

**Date: 20070927**

**Docket: IMM-4725-06**

**Citation: 2007 FC 968**

**Ottawa, Ontario, September 27, 2007**

**PRESENT: The Honourable Madam Justice Dawson**

**BETWEEN:**

**ERICKA MARLENE MARTINEZ REQUENA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Refugee Protection Division of the Immigration and Refugee Board (Board or RPD) is bound to afford procedural fairness to refugee claimants. This is reflected in paragraph 170(e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), which provides that the RPD, in any hearing before it, "must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations". It is also reflected in Rule 29 of the *Refugee Protection Division Rules*, SOR/2002-228, which regulates the disclosure of documents. Rule 29(2) provides that, if the RPD wants to use a document at a hearing, the RPD must provide a

copy of the document to each person in advance of the hearing. Part 5 of the Board's Policy on Country-of-Origin Information Packages in Refugee Protection Claims further states that it is the policy of the Board "to create, implement, and use standard [Country-of-Origin] packages to serve as the Board's disclosure of information in all [Refugee Protection Division] proceedings" [emphasis added].

[2] In accordance with this policy, prior to each hearing, the index to the relevant Country-of-Origin package is disclosed to the refugee claimant. The index is then tendered as an exhibit at the commencement of the hearing. With this introduction, I turn to the case now before the Court.

[3] The present case involves a claim for refugee protection made by Ericka Marlene Martinez Requena, a citizen of Bolivia. She says that she is a peasant rights advocate who fears persecution by the Bolivian authorities and security forces, including the military and the police.

[4] At the commencement of her refugee hearing, the Board confirmed orally that the documents that would be used in the determination of her claim would be certain documents received from Canadian immigration when Ms. Martinez Requena arrived in Canada and the information package entitled "Bolivia 2003". Those documents were marked as Exhibits R-1 and R-2, respectively.

[5] Not disclosed to Ms. Martinez Requena, whether in the Country-of-Origin package or otherwise, was Response to Information Request BOL 43345.E, dated February 10, 2005 (RIR).

The Board relied extensively on this document in order to find that state protection was, and is, available in Bolivia for Ms. Martinez Requena.

[6] I am satisfied that the Board, by relying upon a document not disclosed to her, deprived Ms. Martinez Requena of a reasonable opportunity to participate in her refugee hearing and so failed to afford her procedural fairness. The RIR was obviously material and pertinent to her claim, as evidenced by the Board's substantial reliance upon the document in its reasons. The RIR should have been disclosed to Ms. Martinez Requena in advance of her hearing.

[7] Before moving to consider the consequence of the failure to disclose the RIR, I note that this was not the only error committed by the RPD. It also erred when it found Ms. Martinez Requena had no subjective fear of persecution in Bolivia because she had returned to Bolivia in 2004 from Chile and in 2005 from Uruguay. When considering this finding, it is important to note two things. First, the Board made no adverse finding with respect to Ms. Martinez Requena's credibility. Thus, the Board must be presumed to have accepted the truthfulness of her testimony. Second, the mere fact that a refugee claimant returns to their country of nationality is not determinative of whether they possess a subjective fear. For example, evidence of a claimant's belief that country conditions have changed or evidence of a claimant's temporary visit while he or she remained in hiding would be evidence inconsistent with a finding of a lack of subjective fear.

[8] Given Ms. Martinez Requena's explanation as to why she returned to Bolivia, the Board could not find that she had no subjective fear of persecution unless it found her evidence to be incredible (which it did not). As the Federal Court of Appeal noted in *Shanmugarajah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 583 at para. 3 (C.A.), "it is almost

always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear".

[9] Returning now to the consequence of these errors, counsel for the Minister submitted that the Board's determinative finding was that Ms. Martinez Requena had failed to rebut the presumption of state protection. Counsel therefore argued that it would be futile to return the case to the RPD.

[10] I have two difficulties with this submission. First, as noted by my colleague Mr. Justice Blanchard in *Chalal v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 497 at para. 47 (T.D.), it is rare for a remedy to be withheld from an applicant where they have been denied their right to full and complete disclosure and a fair hearing. Second, in my view, the Minister's submission does not properly take into account that, in the present case, the state of Bolivia was said to be the agent of persecution and Ms. Martinez Requena's testimony was found to be credible.

[11] At paragraph 8.427 of his text *Immigration Law and Practice*, 2d ed. (Markham, Ont.: LexisNexis Butterworths, 2005), Lorne Waldman writes as follows:

[...] there is a distinction between cases where state actors are the agents of persecution and where the state is unable to provide protection to its citizens. In the first scenario the claim should only be assessed on the claimant's unwillingness to seek the protection of the state. This is the necessary implication of the fact that the persecutors fear persons from state agents. If the agents of persecution are state agents, then there is no reason to assess the claim based on inability to seek protection. Once the persecutors are state agents, inability to obtain protection does not arise. The only possible exception might arise in circumstances where the agents of persecution are acting on their own without the knowledge or consent of the central authority. However, in order for such a situation to arise there would have to be

convincing evidence that the central authority was unaware of the acts of its local agents and that it would be in a position to provide protection in the future. Thus the only issue to be addressed by the Board in circumstances where the agents of persecution are agents of the state or persons acting on behalf of the state is whether or not the claimant has a well-founded fear of harm which is sufficiently severe to constitute persecution and whether as a result of this fear he or she is unwilling to avail himself or herself of the state's protection.  
[emphasis added]

[12] In view of Ms. Martinez Requena's unchallenged evidence about her treatment in Bolivia and her unwillingness to approach the state for protection, I cannot conclude that as a matter of law it is futile to remit this matter to the Board. The application for judicial review is therefore allowed.

[13] Counsel posed no question for certification and I am satisfied that no question arises on this record.

## **JUDGMENT**

### **THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is allowed, and the decision of the Refugee Protection Division rendered on August 4, 2006 is hereby set aside.
2. The matter is remitted for redetermination by a differently constituted panel of the Refugee Protection Division.

“Eleanor R. Dawson”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-4725-06

**STYLE OF CAUSE:** ERICKA MARLENE MARTINEZ REQUENA, Applicant  
and  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION, Respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 18, 2007

**REASONS FOR JUDGMENT  
AND JUDGMENT:** DAWSON, J.

**DATED:** SEPTEMBER 27, 2007

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