Federal Court  Cour fédérale

Date: 20111014

Docket: IMM-791-11

Citation: 2011 FC 1150

Ottawa, Ontario, this 14th day of October 2011

Present: The Honourable Mr. Justice Kelen

BETWEEN:

ROSA MARIA QUIROZ MENDEZ
VIRIDIANA GARCIA QUIROZ

Applicants

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 the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 20, 2010, that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), because the applicants have adequate state protection in Mexico.

FACTS

Background

[2] The applicants are a mother and daughter from Mexico: Rosa Maria Quiroz Mendez (the principal applicant), and Viridiana Garcia Quiroz (the minor applicant), who was a minor at the time she made her claim, which was based upon the principal applicant's claim. They arrived in Canada on May 21, 2009, and claimed refugee status on June 15, 2009.

[3] The principal applicant was sexually abused by her father from ages 4-10. She married as early as possible to escape her traumatic home life. She married Alejandro Garcia Lugo (Alejandro) on September 6, 1980.

[4] The abuse continued in her new home: she was the victim of physical violence, forced sexual intercourse, and death threats from her husband over the course of their 24 years living as husband and wife. During that time, the principal applicant called the police on many occasions (approximately 50 times) to come and remove her husband, which the police did. However, each time she did not make a formal complaint. She states that she was afraid to make a complaint because her husband's brother was a federal police officer.

[5] In May 2004, after her husband beat her and terrorized her especially severely, the principal applicant made a formal complaint for the first time. Alejandro was arrested, but was released on bail less then twelve hours later. The principal applicant states that she received threats from her husband and his mother if she did not withdraw her complaint. Her husband's brother also offered her money to withdraw the complaint. In July 2004, she complied and withdrew the complaint.

[6] The principal applicant and her husband separated after the incident in May 2004, but she states that he continued to harass her, call her and threaten her. He would not sign divorce papers, but she received a divorce automatically after they were separated for two years, in August 2006.

[7] In 2009, Alejandro told the principal applicant's daughter – the minor applicant – that he was going to kill the principal applicant. They went to the police, but the principal applicant states that no protection was provided to them. The applicants left Mexico for Canada on May 21, 2009. They filed their claims for refugee protection on June 15, 2009.

The first request for adjournment

[8] On October 5, 2010, counsel for the applicants made an "urgent" request for adjournment of the hearing, scheduled for October 15, 2010. The request stated that the applicants had only retained counsel that day. It also stated that the principal applicant was not aware of the contents of her Personal Information Form (PIF): a community worker had completed the PIF and mistakenly directed the principal applicant to sign the declaration that she understood English. In fact, the principal applicant did not understand English, and the PIF was never translated to her.

[9] The request further stated that a lawyer was mistakenly listed as the principal applicant's counsel in the PIF, but in fact this lawyer had not worked on the PIF, but rather had only provided an opinion to Legal Aid on her behalf. Counsel requested the adjournment to correct errors and make additions to the applicants' PIF and narrative, and she provided several possible hearing dates.

[10] The request for adjournment was denied, and the hearing proceeded on October 15, 2010.

The hearing

[11] At the outset of the hearing, counsel made another request for adjournment. The Member asked whether the grounds were any different from the previous request, and counsel responded that there were new grounds.

[12] Counsel explained that she had discovered the day before that, through the Board's error, the applicants had never received the Board's disclosure package. The Board had at first claimed that it sent the disclosure package to the principal applicant and the lawyer listed as her counsel in the PIF; however, upon further inquiry, a staff member at the Board admitted that they had in fact not sent the disclosure package to the applicants.

[13] Counsel argued that it violated natural justice to require the applicants to prepare for and participate in the hearing without having the Board's disclosure package.

[14] The Member stated that, according to his records, the disclosure package was sent to the applicants. Counsel repeated that this was what the Board told her initially as well, but they later confirmed that they did not send the package to the applicants.

[15] At that point in the hearing, the following exchange occurred, the audio recording of which was played for the Court:

> MEMBER: Well, counsel, my … my file indicates otherwise. So did you manage to get a copy of the disclosure?
> COUNSEL: No, I called the lawyer but he …
> MEMBER: Okay, well …
> COUNSEL: … did not respond.

> MEMBER: … I am going to make you a copy and you can review them at break time …
> COUNSEL: Well I …
> MEMBER: … and we are proceeding today counsel, I mean there is nothing more to hear on this matter.
> COUNSEL: Could I speak to the legal department or something, I think it is in violation of …
> MEMBER: You can do so after the hearing.
> COUNSEL: … natural justice.
> MEMBER: You can do so after the hearing.
> COUNSEL: I did not know …
> MEMBER: [*Raised tone of voice, as evident from the audio recording*] Do you want a copy now or at break time?
> COUNSEL: I need to review it with my client and would need some time to sit with her …
> MEMBER: [*Harsh tone of voice*] I am giving you five minutes and then we are starting, with or without you. Okay, counsel, five minutes. It is 1:11, at 1:16 we are back in here.
> COUNSEL: Okay.
> MEMBER: You can take it up with legal after the hearing.

[16] Shortly after the hearing resumed, counsel repeated her objection to the hearing proceeding that day. Counsel also stated that she had not expected the hearing to proceed and had not made arrangements with her babysitter, and therefore she had to leave that day at 4:00 p.m. to pick up her daughter.

[17] The Member questioned the principal applicant until 2:30, at which point the hearing recessed for fifteen minutes. When the hearing resumed, the Member informed the counsel that she could question the applicants until 3:30 and then use the final 30 minutes for submissions, or she could question the applicants until 4:00 and provide written submissions within two weeks.

[18] At 3:30, the Member interrupted to remind counsel that she could use the remaining 30 minutes either to keep questioning or make her submissions. The following exchange occurred between the Member and counsel, as recorded in the hearing transcripts:

> COUNSEL: Well, I am going to have to question the minor claimant too, I want to question her.
> MEMBER: Well, that is fine, you are going to have to fit it in half an hour.
> COUNSEL: And suppose I am not done?
> MEMBER: Well…
> COUNSEL: My client as come all the way from Mexico to tell her story…
> MEMBER: That is fine, you have until 4:00 o'clock to finish questioning; I am telling you now…
> COUNSEL: There is no need sir for you to shout at me and to raise your voice…
> MEMBER: …gear your questions, if you want a few minutes we will take a little break and you can formulate your questions so that they fit within half an hour. You have to leave at 4:00 o'clock so you fit them in until 4:00.
> COUNSEL: Sir, I do not appreciate your tone of voice.
> MEMBER: Okay, we are taking a five minute break.
> COUNSEL: I did not come here to be shouted at…
> MEMBER: I heard you.
> COUNSEL: …not to raise your voice at me in that offensive manner…
> MEMBER: We are going to take a five minute break, when we return you are going to continue questioning; whether it is the principal claimant, the minor claimant, you decide, you are going to wrap up the questions at 4:00…
> COUNSEL: Sir, I feel very threatened by you, okay…
> MEMBER: …and you are going to…
> COUNSEL: …I feel extremely threatened by you right now, I am leaving; I feel threatened by you.
>
> (Underlining indicates a raised voice and intemperate tone.)

[19] At that point, counsel left the hearing room. The audio recording of this portion of the hearing was also played for the Court.

[20] In her affidavit, counsel for the applicants at the hearing stated that she is herself a victim of domestic violence, and she felt very afraid and threatened in the situation. After counsel left the hearing, the Member told the applicants that he was reserving his decision, and that he would direct their counsel to provide written submissions, as well as details on any areas of questioning she felt still needed to be done. He would then decide whether they needed to reconvene for further testimony.

[21] After the hearing, counsel for the applicants made a motion for the Member to recuse himself due to a reasonable apprehension of bias. As discussed below, the Member denied the motion for recusal in his reasons for the decision.

Decision under review

[22] In a decision dated December 20, 2010, the Board found that the applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the Act. The Board found that the determinative issue in the claim was the availability of state protection.

Motion for recusal

[23] Before analyzing the claims, the Board Member decided whether he must recuse himself because of a reasonable apprehension of bias. The Board summarized counsel's motion for recusal, and recounted the incident described above that occurred during the hearing.

[24] The Board stated the test for reasonable apprehension of bias, as formulated in *Committee for Justice and Liberty et al. v. National Energy Board et al.,* [1978] 1 S.C.R. 369 at 394:

> 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. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[25] The Board stated that the determination of whether there is a reasonable apprehension of bias must take into account the presumption of impartiality, and therefore a real likelihood of bias must be demonstrated. The Board also stated that all members of the Refugee Protection Division take an oath of office in which they affirm that they will carry out their duties impartially and comply with the *Code of Conduct for Members*. This Code of Conduct also affirms that members will make decisions on the merits of each case and not be influenced by improper considerations.

[26] The Board found that the test for a reasonable apprehension of bias was not met. The Board relied in the decision in *The Minister of Citizenship & Immigration v. Cetin*, [2007] F.C.J. No. 1786, Docket IMM-5621-06. In that case, the Court found that there was no reasonable apprehension of bias, but rather that the Minister's counsel had provoked the Member after the Member insisted that the hearing be completed within a certain time period. The Court also found that the Minister's counsel had been prevented from fully presenting his case by his own poor decision to leave the hearing.

[27] The Board found that this decision recognized the Board's authority to be "firm and measured with counsel with respect to the conduct of a hearing." The Board found that, as in *Cetin*, it was counsel's decision to leave the hearing prematurely instead of finishing questioning the claimants. The Board also found that counsel was attempting to provoke the Member, again similar to *Cetin*, which justified a "stern" response.

[28] The Board also addressed whether the hearing was incomplete because counsel had not yet questioned the minor applicant. The Board maintained that it had not prevented counsel from completing her questioning of the claimants as she saw fit, but also stated that the minor applicant's claim was based on the principal applicant's claim, and that counsel had not presented any persuasive evidence that the minor applicant's testimony was critical to determining the claims. The Board concluded that it was unnecessary to examine the minor claimant.

[29] The Board found no reasonable apprehension of bias, and denied the motion for recusal.

State protection

[30] The Board recited the guiding principles in determining whether there is adequate state protection. The Board stated that, except in situations of complete state breakdown, the state is presumed to be capable of protecting its citizens. To rebut this presumption, the Board stated that the claimants must provide "clear and convincing" evidence of the state's inability to protect its citizens: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

[31] The Board stated that claimants are required to approach the state for protection "in situations where state protection might be reasonably forthcoming": *Ward*, above. The Board went on that, in "the absence of a compelling explanation, a failure to pursue state protection opportunities within the home state will usually be fatal to a refugee claim, at least where the state is a functioning democracy with a willingness and the apparatus necessary to provide a measure of protection to its citizens." The Board concluded from the evidence before it that Mexico is a democracy, and therefore found that the claimants "must show that they have taken all reasonable steps in the circumstances to seek protection."

[32] The Board then reviewed the principal applicant's testimony regarding her efforts to seek state protection. It noted that the principal applicant called the police on many occasions, and each time she called they came and took her husband away, sometimes detaining him. On all but one occasion, the principal applicant did not file a complaint because she feared what her husband would do. On the one occasion she filed a formal complaint, she eventually withdrew it after her husband and his family threatened her and offered her money.

[33] The Board found that the principal applicant's failure to file complaints against her husband was unreasonable. The Board found that if the principal applicant had pursued a formal complaint, her husband would have been incarcerated. The Board noted that the principal applicant did not report her husband and his family's threats and bribes to the police, and that "no persuasive evidence was presented to indicate that the police would not take further action if the threats and bribes were also reported to them."

[34] The Board rejected the argument that the principal applicant was afraid to file a formal complaint because her husband's brother was a police officer: the Board found no persuasive evidence that this brother had any influence over police decisions, and given that the principal applicant's husband was aware each time she called the police, the fact that his brother was a police officer would have had little effect on the consequences of filing a complaint.

[35] The Board acknowledged that the documentary evidence indicated problems with regard to corruption in Mexico:

> [45] I would be remiss if I did not acknowledge and consider that there is information in the documentation to indicate that inefficiency, bribery and corruption remain issues in Mexican security forces at all levels, as well as within the public service sector. However, weighed against this is persuasive evidence that indicates that Mexico candidly acknowledges its past problems and is making serious efforts to rectify the corruption and impunity that exists.

[36] The Board reviewed the United States Department of State *Country Report on Human Rights Practices for 2009* for Mexico (DOS Report), and a 2007 report titled "A Profile of Police Forces in Mexico." The Board found that the preponderance of evidence suggested that, despite some problems with corruption, Mexico was able to protect victims of crime. He extensively reviewed efforts to combat police corruption, and the creation of new bodies to address organized crime and drug cartels.

[37] The Board then turned to the issue of domestic and gender-based violence in Mexico: "Mexico has had problems in the past in dealing with domestic violence and violence against

women. However, there is persuasive evidence that indicates that Mexico candidly acknowledges its past problems and is making serious efforts to deal with these issues."

[38] The Board referred to the portion of the DOS Report entitled 'Women,' which stated that Mexico had enacted legislation prohibiting domestic violence and imposing detention and fines for violating that legislation. The Board stated there was federal legislation specifically addressing violence against women, and that many states have laws prohibiting domestic violence. The Board also noted the presence of women's shelters, a hotline for female victims of domestic abuse, and a National Institute for Women.

[39] The Board acknowledged the evidence that victims fail to report abuse for a number of reasons, including "fear of reprisal by the perpetrator." The Board noted that the new legislation was in part focused on making victims more aware of the remedies available to them.

[40] The Board stated that it had considered the documentary evidence submitted by the applicants regarding state protection. It reviewed a few individual pieces of documentary evidence, but found that some of it was unsupported and therefore deserving of little weight.

[41] The Board stated at paragraph 63:

> . . . Counsel has also included many articles about domestic abuse and gender violence issues and cases from Mexico and around the world. I accept that many countries around the world struggle to deal effectively with these issues, however, many countries, such as Mexico, have enacted laws to combat domestic violence and violence against women and have put in place measures to ensure that the laws are enforced.

[42] The Board concluded that the applicants had failed to rebut the presumption of state protection, and that therefore their claims failed.

LEGISLATION

[43] Section 96 of the Act grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[44] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[45] Subsection 48(4) of the *Refugee Protection Division Rules*, SOR/2002-228, requires the Board to consider any relevant factors in deciding whether to grant an application to change the date or time of a proceeding:

48. (4) In deciding the application, the Division must consider any relevant factors, including

(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

(*b*) when the party made the application;

(*c*) the time the party has had to prepare for the proceeding;

(*d*) the efforts made by the party to be ready to start or continue the proceeding;

(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed

48. (4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :

a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

b) le moment auquel la demande a été faite;

c) le temps dont la partie a disposé pour se préparer;

d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;

e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de

in the absence of that information without causing an injustice;

(*f*) whether the party has counsel;

(*g*) the knowledge and experience of any counsel who represents the party;

(*h*) any previous delays and the reasons for them;

(*i*) whether the date and time fixed were peremptory;

(*j*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and

(*k*) the nature and complexity of the matter to be heard.

l'avant en l'absence de ces renseignements sans causer une injustice;

f) si la partie est représentée;

g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

h) tout report antérieur et sa justification;

i) si la date et l'heure qui avaient été fixées étaient péremptoires;

j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;

k) la nature et la complexité de l'affaire.

[46] Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22,

states that costs will only be awarded for special reasons:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

22. Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

ISSUES

[47] The applicants raise the following issues in their submissions:

a. That the Board erred in its analysis of whether there was a reasonable apprehension of bias by the Board Member hearing this case;

b. That the Board denied the applicants procedural fairness:

i. By refusing to grant the applicants an adjournment following its failure to provide the applicants with disclosure;

ii. By not allowing the applicants a reasonable opportunity to present their case by limiting their counsel's ability to question them;

c. That the Board selectively used the evidence, ignored the evidence and misconstrued the evidence resulting in a flawed state protection analysis.

[48] I would reframe the issues as follows:

a. Did the Board breach the principles of procedural fairness by refusing to grant an adjournment or by refusing to grant an additional hearing?

b. Did the Board's conduct give rise to a reasonable apprehension of bias?

c. Was the Board's finding regarding state protection unreasonable?

STANDARD OF REVIEW

[49] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (M.C.I.) v. Khosa*, [2009] 1 S.C.R. 339, per Justice Binnie at para 53.

[50] The question of whether the applicants rebutted the presumption of state protection is a question of mixed fact and law, to be reviewed on a standard of reasonableness: see my decisions in

Monjaras v. Minister of Citizenship and Immigration, 2010 FC 771 at para 15; and *Perez v. Minister of Citizenship and Immigration*, 2009 FC 1029 at para 25.

[51] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47; *Khosa*, above, at para 59.

[52] Questions of procedural fairness, including whether the Board's conduct gives rise to a reasonable apprehension of bias, are to be reviewed on a standard of correctness: *Dunsmuir*, above at paras 55 and 90; and *Khosa*, above at paragraph 43.

ANALYSIS

Issue #1: Did the Board breach the principles of procedural fairness by refusing to grant an adjournment or by refusing to grant an additional hearing?

The adjournment request

[53] The applicants submit that they were denied the ability to review the Board's disclosure before the hearing, and therefore they did not know the case to be met against them. Counsel informed the Board that the disclosure was not sent to the applicants in error, and the applicants submit that the Board's refusal of the adjournment in light of this information breached the principles of procedural fairness.

[54] The respondent submits that the Board's denial of the adjournment was reasonable, in light of the ample time the applicants had to retain and instruct counsel. The respondent further submits that the applicants have not demonstrated that they were denied a fair hearing as a result of being denied the adjournment, and therefore there was no breach of procedural fairness.

[55] The granting of adjournments or postponements is discretionary in nature and there is no presumption of entitlement: *Sierra v. Minister of Citizenship and Immigration*, 2009 FC 1048 at para 56. However, the Board is required to consider all relevant factors before reaching its decision. Subsection 48(4) of the *Refugee Protection Division Rules*, reproduced above, contains a non-exhaustive list of relevant factors in this determination.

[56] As I stated previously in *Modeste v. Minister of Citizenship and Immigration*, 2006 FC 1027, the Board must at least indicate that it has turned its mind to these factors before issuing a negative decision on a request for adjournment. As Madam Justice Carolyn Layden-Stevenson stated in *Ramadani v. Minister of Citizenship and Immigration*, 2005 FC 211 at paragraph 11:

> In my view, the RPD must, at a minimum, indicate that it has had regard to the relevant factors enumerated in *Siloch, supra*, before arriving at a negative decision. Its failure to do so constitutes a reviewable error. I note that my colleagues Madam Justice Heneghan and Mr. Justice O'Keefe arrived at a similar conclusion in *Dias v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 125, 2003 FC 84 and *Sandy v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1770, 2004 FC 1468.

[57] Relying upon the hearing transcripts, the Court finds that the Board failed to consider the relevant factors before denying the adjournment. The Board stated that its records indicated that the

applicants had in fact received disclosure. When counsel responded that she had received confirmation that the disclosure was never sent, the following exchange occurred:

> MEMBER: Well, counsel, my … my file indicates otherwise. So did you manage to get a copy of the disclosure?
> COUNSEL: No, I called the lawyer but he …
> MEMBER: Okay, well …
> COUNSEL: … did not respond.
> MEMBER: … I am going to make you a copy and you can review them at break time …
> COUNSEL: Well I …
> MEMBER: … and we are proceeding today counsel, I mean there is nothing more to hear on this matter.

[58] The Board gave no indication that it had considered any of the factors set out in subsection 48(4) of the *Refugee Protection Division Rules*. The Court finds that, had the Board considered those factors, at least some of the factors may have weighed in favour of granting the adjournment.

[59] The failure of the Board to send the disclosure package to the applicants would likely constitute "exceptional circumstances" for allowing an adjournment. The lack of disclosure also impacted the amount of time the applicants had to prepare for the hearing. Counsel emphasized that she had made efforts to obtain the Board's disclosure and prepare for the hearing, by contacting the Board and the lawyer mistakenly listed as counsel on the principal applicant's PIF.

[60] Thus, the denial of the application for adjournment in this case, without any analysis of the relevant factors, constitutes a reviewable error by the Board. On its face, the denial constitutes a breach of the rules of natural justice and the right to a fair hearing. It is not a fair hearing if counsel

for the applicants was not able to properly prepare for the hearing, as stated by Justice Sean Harrington in *Anand v. Minister of Citizenship and Immigration*, 2004 FC 302 at paras 1 and 4:

> [1] Fundamental rights can never be sacrificed at the altar of administrative efficiency. . . .
>
> [4] Shortly before the scheduled hearing of his application his lawyer wrote to say he could no longer act. Mr. Anand appointed a new lawyer who asked for a postponement at the hearing as she was not fully prepared not only because of the freshness of the appointment but also because she was only able to obtain some of the documentation from his former lawyer a few days earlier. The Board refused to grant an adjournment

[61] The application for judicial review must therefore be granted, and the applicants' claims remitted to the Board for re-determination by a different panel.

Request for additional hearing

[62] While it is not necessary to address this issue in light of the Court's finding regarding the adjournment request, the Court finds that the refusal to grant additional hearing time did not constitute a breach of procedural fairness.

[63] When the hearing ended before counsel had completed her questioning of the applicants, the Board instructed counsel to make detailed written submissions on any remaining areas of questioning of the principal applicant, and proposed areas of questioning of the minor applicant, to allow the Board to determine whether to reconvene for additional testimony.

[64] Counsel's written submissions did not provide details on the relevant areas of questioning remaining, but simply stated the need for further questioning on the "core issues of state protection and IFA." The submissions also asserted that counsel "wishes to question the minor claimant, as well." However, no further details of the proposed questioning were provided.

[65] Thus, the Court finds that the Board afforded the applicants the opportunity to rectify any potential unfairness that may have resulted from insufficient time during the hearing. Based on the submissions provided by counsel, it was open to the Board to decide that no additional hearing time was necessary to ensure procedural fairness. The Court therefore finds no breach of procedural fairness in this aspect of the Board's decision.

Issue #2: Did the Board's conduct give rise to a reasonable apprehension of bias?

[66] The applicants submit that the Board's conduct gave rise to a reasonable apprehension of bias. While the applicants have framed their submissions in terms of the reasonableness of the Board's decision regarding reasonable apprehension of bias, the Court finds that the Board is entitled to no deference in its decision on this issue.

[67] The test for a reasonable apprehension of bias is not in dispute. The oft-cited articulation of the test comes from the dissenting opinion of Justice de Grandpré at page 394 of *Committee for Justice and Liberty et al., supra*:

> 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. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[68] Bias is a serious allegation, and therefore it cannot be based on conjecture, speculation or mere impression: *Arrachch v. Minister of Citizenship and Immigration,* 2006 FC 999; *Arthur v. Attorney General,* 2001 FCA 223, (2001), 283 N.R. 346. Given the presumption of impartiality on the part of the decision-maker, a real likelihood of bias must be demonstrated by the applicants: *Arsenault-Cameron v. Prince Edward Island,* [1999] 3 S.C.R. 851 at paragraph 2.

[69] The applicants submit that denying the request for adjournment raised a reasonable apprehension of bias. They argue that the Member disregarded counsel's explanations regarding the lack of disclosure, and cut counsel off in her arguments for the adjournment. This conduct, the applicants submit, demonstrated that the Member had a closed mind to the applicants and their counsel.

[70] The applicants also submit that the Board's refusal to grant an additional hearing day gives rise to a reasonable apprehension of bias. Given that counsel had questioned the principal applicant for less than one hour, and given that there were two claimants in the case, the applicants submit that the Board's insistence on concluding the hearing that day demonstrated that it was not open to persuasion.

[71] The applicants further submit that the Member's conduct was intemperate during the hearing, which caused counsel to fear for her safety and leave the hearing room. The applicants submit that the Member shouted at counsel, and they direct the Court to the hearing transcript, and to the audio recording of the hearing. The applicants also rely on a sworn affidavit from their counsel at the hearing, which states that the Member shouted at her and acted aggressively towards her.

[72] The applicants point out that the Member left his chair during this incident. They submit that the Board's decision misconstrues this by stating that the hearing was about to recess, and that is why the Member had left his chair. The applicants submit that the hearing had not recessed.

[73] The applicants submit that when the totality of the circumstances are considered, an informed person, viewing the matter realistically and practically – and having thought the matter through, would think that the Member would more likely than not, not decide the claims fairly.

[74] The respondent submits that when viewed in context, the Member's reaction was not so out of proportion to counsel's behaviour as to raise a reasonable apprehension of bias. The respondent acknowledges that the Member raised his voice and spoke sternly, but submits it was in response to counsel's refusal to accept his rulings. The respondent further submits that the Board was entitled to rely on a Statement of Service stating the applicants received disclosure, and therefore the decision to deny the adjournment did not give rise to a reasonable apprehension of bias.

[75] The Court does not agree with all of the applicants' characterizations of what occurred during the hearing. It is clear that there was a disagreement between the Member and counsel regarding (a) whether to adjourn the hearing; and (b) whether to grant an additional hearing day for further questioning. Counsel for the applicants is partly to blame for this conflict: she did not expect the hearing to proceed, and therefore had not made arrangements to stay as long as necessary to complete the hearing. It was counsel's responsibility to be prepared to proceed if the request for adjournment was denied. Her failure to be prepared precipitated the incident at the end of the hearing.

[76] Furthermore, the hearing transcripts indicate that the Member had tried to initiate a recess when the applicants allege that he left his chair. He stated: "Okay, we are taking a five minute break." Thus, the Member's explanation that he was out of his chair because the hearing was about to recess is plausible.

[77] However, considering the totality of the circumstances, and even in light of the presumption of impartiality of the Board, the Court finds that there was a reasonable apprehension of bias in this case.

[78] In *Guermache v. Minister of Citizenship and Immigration*, 2004 FC 870, Justice Luc Martineau described the importance for a Board member to conduct the hearing in a proper manner:

> [4] Members have a difficult but essential role to play. . . .

> [5] With that in mind, the scale of the members' tasks must not cause them to lose sight of the fact that the rules of natural justice must be observed and that their conduct during hearings and applications for protection must, at all times, be irreproachable and objective. It goes without saying that the most basic courtesy and politeness are *de rigueur*. There is no place for intimidation, contempt, and offensive innuendo, nor for harshness or inappropriate language. As the Right Honourable Mr. Justice Fauteux wrote in the *Livre du magistrat* ["a book for judges"], "[TRANSLATION] The judge will ensure the climate necessary for the operation of justice by his moderation, his discipline and his courtesy in his relations with counsel, the parties and the witnesses." (The Right Honourable Gérald Fauteux, *Le livre du magistrat*, Minister of Supply and Services Canada, 1980, at page 49).

[79] Thus, the presiding Member must conduct the hearing in an objective, moderate, irreproachable manner, with politeness and basic courtesy. The Court knows, as Justice Harrington said in *Anand*, above, at paragraph 13, that the Board has "a heavy workload and tight scheduling." Board members are under stress. In the case at bar, counsel for the applicants before the Board refused to accept the Board Member's procedural ruling that she complete her questioning by 4:00 p.m., which was the time she said she had to leave to pick up her child from the babysitter.

[80] The Board Member then raised his voice in an intemperate manner at the applicants' counsel. Counsel for the respondent before the Court described the Board Member as "shouting" at the applicants' counsel. The Board Member was very frustrated by her refusal to finish her questioning by 4:00 p.m., which was the deadline she imposed upon herself.

[81] Upon listening three times to the relevant excerpts of the audio recording, the Court can only conclude that the presiding Member lost control of his demeanour, raised his voice by shouting in

an angry tone, which reflected that he lost his temper with the applicants' counsel. A reasonable observer in the hearing room would likely think that the presiding Member was angry at the applicants' counsel, and in a state of mind against the applicants. If a judge is angry and shouting at a lawyer, a reasonable person would have a reasonable apprehension that the judge was biased against that lawyer's case.

[82] Thus, the Court finds that a reasonable person informed of all these circumstances would conclude that the Board would more likely than not, not decide the matter fairly.

Issue #3: Was the Board's finding regarding state protection unreasonable?

[83] The Court will not need to decide this issue to determine the application for judicial review. However, the Court must note that the Board Member gave "very little weight" to the declaration of Dr. Alicia Elena Pérez Duarte y Norona, which stated that Mexican officials responsible for enforcing the laws against domestic and gender-based violence are negligent. In two judgments of this Court, decided subsequent to the Board's decision in this case, Justices Roger T. Hughes and Donald J. Rennie recognized Dr. Pérez Duarte y Norona as a credible expert and gave her evidence great weight: see *I.M.P.P. v. Minister of Citizenship and Immigration*, 2011 FC 712 at paras 9-11; and *Rodriguez v. Minister of Citizenship and Immigration*, 2011 FC 1017 at para 12.

COSTS

[84] The applicants submit that the "egregious conduct by the Board Member" justifies the awarding of costs on a solicitor and client basis. I stated the following regarding granting costs in

immigration cases in *Yadav v. Minister of Citizenship and Immigration*, 2010 FC 140, at paragraph 39:

> In terms of costs, the threshold for "special reasons" within the meaning of Rule 22 is high. In other words, in immigration litigation there is a "no costs" regime. Special reasons may exist where the Minister's conduct is "unfair, oppressive, improper or actuated by bad faith." See: *Uppal v. Canada (MCI)*, [2005] F.C.J. No. 1390 (QL) at paragraph 8 (QL). There was no malicious intent on the part of respondent or on the part of the applicant in bringing this motion. . . .

[85] I do not find the Board's conduct in this case so egregious as to justify the granting of costs. The Board Member was provoked by counsel at the hearing.

CONCLUSION

[86] The Court finds that the Board's decision must be set aside because of the Board's failure to consider all the relevant factors in deciding whether to grant an adjournment, and because the Member's conduct gave rise to a reasonable apprehension of bias. Therefore, the judicial review is granted, and the applicants' claims will be sent back to the Board for re-determination by a different panel.

[87] No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, and the applicants' claims are referred back to the Immigration and Refugee Board for reconsideration by a different panel.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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