Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

IMM-2745-96

BETWEEN:

SEMIH ERYILMAZLI

Applicant

- AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER
(Delivered orally on the Bench
at Vancouver, B.C. on May 7, 1997, as edited)

McKEOWN J.

The applicant, a citizen of Turkey, seeks a judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the Board), dated April 3, 1996 and signed on July 19, 1996, wherein the Board determined that the applicant is not a Convention refugee.

The issue is whether the Board had jurisdiction to issue reasons as one member of a two-member panel did not sign the final reasons. The hearing of the applicant's refugee claim was heard on August 4, 1995 and on September 7, 1995, before a two-member panel. One of the panel members ceased to hold office on February 23, 1996. The Chairperson requested the member participate in the disposition of matters previously heard by him for an eight-week period pursuant to subsection 63(1) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the Act). That period ended on April 19, 1996.

> The hearing of this matter was held before a two-member panel consisting of Member Sara and I, however these reasons for decision are signed only by one member. The claimant has not consented to a single member panel. Hence, I am setting out the material circumstances which establish my jurisdiction in this matter.

> Mr. Sara ceased to hold office as a member of the Refugee Division on February 23, 1996. The Chairperson requested Mr. Sara to participate in the disposition of matters previously heard by him for an eight-week period, pursuant to subsection 63(1) of the *Immigration Act*. That eight-week period ended on April 19, 1996.
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> The oral hearing of this case was completed on September 7, 1995, and was followed by written submissions by counsel. Mr. Sara fully intended to participate in the disposition of this matter. Mr. Sara did take part in the disposition of this claim during the eight weeks following his end of term, however, he was not able to participate in the signing of the reasons for decision, as they were not ready for signature until after April 19, 1996.
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> Mr. Sara & I discussed this case in early March, 1996 and agreed that Mr. Eryilmazli was not a Convention refugee. As the presiding member in this case, I wrote the reasons for our decision. Mr. Sara read my hand-written reasons for decision and agreed with the reasons given. The draft was then forwarded for typing. Mr. Sara & I both signed the Final Disposition section of the Hearing Disposition Record sheets on our files on April 3, 1996, indicating our decision that Mr. Eryilmazli is not a Convention refugee. By the time the reasons were in final form, Mr. Sara was no longer a member of the Refugee Division, and thus was without jurisdiction to sign the final reasons for decision. The final reasons for decision have not changed in substance from the draft that was reviewed and agreed to by Mr. Sara.
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> In this case, the claimant has had the benefit of a hearing before a two-member panel of the Refugee Division. All of the evidence was considered by a two-member panel of the Refugee Division. The decision was reached by the two-member panel with the benefit of discussion by both members, and the departing member made his decision being fully aware of, and in agreement with the reasons given by the presiding member for the decision that was reached.
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> As in the Garrison case, the decision was an unanimous decision by the two members of the Refugee Division, however, it was signed by one member. In accordance with the Zivkovic decision, the departing member, Mr. Sara, did leave a clear indication of his decision on the file, even though he did not note the reasons for his decision. Unlike the situation in the case of Ricki Singh, Mr. Sara did see, review and agree to the draft reasons for decision.
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> In this case there is no need to rely on subsection 63(2) of the Immigration Act, as Mr. Sara was able to participate in the disposition of the matter, and did so. Hence this case can be distinguished from the case of Kutovsky-Kovaliov. There is no need to consider whether subsection 63(2) is being properly invoked, as was done in the cases of Brailko and Singh. Further, the question of an explanation for the failure to participate in the disposition of the matter within the eight-week period, does not arise as it did in Mirzaei. [footnotes omitted]

The applicant did not consent to having his claim determined by one member. The reasons for decision are dated July 11, 1996, and signed on July 19, 1996 by only one Board member. In this case the retiring member signed the final disposition sheet on April 3, 1996. However, the reasons were not signed by the remaining member until July 19, 1996.

In my view there was no decision until July 19, 1996 when the Order and reasons were communicated to the applicant. I agree with Noël J. in *Mehael v. Minister of Employment and Immigration*, August 23, 1993, Court File A-1534-92 (F.C.T.D.) where he held that the duty to give written reasons is mandatory. Paragraph 69.1(11)(a) provides:

> The Refugee Division may give written reasons for its decision on a claim, except that
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> (a) if the decision is against the person making the claim, the Division shall give written reasons with the decision

Unlike in *Mehael, supra* the retiring member in the case before me is said to have read and agreed with the handwritten reasons, but we do not know if he agreed with the reasons in final form. As Strayer J.A. stated in *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410 at 421 (C.A.):

> I see no reason to depart from the normal requirements of administrative law that a decision is taken to have been made when notice of that decision is given to the parties affected with some measure of formality. Judicial review cannot be sought of decisions until they have been formulated and communicated to the parties affected. Why should the courts take it upon themselves to examine the interdepartmental and intradepartmental correspondence to determine if and when a decision, though never communicated, was indeed taken? ... [footnote omitted]

I am satisfied that the retiring member did partake in the reasons, but I am not satisfied that he agreed with the final reasons. We do not know if the member agreed with the final reasons.

However, I must determine whether subsection 63(2) applies in these circumstances. The Board explained why only one member signed the reasons, and I must decide if the expiration of a Board member's term is sufficient grounds to invoke subsection 63(2) of the Act. Subsection 63(2) reads as follows:

> (2) Where a person to whom subsection (1) applies or any other member by whom a matter has been heard is unable to take part in the disposition thereof or has died, the remaining members, if any, who heard the matter may make the disposition and, for that purpose, shall be deemed to constitute the Refugee Division or the Appeal Division, as the case may be.

Two Federal Court of Appeal decisions appear to say the expiration of a Board member's term is sufficient grounds to invoke subsection 63(2). See *Weerasinge v. Canada (Minister of Employment and Immigration)*, [1993] 22 Imm. L.R. (2d) 1 (F.C.A.), and *Odameh v. Minister of Employment and Immigration*, [1995] 185 N.R. 9 (F.C.A.).

However, the question as to whether the material circumstances must relate to the member being unable to take part in the disposition of the matter for reasons other than the lapse of the eight-week period was not dealt with in these cases.

Lutfy J. in *Latif v. The Minister of Citizenship and Immigration*, November 22, 1996, Court File No. IMM-824-96 (F.C.T.D.) found that the Board members' recitation of the nature of the departed member's participation in and agreement with the decision is not relevant in the absence of a statement of the material circumstances which prevented the matter from being disposed of within eight weeks of the retiring member having ceased to hold office, as required under section 63.1.

The Federal Court of Appeal decisions, in my view, do not preclude this question being asked. In my view, the Board in the case before me, as in *Latif, supra* did not deal with why the matter was not decided within the eight-week period other than to state that the member had retired as required under 63.1.

The question has been certified in other cases related to this subject and the parties did not request me to certify the question again. Accordingly, the application for judicial review is allowed. The matter is returned to a differently constituted Board for redetermination.

W. P. McKeown J.
Judge

OTTAWA, ONTARIO
June 17, 1997