été fixée pour une procédure, il incombe à la partie de veiller à ce que le conseil soit disponible et prêt à poursuivre la procédure à la date fixée. En règle générale, la CISR n'accueille pas les demandes de changement de la date ou de l'heure d'une procédure si la partie retient les services d'un conseil qui n'est pas disponible à la date qui a déjà été fixée.
3.6.3 The IRB provides the parties with reasonable notice of the date and time of a proceeding in every case, which will vary according to the circumstances and the type of proceeding. The IRB	3.6.3 La CISR donne toujours aux parties un avis raisonnable de la date et de l'heure de la procédure, qui varie en fonction des circonstances et du type de procédure. La CISR s'attend

therefore expects that counsel will be available and prepared to present the party's case on the date and time set by the IRB. Where, for any reason, counsel is unable to appear at a proceeding, counsel is expected to make the necessary arrangements to be replaced by another counsel who is prepared to proceed with the case on the scheduled date and time. If counsel does not appear, the IRB may decide to proceed without counsel or, if applicable, to start abandonment proceedings or to conclude that a case has been abandoned.	donc à ce que les conseils soient disponibles et préparés à présenter le cas de la partie. Si, pour une raison quelconque, le conseil ne peut se présenter à l'audience prévue, il doit prendre les mesures nécessaires pour se faire remplacer par un autre conseil qui est prêt à poursuivre l'affaire à la date et à l'heure prévues. Si le conseil ne se présente pas, la CISR peut décider de poursuivre l'affaire en l'absence du conseil ou, s'il y a lieu, d'entamer la procédure de désistement ou de prononcer le désistement de l'affaire.
3.6.4 The fact that counsel wants to take time off, fulfil other professional duties or attend to personal matters that are neither urgent nor unforeseen are not sufficient reasons to allow an application to change the date or time of a proceeding.	3.6.4 Ni le désir du conseil de prendre congé, ni son obligation de s'acquitter d'autres responsabilités professionnelles, ni sa volonté de s'occuper d'affaires personnelles qui ne sont ni urgentes ni imprévues ne constituent des raisons valables de faire droit à une demande de changement de la date ou de l'heure de la procédure.

[12] Although this Guideline expresses a generally negative sentiment toward adjournments based on counsel availability, it does not rule out that possibility. Article 3.6.4 also says that personal or professional conflicts of a non-urgent nature are insufficient to justify an adjournment. This suggests that professional conflicts of a more urgent nature need to be taken into account and may support an adjournment.

[13] When Rule 54 is read harmoniously with the Chairperson Guideline 6, it becomes clear that “exceptional circumstances” are not confined to situations involving a vulnerable person or unexpected emergencies. All relevant factors should be considered and weighed against the need for administrative efficiency.

[14] In denying Mr. Gallardo’s request for an adjournment, the RPD was relying on Rule 54(4). The only factors the RPD seems to have considered were Mr. Gallardo’s lack of diligence in retaining counsel sooner than he did and the need for administrative efficiency. It is not clear to me why the RPD expressed a concern about the need for a hearing within 30 days in accordance with s 159.9(1) of the *Regulations* when it was operating well outside of those parameters in accordance with the exceptions found in s 159.9(3). Indeed, Mr. Gallardo’s hearing was initially scheduled to be heard more than eight (8) months after referral to the RPD. This history detracts from the rationale for a strict adherence to fast-track scheduling and effectively renders the RPD discussion of it irrelevant.

[15] The RPD decision is deficient because it failed to take account of several factors that favoured an adjournment, including the following:

(a) The adjournment request was made in writing two days before the scheduled hearing;

(b) Counsel appeared and explained that he had a scheduling conflict that could not be avoided;

(c) Counsel provided several early dates when he could be available;

(d) This was the first and only request for an adjournment;

(e) Mr. Gallardo had difficulty obtaining financial assistance to retain counsel;

(f) No inquiry was made of Mr. Gallardo's capacity to represent himself despite counsel's advice that Mr. Gallardo had not been properly prepared and the claim had been inadequately put together without the assistance of counsel.

[16] While Rule 54(4) establishes a high bar for obtaining an adjournment, it does not eliminate the obligation to consider relevant factors that favour the granting of relief, including those noted above. By confining the test to two examples given in Rule 54(4), the RPD clearly erred and deprived Mr. Gallardo of the opportunity to be represented by counsel.

[17] In turn, the RAD erred when it unreasonably ruled that the RPD decision was error free. Although the RAD did pay lip service to the idea that the *Siloch*, above, factors needed to be considered, it made no explicit attempt to do so.

[18] An appeal body cannot rectify a breach of procedural fairness by wrongly declaring that the process was fair or that, had the correct ruling been made, it was inevitable that an adjournment would have been refused. The working assumption must always be that if due process had been observed, the outcome might have been different. That is particularly the case here where the procedural lapse resulted in the denial of legal representation to an ill-prepared and unsophisticated claimant and where several other factors favoured the grant of relief. Taken together, those factors might well have overcome the competing considerations of a lack of diligence and the need for efficiency. Had counsel been present, it is also uncertain that the claim would have been denied on the merits.

[19] There is no means now for the RAD to fix this problem after-the-fact, and it is pointless to return the case there for reconsideration. I am therefore quashing this RAD decision and returning the case to it under a direction that the matter be remitted to the RPD for a new hearing on the merits before a different decision-maker. Presumably when the matter is rescheduled, Mr. Gallardo will appear with counsel ready to proceed.

[20] Mr. Gallardo has proposed a certified question which the Minister opposes. Having regard to the disposition of this matter, no question will be certified.

JUDGMENT IN IMM-4079-20

THE COURT ADJUDGES that this application is allowed and the decision of the Refugee Appeal Division is set aside. The Refugee Appeal Division is directed to return this matter to the Refugee Protection Division for a redetermination on the merits before a different decision-maker.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4079-20
STYLE OF CAUSE:	ISMAEL ESTRADA GALLARDO v MINISTER OF CITIZENSHIP AND IMMIGRATION AND CANADA BORDER SERVICES AGENCY
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN VANCOUVER, BRITISH COLUMBIA (THE COURT) AND VANCOUVER, BRITISH COLUMBIA (PARTIES)
DATE OF HEARING:	APRIL 29, 2021
JUDGMENT AND REASONS:	BARNES J.
DATED:	MAY 13, 2021

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