

Date: 20091014

Docket: IMM-4244-08

Citation: 2009 FC 1034

Ottawa, Ontario, October 14, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

**DANIEL TOLODO VANEGAS
ANNA ISABEL CORRAL MENA
MARIANA ISABEL TOLODO CORRAL (Minor)
DANIELA GUADALUPE TOLEDO CORRAL (Minor)**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants who were refugee claimants from Mexico seek judicial review of a decision of September 9, 2008 in which the Refugee Protection Division of the Immigration and Refugee Board (the Board) dismissed their application to have their refugee claim reopened.

BACKGROUND

[2] The Adult Applicants arrived in Canada on May 12, 2007 and made refugee claims when interviewed on May 24, 2007. The Adult Applicants indicated that they had retained a lawyer named Hamza Kisaka as their barrister. The Adult Applicants filed their Personal Information Form (PIF) on June 18, 2007. It identified Mr. Kisaka as their lawyer.

[3] The Minor Applicants arrived in Canada on August 23, 2007 and made refugee claims on October 11, 2007. Their PIF was filed on October 29, 2007. Their claims were consolidated with those of their parents.

[4] On November 28, 2007, the Board sent what it calls a “fourteen day letter.” It advised the Adult Applicants of certain deficiencies in the PIFs and gave them two weeks to respond. A copy of this letter was sent to Mr. Kisaka.

[5] Two months later, a second lawyer became involved. The first correspondence from a lawyer named Bola Adetunji was sent to the Board on January 24, 2008. It advised the Board that

Mr. Adetunji now represented the Adult and Minor Applicants and provided counsel contact information forms.

[6] The Board's record shows that on May 22, 2008, the Board sent the four Applicants a letter advising that their hearing date was July 11, 2008 and that if they did not appear, their claims could be abandoned. The letter showed that a copy was sent to Mr. Adetunji as the Applicants' counsel. The Applicants acknowledge that they received this letter, but they took no steps to tell Mr. Kisaka of the hearing date or to ask Mr. Adetunji why he appeared as their counsel.

[7] A Notice to appear (the Notice) was sent to the Applicants by the Board on May 29, 2008. It again indicated that their hearing would be held on July 11, 2008. The Applicants deny receiving this letter and, on its face, it does not appear to have been sent to either Mr. Kisaka or Mr. Adetunji. Further, it does not appear that the Adult Male Applicant completed the Claimant's Reply Form enclosed with the Notice. However, the Board's file includes a Statement of Service dated May 29, 2008 which shows that the Notice, a list of documents about Mexico and a screening form were served on the Adult Male Applicant and on Mr. Adetunji.

[8] The Board's file then shows no activity until July 3, 2008, when Mr. Adetunji wrote and advised the Board that:

I advised previously that I act for the clients noted above. However, it seems that there might be certain issues around my retainer and the clients may be changing counsel. I have asked the clients to kindly clarify this soonest.

The hearing is presently scheduled for 11 July 2008. With the confusion around the clients' retainer, I did not advise previously that I am not available on that date.

I have a conflict on the dates and may I ask for the hearing to be postponed, please?

[9] On July 4, 2008, the Board asked Mr. Adetunji, by telephone, to indicate whether he or Mr. Kisaka had been retained for the hearing. He was told that if he confirmed that he was to be counsel, the Board would consider his request for an adjournment. There is no indication in the Board's file that Mr. Adetunji ever responded to the Board's request.

[10] The next item in the Board's file is a Notice of Decision dated July 16, 2008 to the effect that the Applicants' claims were declared abandoned on July 11, 2008 because neither the Applicants nor counsel appeared at the hearing.

[11] On August 19, 2008, Mr. Adetunji advised the Board that he had been instructed to file an application to reinstate the Applicants' refugee claims. He filed a Notice of Motion, a Memorandum of Fact and Law and an affidavit sworn by the Adult Male Applicant.

[12] In the section of the Notice of Motion which provides the grounds, Mr. Adetunji said, in part:

[...] Counsel retained is Hamza Kisaka, a Barrister and Solicitor in the Province of Ontario. The claimants applied for legal aid to cover the fees of their counsel. However, through some errors, their legal aid certificate was issued in the name of Bola Adetunji, another Barrister and Solicitor in the Province of Ontario. In error, Bola Adetunji advised the Board that he has been retained to represent the claimants. Since then, Bola Adetunji has been receiving

documents and all correspondences from the Board on the matter of the claimants.

On 22 May 2008, the Board provided the refugee claimants with the Claimant's Confirmation of Readiness by mail. However, the refugee claimants did not get the Notice. However, the claimants were advised of the date for their hearing by Bola Adetunji. The claimants were willing, ready and able to proceed with their hearing.

Counsel Hamza Kisaka did not get a copy of the Claimant's Confirmation of Readiness, given that he was not listed as counsel for the claimants at the Board. Counsel, Hamza Kisaka, did not know of the date set for the claimant's hearing by the board. By reason of this, counsel could not timely advise the Board that he is not available on that date.

The hearing of the refugee claim noted above was scheduled to take place on 11 July 2008. Counsel Hamza Kisaka was not available on that date. He advised the board that he was not available for the hearing. Because Hamza Kisaka was not listed as counsel of record, he was unable to request the postponement.

The office of Hamza Kisaka contacted Bola Adetunji and asked for him to clarify the issue of the retainer and the postponement request. On 3 July 2008, Bola Adetunji wrote to the Board and asked for a postponement of the hearing. With the information from Bola Adetunji, the claimants understood that their hearing will be postponed to a date convenient for them and their counsel, Hamza Kisaka.

[my emphasis]

[13] The difficulty is that these facts are not sworn evidence. Neither Mr. Adetunji nor Mr. Kisaka filed affidavits.

[14] The Adult Male Applicant did swear an affidavit. However, it does not disclose that he was ever advised that an adjournment had been arranged, and it does not say which lawyer was to attend

the hearing. He only says that "...Bola Adetunji informed me and I verily believe that our hearing should be postponed to a time convenient for our lawyer" [my emphasis].

[15] On September 9, 2008, the Board dismissed the motion to have the claim reopened (the Decision) and leave was later granted for judicial review of that Decision.

[16] Thereafter, acting on their own behalf, the Applicants requested a Pre-Removal Risk Assessment. However, their submissions were not accepted and they were deported to Mexico on March 18, 2009.

[17] When this application for judicial review of the Decision came on for hearing on May 5, 2009, the Court was advised of the deportation. The matter was adjourned for further submissions which were made by teleconference on August 21, 2009.

DISCUSSION AND CONCLUSIONS

[18] The Applicants say that their refugee claim should have been reopened because they never intended to abandon it. They say that the only reason they failed to attend their hearing was Mr Adetunji's advice that it would be postponed.

[19] However, the underlying issue is the confusion surrounding their representation. If Mr. Kisaka had been counsel of record, he would have received a notice of the hearing well in

advance. If unable to attend, Mr. Kisaka would have been able to request a postponement directly from the Board, instead of relying on Mr. Adetunji. In effect, the Applicants argue that the Board should have reopened their refugee claim because of this confusion, without which the claim would never have been abandoned.

[20] However, the Adult Applicants did not take reasonable steps to correct the Board's record to show Mr. Kisaka as counsel. They knew at least as early as the Board's letter of May 22, 2008, which showed that a copy had been sent to Mr. Adetunji as counsel, that the Board was no longer treating Mr. Kisaka as their lawyer. They acknowledge that they received this letter but they took no steps to have Mr. Kisaka reinstated as counsel in the Board's file. As well, they apparently did not tell him of the hearing date.

[21] In these circumstances, the Applicants cannot rely on confusion about their legal representation to justify their failure to appear at the hearing, particularly when, as their evidence shows, they were not advised that a postponement had, in fact, been granted.

[22] For all these reasons, an order will be made dismissing the application.

[23] In view of this conclusion, there is no question certified for appeal.

JUDGMENT

UPON hearing representations of counsel for the Applicants in Toronto on May 5, 2009 and by teleconference on August 21, 2009.

THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application for judicial review is hereby dismissed.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4244-08

STYLE OF CAUSE: Daniel Toledo Vanegas and others
v. Minister of Citizenship and Immigration

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: August 21, 2009

REASONS FOR JUDGMENT: SIMPSON J.

DATED: October 14, 2009

APPEARANCES:

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