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Docket: IMM-2081-07

Citation: 2008 FC 270

Ottawa, Ontario, February 29, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

ALVARO ANTONIO OROZCO HURTADO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Orozco (the applicant) brings this application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), seeking judicial review of the April 30, 2007 decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") refusing his application to reopen his claim for refugee protection.

I. Background

Mr. Orozco

[2] Mr. Orozco was born in Nicaragua on July 3, 1985. He was raised in a family plagued by violence and was regularly beaten by his alcoholic father. At around the age of 13, he fled from his dysfunctional home and travelled through Honduras, Guatemala and Mexico en route to America. Travelling by foot, hitchhiking, and relying generally on the kindness and hospitality of local church groups along the way, Mr. Orozco worked various jobs from time to time, and on one occasion, while attempting to cross into Mexico, had to convince a border patrol agent that he was a Guatemalan street youth in order to avoid further detention or possible deportation.

[3] At the age of 14, Mr. Orozco entered the United States from Mexico by swimming across the Rio Grande. He was intercepted by U.S. immigration authorities and taken to an immigration detention house in Houston, Texas. He claims to have appeared in Court a number of times without legal representation and that he was finally coerced by his caregivers at the time into withdrawing an application for asylum and signing a declaration of his intention to leave the country voluntarily. Fearing deportation, he escaped from the detention home and fled, first to Dallas, and then on to Miami where he lived and worked illegally for a number of years before entering Canada. Mr. Orozco made an application for refugee protection in Canada on January 19, 2005.

[4] For the sake of clarity, I will refer to the decision maker who denied Mr. Orozco's claim for protection as the "Panel" or the "Panel Member", and to the decision maker who refused the application to reopen as the "Board" or "Board Member".

Negative Decision of the Panel

[5] Mr. Orozco's initial claim for refugee protection was based on his claim to be a gay man fearing persecution in Nicaragua at the hands of his father and other homophobic Nicaraguans.

[6] A hearing was held by way of video conference between Calgary and Toronto on October 6, 2005. Mr. Orozco was represented by barrister and solicitor Michael Brodsky, who also helped Mr. Orozco fill out and amend his Personal Information Form ("PIF"). Although Mr. Orozco was able to speak and understand English, he preferred to communicate in Spanish through the interpreter provided.

[7] In a decision dated October 11, 2005, the Panel determined that Mr. Orozco is not a Convention refugee and not a person in need of protection, and that his claim does not have a credible basis. The Panel found insufficient credible and trustworthy evidence to establish that Mr. Orozco is in fact a homosexual and also found no evidence to establish a well-founded fear of persecution in Nicaragua today based on any ground enumerated in the Convention refugee definition.

[8] Given Mr. Orozco's history and the path he took to get to Canada, the Panel Member perceived him to be a savvy, street-smart, resourceful and flexible individual. Ultimately, the Panel found that Mr. Orozco had left Nicaragua to secure a better life for himself elsewhere and fabricated the sexual orientation component to support an otherwise unsubstantiated claim for refugee protection in Canada. The Panel Member further commented that given Mr. Orozco's age – he was twenty at the time of the hearing - he would be able to find a place to live away from his father and would be free to build a life for himself free from any substantial fear of persecution upon his return to Nicaragua.

[9] An application for judicial review of the Panel's decision was considered by the Court without personal appearance and was dismissed by Mr. Justice de Montigny in Ottawa on February 14, 2006 (*Alvaro Antonio Orozco Hurtado v. MCI*, IMM-6561-05).

Psychological Report

[10] In December of 2006 and again in January of 2007, Mr. Orozco was seen in psychiatric consultations at the Shout Clinic in Toronto, a charitable organization providing health services to homeless and street-involved youth in Toronto. According to a letter written by Dr. Marcia Zemans purporting to contain a psychiatric report, Mr. Orozco was seen for consultation at the request of the Shout medical staff, who expressed concerns about Mr. Orozco's levels of anxiety and depression. There is no evidence before me indicating when Mr. Orozco first frequented Shout, though he claims to have entered therapy in the winter of 2006. I can only find that Mr. Orozco attended at least two consultation sessions with Dr. Zemans.

[11] In her report, Dr. Zemans observed that Mr. Orozco had been experiencing "symptoms of Post Traumatic Stress Disorder, Chronic type and a co-morbid Acute Stress Disorder"; the trauma followed from his experiences in Nicaragua, and was compounded for years as he lived in terror of authorities and of his sexual orientation being discovered. She stated that when Mr. Orozco completes interviews in English he will become stressed, may stutter, and may not express himself clearly. She further recommended that anyone interviewing Mr. Orozco should be aware that his intense fear of authority would impede his capacity to present information fluently and that he may not fully comprehend the nature and scope of questions asked in English. He may also experience an inability to concentrate, may disassociate, and may appear unfocussed or have difficulty retrieving or articulating information. Finally, it was Dr. Zemans' opinion that Mr. Orozco "should be interviewed in informal surroundings and with a supportive person of his choice present". Although Mr. Orozco is over 18, Dr. Zemans suggested that "he would benefit from a designated representative in any formal proceeding".

[12] This psychological report was prepared for a Pre-Removal Risk Assessment (PRRA) and was part of the record before Board Member de Rousseau, whose decision is here under review. A first PRRA was dismissed and leave for judicial review of this decision was refused. The applicant has lodged a second PRRA.

II. The decision under review

[13] In a letter sent to the Board dated February 8, 2007, Mr. Orozco sent an application to reopen his refugee claim under Section 55(1) and 55(4) of the *Refugee Protection*

Division Rules, SOR/2002-228 (the "Rules"). He urged that the application be reviewed as soon as possible as he was scheduled to be removed from Canada on February 13, 2007.

Alleged Grounds for Reopening

[14] The Board Member identified the three grounds presented by Mr. Orozco in the application to reopen his claim: (1) that the Spanish interpreter used at the hearing had a Chilean accent which Mr. Orozco had difficulty understanding; (2) that the Mr. Orozco should have been identified as a Vulnerable Person and that in failing to carry out an "assessment of his vulnerabilities prior to or at the outset of his hearing", the Panel breached rules of natural justice, which necessitates a re-opening of his claim; and (3) that Mr. Orozco's previous counsel erred or was negligent in not seeking procedural consideration of his vulnerabilities, and in not providing a psychological assessment to the panel.

[15] Simply put, the question before the Board Member was whether Mr. Orozco received a fair hearing. Interpreting and applying both the Rules and the the Immigration and Refugee Board of Canada's Guideline 8, *Guideline with Respect to Procedures on Vulnerable Persons Appearing Before the IRB* (the "Guideline"), the Board Member determined that the applicant failed to establish that there was a failure to observe a principle of natural justice in regards to Mr. Orozco's initial claim. The application to reopen, therefore, was refused.

The Board Member's Conclusions

(1) Problems with the Interpreter

[16] The Board Member relied on the case of *Mohammadian v. Canada (Minister of Citizenship and Immigration),* [2000] 3. F.C. 371 (T.D.), and found that where an applicant fails to raise a concern regarding interpretation at the hearing, the applicant waives his right to raise subsequent objections for the purpose of reopening an application. Further, the Board Member found that there was no indication on the record that there was a problem with interpretation or that the claimant did not understand the interpreter or the questions put to him. Given that the applicant makes no further submissions on this point, there is no need to address it any further and, in any event, I agree with the decision of the Board Member on this point.

(2) Identification of the claimant as a "vulnerable person" prior to the hearing of the claim

[17] For the following reasons, the Board Member determined that the record and subsequent evidence did not demonstrate any procedural deficiencies or a denial of natural justice.

[18] The Board Member noted that there was no request for an accommodation between the filing of Mr. Orozco's PIF and the hearing, which took place eight months later. Further, the only issue raised by the application appeared to be an indication that the applicant was not comfortable with the use of videoconferencing, however, no objection was ever raised by the applicant or his counsel either before or during the initial hearing. In reading Dr.

Zemans' report, the Board Member noted that the report stated that the applicant may be stressed by having to give interviews in English, which was not the case at the hearing. The Board Member also found no indication that Mr. Orozco was unable to express himself at the hearing. After a careful review of the transcript of the initial hearing, the Board member found that Mr. Orozco demonstrated no unusual difficulty explaining or expressing himself; he answered questions put to him clearly and completely and asked for clarification when it was needed. At the close of questioning, when he was invited to add anything further, Mr. Orozco made an eloquent statement about his hope for a new life in Canada. Finally, the applicant pointed to no other possible accommodations that could have been made in these circumstances but were not. Therefore, the Board Member determined that the record and subsequent evidence did not establish a denial of natural justice to the claimant.

[19] Though she found it to be of little assistance and hardly applicable to Mr. Orozco, the Board Member nonetheless assessed Mr. Orozco's claim in light of the Guideline. The Board Member noted the Guideline became effective in 2006, and therefore there were no formal procedures for identifying Vulnerable Persons at the time of Mr. Orozco's initial hearing. Nonetheless, the Board Member noted that prior to the issuance of the Guideline the Board addressed its obligation to ensure adherence to the principles of natural justice and made necessary procedural accommodations on a case by case basis. In any event, the Board Member found "no indication that this claimant was, using the definition of a vulnerable person in section 2.1 of the Guideline, an individual whose ability to present his case before the IRB was severely impaired". Again, the Board Member found no indication that the

applicant was not able to express himself, nor did the applicant indicate what could have been done by way of procedural accommodations to overcome any alleged difficulties.

(3) Negligence of Counsel

[20] In written submissions to the Board the applicant relied on the principle that if the exclusion of evidence "was solely the result of a lawyer's error and/or negligence, a litigant who has acted with care should not be required to bear the consequences of such an error or negligence" (*Mathon v. Canada (Minister of Citizenship and Immigration),* [1988] F.C.J. No. 707 (QL)). From this, the Board Member inferred that the applicant appeared to allege, without clearly stating it, that Mr. Orozco's previous counsel was negligent in not making a request for some unspecified accommodation before the hearing or to provide a psychological assessment prior to the hearing.

[21] The Board Member noted that previous counsel, Michael Brodzky, is an experienced barrister and solicitor with considerable experience dealing with the Board and refugee claims. It was also noted that applicant did not state what Mr. Brodzky could or should have done

[22] In reaching her conclusion, the Board Member mentioned the case of *Nunez v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 555 (QL), wherein Justice Pelletier stated that charges of negligence or incompetence against a member of the bar are not to be treated lightly and will not be accepted without having the member's explanation for the conduct in question or evidence that the matter has been referred to the

governing body for investigation. The Board Member concluded by finding no evidence that Mr. Brodsky failed in his obligations in any way, and that it was not in fact negligent for counsel to conclude that there was no need for a request for accommodation or a psychological assessment.

III. Issue

[23] The only issue in this application is whether the Board erred in its interpretation and application of section 55 of the Rules by denying the Applicant's motion to reopen his Convention refugee claim. The applicant must demonstrate that the Board Member erred in finding no breach of the principles of natural justice in the negative determination of Mr. Orozco's initial refugee claim.

IV. Standard of review

[24] In cases dealing with the refusal of the Board to reopen a negative determination of a refugee claim, this Court has found that the applicable standard of review to be reasonableness simpliciter. In this regard, I refer to the decision of Justice Elizabeth Heneghan in *Nazifpour v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 2097 (QL) at para. 24; and in particular to Justice François J. Lemieux's thoughtful analysis in *Masood v. Canada (Minister of Citizenship and Immigration),* [2004] F.C.J. No. 1480 (QL) at paras. 7-15. In the latter case, Justice Lemieux reached his conclusion by drawing an analogy to the standard of review applicable to Board decisions holding a claim to be abandoned (See *Ahamad v. Canada (Minister of Citizenship and Immigration),* [2000] 3 F.C. 109 (T.D.) and *Mangat v. Canada (Minister of Citizenship and Immigration),* [2000]

F.C.J. No. 1301 (T.D.)). In the case before me, the nature of the Board's decision has significant consequences to the claimant and must be subjected to considerable scrutiny.

[25] The question before the Board Member was whether the previous Panel failed to observe a principle of natural justice. Such a question at first blush appears to be a particularly legal one, dealing as it does with the fairness of a hearing, and may seem to militate in favor of a less deferential standard. However, given the relative expertise of Board members, their familiarity with the procedural accommodations afforded to claimants, the IRB's mandate to design and implement their own procedures, and the fact that the question before the Board Member demands the interpretation and application of the law to the facts (a question of mixed fact and law), I too find reasonableness simpliciter to be the appropriate standard in reviewing a refusal to reopen a refugee claim.

[26] In applying this standard, my own determination of the question before the Board is irrelevant (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 80) and I must focus on the reasonableness of the decision under review, not on whether it was a tolerable deviation from a preferred outcome (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 at para. 50). This task is somewhat difficult here as I am asked to ignore what I might view as a preferable outcome in two decisions, the initial negative decision of the Panel and the subsequent decision of the Board, which is the exclusive focus of the present application. I can only grant this application for judicial review if I find that the Board's decision cannot withstand a somewhat probing analysis. Put another way, I must dismiss this application if I find that the Board Member put forward a

clear line of analysis within the given reasons that could reasonably lead the Board Member from the evidence before her to the conclusion at which she arrived (see: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 (QL) at para. 55).

V. Analysis

The Rules

[27] Pursuant to section 55 of the Rules, a claimant may make an application to reopen a claim for refugee protection that has been decided and the application must be allowed if it is established that there was a failure to observe a principle of natural justice:

55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	**55.** (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[28] As noted by the Board Member, the Board's jurisdiction to reopen was clarified and reaffirmed by the Federal Court of Appeal in *Nazifpour v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 179 (F.C.A.) (QL), aff'g [2005] F.C.J. No. 2097, leave to appeal refused [2007] S.C.C.A. No. 196:

> [82**]** The Federal Court has rejected the argument that, while Rule 55 expressly obliges the Division to reopen for breach of natural justice, since this is not stated to be the only ground for reopening, it does not preclude the Division from reopening decisions on other grounds, including the existence

> of new evidence. The Court has held that Rule 55 does not expand the jurisdiction to reopen refugee and protection determinations. The Division may reopen only for breach of a principle of natural justice: *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153, (2004), 258 F.T.R. 226 at paras. 23-25.

The relevant passages from *Ali* cited with approval by the Federal Court of Appeal reads as follows:

> [24] At first blush, the wording of Rule 55 of the RPD Rules appears to permit the consideration of applications to reopen on any ground and the only factor which mandates that the decision must be a positive one for the claimant is the establishment of a breach of natural justice. However, on closer inspection I am satisfied that the correct interpretation is that applications to reopen may only be allowed where a breach of natural justice can be established.
>
> [25] Under the former immigration scheme, there was no express procedure permitting motions to reopen refugee claims that had been decided or ones that had been declared abandoned, however, such motions were made under Rule 28 of the former Rules, pursuant to jurisprudence such as Longia, supra, that established that the Board has inherent jurisdiction to reopen a refugee claim only where a principle of natural justice has been breached. In my opinion, such interpretation is what was intended to be codified in the new RPD Rules. I note that this interpretation of Rule 55 of the RPD Rules was recently applied by this Court in Wackowski v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 315 (F.C.) (Q.L.) at para. 12.

It is therefore quite clear that a refugee claim must be opened if and *only if* the claimant wishing to reopen demonstrates that the initial decision was rendered unfairly or in breach of the principles of natural justice.

The Guideline

[29] The Guideline (above, at para. 15), became effective on December 15, 2006. It was not in effect at the time of the Mr. Orozco's hearing, however the Immigration and Refugee

Board has consistently recognized its obligation to ensure that all persons appearing before it are able to present their claims in accordance with the principles of natural justice. The Guideline itself notes that special consideration has always been available to particularly vulnerable individuals in the past and such situations were addressed on a case by case basis (at 1.4).

[30] Section 2.1 of the Guideline sets out a definition of Vulnerable Persons:

> 2.1 For the purposes of this Guideline, vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution.

This definition is further qualified by Section 2.3 of the Guideline, which recognizes that persons making well-founded refugee claims will often demonstrate some vulnerability and therefore distinguishes ordinarily vulnerable refugee claimants from those that are severely vulnerable and therefore in need of particular accommodations:

> 2.3 Persons who appear before the IRB frequently find the process difficult for various reasons, including language and cultural barriers and because they may have suffered traumatic experiences which resulted in some degree of vulnerability. IRB proceedings have been designed to recognize the very nature of the IRB's mandate, which inherently involves persons who may have some vulnerabilities. In all cases, the IRB takes steps to ensure the fairness of the proceedings. This Guideline addresses difficulties which go beyond those that are common to most persons appearing before the IRB. It is intended to apply to individuals who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability

A footnote to this section cites paragraph 209 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva, January 1992) (the "Handbook"). The Handbook states that "some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution". Such persons, the footnote continues, "regularly appear before the IRB, and the processes of the IRB have been designed to ensure that all persons are treated with sensitivity and respect". Notably, the footnote concludes as follows: "This Guideline will not necessarily apply to all such persons since it is intended to apply to those individuals whose ability to present their cases before the IRB is severely impaired". It seems clear, therefore, that a duty to accommodate above and beyond those already built into IRB processes is triggered only in cases of severe vulnerability where an applicant's ability present their cases is significantly and considerably impaired.

Applicant's Submissions

[31] The applicant relies heavily on the report prepared by Dr. Zemans in arguing that the panel deciding the applicant's initial refugee claim ought to have considered Mr. Orozco's extreme vulnerability and that certain procedural accommodations should have been made in order to secure a fair hearing. There is little other evidence supporting this claim.

[32] While no particular accommodations are suggested by the applicant, a report by Dr. Mark Federman entitled "On the Media Effects of Immigration and Refugee Hearings via Videoconference" clearly suggests that the applicant takes issue with the fact that the initial hearing was held via videoconference. However, I note that no objection to video

conferencing was made to the Panel, that this concern was not apparent to anyone involved in the initial hearing, and that it appears that the present application is first time this issue has been raised.

[33] The applicant submits that in deciding the question before her, the Board member had not turned her mind to the fact that the Panel had no evidence before it that would allow it to properly appreciate the applicant's mental health and vulnerabilities.

[34] First, the applicant argues that the Board Member did not assess whether the previous panel failed to observe a principle of natural justice, but rather required the applicant to show that the previous panel made a mistake on the evidence before it. This seems to ignore the principle that a panel may fail to observe a principle of natural justice where relevant evidence was unavailable at the time of the hearing (*Muqueem v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 565 (QL); *Taher v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1327 (QL); *Ali v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1394 (QL); and *Bouguettaya v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 992 (QL)). The argument here appears to be that the Board Member failed to appreciate that the Panel was unaware that it ought to have considered Mr. Orozco's mental health issues and could hardly be blamed for denying him a fair hearing.

[35] Building upon this argument, the applicant argues that the Board Member erred in requiring that the applicant demonstrate his previous counsel's negligence in failing to raise

concerns as to his client's vulnerability before the Panel. The applicant argues that the Board Member ought to have merely considered whether the action (or inaction) of Mr. Orozco's previous counsel kept essential evidence of Mr. Orozco's vulnerability from the previous panel and so denied Mr. Orozco a fair hearing in which his vulnerabilities would be duly accommodated.

[36] Finally, the applicant submits that the Board Member ought to have found that the previous panel's conclusions did not square with the psychological evidence. The panel noted that Mr. Orozco had managed to travel alone and sustain himself through six different countries en route to Canada and found him to be a resourceful and flexible young man. The previous panel would not have reached such conclusions had the psychiatric report been before them, which should indicate that Mr. Orozco was denied a fair hearing.

Respondent's Submissions

[37] The respondent submits that the Board Member's decision was reasonable and that the applicant failed to demonstrate with sufficient persuasive evidence that he was denied a fair hearing.

[38] First, the respondent submits that the mere existence of new evidence, Dr. Zeman's report, is not a basis for reopening a refugee claim (*Longia v. Canada*, [1990] 3 F.C. 288 (F.C.A.)). Second, even if Dr. Zeman's report is not considered to be entirely new evidence, the respondent submits that the report is of little weight or probative value. They note that the report is vague; contains no methodology and no list of questions posed to Dr. Zemans

by Mr. Orozco's counsel at the time; does not explain the meaning of the terms contained within; does not extend backward in time to demonstrate a breach of natural justice at the time of Mr. Orozco's hearing; and has not been subject to examination or qualification. Further, the respondent questions the objectivity and authenticity of the report, suggesting that the language used by Dr. Zemans, in particular the term "designated representative" is conspicuously similar to language found in the Guidelines.

[39] Third, even if the authenticity of Dr. Zemans' report is provisionally accepted, the respondent argues that the meetings between the applicant and Dr. Zemans, and any conclusions as to Mr. Orozco's mental health at that time, do not lead to the conclusion that the principles of natural justice were violated at the initial hearing in October 2005. Dr. Zemans did not have the opportunity to review the full record put before the panel and would ultimately have to rely solely on what the applicant or his counsel would have told her. Based on the information before her, it was not possible for Dr. Zemans to assert that Mr. Orozco exhibited certain symptoms at the time of his initial hearing or that his apparent mental condition existed at all at the relevant time; Dr. Zemans was only able to observe Mr. Orozco in the winter of 2006, mere months before his scheduled removal from Canada. For these reasons, the relevance of the report itself is highly suspect.

[40] Finally, the respondent contends that, notwithstanding the psychological evidence, the applicant failed to demonstrate that he was denied a fair hearing on October 6, 2005, or that he was denied the right and opportunity to participate meaningfully at that time. The respondent stresses that the Board Member considered the psychological evidence in the

face of the record, and having regard to the totality of the evidence reasonably found insufficient evidence to demonstrate that Mr. Orozco had any difficulty expressing himself or otherwise participating meaningfully in the hearing. Therefore, the Board Member correctly found no breach of natural justice.

[41] Regarding the action or inaction of Mr. Orozco's former counsel, the respondent submits that the applicant is putting a new spin on the question put before the Board Member. It is clear that the failure of counsel freely chosen by a client cannot, in any but the most extraordinary of circumstances, result in overturning a decision upon review (*Sheikh v. Canada (Minister of Employment and Immigration),* [1990] 3 F.C. 238 (C.A.); *Shirwa v. Canada (Minister of Employment and Immigration)* (T.D.),[1994] 2 F.C. 51 at para. 12 citing *Huynh v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 11 (F.C.T.D.)). Rather than argue that counsel was negligent, as it appeared to do before the Board, the applicant has since changed their line of argument, contending that the question of negligence was immaterial and that the appropriate question was whether or not Mr. Orozco's previous counsel caused the panel to fail to observe a principle of natural justice. However, the respondent notes that in the application to reopen the applicant argues in very strong terms that the Mr. Orozco's vulnerability was patently obvious and relied on case law to argue that he ought not bear the consequences of an error that was solely the result of the lawyer's error or negligence. In the face of such submissions, the Board Member cannot be seen to have erred in considering whether the applicant had demonstrated counsel's negligence particularly in the absence of any evidence of a complaint to the governing body (*Mathon, supra.*).

[42] In any event, the respondent submits that the rationale underlying the applicant's arguments on this issue are specious and self-defeating: either the applicant's mental health issues were so obvious that counsel was negligent in not noticing them, and significant persuasive evidence or a notice to the governing body would be needed to substantiate this allegation, or, alternatively and most likely, no relevant mental health issues existed at the time.

[43] In sum, the respondent suggests that the Board Member was correct in finding that at the time of his initial hearing, Mr. Orozco was not a Vulnerable Person so defined; that he was represented by counsel through the duration of his claim for refugee protection; and that no one, especially counsel, but also the initial panel, the refugee protection officer and a judge of the Federal Court noted any issues of vulnerability because there was likely nothing to notice.

VI. Decision

[44] The jurisdiction to grant an application to reopen a refugee claim exists only where an applicant demonstrates a breach of natural justice occurred at the initial hearing (Rule 55; *Nazifpour, supra.*). It follows that where a decision maker finds that an applicant was afforded a fair hearing, there are no grounds for reopening a claim.

[45] The applicant here wishes to demonstrate that Mr. Orozco was denied a fair hearing because everyone involved with the initial hearing failed to appreciate that he was a

Vulnerable Person as defined in the Guideline and so was entitled to particular procedural accommodations. I am sympathetic to the hardships Mr. Orozco endured in Nicaragua and en route to Canada and I have no reason to doubt that he is a sensitive young man who genuinely desires to build a life in Canada. My task is not, however, to review the merits of his initial application nor am I to consider his application to reopen anew. The question before me is whether the Board Member erred in refusing the application to reopen Mr. Orozco's refugee claim.

[46] The applicant contends that the Board Member did not consider that a panel may fail to observe a principle of natural justice where relevant evidence was unavailable at the time of the hearing. The authorities cited by the applicant demonstrate clear cases where a breach natural justice occurs in just such a case (*Muqueem; Taher; Ali;* and *Bouguettaya, supra.*). While this is undoubtedly a valid proposition, I find its present application and the relevance of the authorities relied upon by the applicant to be tenuous at best.

[47] The first three authorities listed above address refusals to reopen refugee claims deemed to be abandoned despite evidence of extraordinary circumstances that led to the late filing of Personal Information Forms or other essential evidence. In each case, the reviewing court found that the Board Member erred in finding that the principles of natural justice had not been breached because the previous panel had decided the matter on the evidence before it. The case of *Bouguettaya* is also of little assistance. There, the panel relied on an exhibit as the basis for rejecting the claimant's testimony on three essential points. Subsequent to the decision, the applicant had demonstrated the information relied on to be false and that the

panel members who had initially rejected his claim subsequently admitted this to be the case in other subsequent claims. The Board Member refusing the application to reopen completely ignored this fundamental point and made no mention of this central piece of evidence in their decision. In all of the cases, the unavailable evidence was not only relevant to the decision, but essential.

[48] Here, the only evidence not before the initial panel is Dr. Zeman's psychological report. I agree with the respondent that the relevance and probative value of this report is questionable. Dr. Zemans' diagnosed Mr. Orozco fifteen months after his hearing as his removal date drew near; she was not privy to the full record placed before the initial panel; she did not explain the meaning of particular terms in the report and also employed language that seems to have been conspicuously borrowed from the Guideline; and finally, her diagnosis cannot reasonably be said to extend back to the time of Mr. Orozco's initial hearing. Despite all this, however, the Board Member raised little objection to the report and decided Mr. Orozco's application to reopen in the face of this new evidence. After reviewing the record, she noted that Mr. Orozco had no unusual difficulty explaining or expressing himself at the hearing. She determined that notwithstanding Dr. Zemans' conclusions, Mr. Orozco's ability to present his case was never severely impaired. She concluded that he was neither a Vulnerable Person, nor was he denied a fair hearing. It appears, then, that the existence of the report is immaterial and there was no need for it to have been put before the Panel, which treated Mr. Orozco fairly, as it would any other refugee claimant.

[49] With regards to the applicant's contention that the Board Member demanded that the applicant demonstrate negligence on the part of his previous counsel, I agree with the respondent that this is a new spin on the question put before the Board Member. In the submissions put to the Board Member, the applicant framed the issue in very strong terms, arguing strenuously that Mr. Orozco not be punished for an error that was solely the result of his lawyer's action or inaction. The Board Member reasonably addressed this argument in her decision.

[50] In any event, I am not convinced by the alternative interpretation presently put forward by the applicant. The applicant ostensibly argues that the inaction of Mr. Orozco's previous counsel kept essential evidence from the deciding panel, denying Mr. Orozco a fair hearing. The only relevant evidence is Dr. Zemans' report, which the Board Member found did not demonstrate Mr. Orozco to be a Vulnerable Person. Again, whether the report was before the deciding panel or not is therefore immaterial. In this light, the respondent's argument is persuasive: either Mr. Orozco's ability to present his case was so severely impaired that failing to seek out a medical opinion would be negligent (and would therefore mandate an explanation or formal complaint), or there was no reason to seek out medical assistance because Mr. Orozco was not in fact a Vulnerable Person and was therefore afforded a fair hearing.

[51] Finally, the applicant argued that the Board Member failed to appreciate that the panel's decision flies in the face of the psychological evidence. How could the panel have found Mr. Orozco to have been resourceful or savvy, they argue, in light of the fact that Dr.

Zemans has strongly suggested that he is a Vulnerable Person? Again, I believe the applicant seeks to place too much weight on the psychological evidence, or at the very least, is asking this Court to reweigh its relevance. While it is not for this Court to do so, I would note that the Guideline notes that an expert medical report regarding an allegedly vulnerable person is an important piece of evidence (at 8.1). The Guideline goes on to enumerate what an expert report should contain:

8.3 Generally, experts' reports should contain the following information:	8.3 Règle générale, les rapports d'experts devraient renfermer les renseignements suivants :
a. the particular qualifications and experience of the professional that demonstrate an expertise which pertains to the person's particular condition;	a. la qualification et l'expérience particulières du professionnel, qui indiquent une expertise pertinente par rapport à la condition particulière de la personne vulnérable;
b. the questions that were posed to the expert by the person who requested the expert report;	b. les questions qui ont été posées à l'expert par la personne qui a demandé le rapport d'expert;
c. the factual foundation underlying the expert's opinion;	c. le fondement factuel sur lequel s'appuie l'avis de l'expert;
d. the methodology used by the expert in assessing the person, including whether an interview was conducted, the number and length of interviews, whether tests were administered, and, if so, what those tests were and the significance of the results;	d. la méthodologie utilisée par l'expert pour évaluer la personne, notamment si une entrevue a été tenue ou non, le nombre et la durée des entrevues, si des tests ont été administrés ou non, et, dans l'affirmative, la nature de ces tests et la signification de leurs résultats;
e. whether the person is receiving treatment and, if so, the nature of the treatment and whether the treatment is	e. des précisions à savoir si la

controlling the condition;	personne suit un traitement, et, dans l'affirmative, la nature du traitement, et s'il permet de contrôler la condition de la personne vulnérable;
f. whether the assessing expert was also treating the person at the time of producing the report; and	f. des précisions à savoir si l'expert procédant à l'évaluation traitait également la personne au moment de la production de son rapport;
g. the expert's opinion about the person's condition and ability to participate in the hearing process, including any suggested procedural accommodations and why particular procedural accommodations are recommended.	g. l'avis de l'expert concernant la condition de la personne et sa capacité à participer au processus d'audience, y compris toute adaptation d'ordre procédural qu'il pourrait recommander ainsi que les motifs de cette recommandation.

I note that few of these criteria are satisfied within the materials produced by Dr. Zemans', which therefore appears to be more of a letter than an expert report.

[52] In the final analysis, the Board Member nonetheless accepted and considered Dr. Zemans' letter and concluded that it did not demonstrate Mr. Orozco to be a Vulnerable Person nor did it suggest that he was denied a fair hearing. It follows that there is no need to have the claim reopened and reheard. Further, in the present case, where the relevance of psychological evidence is so questionable it is not unreasonable for the Board to defer to the findings of the initial panel rather than to those of Dr. Zemans, who only had an opportunity to observe Mr. Orozco fifteen months following the hearing as his removal drew near. Given that no one except for Dr. Zemans seemed to observe Mr. Orozco to be especially

vulnerable or found that his ability to present his case was severely impaired, I cannot find the Board Member's conclusion unreasonable.

[53] I find the Board Member committed no reviewable errors and arrived at a reasonable conclusion supported by the evidence before her and therefore must dismiss this application for judicial review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. No question of general importance is stated.

"Orville Frenette"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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