Federal Court  Cour fédérale

**Date: 20120402**

**Docket: IMM-3236-11**

**Citation: 2012 FC 385**

**Ottawa, Ontario, April 2, 2012**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**CARLOS CLARA VAZQUEZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, a citizen of Mexico, claimed refugee protection based on allegations that he had been threatened and assaulted by members of an organized crime group and corrupt government officials. The hearing before the Refugee Protection Division of the Immigration and Refugee Board (the Board) was to take place on March 11, 2011. Two days before the hearing, the applicant requested a postponement of the hearing in order to seek legal counsel. This request was rejected. At the hearing, the applicant requested an adjournment on the same grounds. This request was again rejected and the hearing proceeded. In a decision dated March 21, 2011, the Board

rejected the applicant's claim for refugee protection. The Board found that the applicant had not provided credible and trustworthy evidence that was sufficient to support his alleged fear of returning to Mexico.

[2] For the following reasons, the application for judicial review is allowed.

## I. Issues

[3] The applicant challenges the Board's decision on several fronts. First, he alleges that by refusing to adjourn the hearing, the Board breached his right to a fair hearing. The applicant also challenges the Board's negative credibility findings and, in addition, alleges that the Board failed to deal with his alleged fear of persecution based on his aboriginal identity.

[4] It is not necessary for me to deal with all the arguments raised by the applicant as I find that the issue of procedural fairness is determinative in this case. A finding that the Board breached its duty to ensure procedural fairness does not warrant any deference and requires this Court to set aside the Board's decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 53-54, [2006] 3 FCR 392).

## II. Decision under review

[5] Two days prior to the hearing, Ms. Geraldine Sadoway, a staff lawyer from the Parkdale Community Legal Services Clinic, requested a postponement of the hearing on behalf of the applicant. In her letter, Ms. Sadoway stated that the applicant had visited the clinic in February 2011 in order to secure legal representation for his refugee claim hearing. However, due to the fact that

the clinic is a teaching clinic with rotating law students and due to workload issues, they were unable to represent the applicant at that time. She stated that if the hearing was postponed until mid-May or early June 2011, the clinic would then be able to represent the applicant. Ms. Sadoway also proposed several alternative dates in May or early June to reschedule the hearing.

[6] The request for a postponement was rejected.

[7] At the hearing, the applicant requested an adjournment for the same reasons; he stated that he did not want to proceed without assistance and wished to be assisted by a lawyer.

[8] In its written decision, the Board indicated that careful consideration was given to the request for an adjournment, as well as the factors outlined in Rule 48 of the *Refugee Protection Division Rules* (SOR/2002-228) [the Rules]. The Board member explained to the applicant why his request for a postponement was refused:

a. The applicant was in Canada since May 2009 and had been referred to the Board in July 2009; he had been in Canada for a sufficient amount of time to find representation;
b. At the scheduling conference that he attended on January 27, 2011, the Board made the applicant aware of his right to counsel and the fact that he had between January 27, 2011 and the hearing date, to secure legal representation;
c. The hearing was scheduled peremptorily and, therefore, the hearing was to proceed unless there were exceptional circumstances;

d. The applicant had signed the Confirmation of Readiness declaration one month prior to the hearing on January 27, 2011; and

e. The request for postponement was made very late and all the resources devoted to proceeding could not be reallocated efficiently at the last minute. The situation might have been different if the applicant had made the request in advance.

[9] The Board noted that it found the last two reasons particularly relevant to its decision to refuse to adjourn the hearing and found that there were no exceptional circumstances that warranted granting the adjournment.

III. Analysis

[10] It is well established that the decision to allow a postponement or an adjournment falls within the Board's discretion. Furthermore, the right to counsel is not absolute in immigration matters and the Board is master of its own procedure. However, in determining whether to allow an adjournment based on the absence of representation by counsel, the Board must respect procedural fairness (*Golbom v Canada (Minister of Citizenship and Immigration)*, 2010 FC 640 at para 11 (available on CanLII) [*Golbom*]; *Conseillant v Canada (Minister of Citizenship and Immigration)*, 2007 FC 49 at para 12, 159 ACWS (3d) 259; *Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423 at para 6, 147 ACWS (3d) 1048; *Siloch v Canada (Minister of Employment and Immigration)* (1993) 38 ACWS (3d) 570, 151 NR 76 (FCA) [*Siloch*]; *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568-569, 57 DLR (4th) 663).

[11] Subsection 48(4) of the Rules sets out non-exhaustive factors to be considered by the Board in deciding whether to grant an adjournment. It reads as follows:

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| 48. (1) A party may make an application to the Division to change the date or time of a proceeding. | 48. (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure. |
| Form and content of application | Forme et contenu de la demande |
| (2) The party must | (2) La partie : |
| (*a*) follow rule 44, but is not required to give evidence in an affidavit or statutory declaration; and | a) fait sa demande selon la règle 44, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle; |
| (*b*) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding. | *b*) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure. |
| If proceeding is two working days or less away | Procédure dans deux jours ouvrables ou moins |
| (3) If the party wants to make an application two working days or less before the proceeding, the party must appear at the proceeding and make the application orally. | (3) Si la partie veut faire sa demande deux jours ouvrables ou moins avant la procédure, elle se présente à la procédure et fait sa demande oralement. |
| Factors | Éléments à considérer |
| (4) In deciding the application, the Division must consider any relevant factors, including | (4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment : |
| (*a*) in the case of a date and time that was fixed after the | *a*) dans le cas où elle a fixé la date et l'heure de la procédure |

Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

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

*b*) le moment auquel la demande a été faite;

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

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

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

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

(*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 in the absence of that information without causing an injustice;

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

(*f*) whether the party has counsel;

*f*) si la partie est représentée;

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

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

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

*h*) tout report antérieur et sa justification;

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

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

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

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

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

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

[12] In addition, the jurisprudence of this Court and the Federal Court of Appeal has recognized that other factors may be relevant to a Rule 48 analysis, such as the efforts made by the applicant to secure legal representation and whether he or she can be faulted for not being ready to proceed (*Golbom*, above, at para 13; *Siloch*, above, at para 15; *Modeste v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027 at para 15, 299 FTR 95 [*Modeste*]; *Sandy v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468 at para 52, 260 FTR 1 [*Sandy*]).

[13] Further, it has been held on numerous occasions that a failure to consider relevant negative and positive factors in deciding whether to grant an adjournment, constitutes a breach of the duty to act fairly (*Golbom*, above, at para 13; *Sandy*, above, at para 54; *Modeste*, above, at paras 18-19; *Austria*, above, at para 14; *Siloch*, above).

[14] The applicant argues that the Board failed to consider several factors that militated in favour of granting the requested adjournment, namely:

a. That he had made serious efforts to retain counsel and had approached several lawyers that were charging fees that he could not afford;
b. That he was finally able to secure free legal representation through the Parkdale Community Legal Services Clinic but that nobody was available to assist him at the scheduled date, due to workload issues. However, the letter sent to the Board by Ms. Sadoway stated that the clinic was willing to represent the applicant and would be able to represent him if the hearing was adjourned until mid-May or early June. She even proposed several possible dates for a hearing in May or June 2011;

c. That the length of the requested adjournment was short;

d. That there were no previous requests for postponement made by the applicant;

e. That he had no choice other than to sign the readiness to proceed declaration, considering that failure to do so would have led to an abandonment of the proceedings;

f. That he was clearly uncomfortable with proceeding without legal representation and felt that his lack of representation was prejudicial to his ability to present his case;

g. That the nature of the issues were complex and difficult for an unrepresented claimant to address properly; and

h. That his failure to be represented jeopardized his ability to articulate his fear related to his aboriginal identity.

[15] The respondent argues that the Board did in fact consider all of the relevant factors and that the Court ought to examine the Board's assessment on the basis of the entire record and the transcript of the hearing. The respondent maintains that there is no evidence on the record to indicate when the applicant started looking to secure legal representation. The respondent added that the Board clearly stated that it considered all of the factors set forth in Rule 48 and that it explicitly dealt with the factors that he considered determinative. The respondent submits that it appears from a review of the transcript of the hearing, that the Board member considered, in addition to the factors mentioned in his decision, the fact that request for an adjournment was made at the very last minute and that the applicant had 20 months to prepare for his hearing. The respondent further argues that there was no formal commitment from the Parkdale Community Legal Services Clinic to represent the applicant and that the hearing had been set peremptorily.

[16] The respondent also contends that the transcript of the hearing shows that the applicant was able to participate fully in the hearing. The central findings of the Board related to the numerous inconsistencies and discrepancies in the applicant's history and the applicant did not need counsel to give a credible account of his allegations. Therefore, the fact that he was self-represented did not impact on the fairness of the hearing or on the outcome of the Board's findings.

[17] The respondent further argues that the applicant never raised any claim related to his alleged aboriginal identity. It submits that the mere filing of a declaration of identity at the hearing is not sufficient to conclude that he based his claim on persecution, as a result of his aboriginal identity. Moreover, the respondent insists that the declaration letter that the applicant filed at the hearing does not mention any fear of persecution or risk to the applicant's life.

[18] I am not satisfied that the Board weighed all of the relevant factors in determining whether to grant the postponement. It is not sufficient for the Board to state that it considered all the factors listed in Rule 48. The record and the decision must show that the Board did, in fact, consider the positive and negative factors in its assessment. In *Ramadani v Canada (Minister of Citizenship and Immigration)*, 2005 FC 211 at para 13, 137 ACWS (3d) 383, Justice Layden-Stevenson underscored that the Board must "in its deliberations, weigh the factors militating in favor of and against the granting of the requested adjournment."

[19] In the present case, the Board seems to weigh heavily on the fact that the hearing had been scheduled peremptorily, the applicant had signed the readiness declaration and his request for a

postponement was made very late. While I acknowledge that efficiency and resource allocation are certainly very relevant matters, they must be weighed and balanced against the other positive factors. A reading of the transcript and of the Board's decision leads me to conclude that the Board failed to consider the applicant's efforts to seek legal representation, together with the fact that he was finally able to secure free legal representation from the Parkdale Community Legal Services Clinic. I do not agree with the respondent that there was no commitment from the clinic to represent the applicant. Ms. Sodaway's letter clearly indicated that they would be able to represent the applicant if the hearing was postponed to either mid-May or early June. Moreover, the Board does not seem to have considered the short length of the requested postponement. The applicant was not responsible for the time that it took for the Board to schedule the hearing and he had not requested any prior postponement. In addition, I find that, in the circumstances of this case, it was unreasonable to give significant weight to the fact that the applicant had signed the letter for readiness to proceed. While I acknowledge that it was a relevant factor, it was not determinative, given that a failure to sign the declaration would have led to an abandonment of the proceeding. The applicant explained that he signed the declaration because he did not know what else to do. The Board also did not consider the fact that the applicant was clearly uncomfortable with proceeding without the assistance of counsel and that he mentioned his reluctance on numerous occasions both before and during the hearing.

[20] Therefore, I am not satisfied that the Board considered all of the relevant factors before arriving at a negative decision and, in failing to do so, it breached its duty to act fairly.

[21] In *Austria*, above, at para 6, Justice Tremblay-Lamer stressed that the right to counsel was not absolute, but that the right to a fair hearing was. Referring to a judgment rendered by Justice Harrington in *Canada (Minister of Citizenship and Immigration) v Fast* (2001), [2002] 3 FC 373 at paras 46-47, 208 DLR (4th) 729 (TD), Justice Tremblay-Lamer outlined that, in order to fulfil the duty of fairness, the applicant must be able to participate in a meaningful way at the hearing.

[22] It is clear from the transcript of the hearing that the applicant was very nervous, and reluctant and uncomfortable to proceed without legal representation. He raised the issue at least seven times during the hearing and in the beginning refused to answer the questions that the Board member asked him. The applicant also alleges that if he had been represented, he would have been able to articulate the other basis for his claim, relating to his aboriginal identity. In these circumstances, as I am not able to appreciate the full extent of the prejudice, if any, to the applicant, I find it even more prudent to send the file back for re-determination.

[23] For all of the above reasons, the application for judicial review is allowed. The parties did not propose any question for certification and none arises in this case.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the applicant's claim for refugee protection is sent back for re-determination by a different panel of the Board. No question is certified.

"Marie-Josée Bédard"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3236-11 |
| **STYLE OF CAUSE:** | CARLOS CLARA VAZQUEZ v MCI |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | March 14, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | BÉDARD J. |
| **DATED:** | April 2, 2012 |

**APPEARANCES:**

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| Lily Tekle | FOR THE APPLICANT |
| Rachel Hepburn Craig | FOR THE RESPONDENT |

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