

Date: 20080417

Docket: IMM-159-07

Citation: 2008 FC 496

Toronto, Ontario, April 17, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**CLAUDIA ALEJANDRA ARIAS DE ACEVEDO
RENZO DAVID ACEVEDO
MARIANELA ACEVEDO
JULET HAYLEN ACEVEDO**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Acevedo is the mother of the three other applicants in the present judicial review application. Ms. Acevedo and her children were joined claimants in a claim for refugee protection made by her husband in 2001. In 2006, Ms. Acevedo applied to the Refugee Protection Division of the Immigration and Refugee Board (RPD) to have her claim for protection re-opened to allow her

to assert independent grounds from those raised by her husband. The RPD rejected her request on December 18, 2006 and the present judicial review application challenges that decision.

[2] Ms. Acevedo's application to re-open was made pursuant to Rule 55 of the *Refugee*

Protection Division Rules, SOR/2002-228:

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.

(2) The application must be made under rule 44.

(3) A claimant who makes an application must include the claimant's contact information in the application and provide a copy of the application to the Minister.

(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.

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.

(2) La demande est faite selon la règle 44.

(3) Si la demande est faite par le demandeur d'asile, celui-ci y indique ses coordonnées et en transmet une copie au ministre.

(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[Emphasis added]

Therefore, in response to Ms. Acevedo's application to re-open, the RPD was required to establish whether there was a breach of natural justice at the original hearing.

[3] In support of her application to the RPD, Ms. Acevedo provided extensive evidence that her natural justice rights had been denied. In addition to supporting documentation, she provided a sworn statement detailing the abuse that she suffered at the hands of her husband and how it had prevented her from participating in the claim her husband advanced. Critical elements of the statement are as follows:

The abuse did not stop once we came to Canada. In fact, I believe that the lack of status made Victor more angry. He was uncertain about his future, and would blame me for his problems. He beat me two three times a week. Weekends were worse, as he would be home and would beat me on the smallest pretext.

[...]

He was also very verbally abusive. He would always call me names, and put me down. The children have witnessed many of these incidents of physical, emotional and verbal abuse. Following these episodes of abuse, he would always apologize, and claim to have repented and changed his ways, but he never changed and continued to abuse me.

Victor had made a refugee claim based on problems at work. He told me that he had faced severe persecution. I do not know the details of his case, as he would not tell me much about his life. He just told me that he had to leave for Canada with three other co-workers from his company and that his life was in danger.

I attended his refugee hearing, but I was not asked any questions. I do not remember accurately, but I believe his hearing took place sometime in 2003 / 2004. His abuse intensified after his claim was rejected. He did not inform me whether he appealed the decision or not.

[...]

At the time when my husband made a claim I was not aware that I could make my own claim based on the violence I had faced. Once I was in the shelter, the shelter staff referred me to Barbra Schlifer Commemorative Clinic. I was able to meet one of the immigration lawyers, who referred me to my Counsel, Ms. Sapru. I met Ms.

Sapru in late July. She was the first person who informed me that I could make seek to re-open my refugee claim based on the violence we had experienced and because we didn't have a just or fair hearing of our claim.

Immediately she referred me to a counselor for therapy. My counselor is on vacation at present, but I will be submitted a letter from her as soon as she returns. Life is changing for me for the first time. I am starting to feel like I am important. That what I feel is important. That my life is important. I am starting to gain strength. I have never ever seen my children this relaxed and comfortable. I cannot imagine going back to that life of hell, or subjecting my children to that ever again.

I have asked Ms. Sapru to represent us in re-opening our refugee claim so that our story could be told. Because of the abuse, I was unable to make an informed, free and independent decision with regard to my original refugee claim.

I remember the physical torture so clearly. He would use his fists to punch me on my head, he would kick me and push me. The assault was endless.

He doesn't believe that I am a human being. He kept saying things like "who do you think you are" and "you better show me respect, I am the man." On a daily basis he would degrade me, calling me: son of a bitch, motherfucker, etc.

In this relationship with Victor, I was constantly scared of his rage. He stopped me from meeting with my friends, family and, from going to places, and having any kind of independence whatsoever. I could never make a decision without consulting with him first.

I had no privacy; he would control everything that I did. He was also financially abusive.

I remained in this violent relationship for fifteen, [sic] it is hard to fully explain the complete fear and shame that kept me in it. He told me that I was nothing without him and I think he had convinced me of that. I cannot go back to that life, in fact even if I did, I don't think I would survive.

(Tribunal Record, pp.96-100)

[4] Based on Ms. Acevedo's evidence, Counsel for Ms. Acevedo argued in written submissions that the original refugee hearing constituted a denial of natural justice:

As a general concept, natural justice involves the "right to be heard". The Courts have previously held that the right to be heard is violated where a person is mentally or emotionally constrained from bringing forward the full facts of their cases because of duress. (*Kaur v. Canada (Minister of Citizenship and Immigration)*), (1989) 64 D.L.R. (4th) 317 (Fed C.A.)

For example, in the case of *Kaur*, the Court held that an abused women had been "unable to make a free, informed and independent decision respecting a claim to refugee status". This was held to be a denial of fundamental/natural justice.

(Applicant's Application Record, p. 79)

[5] In the decision rendered, the RPD acknowledged that if Ms. Acevedo was under duress at the time of the original protection hearing, this could result in a denial of natural justice; however, the RPD rejected re-opening application on the following basis:

There is no evidence that her [the applicant's] movements were constrained by her spouse or that she was prevented from seeking independent advice regarding her situation.

There is no evidence before the Board as to her psychological condition at the time. In the panel's opinion, it has not been shown that the situation faced by the applicant at the time of the hearing of her refugee claim rose to a level of duress, such as to have deprived her of the right to be represented by independent counsel, as well as the ability to make a free, informed and independent decision respecting her claim to refugees status.

[Emphasis added]

(Decision, at p. 3)

[6] In the decision, the RPD states that it is “cognisant of the Chairperson’s *Gender Guidelines* and the factors that may impact on the behaviour of an abused woman” but, despite this says:

The panel does not find that Chairperson’s guidelines provide a basis on which to re-open the refugee claim.

(Decision, at p.3)

[7] I find that the RPD’s decision is made in manifest error because the finding that there is “no evidence” on essentially important elements of the application to re-open is erroneous, and further, that the decision exposes a complete lack of appreciation of the content and spirit of the *Gender Guidelines*. The *Gender Guidelines* require that a decision-maker be sensitive to gendered claims and not judge the actions of an abused women without enhanced knowledge of what to expect. In failing to be sensitive to gender issues as required by the *Gender Guidelines*, the RPD failed to appreciate that the power imbalance present in Ms. Acevedo’s abusive relationship with her husband certainly could have resulted in her being under duress.

[8] As a result, I find that the Decision is made in reviewable error.

ORDER

Accordingly, I set aside the decision under review and refer the matter back to a differently constituted panel for re-determination in accordance on the direction that the approach required by the *Gender Guidelines* be applied.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-159-07

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JUILET HAYLEN ACEVEDO v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: APRIL 17, 2008

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