Date: 20061026

Docket: IMM-1218-06

Citation: 2006 FC 1273

Ottawa, Ontario, the 26th day of October 2006

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

OLGA CADENAS MUNOZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] . . . It appears obvious to us that the Division did not believe the appellant, because it found major contradictions between his actions and his statements. This is a conclusion that is within the jurisdiction of the tribunal and we cannot intervene unless it was reached in an unreasonable manner, which is certainly not the situation in the case at bar.

(*Rahman v. Canada* (*Minister of Employment and Immigration*), [1994] F.C.J. No. 562 (QL), as stated by Mr. Justice James K. Hugessen)

NATURE OF THE PROCEEDING

[2] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) dated January 26, 2006, that the applicant is neither a "Convention refugee" nor a "person in need of protection" under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

FACTS

[3] The applicant, Olga Cadenas Munoz, was born on February 21, 1969, in the Federal District of Mexico City in Mexico. She is unmarried and all of her relatives live in Mexico.

[4] Ms. Munoz claims to be persecuted in her country of origin by Luis Hernandez, a judicial police officer with the Attorney General of Mexico (AGM), whom she dated in 2001. On March 7, 2002, Ms. Munoz informed Mr. Hernandez that she had feelings for one of her work colleagues, Ana Lilia Garcia. At that time, Mr. Hernandez became furious and insulted her. On March 9, 2002, the situation worsened when Mr. Hernandez surprised Ms. Munoz and Ms. Garcia exchanging a kiss in public. On that occasion, he struck her, insulted her and threatened to kill her because of this insult to him. Ms. Munoz alleges receiving a call on March 17, 2002, from Mr. Hernandez, again insulting her and making death threats against her.

[5] Ms. Munoz claims to have been approached on March 18, 2002, by one of her work colleagues at Panasonic, who told her than an e-mail containing nude photos of her had been sent to the human resources office and to all individuals on the human resources contact list, including all

of her clients. She suspected Mr. Hernandez of having infiltrated the Panasonic computer system in order to send the e-mail containing the nude photos.

[6] Ms. Munoz alleges that her employer, Panasonic, asked her to resign shortly afterwards. When she refused, Panasonic dismissed her. Ms. Munoz then received many calls requesting sexual services. She became depressed. She says that she [TRANSLATION] “went through hell for many months”.

[7] Following this event, Ms. Munoz claims that Mr. Hernandez continued to harass her with telephone calls. In view of this situation, she decided to leave Mexico to travel to Canada in October 2002. While she was away, Mr. Hernandez made telephone calls to Ms. Munoz’s mother. Ms. Munoz therefore decided to return to Mexico. Upon her return to her native country, she went to live with her father in Chiapas, where she hoped to find refuge.

[8] Ms. Munoz alleges that, in March 2003, friends of Mr. Hernandez found her in Chiapas and confined her in a car. While she was being held by these people, the individuals in question received a call from Mr. Hernandez asking them to order Ms. Munoz to return to live in her usual residence, or else he would come and get her. On March 5, 2003, Ms. Munoz went back to live with her mother.

[9] On March 17, 2003, Ms. Munoz used a passport and left Mexico for the United States. She lived in New York City until September 8, 2003. On September 9, 2003, Ms. Munoz entered Canada and stated at the port of entry that she wanted to claim refugee status. A few months later,

the applicant sought refugee protection in Canada, alleging a well-founded fear of persecution in her country because of her membership in particular social group—women who are victims of conjugal violence in Mexico—since she was the victim of a member of the Mexican federal police force. The claim was heard on December 20, 2005, and was rejected on January 26, 2006.

IMPUGNED DECISION

[10] The RPD rejected Ms. Munoz's claim for refugee protection on the grounds that she is not credible with regard to the essential features of her claim. In addition, the RPD found that the applicant's behaviour was incompatible with a subjective fear of persecution as alleged in her claim. This finding is based on the many contradictions and implausibilities in Ms. Munoz's testimony.

ISSUES

1. Were the RPD's findings capricious and unreasonable in view of the applicant's credibility?
2. Did the RPD err in law by not applying in its decision the "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution" (Guidelines)?
3. Did the RPD err by not taking into account the documentary evidence on the lack of protection in Mexico for persons in Ms. Munoz's situation?
4. Did the RPD err in applying the Federal Court's initial judgment in this file? Is it bound by the principle of *stare decisis*?
5. Was the proceeding fair and equitable? Did the RPD demonstrate bias?

STANDARD OF REVIEW

[11] The determination of a witness's credibility and the weighing of evidence are the responsibility of the RPD, whose expertise in determining questions of fact and, particularly, in evaluating a claimant's credibility and subjective fear of persecution is well established (*Cepeda-Gutierrez v. Canada* (*Minister of Citizenship and Immigration*), [1998] F.C.J. No. 1425 (QL), at paragraph 14).

[12] In an application for judicial review, the appropriate standard of review as regards issues of credibility is patent unreasonableness. The Court must accord considerable deference, because it is for the IRB to assess the applicant's testimony and to evaluate whether her allegations are credible. If the RPD's findings are reasonable, no intervention is warranted. However, the RPD's decision must be supported by the evidence; it must not be made capriciously, based on erroneous findings of fact or without regard to the evidence (*Mugesera v. Canada (Minister of Citizenship and Immigration*), [2005] 2 S.C.R. 100, [2005] S.C.J. No. 39 (QL), at paragraph 38; *Aguebor v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 732 (QL), at paragraph 4).

ANALYSIS

1. Ms. Munoz's burden of proof

[13] If Ms. Munoz fails to demonstrate that the inferences drawn by the RPD are so unreasonable as to warrant the Court's intervention, the RPD's findings are not open to judicial review. The fact that remarks were made about Ms. Munoz's credibility in no way reduces her burden of convincing the RPD of her credibility (*Aguebor*, *supra*, at paragraph 4).

[14] Moreover, the Federal Court decided in *Shahamati v. Canada* (*Minister of Employment and Immigration*), [1994] F.C.J. No. 415 (QL), at paragraph 2, that the IRB's findings of implausibility may rely on criteria such as "rationality and common sense".

[15] In addition, Rule 7 of the *Refugee Protection Division Rules*, SOR/2002-228 (the Rules) specifies that the claimant must provide acceptable documents establishing identity and other elements of the claim. In this regard, see *Kante v. Canada* (*Minister of Employment and Immigration*), [1994] F.C.J. No. 525 (QL), which states the following:

> [8] The law is clear that the burden of proof lies with the Applicant i.e. he must satisfy the Refugee Division that his claim meets both the subjective and objective tests which are required in order to have a well founded fear of persecution. Consequently an Applicant must come to a hearing with all of the evidence that he is able to offer and that he believes necessary to prove his claim.

[16] Moreover, in *Pan v. Canada* (*Minister of Employment and Immigration*), [1994] F.C.J. No. 1116 (QL), the Federal Court of Appeal decided that the RPD was at liberty to find that a claimant's behaviour was inconsistent with a subjective fear of persecution.

2. Evaluation of Ms. Munoz's credibility

[17] Ms. Munoz argues that the RPD's findings concerning her credibility were made in a capricious and unreasonable manner. The RPD's decision is impugned on six issues:

(1) The RPD attached too much importance to the fact that Ms. Munoz had travelled to Canada prior to the claim for refugee protection and to the amount of time it took her to make her claim;

(2) The RPD imposed an excessive burden of proof when it asked Ms. Munoz to demonstrate the steps taken by Panasonic to correct the computer infiltration problems. In addition, the RPD erred in holding it against the applicant that Panasonic did not indicate in its letter of dismissal any mention of her being fired because of the problems alleged by the applicant, since this admission would discredit the business with its customers;

(3) The RPD erred in doubting the authenticity of the nude photos simply because Ms. Munoz was unable to produce the e-mail that accompanied the photos that she adduced as evidence;

(4) The RPD erred in not assigning any probative value to the letters from Ms. Munoz's work colleagues and from her mother;

(5) The RPD erred in not considering Ms. Munoz's severe depression and in not assigning probative value to the psychological reports adduced as evidence and to her emergency stay at the emergency hospital in the United States;

(6) The RPD erred in not assigning any probative value to the detailed affidavit submitted at the hearing of Francisco Rico Martinez. According to Ms. Munoz, this document demonstrates the lack of state protection in Mexico.

[18] Further to an examination of the documentary evidence and the transcript, the Court is of the opinion that the RPD was correct in basing the reasons for its decision on the contradictions and

implausibilities in the testimonial and documentary evidence, which are amply supported in the reasons.

[19] First, contrary to Ms. Munoz's arguments, the RPD did not err by attaching too much importance to the fact that Ms. Munoz did not claim the protection of Canadian authorities and that she subsequently returned to Mexico. On this point, the RPD stated the following:

> . . .It should be noted that the claimant had already come to Canada at least four times: in 1999, 2000, 2001, and 2002. . . .
>
> . . .
>
> Finally, the claimant arrived in Canada on September 9, 2003, at the Lacolle port of entry, and stated her intention of claiming protection from the Canadian authorities. As mentioned above in this decision, she had come to Canada many times before. The last time, in 2002, she allegedly shut herself in at the Hilton Hotel at Dorval Airport for four days. She testified that, on the other occasions when she supposedly visited Canada, she had been part of a tour group and never thought of contacting or speaking to anyone. The panel greatly doubts this statement, as it is strange to say the least that a person who had been beaten and even hunted down by Mr. Hernandez and his cronies, and threatened with death after being kidnapped, would not have claimed protection from the Canadian authorities when she came to Canada. The panel believes instead that she came to visit friends here.

[20] In the caselaw, this Court has consistently held that the voluntary return of a claimant to his or her country of origin is behaviour that is incompatible with a subjective fear of persecution (*Bogus v. Canada* (*Minister of Employment and Immigration*) [1993] F.C.J. No. 1455 (QL); *Caballero v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 483 (QL); *Zergani v. Canada* (*Minister of Employment and Immigration*), [1994] F.C.J. No. 493 (QL); *Hoballah v. Canada (Minister of Employment and Immigration*), [1995] F.C.J. No. 37 (QL)).

[21] Moreover, it was reasonable for the RPD to take into consideration in assessing the well-foundedness of the applicant's fear her behaviour in not taking serious measures to protect herself. In this regard, Mr. Justice Yvon Pinard for this Court expressed the following in *Mardones v. Canada* (*Minister of Citizenship and Immigration*), [1997] F.C.J. No. 351 (QL):

> [2] The decision of the Refugee Division is based on the conclusion that the applicants' story is not credible. The Board reached this conclusion because of the inconsistencies between the applicants' personal information forms and their testimony, and also because it considered it implausible that the principle applicant would have been targeted by the Manuel Rodriguez Front. Lastly, the Refugee Division found that the applicants' conduct, in that they failed to take [TRANSLATION] "serious measures" to protect themselves, was inconsistent with a fear of persecution.
>
> [3] In Aguebor v. Canada (M.E.I.), (1993), 160 N.R. 315 (F.C.A.), Mr. Justice Décary stressed the restraint that must be adopted in respect of a finding of credibility in this sort of case . . . .

[22] It was reasonable for the RPD to draw a negative inference from Ms. Munoz's failure to seek the protection of the United States where she stayed for several months. If the applicant's intention was truly to protect her life by leaving Mexico, it is reasonable to expect that she would claim protection as soon as she had the opportunity to do so, that is, in the United States (*Heer v. Canada* (*Minister of Employment and Immigration*), [1988] F.C.J. No. 330 (QL); *Huerta v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 271 (QL); *Riadinskaia v. Canada* (*Minister of Citizenship and Immigration*), [2001] F.C.J. No. 30 (QL), at paragraph 7).

[23] In *Rahman, supra*, Hugessen J. wrote the following:

> . . . It appears obvious to us that the Division did not believe the appellant, because it found major contradictions between his actions and his statements. This is a conclusion that is within the jurisdiction of the tribunal and we cannot intervene unless it was reached in an unreasonable manner, which is certainly not the situation in the case at bar.

[24] Second, with regard to Ms. Munoz's allegations that the RPD erred in not assigning any probative value to the documentary evidence filed with the RPD, the Federal Court has already decided that a finding of a lack of subjective fear in and of itself warrants rejection of the claim for refugee protection because both elements of the alleged fear of persecution, subjective and objective, must be demonstrated in order to fall within the definitions of "refugee" and "person in need of protection" (*Kamana v. Canada* (*Minister of Citizenship and Immigration*), [1999] F.C.J. No. 1695 (QL); *Fernando v. Canada* (*Minister of Citizenship and Immigration*), 2001 FCT 759, [2001] F.C.J. No. 1129 (QL), at paragraph 3, in which the Court cited *Kamana*, *supra*, with approval).

[25] It is reasonable for the RPD to find that Ms. Munoz's behaviour was inconsistent with any subjective fear and seriously undermined her credibility and the credibility of her allegations. Moreover, it is clear from the applicant's submission and affidavit that she was trying to complete her evidence by giving further details about the explanations already offered to but not accepted by the RPD and which were satisfactory.

[26] The most recent reasons for the decision show that the RPD confronted Ms. Munoz concerning the gaps in her evidence. However, the RPD, in this case, assessed her explanations but found that they were not credible and satisfactory. In this regard, this Court has held in other cases that explanations previously offered to the RPD but deemed unsatisfactory by the RPD are not to be reassessed by the Federal Court (*Kabir v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCT 907, [2002] F.C.J. No. 1198 (QL); *Muthuthevar v. Canada* ((*Minister of Citizenship and*

Immigration), [1996] F.C.J. No. 207 (QL); *Castro v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 787 (QL).)

[27] Finally, in *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238, [1990] F.C.J. No. 604 (QL), the Federal Court of Appeal held that the finding of a lack of credibility in the claimant's testimony may be extended to all relevant evidence emanating from that testimony. Although this decision relies on the former *Immigration Act*, R.S.C. (1985), c. I-2, it is still valid. Within the legislative framework of the current Act, the Federal Court stated that "a tribunal's perception that a claimant is not credible on an **important element** of their claim can amount to a finding that there is no credible evidence to support the claim" (*Chavez v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 962, [2005] F.C.J. No. 1211 (QL), at paragraph 7; *Touré v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 964, [2005] F.C.J. No. 1213 (QL), at paragraph 10.)

[28] In essence, Ms. Munoz is asking the Court to reassess the evidence in order to substitute its findings for those of the RPD, without showing how these findings are patently unreasonable. The RPD's findings of fact are reasonable; the term "findings" refers to those that rely on all of the evidence within the context of this matter. Consequently, this Court's intervention is not warranted on this point.

3. Guidelines on gender-related persecution

[29] Ms. Munoz claims that the RPD did not take into account the "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution". This argument is unfounded.

[30] First, the fact that the Guidelines were not mentioned in the reasons for the decision does not mean that they were not taken into consideration. Moreover, in some circumstances, the RPD is not even obliged to mention the Guidelines in its decision (*Ayub v. Canada* (*Minister of Citizenship and Immigration*), 2004 FC 1411, [2004] F.C.J. No. 1707 (QL), at paragraph 19; *Hazarat v. Canada* (*Secretary of State*), [1994] F.C.J. No. 1774 (QL), at paragraph 7; *Balasingam v. Canada* (*Minister of Citizenship and Immigration*), [1998] F.C.J. No. 1717, at paragraph 20; *Legault v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCA 125, [2002] F.C.J. No. 457 (QL), at paragraph 20).

[31] Second, the RPD was presented with an account that was not credible, in which there was no credible allegation related to the claimant's gender. Moreover, as mentioned above, the RPD stated in clear, explicit and intelligible terms the valid reasons why it doubted the truthfulness of Ms. Munoz's allegations, given her lack of credibility.

[32] The defects noted by the RPD were based on the evidence submitted, pertained to major points in Ms. Munoz's claim and were relevant and sufficient to reject the applicant's credibility. In this case, the RPD considered that since the applicant's account had been deemed not credible, her claim raised no such issues.

[33] The Guidelines are used to ensure that gender-based claims are heard with sensitivity. In this case, the RPD followed the "spirit" of the Guidelines by means of active listening, despite the fact

that this particular case does not even lead to the application of the Guidelines primarily because the RPD considered Ms. Munoz and the basis of her evidence to be not credible.

[34] Finally, it is important to reiterate that, in the caselaw, it has consistently been held that the RPD is not bound by the Guidelines in cases where they do not apply (*Ayub, supra,* at paragraph 19; *Balasingam, supra*).

[35] Consequently, failure to consider the Guidelines on gender-based persecution does not in itself give rise to a reversible error where there is a sufficient basis for the tribunal's conclusion, as in this case (*Sy v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 379, [2005] F.C.J. No. 462 (QL), at paragraph 18.)

[36] In the circumstances, the Court's intervention on this point is not required.

4. The Federal Court's previous judgment

[37] Ms. Munoz alleges that the RPD did not accept the authority of *res judicata* concerning [TRANSLATION] "several important findings of the RPD" in the initial judgment. In addition, according to the latter, certain significant evidence, filed for the first time by Ms. Munoz with the RPD, to which the Court attached importance, was not mentioned in the RPD's decision.

[38] First, the RPD indicated at the beginning of its reasons in the Author's note (Reasons p. 2) that the Federal Court order was taken into consideration.

[39] Second, the reasons for the Court's decision indicate that the Court did not find that the applicant was a credible claimant. This finding is therefore erroneous.

[40] Third, contrary to Ms. Munoz's allegations, no evidence of unwarranted and inappropriate comments made by the RPD was adduced in this case.

[41] Fourth, Ms. Munoz's argument that the application for judicial review inevitably leads to a final positive ruling at the end of the new hearing is not correct. The Court would like to emphasize that a judicial review is not an appeal and that even in cases where a decision is returned for review by a differently constituted panel, the RPD is an independent tribunal that is responsible for reviewing and deciding on the credibility of the evidence adduced, in accordance with its own legislation, rules, guidelines and institutional memory.

[42] In this case, the Federal Court ordered that the matter be "referred to a differently constituted panel of the Immigration and Refugee Board for reconsideration". The latter gave no instructions other than the fact that the matter was to be heard by a differently constituted panel. All that was required of the new panel was to reconsider the matter *de novo*. In the absence of specific instructions of the Court in this respect, it was appropriate to order a new hearing so that the RPD could construct its own opinion on the credibility of Ms. Munoz's evidence.

[43] The reasons for the RPD's decision in this case indicate that the RPD drew its own conclusions concerning the evidence adduced. Specifically, with respect to the RPD's finding concerning the fact that there was no mention in the documents from Panasonic that Ms. Munoz

was dismissed because of the problems she alleges to have experienced, the RPD clearly set out many other reasons in its decision for doubting that the photos of Ms. Munoz had circulated within Panasonic's computer system. Thus, no intervention of the Court is warranted on this basis (*Miranda v. Canada* (*Minister of Employment and Immigration*), [1993] F.C.J. No. 437 (QL).)

5. Observance of the principles of natural justice and procedural fairness

(a) Guideline 7 – Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division

[44] In this case, Ms. Munoz did not establish that the principles of natural justice or procedural fairness were violated by the fact that the tribunal applied Guideline 7.

[45] The text below is simply a restatement of the current caselaw on Guideline 7, which, in this case, does not apply primarily because of the elements mentioned above and specified in the following text:

[46] A number of Federal Court decisions pertain to this Guideline.

[47] In *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] F.C.J. No. 8 (QL), Mr. Justice Edmond P. Blanchard held that the order of questioning at an RPD hearing does not in itself result in a breach of the principles of natural justice because there is no inherent right to an examination-in-chief within the context of a claim for refugee protection:

> [91] The Intervener has provided some evidence pointing to the difficulties refugee claimants face and the benefits to them of "counsel-first" questioning. However, in my view, neither the Applicant nor the Intervener has established that the principles of natural justice or procedural fairness require that refugee

> claimants be afforded an "examination-in-chief" in order for the refugee determination process before the Board to be fair. The opportunity for the Applicant to make written submissions and provide evidence to the Board, to have an oral hearing with the participation of counsel, and to make oral submissions, in my opinion, satisfies the requirements of the participatory rights required by the duty of fairness in this case.
>
> [92] After considering the factors set out in *Baker* and the further factors submitted by the Intervener, I am not persuaded that the principles of natural justice or procedural fairness demand that the Applicant's refugee determination hearing be conducted with a particular order of questioning – that is, with counsel for the Applicant questioning first – in order to ensure the Applicant has a meaningful opportunity to present his case fully and fairly.

[48] It not possible at the outset to state that the RPD is required by the rules of natural justice to allow counsel for a claimant to be the first to question his or her client and witnesses, if any.

> [45] In particular, the Applicant submits that in Kante at paragraph 10, the Court established a refugee claimant's right to an "examination-in-chief":
>
> > I would suggest to counsel for Applicants to remember at all times that as the burden of proof is on them they are entitled to present their case as they see fit.
>
> [46] In my opinion, in none of these cases did the Court establish that the principles of natural justice and procedural fairness require that refugee claimants be questioned by their counsel first. In fact, whether the Board's choice of the order of questioning accorded with natural justice or procedural fairness was not before the Court in any of the cases. The cases all dealt with specific circumstances in which the Court held that the Refugee Board's conduct of the hearing was improper or led to an error in the Board's findings of fact.
>
> [47] In *Kante*, the Applicant had not raised any issue of procedural unfairness. Rather, Mr. Justice Nadon, then of this Court, informed both parties that he was troubled by the fact that the Refugee Board had told counsel not to question the claimant regarding certain events. His comment, quoted above by the Applicant, did not concern the validity of the order of questioning. In fact, it appears that the hearing was conducted with the claimant's counsel questioning first.
>
> . . .

> [50] In *Veres*, the Refugee Board had adopted a procedure of directly cross-examining the claimant without having him put his case in chief first. As the Applicant in this case points out, Mr. Justice Pelletier did state that "…one would not think it contentious to say that the person who has the onus of proof must be given a fair chance to meet that onus". However, Mr. Justice Pelletier did not conclude that in the context of refugee determination hearings that claimants have an inherent right to lead their evidence first, as in civil or criminal court proceedings. Nor did he find that not allowing the claimant to go first was, in itself, a breach of natural justice. Rather, Mr. Justice Pelletier stated that the unfairness arises where the Board in its reasons reproaches claimants for failing to provide some piece of evidence without putting the claimants on notice that they are at risk on that issue. At paragraph 28 of his decision, Mr. Justice Pelletier wrote:
>
> > It is clear that the CRDD is the master of its procedures. It is entitled to take economy of time into account in devising its procedures. It can equally direct which evidence it wishes to hear from the mouth of the witness and which it waives hearing. But when it says it does not need to hear from the witness, it cannot subsequently complain that it has not heard from the witness.
>
> . . .
>
> [53] In my opinion, the cases cited by the Applicant and the Intervener do not lead to the conclusion that a meaningful opportunity to present one's case includes a right to question first. Rather, they reaffirm that the Board is entitled to control the procedures of a hearing but that the Board must conduct the hearing in a way that does not unfairly restrict the claimant's right to present her or his case.
>
> [54] The Court's jurisprudence has not settled whether a claimant appearing before the Board in a refugee determination hearing has the right to an "examination-in-chief" or whether not allowing the claimant's counsel to question first is inherently unfair. The Applicant and the Intervener must still establish that the principles of natural justice and procedural fairness dictate a particular order of questioning in refugee determination hearings before the Board in order to succeed on their argument.

(*Thamotharem*, *supra*)

[49] In *Thamotharem*, Blanchard J. states that Guideline 7 in and of itself does not affect the role of the Board member responsible for hearing the refugee protection claim. The RPD is an

administrative tribunal with investigatory powers and thus Board members can take the measures that they consider necessary to provide a full and proper hearing of the claim (section 165 of the Act). It is therefore not wrong for the RPD to engage in a probing examination of the claimant in order to assess the well-foundedness of the claim.

[50] With regard to the discretion of the member hearing the refugee claim, Blanchard J. determined in *Thamotharem* that where the member feels bound by Guideline 7 and thus is prevented from proceeding in the most appropriate manner to achieve a just and equitable hearing, the member's discretion has been fettered. Everything is a question of circumstances and how the member perceives and interprets Guideline 7.

[51] However, it must be noted that this decision is currently under appeal to the Federal Court of Appeal.

[52] Moreover, Mr. Justice Richard Mosley recently arrived at quite a different conclusion on the issue of the Board member's discretion in *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] F.C.J. No. 631 (QL):

> [171] There is considerably more evidence before me as to the manner in which Guideline 7 is actually being applied by RPD members than there was before my colleague in *Thamotharem*. On that evidence in these proceedings, I am not satisfied that the applicants have demonstrated that the discretion of RPD members to determine the procedure to be followed in the refugee proceedings before them has been fettered by the implementation of Guideline 7.

[53] There is no evidence in this case to suggest that the RPD's discretion was fettered. Indeed, the reasons for the decision show that the RPD considered Ms. Munoz's objection and proceeded in

the manner that it felt was the most appropriate. Proceeding in this manner did not prevent Ms. Munoz from presenting her case because she was able to adduce her evidence, and in fact was allowed to adduce it late, and testify as to the facts of her claim for refugee protection. In addition, in reading the reasons for the RPD's decision and Ms. Munoz's file, the Court notes that Ms. Munoz's account was clearly understood by the RPD.

[54] In short, the RPD must observe the principles of natural justice in carrying out the duties and exercising the powers provided for in the Act. In this case, the RPD did not breach any of these principles.

(b) Allegations of bias

[55] Ms. Munoz claims that the atmosphere at the hearing was hostile and that her counsel was attacked by the Board member. In addition, she emphasizes that the reasons for the decision that pertain to the Board member's behaviour raise the issue of the RPD's bias. Ms. Munoz did not directly submit any significant particulars supporting her allegations in this regard.

[56] First, it appears from the reasons for the RPD's decision that a criticism was levelled at the proceedings:

> . . .both before and during the hearing concerning the role of the refugee protection officer and even the impartiality of the presiding member, he went so far as to submit that the Immigration and Refugee Board acted in a manner contrary to human rights, alleging that both the member and the Board as an organization failed to respect the rules of natural justice.

[57] Second, Ms. Munoz's allegations seemed to rely on her own impressions, hypotheses and opinions not directly based on testimonial or documentary evidence. In addition, Ms. Munoz did not provide any examples of questions addressed to her that were allegedly hostile.

[58] It is not sufficient to allege that the RPD had a skeptical attitude; one has to demonstrate that the RPD's manner of proceeding resulted in a denial of natural justice. In this case, no direct and specific demonstration of this was made.

[59] Third, it must be remembered that the tribunal is presumed to be impartial and that it is up to the applicant to prove or provide a basis for an allegation of bias. This evidence must be clear and unequivocal (D. Lemieux, *Le contrôle judiciaire de l'action gouvernementale*, Montréal, CEJ 1986, 3, at page 116). The caselaw holds that the test for a reasonable apprehension of bias is that of an informed person having thought the matter through and that the reasons for this apprehension must be serious, particularly in the case of an administrative tribunal, as in this case (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (QL); *Wu v. Canada* (*Minister of Citizenship and Immigration*), [2000] I.A.D.D. No. 2158.)

[60] In this case, Ms. Munoz's statements in her affidavit and in her submissions do not establish that the test for bias developed by the caselaw has been met. It was her responsibility to show that the RPD's behaviour towards her was reprehensible, which would cast doubts about its impartiality. Ms. Munoz did not show this. Her general allegations are not of this nature and are therefore not sufficient to warrant this Court's intervention.

CONCLUSION

[61] In view of the foregoing, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed.

2. There is no serious question of general importance to be certified.

"Michel M.J.Shore"

Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1218-06
STYLE OF CAUSE:	OLGA CADENAS MUNOZ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 16, 2006
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Shore
DATED:	October 26, 2006

APPEARANCES:

Alain Vallières	FOR THE APPLICANT
Lisa Maziade	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ISTVANFFY VALLIÈRES ET ASSOCIÉS Montréal, Quebec	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT