

Federal Court



Cour fédérale

Date: 20200110

Docket: IMM-59-19

Citation: 2020 FC 29

Ottawa, Ontario, January 10, 2020

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

ALDO GUSTAVO BARRIOS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Aldo Gustavo Barrios is a citizen of Honduras who obtained refugee status and permanent residence in Canada. Subsequently, he acquired a Honduran passport and travelled to Honduras several times. On one of his returns to Canada, he told an officer of the Canada Border Services Agency (CBSA) that he was no longer fearful of persecution in Honduras.

[2] Another CBSA officer asked Mr Barrios to attend an interview. Mr Barrios complied and described to the officer his various trips to Honduras.

[3] The Minister of Citizenship and Immigration then sought cessation of Mr Barrios's refugee status. Mr Barrios provided a written response.

[4] A panel of the Immigration and Refugee Board considered and dismissed the Minister's request. The Board found that Mr Barrios had been denied the right to be represented by counsel during his initial encounter with the CBSA officer and during his interview. The Board found that both interactions were evidence-gathering hearings and that Mr Barrios should have been given notice of his right to counsel. The Board excluded evidence obtained during the encounters with the CBSA, leaving little proof to support the Minister's application.

[5] The Minister maintains that the Board wrongly excluded relevant evidence, and erroneously concluded that the officer was unaware that Mr Barrios had been granted refugee status; that knowledge would have justified the officer's questioning. The Board found that the officer learned of Mr Barrios's refugee status only by way of improper questioning. The Minister asks me to order another panel of the Board to reconsider the cessation application.

[6] I agree with the Minister that the Board erred in excluding evidence on the basis that Mr Barrios had been denied his right to counsel. It follows that the Board wrongly excluded relevant evidence. I will, therefore, allow this judicial review and order a new hearing before the Board. It

is unnecessary to consider whether the Board also erred in finding that there was no remaining evidence of Mr Barrios's refugee status.

[7] The sole issue is whether the Board erred in its conclusion that Mr Barrios's right to counsel was violated.

II. Was Mr Barrios's right to counsel violated?

[8] The Board found that a person who is the subject of a hearing is entitled to be represented by counsel. Where that right has been violated, said the Board, any evidence acquired as a result of the violation must be disregarded.

[9] I can overturn the Board's conclusion if it was incorrect: *Canada (Minister of Citizenship and Immigration) v Paramo de Gutierrez*, 2016 FCA 211 at para 44. In my view, the Board's conclusion was incorrect. The Board relied on the *Paramo de Gutierrez* decision for the proposition that pre-hearing procedures attract the right to counsel. In fact, that decision does not stand for that proposition. Rather, the Federal Court of Appeal found that the applicants had a right to counsel at an interview conducted a few weeks before the applicants' hearing before the Board. In that situation, the applicants were the subject of proceedings before the Board and were entitled to be represented by counsel according to s 167 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[10] Here, at the time of his interviews, Mr Barrios was not the subject of any proceeding before the Board. He became a subject of proceedings before the Board only after the Minister commenced a cessation application.

[11] Further, the jurisprudence is clear that a person is generally not entitled to counsel at interviews or pre-hearing proceedings: *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053 at paras 49, 51; *Canada (Minister of Citizenship and Immigration) v Bermudez*, 2016 FCA 131 at para 50; *Paramo de Gutierrez* (above) at para 54.

[12] Accordingly, the Board erred in finding that Mr Barrios had a right to counsel and that the evidence obtained from him should be excluded. I must, therefore, refer the matter back to another panel of the Board for reconsideration.

III. Conclusion and Disposition

[13] The Board erred in finding that Mr Barrios's right to counsel had been violated and in excluding evidence taken by CBSA officers. I must, therefore, allow this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT IN IMM-59-19

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to another panel of the Board for reconsideration. No question of general importance is stated.

"James W. O'Reilly"

Judge

ANNEX

*Immigration and Refugee
Protection Act, SC 2001, c 27*

*Loi sur l'immigration et la
protection des réfugiés (LC
2001, ch 27)*

Right to counsel

Conseil

167 (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel

167 (1) L'intéressé qui fait l'objet de procédures devant une section de la Commission ainsi que le ministre peuvent se faire représenter, à leurs frais, par un conseiller juridique ou un autre conseil.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-59-19

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v ALDO GUSTAVO BARRIOS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 5, 2019

JUDGMENT AND REASONS: O'REILLY J.

DATED: JANUARY 10, 2020

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