Federal Court Cour fédérale

Date: 20131209

Docket: IMM-11262-12

Citation: 2013 FC 1232

Ottawa, Ontario, December 9, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ORISON RAMIREZ VELA
by his litigation guardian SUSAN WOOLNER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application, pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision of the Immigration and Refugee Board [the "Board"] dated October 11, 2012, refusing the applicant's claim for refugee protection.

Background

[2] The applicant is a citizen of Peru who claims that if returned he will be persecuted by a narco-terrorist named Mr Tecse. Tecse was allegedly associated with a known convicted drug trafficker named Zevallos.

[3] The applicant worked for the National Institute of Culture ["NIC"] in Peru. In the course of his duties, he reviewed an application for a permit to use a facility, filed by Tesce. This permit application was on behalf of an organization called the Association of Producers and Artisans ["APAR"]. The applicant refused to issue a permit because APAR was not a registered organization.

[4] The applicant was allegedly told by a colleague that Tesce was a narco-terrorist. On January 9, 2007, Tesce filed a complaint against the applicant and his manager, accusing them of racism. The applicant allegedly began receiving threats. He filed a report with the police.

[5] The threats continued. In March 2007, the applicant was beaten in the street. He moved around to different places but was found.

[6] The applicant fled to Canada on June 20, 2007, and made a claim for refugee protection.

[7] In its decision, the Board made a number of adverse credibility findings because the applicant's testimony contained a number of inconsistencies, and he provided misleading evidence.

The Board also found that if Tesce were truly a narco-trafficker, the applicant would have been able to produce reliable evidence to substantiate that claim. He did not.

Issues

[8] The issues before the Court are:

a. Did the Board proceedings give rise to a reasonable apprehension of bias?

b. Did the Board err in its credibility assessment or in its assessment of the evidence?

Standard of Review

[9] With respect to the interpretation of provisions governing the appointment of a designated representative, because these relate to fundamental fairness in ensuring that a party is able to appreciate the nature of the proceedings, the issue engages a standard of correctness. See for instance *Black v Canada (Minister of Citizenship and Immigration)*, 2009 FC 703 at paras 29, 31:

> **29** The Applicant submits the following issue on this application:
>
> 1) Whether the IAD breached the Applicant's right to procedural fairness by not meaningfully appointing a designated representative.
>
> [. . .]
>
> **31** The issue raised by the Applicant involves a question of procedural fairness: I find the appropriate standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

[10] Conversely, with respect to a Board member's exercise of discretion to determine whether an applicant can appreciate the proceedings, based on the testimony at the hearing, the standard of review is the deferential one of reasonableness. Similarly, a refusal to grant an adjournment,

although an aspect of fairness, is a matter of mixed fact and law and also attracts a standard of reasonableness. So too is reasonableness the appropriate standard for issues concerning a Board member's evaluation of the evidence and credibility determinations (*Pathmanathan v Canada (MCI)*, 2012 FC 519 at paras 27-30).

Analysis

A. Did the Board proceedings give rise to a reasonable apprehension of bias?

[11] The applicant claims that the member's actions gave rise to an apprehension of bias when he refused to appoint a designated representative or to adjourn the preceding once aware of the applicant's difficult mental and physical situation. Related to this issue is the submission that the member erred in his credibility assessments because of his refusal to give proper consideration to the medical evidence suggesting that the applicant was not able to properly participate in the proceedings.

[12] With respect to the underlying issues said to inform a claim of apprehension of bias, the respondent makes a twofold argument:

(i) First, no prejudice was occasioned the applicant as a result of the member's not appointing a designated representative or adjourning the matter; and

(ii) Second, the applicant demonstrated by his answer to the member's questions that he was capable of appreciating the nature of the procedures such that he did not meet the requirements for the appointment of a designated representative. Furthermore, in the circumstances that occurred at the hearing, an adjournment was not denied, nor apparently required.

(i) No Prejudice

[13] I am in agreement with the respondent that regardless of the circumstances of the failure to appoint a designated representative or to adjourn the matter, no prejudice occurred to the applicant.

[14] The impugned events occurred at the opening of the hearing on April 6, 2010. The proceedings of that day were much truncated due to the applicant's physical condition of vomiting. As a result the hearing was brief, limited only to questions about the appointment of a designated representative and some preliminary considerations with respect to the personal information form. In addition, the member provided some general explanations to the applicant on how the matter would proceed in the future.

[15] When the hearing resumed 11 months later in March 2011, the member countermanded his earlier decision refusing to appoint a designated representative. After further questioning of the applicant, he concluded that he was not capable of appreciating the nature of the proceedings and required assistance of a designated representative. The matter was then adjourned and not brought back on until September of the same year. The evidence upon which the decision was based was introduced after the appointment of the designated representative.

(ii) The Initial Refusal to Appoint a Designated Representative and Adjourn the Hearing

[16] Although no direct prejudice can be said to have resulted from the refusal to appoint a designated representative or adjourn the proceedings, these issues nevertheless retain some relevance. The applicant argues that the member's conduct in originally refusing to appoint a designated representative and not adjourning the matter when the applicant was obviously not well

should be considered as evidence of bias indirectly prejudicing the applicant, a bias which contributed to the member's negative conclusions about the applicant's conduct and credibility. Accordingly, I will deal with these issues.

(i) Designated Representative

[17] The member applied the correct test for determining whether a designated representative should be appointed. Section 167(2) of the IRPA provides that a designated representative should be appointed when the decision-maker is of the opinion that the person is unable to appreciate the nature of the proceedings. I cite the provision below:

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.	(2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

[Emphasis added]

(ii) Representation

[18] In light of these provisions, the member was correct in concluding that he could not "appoint a designated representative for someone who understands the hearing and the process". The member was entitled, and indeed I would say required, in the circumstances to question the applicant to be able to determine whether he could appreciate the nature of the proceedings.

[19] Similarly he cannot be criticized for proceeding to ask questions on this issue when it was the applicant who was seeking the appointment of a designated representative and this information was required in order to be able to accede to that request.

[20] The member was also not required to rely upon medical opinions produced by the applicant on this subject for this purpose. He could reject these opinions if satisfied on the basis of the answers to his questions that the applicant was capable of appreciating the nature of proceedings.

[21] As was demonstrated by the applicant's capacity to appreciate and participate in the process in answer to the member's questions, both before and after the request for the adjournment, sufficient evidence resulted to support the member's conclusion that the applicant was capable of appreciating the nature of the proceedings.

(iii) Refusal to Adjourn

[22] The issue concerning appointment of a designated representative became entwined somewhat with the further issue of the member's alleged refusal to grant an adjournment. This came after the decision not to appoint a designated representative. The evidence on this issue at page 14 of the transcript is as follows:

> Claimant: I heard before that you mentioned you were going to accommodate me today. Right now I would like to go to the hospital; are we going to continue now or can I …
>
> Member: You were going to go to the hospital now?
>
> Claimant: Yes, I am not feeling well …
>
> Member: Do you need me to call some hospital for you … I mean an ambulance for you?
>
> Claimant: I want to see my doctor to ask her why I am having these side effects [vomiting from the medication].
>
> Member: Oh, I understand that, that is a good question and you should ask your doctor that. We are not going to be

very much longer, maybe another 15 minutes, 20 minutes or so. Do you think you will be able to … to make it that long or no?

Claimant: Can I go to the washroom now?

Member: Yes, of course you can.

Member: [upon returning] Okay, so I would just try to make some final comments. So I know the hearings can be difficult, all refugee claims are difficult but this one may be more difficult given the medication and the side effects and so on, but please try to relax, there is … nothing will happen to you while you are here today or when we come back the next time nothing will happen to you here.

[23] From the foregoing evidence it is seen that while the applicant originally demanded to be accommodated to permit him to proceed to the hospital, when the offer was made to call an ambulance, he indicated that he only wanted to ask his doctor why he was having side effects from the medication. From that point where the urgency was considerably downgraded, the member asked whether the applicant could last another 15 to 20 minutes. I interpret the applicant's request to be excused to go to the washroom and his return to the hearing as a voluntary response to the member's request. The member then tried to calm the applicant's anxieties so as to encourage him to engage in the process.

[24] I am of two minds with respect to these facts. If someone is debilitated such as by vomiting, normally there is no issue of asking the witness to stay on, even if the purposes were to obtain some preliminary information on the personal information form and explain the process to the applicant.

[25] However, one must recall that only the member was in a position to judge what was appropriate. He had been told that the applicant could not appreciate the nature of the proceedings, and that this opinion was supported by medical evidence. But the member's questioning led him, with reason, to conclude otherwise.

[26] First day anxiety at a hearing is also a common occurrence. Somewhat like giving a speech, once over the initial anxiety the person usually settles down. In this case, from the evidence in the transcript, the member tried to assure the applicant of the situation after which the applicant participated well in the process. By doing so he further demonstrated that he was able to understand the proceedings and actively partake in them. For example, a typical exchange after he returned was as follows:

> Member: Well what about the part about why you were afraid to go back to Peru; was that part read back to you in Spanish?
>
> Claimant: No, I am telling you that a translation was done very fast because they had to submit it. They had to submit it right away and they were going on holiday, vacation. And when I said translation she is meaning to the answers, from Spanish to English …
>
> Member: Yes, okay.
>
> Claimant … not from English to Spanish.
>
> Member: Okay and is the same true of the attachments … the additional questions rather?
>
> Claimant: I rather because the personal information form was done in a rush that is why there were questions not answered and that is why … you requested those …
>
> Member: Yes, and who … who helped you complete the additional questions?

Claimant: Same place, I went back to them. I did not have anybody else.

[27] I do not see any problem with the decision-maker trying to keep a party or a witness engaged in the proceeding so as to avoid wasting time and resources caused by adjournments and the like. In addition, delay is a strategy resorted to in all forms of litigation, including in immigration proceedings. Given the scarcity of costly court and administrative tribunal resources, I see nothing untoward, and indeed would encourage some gentle "testing" of requests for adjournment or statements of inability to continue if the circumstances are appropriate.

[28] I find the member's handling of the situation appropriate in this instance. He was not insensitive or unaware of the applicant' a situation and treated him with respect and consideration as he attempted to deal with the issues before him. As a result, he succeeded in engaging the applicant and completed those limited tasks that he had hoped to accomplish so as not to entirely waste the time which had been booked, all without prejudicing the applicant's case.

[29] I therefore find misplaced the strong criticism directed at the member for how he handled the situation. There is no basis to assume an apprehension of bias, partiality or unfairness in his conduct towards the applicant, which allegation I reject entirely.

B. The Board's Credibility Assessment and Consideration of the Evidence

[30] The applicant challenges the reasonableness of the member's decision based upon his alleged failure to take into consideration the applicant's psychological difficulties and his

"microscopic" approach to the evidence which prevented him from properly considering the totality of the applicant's claim.

[31] On the first point, there is no basis to conclude that the applicant's medical condition and psychological disability were not taken into consideration in assessing the applicant's evidence. At paragraphs 16 and 20 of the reasons and elsewhere, the member gives consideration to the applicant's psychological difficulties while discussing his concerns about inconsistencies in the applicant's testimony. For example, he states at paragraph 16 the following:

> [16] The psychological reports do state the claimant might have difficulty with memory or concentration, and that appears to have been the case here. On the other hand, when the claimant does recall, he seems to be able to recount precisely as stated in the narrative. It would appear the claimant's memory does work quite well sometimes.

[32] In addition, in *Kaur v Canada ((MCI)*, 2012 FC 1379 [*Kaur*] at para 33, Chief Justice Crampton noted that recent Supreme Court jurisprudence "has significantly reduced the scope for setting aside decisions of the Board on the basis that it did not consider or did not sufficiently consider the contents of a psychologist's report." In *Kaur* at para 36, the Court went on to find:

> The fact that there may be something in the psychologist's report which provides an alternative potential explanation for all or some [inconsistencies, contradictions or omissions"] will not change the fact that those [inconsistencies, contradictions or omissions], once confirmed through a review of the record, provide a reasonable basis, or rational support, for the Board's adverse credibility finding and its ultimate conclusion.

[33] I also do not find that the member's analysis was microscopic or too focused on credibility issues. His reasons are admittedly detailed and extensive regarding the applicant's credibility problems. However, credibility findings were central to the rejection of the applicant's evidence.

More importantly, the applicant did not challenge most of the significant inconsistencies described by the member in his reasons, nor the conclusion that there was no evidence linking Mr. Tecse to the death threats upon which his case was founded.

[34] The applicant also points to the failure of the member to give weight to a newspaper clipping from 2007 reporting that the applicant was being threatened with death through anonymous phone calls after being denounced for ethnic racism by an association of artists represented by Tecse. The member discounted the weight of this evidence due to its lack of attribution to an author and given that it appeared to be printed in one of Peru's less reputable and reliable news sources. The article contains no indictment against Tecse, noting only that that the applicant was denounced by him in his workplace.

[35] Even if the member's criticisms of the newspaper article were somewhat anemic, the evidence was far from probative and did little to support the claim in comparison with the detailed analysis in the reasons describing extensive inconsistencies found in the testimony and story of the applicant.

[36] In consideration of all the foregoing, I conclude that the decision of the member was reasonable and within the range of possible outcomes based on the facts and law engaged in this matter.

[37] Accordingly, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is denied.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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