Federal Court  Cour fédérale

Date: 20100129

Docket: IMM-2928-09

Citation: 2010 FC 106

Ottawa, Ontario, January 29, 2010

Present: The Honourable Mr. Justice Harrington

BETWEEN:

HABIBA FAZIA MADOUI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Habiba Fazia Madoui is an Algerian woman who rebelled against the idea of marrying a much older man. The marriage was arranged by her father, who is apparently a fairly influential man and who allegedly beat her. With her mother's help, she left Algeria for Canada, where she made a claim for refugee protection. This is the judicial review of the decision of the Refugee

Protection Division (RPD) of the Immigration and Refugee Board (IRB) rejecting her claim. The RPD found Ms. Madoui not to be credible.

ISSUES

[2] Two arguments were raised in support of this application for judicial review. The first is that Ms. Madoui's counsel, who had been retained just six days prior to the hearing and had not been in possession of the complete file, had applied to have the hearing postponed. That application was dismissed. The second is that, in any event, the decision is unreasonable and should be quashed.

STANDARD OF REVIEW

[3] The refusal to postpone a hearing to allow counsel to prepare is an issue of procedural fairness. No deference is owed to the RPD: *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539. As for the decision to reject Ms. Madoui's claim for refugee protection, the standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

PROCEDURAL FAIRNESS

[4] Counsel for Ms. Madoui was retained just six days prior to the date set for the hearing. That was the fourth time that the matter had been scheduled to be heard.

[5] Counsel, Mr. Si Ali, applied in writing to the RPD to have the hearing postponed, noting the following ground: [TRANSLATION] ". . . I do not have a copy of the file, and, given the proximity of the hearing date (March 25, 2009), I would like to request that the hearing be postponed to a later date".

[6] His application was dismissed just prior to the start of the hearing. The decision is simply worded as follows: [TRANSLATION] "A lawyer who accepts a case must make sure that he or she is available on the appointed date". The hearing took place. Mr. Si Ali cannot be faulted for not having applied to this Court for a stay, considering the Court's reluctance to rule on interlocutory matters raised before the RPD: *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon*, 2005 FC 1000, [2006] 3 F.C.R. 493.

[7] The Minister defends the RPD's decision on a different basis from that on which the decision was actually rendered. The Minister submits that the RPD dismissed the application because it was merely another delaying tactic by Ms. Madoui. In fact, the applicant's new counsel requested an adjournment the very day he was retained. His application was dismissed on the grounds that [TRANSLATION] "a lawyer who accepts a case must make sure that he or she is available on the appointed date". The Minister also maintains that, even if Mr. Si Ali had been given more time to prepare, the outcome would have been the same.

[8] The RPD was understandably frustrated by Ms. Madoui's behaviour, including her failure to keep it informed of her changes of address. However, the first two dates were rescheduled for administrative reasons that had nothing to do with Ms. Madoui. The third date

was rescheduled because Ms. Madoui's counsel had withdrawn from her file, as his fees had not been paid. That was in September 2008. In February 2009, the hearing date was set for March 25, 2009. It was clearly mentioned that she was to be ready to proceed.

[9] It may very well be that the RPD refused to postpone the hearing because Ms. Madoui resorts to delay tactics. However, that was not the reason it gave. The RPD focussed on counsel, not Ms. Madoui.

[10] Clearly, there are situations where lawyers have not only the right but also a duty to accept a retainer when they are unable to proceed on a previously set date. Suppose, for example, that Ms. Madoui's counsel suddenly died or was appointed to the judiciary. In such circumstances, she would not all the same have been forced either to find a lawyer who would feel ready without the file or to represent herself.

[11] Rule 48 of the RPD Rules reflects the principles of natural justice. If an application is made to change the date of a proceeding, the RPD must consider any relevant factors, including:

(*c*) the time the party has had to prepare for the proceeding;	*c*) le temps dont la partie a disposé pour se préparer;
. . .	[…]
(*f*) whether the party has counsel;	*f*) si la partie est représentée;
(*g*) the knowledge and experience of any counsel who represents the party;	*g*) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
(*h*) any previous delays and the reasons for them;	*h*) tout report antérieur et sa justification;

(*i*) whether the date and time fixed were peremptory;	*i*) si la date et l'heure qui avaient été fixées étaient péremptoires;
(*j*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and	*j*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;
(*k*) the nature and complexity of the matter to be heard.	*k*) la nature et la complexité de l'affaire.

[12] In making that decision, the RPD failed to consider all of the relevant factors. The Minister provided the Court with a great number of judgments concluding that a party's right to counsel is not absolute. An application for a postponement also requires a legitimate reason. I have reviewed many of the authorities in *Mervilus v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206. More recently, Justice Russell analyzed them in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 22.

[13] In determining whether the refusal to allow a postponement is reviewable, the Court must consider whether the case is complex, whether the consequences of the decision are serious, and whether the individual has the resources—be it in terms of intellect or legal knowledge—to properly represent his or her interests.

[14] The Minister submits that the case was not complex and that Mr. Si Ali did an excellent job. Moreover, if there was a lack of procedural fairness, this deficiency was corrected when Mr. Si Ali was given the opportunity, after the hearing, to submit additional information.

However, this opportunity was limited to information on the influence that Ms. Madoui's father exerted in Algeria. At the end of the hearing, the member said that, [TRANSLATION] "as [Mr. Si Ali had not had] much time to prepare for this hearing, [she would give him] a little homework to do", which was to find a document confirming that the father is the director of a cultural centre.

[15] In my opinion, the initial breach of natural justice in this case has not been rectified. It is not a situation where, at the next level, be it an appeal or a review, the applicant may introduce new evidence and proceed *de novo*, such as in an appeal under the *Veterans Review and Appeal Board Act.* See, for example, *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. In a judicial review proceeding, the Court may quash a decision, but it cannot render the decision that should have been made at trial.

[16] The facts in this case relate to the principles set out in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL). Justice Le Dain, writing for the Court, stated the following at paragraph 23:

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[17] I am not prepared to speculate as to what the outcome might have been had Mr. Si Ali been given enough time to prepare. *Mobil Oil Canada Ltd v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, establishes the principle that, in some cases, a breach of procedural fairness may be disregarded because there could not have been a different outcome. However, in that case, a different result would have been impossible under the applicable legislation. Here, the decision is based on findings of fact: Ms. Madoui's lack of credibility. I am not prepared to conclude that there is so little need for lawyers in immigration hearings that the outcome could not have been any different had Mr. Si Ali been given more time to prepare.

ORDER

FOR THESE REASONS,

THE COURT ORDERS that:

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division of the Immigration and Refugee Board is quashed.
3. The matter is referred back to the Refugee Protection Division of the Immigration and Refugee Board for rehearing before a differently constituted panel.
4. No serious question of general importance is certified.

"Sean Harrington"
Judge

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2928-09
STYLE OF CAUSE:	Habiba Fazia Madoui v. MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 20, 2010
REASONS FOR ORDER AND ORDER BY:	HARRINGTON J.
DATED:	January 29, 2010

APPEARANCES:

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