

Date: 20080404

Docket: IMM-74-06

Citation: 2008 FC 444

Ottawa, Ontario, April 4, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**JOSÉ OCTAVIO OLVERA-PAOLETTI
SILVIA ADRIANA MARZANA-GARCIA
TABATTA ANDREA OLVERA-MARZANA
GEORGINA OLVERA-MARZANA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] José Octavio Olvera-Paoletti (the “Applicant”) and members of his family apply for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the “IRPA”) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated December 6, 2005, wherein it was determined the Applicant and his

family were not Convention refugees and not persons in need of protection within the meaning of sections 96 and 97 of the IRPA.

[2] The Applicant, his wife Silvia Adriana Marzana-Garcia and their two daughters, Tabatta Andrea Olvera-Marzana and Georgina Olvera-Marzana, are citizens of Mexico. They said they fled Mexico to escape persecution by a former employer who hired corrupt police officers to threaten and kill the Applicants. The Applicants came to Canada in November 2004 and made their refugee claim in January 2005.

[3] For reasons that follow I have decided the application for judicial review should be allowed.

BACKGROUND

[4] When the Applicant and his wife were dismissed by their employer in 2002, they filed a labour complaint with the Labour Commission. The Commission granted them a substantial award when the employer failed to respond to the complaint filed against him. The Applicant claims that the employer hired corrupt police officers who threatened and tried to kill the Applicant and his family. He says these corrupt police officers abducted him his family on two occasions. The Applicant says they managed to escape both times and made denunciations to police officials who did nothing to help them. The Applicant and his family relocated outside of Acapulco before deciding to flee Mexico in 2004.

[5] The Applicant submits that the issues to be considered on judicial review are:

1. The hearing was unfair because the Board member fettered his discretion by following the Chairperson's Guideline 7 Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division ("Guideline 7") which resulted in the Board member questioning the Applicant first.
2. The hearing was unfair because of the tone and content of the Board member's questions and commentary during the course of the hearing.
3. The Board member failed to consider adverse documentary information concerning state protection.

[6] I conclude that the substantive issue to be addressed is the fairness in the conduct of the hearing. The Supreme Court of Canada in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. at para. 46, held that the principles of fundamental justice "do not require that the applicant have the most favourable proceedings. They do require that the proceedings be fair: *Lyons, supra*, at p. 362; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para.130; *B. (R.), supra*, at para. 101".

STANDARD OF REVIEW

[7] The standard of review for a breach of procedural fairness is correctness. Where there is a breach of procedural fairness the decision will be set aside (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 at para. 65).

THE DECISION UNDER REVIEW

[8] The Board member decided that the determinative issues in the Applicants' claim were whether their fear was well-founded and state protection. He held that the Applicant was not a generally credible and trustworthy witness. Further, he found the Applicant's testimony contained inconsistencies and omissions that were not satisfactorily explained.

[9] The Board member did find that the Applicant and his wife had been dismissed by their employer and that they had sued him. The Board member accepted that the Labour Commission awarded them a favourable settlement. However, the Board member did not believe the Applicant's claim of being targeted by corrupt police officers nor did he believe that the Applicant made efforts to obtain police protection.

[10] The Board member found that while the Applicant and his family may have a subjective fear of persecution, they did not have an objective basis for their fear and thus their claim of persecution was not well-founded. Finally, the Board member accepted documentary evidence that state protection was available and that the Applicants did not make a determined effort to secure such protection.

ANAYLSIS

[11] The Board member applied Guideline 7 and questioned the Applicant first. The relevant portion of Guideline 7 reads as follows:

19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly

understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.

[12] The recent decision of the Federal Court of Appeal in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para. 79, makes it clear that a Board member must permit a claimant to be questioned first by his or her own counsel when the duty of fairness requires. However, Guideline 7 itself is valid. Since the Applicant did not object to the order of questioning no issue of unfairness arises.

[13] Section 165 of the IRPA grants members of the Refugee Protection Division of the Immigration and Refugee Board the power and the authority to take actions they consider necessary to provide a full and proper hearing. This includes the authority and the power to administer oaths and examine any person under oath. In a judicial setting, when examining a witness, there are sound reasons for a judge to remain within certain boundaries. These boundaries were highlighted by the Federal Court of Appeal in *Rajaratnam v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 1271, where that Court referenced the caution provided by Lord Green M.R. in *Yuill v. Yuill*, [1944] P.15 (C.A.):

A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue. That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill founded has indeed been recognized by the House of Lords itself (emphasis added).

I believe the caution also applies in the case at bar. This was echoed in *Sivaguru v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 47 (F.C.A.), where it was held that the impartiality required of judges extends to Board members as well.

[14] The decision to question first places responsibility upon a board member for setting the tone for the hearing. A board member's questions, directions and manner can influence an applicant's response and affect the course of the hearing. The board member's fundamental responsibility, as required by section 165 of the IRPA, is to do what is necessary "to provide a full and proper hearing". A "full and proper hearing" necessarily implies one that is fair. In the case at bar, fairness was impacted by the Board member's handling of interpretation, his questions, attempts to give advice and his commentary. Each of these is discussed below.

[15] The Applicant and his wife testified through an interpreter. The Board member did not handle questioning with an interpreter very well. At times the Board member referred to the Applicant directly in the second person and, at other times, spoke of the Applicant in the third person as if the member's statements were being addressed to another party, either the interpreter or other persons in the room.

[16] The most troubling aspect of the Board member's questions and commentary is where he purports to offer advice to the Applicant on credibility. The explanations offered by the Board member are not particularly clear. They are also coupled with a negative opinion by the Board member about the Applicant's responses.

[17] In all, there are four instances where the Board member attempts to advise the Applicant on how to respond to questions.

[18] At 357 of the Tribunal Record, the transcripts reveal:

PRESIDING MEMBER: You just told me right from the beginning. I read your story, okay, and I have read all of your denunciations that you made. I read about your lawsuits. If you answer my questions directly there will be a lot less problems in terms of confusion.

MALE CLAIMANT: Sorry.

PRESIDING MEMBER: And, no, it's just answer my questions directly and the more you try to go around the question you will give me reason to doubt the credibility of your answers. Although that is not mentioned in my list of issues your counsel will tell you that credibility is a central issue in every refugee claim. Okay? All right...

[19] At 359 of the Tribunal Record:

MALE CLAIMANT: There is a lot of denunciations that were made and I can't precisely remember dates for all of them.

PRESIDING MEMBER: Well you know, these are his experiences and I have to sort of determine within a level of reasonableness, you know, whether the claimant, you know, if he has lived through these experiences would recollect where, how, when why these things happened. I mean I can understand there is a certain state of nervousness and possible confusion. You had a lot of things happen in a relatively – over a long period of time. I mean, you know, if the claimant is old in age and has memory problems or suffers psychological repercussions as a result of persecutions and harm experienced I can overlook some of these inconsistencies. But if it's contradiction then credibility of the claimant is called into question.

So don't feel too nervous about the dates. I am looking for certain degrees of reasonableness and if you know it's reasonable I can overlook it. Okay. So I mean this is sort of response to your sort of cautionary note that you may not remember all the dates and I am prepared to overlook some of them. But if all your dates are wrong, then it's more than just a sort of, you know, variance to the credibility of your story. Okay?...

[20] At 360 of the Tribunal Record:

PRESIDING MEMBER: Okay. How much money was owing to you as a result of your dismissal?

MALE CLAIMANT: Of the entire denunciation?

PRESIDING MEMBER: Well yes, I have a copy now of your disclosure, I believe it's the most recent one this morning on C-7 and I guess it's the decision of the Labour Arbitration Board. Normally we do not allow sort of, you know, (inaudible) documents; you should know how much money was owed to you, I mean you lived through it. It's not unreasonable to expect you to know how much money was owing to you when you were fired. I am referring to, preference to the documents. I mean if you are owed a few thousand dollars I can overlook that. If I heard a thousand dollars I may not. These are just examples...

[21] At 363 of the Tribunal Record:

PRESIDING MEMBER: Okay. So two days after the Commission made its recommendations the persecution started. I guess back to my question, when did the persecution start, in the year 2002, 2003, 2004, 2005, 2006?

MALE CLAIMANT: 2002, the year 2002.

PRESIDING MEMBER: What month?

MALE CLAIMANT: You want a day and a month? The day I don't have it but the month was July.

PRESIDING MEMBER: All right. I'll ask the female claimant to restrain at this point. The more she is going to try to help the more I am going adduce that the male claimant does not know the answer and hence make a negative inference as to the credibility of the claim.

PRESIDING MEMBER: So July 2002. Okay...

[22] The Board member decided that the Applicant was not generally credible and stated that “[the Applicant’s] story and testimony contained inconsistencies and omissions that I did not find satisfactorily explained” (Reasons at 3).

[23] The Board member specifically found an inconsistency with the Applicant's response that the alleged persecution began in July 2002, a date found to be before the Labour Commission award. The Board member drew a negative inference from the Applicant's response given that he had earlier testified that the persecution started two days after the Labour Commission award. This is notwithstanding the Board member's explanation that dates were not necessarily critical (see para. 19 above). Upon review of the transcripts, it is clear that the Applicant incorrectly provided the July 2002 date as a result of the insistent probing by the Board member. When the Applicant's wife, whom I stress was also an applicant in these proceedings, attempted to speak, perhaps to offer clarification, she was promptly prevented from doing so by the Board member.

[24] The Board member chose to inject his own advice to the Applicant on the question of credibility. He did so repeatedly and in a confusing manner. I cannot say that the Board member did not compromise his ability to assess credibility nor can I say that the Board member did not influence the Applicant's testimony such that his credibility was affected.

[25] While not commenting on whether a board member can provide advice to a claimant, if such advice is offered, it must, at the very least, be clear, accurate and understandable. The advice offered by the Board member to the Applicant, in this case, does not satisfy these criteria.

[26] At the outset of the hearing, the Board member stated that if a question was not clear, the Applicant should ask for clarification (Tribunal Record at 355). At one point in the proceeding, after the Applicant again asked for clarification of a question, the Board member stated that he was not going to repeat the question for the third time (Tribunal Record at 369). Confusion on the part

of the Applicant is understandable given that the transcripts demonstrate that the Board member would switch between “you” and “he” in the same series of questions. At another point in the hearing, when the Applicant was attempting to establish his persecution at the hands of corrupt Mexican police officers, the Board member asked the Applicant how he found out his attackers were actually police officers but then stated “I could go and ask him how but I don’t think I will” (Tribunal Record at 365).

[27] The Board member also interjected disparaging comments throughout the course of questioning, but two instances in particular stand out as uncalled for (Tribunal Record at 361):

PRESIDING MEMBER: Okay. So you are saying that you worked there for a year and two months and that you complained to the Labour Board, you were owed 1.5 million pesos that represents 14 months of back wages or wages owed.

MALE CLAIMANT: What I want to clarify, I did not ask for this amount of money. That Commission was the one that determined that that was the money owed to me.

PRESIDING MEMBER: So which – Labour Commission?

MALE CLAIMANT: Yes.

PRESIDING MEMBER: You have a very generous Labour Commission in Mexico.

[28] Later, at 372 of the Tribunal Record:

PRESIDING MEMBER: Okay. You were fired in April 23rd, first threat in July 2002, fired April 2002, first threatened in 2002. You did not leave until November 2004 which is almost two and a half years later. Why did it take you so long for you to decide to leave?

MALE CLAIMANT: Because I still believed in justice in Mexico.

PRESIDING MEMBER: All right. Notwithstanding that everybody there can buy uniforms to be policemen and that everybody there is for hire, there is justice in Mexico after all.

MALE CLAIMANT: Well I am a Mexican, sir.

The Board member's sarcastic comment ridicules the Applicant's belief in the Mexican judicial system, yet the Board member ultimately decides that state protection is available.

[29] I agree with Justice Barnes' review of the law in *Chaudry v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1015 at para. 13, concerning the latitude owed to the Board in the manner in which it conducts a hearing:

While I do accept the Respondent's argument that considerable latitude is owed to the Board in the manner in which it conducts a hearing including the right to extensively and energetically question a claimant (see *Bankole v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1942; 2005 FC 1581) and that some degree of rudeness, sarcasm or harshness may be legally excusable (see *Kankanagme v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1757; 2004 FC 1451), fairness does not permit intrusive, insensitive, intimidating, harassing, unwarranted, or highly irrelevant interventions by the Member which are capable of giving the impression that the Member was biased: see *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629, [1991] F.C.J. 1049 (F.C.A.) and *Kumar v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 14, [1987] F.C.J. No. 1015 (F.C.A.). As was stated by Justice Michael Phelan in *Quiroa v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 338; 2005 FC 271, there is an appropriate tone and demeanour to the adjudicative process necessary to ensure that the Member may be seen not to have reached a decision prematurely. I think that the Member's conduct in this case did cross the line, and I do not accept the Respondent's contrary argument.

[30] In my view, a reasonably informed person reviewing this hearing in its totality would conclude that the Board member adversely impacted on the fairness of the hearing process by giving unclear opinionated advice to the Applicant during the course of the hearing. In addition, the Board member demonstrated a loss of objectivity by his commentary and asides. I find that the

Applicant and his family did not receive a fair hearing in that the Board member failed to maintain both the appearance and fact of impartiality.

CONCLUSION

[31] In result, I find there has been a breach of procedural fairness. The Board decision is quashed.

[32] The Applicant has submitted a question on the issue of state protection. The Respondent opposes the question proposed by the Applicant. Given that the issue of state protection was not considered in this judicial review, I decline to certify a question on state protection.

JUDGMENT

THIS COURT ORDERS that:

1. The application for judicial review is allowed. The matter will be referred back to a differently constituted Board for redetermination.
2. No serious question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-74-06

STYLE OF CAUSE: JOSE OCTAVIO OLVERA-PAOLETTI et al.
v.
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 20, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mandamin, J.

DATED: April 4, 2008

APPEARANCES:

Douglas Lehrer

FOR THE APPLICANTS

Asha Gafar

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Vander Vennen Lehrer
Barristers and Solicitors
45 St. Nicholas Street
Toronto, ON M4Y 1W6

FOR THE APPLICANTS

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE RESPONDENT