

Federal Court



Cour fédérale

Date: 20110106

Docket: IMM-2214-10

Citation: 2011 FC 7

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, January 6, 2011

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

DILANO GILLES

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27 (the Act), by Dilano Gilles (the applicant). The panel determined that the applicant was neither a refugee nor a person in need of protection and therefore rejected his claim for refugee protection.

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[2] The applicant is a citizen of Haiti who was born on November 15, 1958. He is a farmer and has lived in Croix-des-Bouquets his entire life. He is illiterate.

[3] In his Personal Information Form, the applicant alleged that armed men had been looking for him and that he had had to hide at his in-laws' for two months. He claimed to fear being attacked by men in the army. He noted the extreme violence that is rampant in Haiti and claimed he had no other choice but to leave.

[4] The applicant's first hearing before the RPD was held on August 18, 2008, at which the applicant represented himself, due to the fact that his counsel had withdrawn at the last minute. The panel proceeded anyway and rejected his claim. That decision was set aside by this Court, with the consent of both parties, on September 29, 2009, for breach of natural justice.

[5] The applicant was represented at the second hearing, which was held on March 24, 2010, and an oral decision was rendered at the end of it.

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[6] The panel took into account the circumstances of the first decision that had been set aside as well as the applicant's personal circumstances, including his illiteracy. The panel expressly stated its intention to make sure the applicant understood its decision.

[7] The panel found the applicant's testimony to be clear with regard to the point that, in the end, he did not fear anything if he were to return, other than the general climate in Haiti and the fact that he would find it difficult to move back there. When the panel asked him if there were individuals he feared the applicant replied "no".

[8] Without examining the credibility of the various allegations made by the applicant, the panel noted that the onus was on him to establish a well-founded fear of returning to his country of citizenship, which he did not succeed in doing. The panel also found that the applicant had made no reference to any fear with regard to the reasons for which he would allegedly be persecuted and that he had not established that it was more likely than not that his life would be at risk or that he would be subjected to a danger of torture if he were to return to Haiti.

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[9] The following paragraphs from the *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB* (December 15, 2006), issued by the Chairperson of the IRB pursuant to paragraph 159(1)(h) of the Act (the Guideline), are also relevant:

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

Définition d'une personne vulnérable

2.1 Pour l'application des présentes directives, une personne vulnérable s'entend de la personne dont la capacité de présenter son cas devant la CISR est grandement diminuée. Elle peut, entre autres, être atteinte d'une maladie mentale; être mineure ou âgée; avoir été victime de torture; avoir survécu à un génocide et à des crimes contre

persecution.

General Principles

5.1 A person may be identified as vulnerable, and procedural accommodations made, so that the person is not disadvantaged in the presentation of their case. The identification of vulnerability will usually be made at an early stage, before the IRB has considered all the evidence in the case and before an assessment of the person's credibility has been made.

Early identification

7.1 A person can be identified as vulnerable at any stage of the proceedings. It is preferable to identify vulnerable persons at the earliest opportunity.

7.2 In the course of early review of the file, the IRB may find information which discloses that the ability of the person to present their case may be severely impaired. The IRB may initiate early contact with the person, the designated representative, counsel or any other person to gather evidence which is relevant to whether the individual should be identified as a vulnerable person and which is relevant to the types of procedural accommodations which might be made.

7.3 Counsel for a person who may be considered vulnerable is best placed to bring the vulnerability to the attention of the IRB, and is expected to do so as soon as possible. Others who are associated

l'humanité; il peut aussi s'agir d'une femme qui a été victime de persécution en raison de son sexe.

Principes généraux

5.1 Une personne peut être identifiée comme étant vulnérable et peut faire l'objet d'adaptations particulières sur le plan procédural, de manière à ne pas être désavantagée dans la présentation de son cas. L'identification de la vulnérabilité est habituellement faite au début du processus, avant que la CISR ait examiné tous les éléments de preuve du cas et que la crédibilité de la personne soit évaluée.

Identification à la première occasion

7.1 Une personne peut être identifiée comme étant vulnérable à n'importe quelle étape des procédures. Il est préférable d'identifier une personne comme étant vulnérable le plus tôt possible.

7.2 Lors de l'examen du dossier en début de processus, la CISR peut trouver de l'information qui révèle que la capacité de la personne de présenter son cas peut être grandement diminuée. En début de processus, la CISR peut amorcer des contacts avec la personne, le représentant désigné, le conseil ou toute autre personne pour recueillir des éléments de preuve pertinents en vue de déterminer si la personne devrait être identifiée comme étant vulnérable de même qu'établir le genre d'adaptations d'ordre procédural qui pourraient être appliquées.

7.3 Le conseil de la personne pouvant être identifiée comme étant vulnérable est le mieux placé pour porter sa vulnérabilité à l'attention de la CISR, et il devrait le faire le plus rapidement possible. Les

with the person or who have knowledge of facts indicating that the person may be vulnerable (counsel for the Minister or any other person) are encouraged to do the same. Wherever it is reasonably possible, independent credible evidence documenting the vulnerability must be filed with the IRB Registry.

7.4 Counsel for a person who wishes to be identified as a vulnerable person must make an application under the Rules of the Division. The application must specify the nature of the vulnerability, the type of procedural accommodations sought and the rationale for the particular accommodations. The IRB will be sensitive to the barriers that may be created by the formal requirements related to making applications in the case of unrepresented persons and other situations and will waive or modify the requirements or time limits set out in the Rules, as appropriate. The IRB may also act on its own initiative.

personnes associées à cette personne ou qui connaissent des faits indiquant qu'elle pourrait être vulnérable (conseil du ministre ou toute autre personne) sont encouragées à en faire autant. Lorsque c'est raisonnablement possible, des éléments de preuve crédibles et indépendants établissant la vulnérabilité doivent être déposés auprès du greffe de la CISR.

7.4 Le conseil d'une personne qui souhaite être identifiée comme étant une personne vulnérable présente une demande à cet effet en vertu des Règles de la Section. La demande doit préciser la nature de la vulnérabilité, le genre d'adaptation d'ordre procédural recherché ainsi que la raison. La CISR est sensibilisée aux obstacles que peuvent créer les exigences officielles liées à la présentation de demandes dans le cas de personnes non représentées et d'autres situations; elle donne une dispense ou modifie les exigences ou les délais établis dans les Règles, au besoin. La CISR peut également agir de sa propre initiative.

[10] The only issue is whether the panel correctly applied this Guideline.

[11] According to *Hernandez v The Minister of Citizenship and Immigration*, 2009 FC 106, at paragraph 12, and *Sharma v The Minister of Citizenship and Immigration*, 2008 FC 908, at paragraphs 14 to 16, this kind of issue, i.e. the application of the Guideline, is reviewable on a standard of correctness because it is a question of procedural fairness.

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[12] The applicant argues that the panel did not correctly apply the Guideline in the case at bar and that its decision should therefore be set aside. Counsel for the applicant contends, without being specific, that his client showed all the signs of a vulnerable person who was mentally troubled and who could not testify calmly. The applicant's counsel also argues that the panel should have suggested that the hearing be postponed in order for the applicant to undergo a psychological assessment, in accordance with the Guideline, adding that the panel had erred by not mentioning the Guideline.

[13] For his part, the respondent argues that, in the first place, the applicant in no way challenges the RPD's findings or the facts and elements on which they are based. On this point, I do not agree since the applicant is alleging that there was a breach of procedural fairness with regard to the applicant's testimony on which the decision was based. In my view, it is implied that the applicant is challenging the findings that are based on this testimony, which he considers to be tainted by a lack of procedural fairness.

[14] The respondent further argues that the applicant's allegations are gratuitous and far too general. He submits that the simple fact that the applicant is illiterate does not make him a "vulnerable" person and that, at any rate, the panel specifically took the applicant's illiteracy into consideration when it took pains to clearly explain the process.

[15] The respondent adds that if the applicant had any other difficulties, other than his illiteracy, for which he could be considered to be a vulnerable person, it was up to his counsel to request that the hearing be postponed in order for him to undergo a psychological assessment. The respondent specifically cites paragraphs 7.3 and 7.4 of the Guideline, which note that counsel for the applicant is best placed to bring his vulnerability to the attention of the panel and is expected to do so as soon as possible. Paragraph 7.4 sets out that counsel for the applicant must then make an application under the Rules of the RPD, specifying the nature of the vulnerability as well as the type of procedural accommodations sought and the rationale for the particular accommodations. The respondent notes that counsel for the applicant, who had been representing him for several months before the hearing, did not mention having made such an application, even though he was the one who knew the most about his client's mental state and illiteracy.

[16] The respondent also notes that it is apparent from the reasons that, in spite of the absence of such an application on the part of the applicant, the panel did consider his personal situation, i.e. his illiteracy and the difficulties he had had at the first hearing. Lastly, the respondent argues that the applicant had ample time to tell his story and provide explanations during the proceeding, and that the applicant in no way indicated how he might have been prevented from doing so.

[17] I agree with the respondent on these other issues, particularly given the transcript of the hearing before the panel. It is apparent from the panel's reasons that it was sensitive to the applicant's limitations at the hearing and that it tried to take his difficulties into consideration. While the Guideline notes that the panel may raise the issue of vulnerability on its own initiative, it is clear that the same Guideline places the greater part of the burden on the applicant's counsel, who, in the case at bar, did nothing at the time to raise the issue of the applicant's mental condition before the panel. The panel apparently did not notice anything abnormal about the applicant's mental state, and so the burden was on counsel to refer to the Guideline, which he did not do. In my opinion, there was no error in the case at bar and the panel acted correctly.

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[18] For the above-mentioned reasons, the application for judicial review is dismissed.

[19] I agree with counsel for the parties that there is no question for certification arising from the matter.

JUDGMENT

The application for judicial review of the decision of the member of the Immigration and Refugee Board's Refugee Protection Division dated March 26, 2010, is dismissed.

“Yvon Pinard”

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-2214-10

STYLE OF CAUSE: DILANO GILLES v. THE MINISTER OF CITIZENSHIP
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PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 1, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Pinard J.

DATED: January 6, 2011

APPEARANCES:

Luc R. Desmarais FOR THE APPLICANT

Isabelle Brochu FOR THE RESPONDENT

SOLICITORS OF RECORD:

Luc R. Desmarais FOR THE APPLICANT
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada