Federal Court  Cour fédérale

Date: 20110722

Docket: IMM-57-11

Citation: 2011 FC 923

BETWEEN:

YUNETSY GARCIA LUZBET

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] Ms. Luzbet is a Cuban state lawyer who advised state enterprises; in this case, she had been offering advice to a trucking company that delivered foodstuffs to resorts catering to foreign tourists. A driver refused to make a delivery on the grounds that he had already put in too many hours and was too tired to drive safely. By siding with him, she earned the ire of management. She claims she was persecuted and cannot return because her Cuban exit visa was obtained fraudulently and, in any event, because she failed to return within the time allowed.

[2] This is the judicial review of the decision of a member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) who dismissed Ms. Luzbet's claim.

[3] Three issues arise. One is whether the member allegedly failed to appreciate that within Cuba, Ms. Luzbet's actions did not merely give rise to an employer-employee dispute, but gave her a most unfavourable political profile. The second is whether the member erred in law with respect to a Cuban law of general application – the law relating to exit visas – by failing to appreciate that Ms. Luzbet would be considered a danger to the State for leaving without a proper visa. The third issue was a potential apprehension of bias on the part of the decision maker.

Natural justice

[4] The allegation of bias must be dealt with first. If that allegation is well founded, the decision must be set aside for it is not up to this Court to speculate whether another decision maker would have come to the same conclusion on the merits of the claim (*Cardinal v Kent Institution*, [1985] 2 SCR 643, [1985] SCJ No 78 (QL)).

[5] No deference is owed to the decision maker on this issue. Although some say the standard of review is correctness, strictly speaking the standard of review does not apply at all to questions of natural justice (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539).

[6] It was only at the commencement of the RPD hearing that Ms. Luzbet's attorney learned the identity of the member who was to decide the matter. She immediately moved that he recuse himself. The reason was that Ms. Luzbet's attorney was representing another lawyer who had filed a complaint against the member which arose from another case. That lawyer claimed she was intimidated by the member. No decision on the complaint had been made at the time of Ms. Luzbet's hearing, or indeed at the time of the hearing of this judicial review.

[7] The member refused to recuse himself and said he would give the reasons therefore in his decision. According to Ms. Luzbet's counsel, this further bolstered the apprehension of bias as a member is not expected to give reasons when a refugee claim from Cuba is accepted, but only when the claim is refused. She submits that his remarks suggest a predetermined outcome and that questions during the hearing posed by the member were geared towards that outcome.

[8] The issue here is not actual bias, but rather the apprehension of bias. Justice must not only be done, but must be seen to be done. The classic statement circumscribing apprehension of bias is that of Mr. Justice de Grandpré in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369; [1976] SCJ No 118 (QL), where he said at pages 394-395:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude.
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias, or 'real likelihood of bias'. The grounds for this

> apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[9] In speaking of reasonable apprehension of bias as applied to a member of the IRB, Mr. Justice Mosley had this to say in *Arrachch v Canada (MCI)*, 2006 FC 999; 299 FTR 1:

> 20 An allegation of bias, actual or apprehended, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture or mere impressions of an applicant or counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard: *Arthur v. Canada (Attorney General)*, 2001 FCA 223, (2001), 283 N.R. 346.

[10] The member's reasons demonstrate that he had a thorough grasp of the jurisprudence. He pointed out that he had taken an oath of office in which he undertook to carry out his duties impartially. He referred to the *Code of Conduct for Members of the Immigration and Refugee Board of Canada*, which emphasizes the importance of honesty, good faith, and transparency.

[11] Section 29 thereof states:

> Members shall not be influenced by extraneous or improper considerations in their decision-making. Members shall make their decision free from the improper influence of other persons, institutions, interest groups or the political process.

[12] In my opinion, the facts of this case do not give rise to a reasonable apprehension of bias on the part of reasonable and right minded persons. It is highly speculative to suggest that the member's statement that he would give the reasons as to why he refused to recuse himself in the written decision to follow showed that his mind was already made up against Ms. Luzbet. Although

the practice is that one need not give reasons if the Cuban claimant is accepted, the member is always free to give reasons whatever the outcome of his decision. This Court, as a result of scheduling and constraints of time, often makes decisions, with written reasons to follow.

[13] There was nothing unreasonable in the member's line of questioning. Ms. Luzbet may well believe that her dispute with her employer raised her political profile and would subject her to persecution, but the member was perfectly entitled to test that opinion. Indeed, it was his duty to do so.

[14] Finally, given that the right to counsel is so well entrenched in our society, I cannot accept bias against a lawyer, and by ricochet her client, simply because she is representing another lawyer who complained about the member's conduct in another hearing.

Is Ms. Luzbet a refugee?

[15] It seems odd to me that the director of the trucking company and ranking members of the Communist Party would not have accepted Ms. Luzbet's advice that a driver who had been driving for twenty consecutive hours should not be put back on the road. Their position, as recounted by Ms. Luzbet, is that the driver had to work in the interest of the State in order to make sure that the tourist industry was properly serviced. I would have thought that the risk of an accident which might not only injure or kill the driver in question, but also drivers and passengers in other vehicles, which passengers might include tourists, would be more detrimental to the tourist industry. Her advice was actually helpful to the State; however, there was no general adverse credibility finding against her.

[16] The reprisals for her unwanted legal advice were that her work was more closely scrutinized, some cases were taken from her, she was given low profile jobs and she was regularly questioned. These incidents do not add up to persecution. In fact, over the next four months, her requirement to report went from daily to weekly, and no formal sanctions were taken against her. Thus, it was not unreasonable within the meaning of *Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] SCJ No 9 (QL), to find that she was not being persecuted for political opinions in opposition to that of the State, or for any other reason.

[17] She asserts that her Cuban exit visa was obtained illegally, but the circumstances thereof, including the fact that she signed some papers that were processed by a friend, are such that it was reasonably open for the member to find that she had a valid exit visa good for six months.

[18] It was her decision not to return to Cuba within the six months. In making this decision, she violated a law of general application. The member did not err in relying upon the Court of Appeal's decision in *Valentin v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 390, [1991] FCJ No 554 (QL), with respect to Czech nationals who did not return there within the delay stipulated in their exit visas:

> 8. … Neither the international Convention nor our Act, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to [page396] punishment for violating a criminal law of general application.

[19] Ms. Luzbet's assertion that she would be deemed a dangerous offender is speculative, and it was not unreasonable for the member to reject it.

[20] Although a microscopic examination can always raise issues (*Miranda v Canada*, 63 FTR 81, [1993] FCJ No 437 (QL)), read objectively, the decision is well reasoned and intervention by this Court is not justified.

[21] Counsel for the applicant shall have one week from the date hereof to submit a serious question of general importance which could support an appeal, and the respondent will have one week to reply.

"Sean Harrington"
Judge

Ottawa, Ontario
July 22, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-57-11
STYLE OF CAUSE:	YUNETSY GARCIA LUZBET v MCI
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