Date: 20051013

Docket: IMM-1705-05

Citation: 2005 FC 1400

Ottawa, Ontario, October 13, 2005

PRESENT: MADAM JUSTICE TREMBLAY-LAMER

BETWEEN:

JANETTE WILSON MALLETTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the "Board"), dated January 21, 2005, wherein the Board cancelled the applicant's stay of execution of a removal order, dismissed the applicant's appeal and maintained the deportation order which was issued against the applicant on January 31, 2001.

[2] The applicant arrived as a visitor in Canada in 1968. She married while in Canada and was sponsored by her husband. She was deported in 1976 because she had committed theft and fraud. She came back to Canada in 1977 as an undocumented visitor. She was granted amnesty in 1986 and obtained permanent residence in Canada on January 8, 1989.

[3] The applicant was ordered deported again on January 31, 2001 because she had been convicted of possession of narcotics for purposes of trafficking. However, on July 25, 2002, the Board granted the applicant a stay of execution for five years on ten express conditions. Among other things, the conditions required the applicant to:

- report monthly to the Ottawa Canada Immigration Centre;
- report any change of address;
- report any criminal charges and convictions;
- continue counselling with the Elizabeth Fry Society once a week;
- continue attending drug rehabilitation programs on a regular basis;
- refrain from the illegal use or sale of drugs; and
- keep the peace and be of good behaviour.

[4] In its decision, the Board advised the applicant that an oral review would take place on or about July 10, 2003 and that the Board would review the case on or about July 10, 2007 or at such earlier date as it considered necessary.

[5] In February 2003, the Minister's representative requested an early review of the stay of execution alleging several breaches of the conditions imposed. The breaches included further criminal offences, the use of illegal drugs, sale of drugs including problems with keeping the peace and good behaviour.

[6] As a result, a hearing was held in May 2003. At the hearing, the applicant admitted to breaching several of the conditions imposed on her. However, the Board concluded that cancelling the stay of execution would have been too harsh a solution at that time. Instead, the Board did not cancel the stay and modified the initial conditions imposed on the applicant.

[7] In its May 29, 2003 decision, the Board advised the applicant that an "oral interim reconsideration" of the case would take place on or about May 16, 2004 and that a "final reconsideration" would take place on or about July 10, 2007 or at such other date as it determines.

[8] On August 9, 2004, the Board sent the applicant a Notice of Hearing Date. The Notice indicated that the purpose of the hearing was to conduct an oral review of the Order of the Board dated May 29, 2003.

[9] The applicant arrived at the January 21, 2005 hearing without a lawyer and testified on her own behalf. In a written decision dated February 18, 2005, the Board cancelled the order staying the applicant's removal and directed that the applicant be removed from Canada as soon as reasonably possible.

[10] The Board found that since the decision of May 29, 2003, the applicant had had problems with the law, including involvement in criminal activity. She was charged on May 25, 2003 for shoplifting, although that charge was withdrawn. She was charged on November 5, 2003 and on February 18, 2004 of prostitution and convicted of those charges. She also had problems with reporting requirements and the illegal use of drugs.

[11] The Board was not convinced that the community help she was receiving, including attending community groups, would be of any assistance. She had been in breach of conditions imposed on her after both previous decisions of the Board. Although she had moved into a senior citizens building and had a boyfriend, the Board member found nothing in the evidence which indicated she would maintain and respect the conditions of the initial decision.

[12] As a result, the Board cancelled the stay of execution of a removal order, dismissed the appeal, and maintained the deportation order issued against the applicant on January 31, 2001.

[13] Should the Board have adjourned the hearing when the applicant indicated she did not have counsel?

[14] The right to counsel is not absolute. The case law in immigration matters indicates that a decision is invalid should the absence of counsel deprive the applicant of his or her right to a fair hearing. In *Mervilus v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1460 (QL), 2004 FC 1206, Harrington J. reviewed the law from this Court and the Federal Court of Appeal and summarized as follows at paragraph 25:

> The following principles can therefore be drawn from the case law: although the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.

[15] I find all of the factors to be present in this case. It is clear that the applicant was not capable of representing herself.

[16] While she was formally notified twice that the Board intended to review the applicant's compliance with the conditions attached to the stay of execution of her deportation order, it is evident that she understood the purpose of the hearing to be a

yearly review of her progress in recovery, similar to her monthly stay interviews. It is for this reason, she says, that she did not bring a lawyer to represent her.

[17] In her affidavit, the applicant states that about 10 minutes into the hearing, she began to feel nervous and confused. She did not understand several of the questions being asked of her and was surprised at being asked about her past convictions and past immigration hearings.

[18] Approximately 27 minutes into the hearing, the following exchange took place between Ms. Julie Ryan, counsel on behalf of the Minister, and the applicant:

> Ms. Ryan: On page 5 we have the Certificate of Conviction for that charge. Did you get this, the Record? It was sent to your old address.
>
> Applicant: No I did not. If I had known this, I would have brought a lawyer.

[19] Moreover, a review of the transcript indicates that she had trouble with her memory, did not understand basic questions asked of her and that she broke down on a number of occasions. She was not able, in any way, to argue her case. The consequences of the decision are very serious. If she is deported, the applicant, after having lived in Canada for the better part of almost 20 years, will be deported to Scotland where she has no relatives that she knows of, at the age of 61 years old. This will also interrupt any progress she has made with her drug addiction and general rehabilitation.

[20] The Board's failure to provide an adjournment in order that the applicant might retain counsel deprived her of the right to a fair hearing.

[21] The Board also erred when it denied the applicant the opportunity to present evidence. Having appeared without counsel, and with a number of letters evidencing her progress and rehabilitation with regard to her drug addiction and problems with the sex trade, the Board should not have refused the applicant from introducing such relevant evidence necessary to demonstrate that her situation was, in fact, changing. Whether or not this would have changed the outcome of the Board's decision is not for this Court to determine, but it is clear that these letters could have brought a different outcome.

[22] Thus, the decision of the Board cancelling the applicant's stay of execution of a removal order, dismissing the applicant's appeal and maintaining the deportation order which was issued against the applicant on January 31, 2001 is set aside and the matter is referred back for redetermination by a newly constituted panel. No questions were submitted for certification.

ORDER

THIS COURT ORDERS that

[1] The application for judicial review is allowed.

[2] The matter is referred back for redetermination by a newly constituted panel.

"Danièle Tremblay-Lamer"

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1705-05
STYLE OF CAUSE:	JANETTE WILSON MALLETTE v. THE MINISTER OF CITIZENSHIP AND IMMIGATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 13th , 2005
REASONS FOR ORDER:	THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER
DATED:	OCTOBER 13, 2005

APPEARANCES:

Mr. George Brown	FOR THE APPLICANT
Ms. Lynn Marchildon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. George Brown Ottawa, Ontario	FOR THE APPLICANT
Mr. John H. Sims,Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT