Federal Court  Cour fédérale

Date: 20100611

Docket: IMM-4357-09

Citation: 2010 FC 638

Ottawa, Ontario, June 11, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

WAYNE ANTHONY HILLARY

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated August 7, 2009 (Decision), in which the IAD refused the Applicant's request to reopen his appeal.

BACKGROUND

[2] The Applicant was born in Jamaica. He came to Canada in 1981 at the age of 13 and acquired permanent resident status. He never applied for citizenship.

[3] The Applicant was diagnosed with HIV and schizophrenia in 1989.

[4] The Applicant has a lengthy criminal history dating back to 1987. Because of his criminal activities, the Applicant was ordered deported in 1991. This order was stayed for a period of five years. The IAD then allowed the Applicant's appeal and quashed the deportation order in March, 1998.

[5] The Applicant was ordered removed again in April, 2007 as a result of a conviction for robbery. His appeal of this decision was dismissed by the first IAD panel (Panel). The Applicant then applied to have his file reopened pursuant to section 71 of the Act. This application was refused by the IAD.

DECISION UNDER REVIEW

[6] The IAD found that where it is apparent that an appellant may not appreciate the nature of the proceedings, further inquiry and possibly the appointment of a designated representative is required.

[7] The IAD noted that the Applicant was represented by counsel and that no request for a designated representative had been made.

[8] Moreover, because the Applicant had been previously ordered deported from Canada and had undergone an appeal process from that decision, he "ha[d] a much greater familiarity with the process than someone coming before the IAD for the first time."

[9] The IAD noted that the Panel that had heard his appeal was aware of the Applicant's schizophrenia and referred to it multiple times in its decision to dismiss his appeal. There is nothing in the Panel's decision indicating that the Applicant did not understand the nature of the proceedings. Indeed, the Applicant provided evidence at the hearing to support his application.

[10] The IAD found it noteworthy that more than two years had passed between the dismissal of the Applicant's appeal and his application to reopen the appeal. Furthermore, the IAD noted that the Applicant

> ha[d] not argued that any request for a designated representative was put forth or that anything in the appellant's behaviour or demeanor should have alerted the panel to the need for a designated representative.

Rather, the IAD determined that the Applicant was arguing that the appointment of a designated representative should have been considered because the Panel was aware of the Applicant's schizophrenia.

[11] The IAD noted that not all persons suffering from schizophrenia are incapable of appreciating the nature of the proceedings and so require a designated representative. In this case, the Applicant instructed counsel and testified on his own behalf. Furthermore, counsel for the Applicant did not raise any concern with regard to the Applicant's ability to instruct or appreciate the nature of the proceedings. There was no evidence before the IAD in this instance to demonstrate that the Applicant was unable to tell his story.

[12] The Applicant would have liked to make a better presentation of his case to the Panel. The Panel's decision was based in part on the lack of evidence as to the "facilities, medicine and programs" available to those in Jamaica requiring treatment for HIV and schizophrenia. The Panel also took into account that the Applicant's mother and sister did not attend the hearing or provide letters in support, that the psychological evidence before the Panel was dated, and that the Applicant had "almost completely denied any criminal involvement in relation to the offences on his record." The IAD determined that the Panel's findings "point to a failure in appeal strategy or preparedness that may reflect on counsel decisions rather than revealing an inability to appreciate the nature of the proceedings."

[13] The IAD also determined that the inadequacy of the Applicant's presentation was not due to a failure on the Panel's part to "observe a principle of natural justice." In the words of the IAD,

> one cannot look at the Member's observation about the failings in the appellant's case and deduce that a designated representative would have dealt with those failings in a manner that would have provided a different outcome

[14] Indeed, the IAD found that the availability of a designated representative would not have affected the Panel's negative findings with regard to the Applicant's lack of remorse and rehabilitation. Furthermore, the IAD determined that

> there is no basis to conclude that a designated representative would have instructed counsel to present evidence about country conditions in relation to HIV and schizophrenia treatment or arranged for the appellant's mother or sister to testify.

[15] Because the Applicant had not established that the Panel failed to observe a principle of natural justice, his application to reopen the appeal was denied.

ISSUES

[16] The issues on this application can be summarized as follows:

1. Whether the Panel that heard the Applicant's initial application erred in failing to advise the Applicant of the possibility of having a designated representative and asking whether one was required;
2. Whether the IAD used the wrong test in determining whether a breach of fairness occurred during the Applicant's application to reopen his appeal.

STATUTORY PROVISIONS

[17] The following provisions of the Act are applicable in these proceedings:

Reopening appeal	Réouverture de l'appel

71. The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.	**71.** L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.
Representation	Représentation
167 (2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.	**167 (2)** Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] Issues of procedural fairness are to be considered on a standard of correctness. See *Dunsmuir*, above, at paragraphs 126, 129. Accordingly, correctness is the appropriate standard to

use in considering whether the Panel erred by failing to inform the Applicant about the possibility of the appointment of a designated representative.

[20] Correctness is also the appropriate standard with which to consider whether or not the IAD applied the appropriate legal test to the case at hand. Based on the Supreme Court's ruling in *Dunsmuir*, questions of law may be reviewable on a reasonableness standard, if they are not "legal questions of central importance to the legal system as a whole and outside a decision-maker's specialized area of expertise." See *Dunsmuir*, above, at paragraphs 55 and 60. However, in accordance with the analysis of Justice Dawson in *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, [2008] F.C.J. No. 601, as in the case at hand,

> having regard to the absence of a privative clause, the relative lack of expertise on the part of an officer to appreciate whether he or she has applied the wrong test at law, and the importance of ensuring that officers apply the test that Parliament has prescribed, I conclude that the question of whether the officer applied the correct test is reviewable on the correctness standard.

In my view then, correctness is the appropriate standard in considering whether the IAD applied the correct legal test.

ARGUMENTS

The Applicant

Designated Representative

[21] The Applicant submits that there is an obligation under section 167(2) of the Act to designate a representative for an applicant who cannot appreciate the nature of the proceedings. This obligation arises at "the earliest point in time at which the Board became aware of facts which revealed the necessity of…a designated representative." See *Duale v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 150, [2004] F.C.J. No. 178. A failure to comply with this obligation is an error in jurisdiction which renders the decision void. See, for example, *Vashee v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1004, [2005] F.C.J. No. 1360; *Sibaja v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1079, [2004] F.C.J. No. 1363; *Stumf v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 148, [2002] F.C.J. No. 590.

[22] In this instance, the Panel was aware of the Applicant's mental illness. However, the Panel did not examine the Applicant with regard to his condition or his appreciation of the nature of the proceedings. As described in his affidavit, it was only after the hearing that it became clear that the Applicant did not fully comprehend the nature of the proceedings.

Wrong Legal Test

[23] The test to determine whether a breach of procedural fairness has occurred was stated by Justice Dawson in *Duale*, above. In *Duale*, an application for judicial review was allowed on the basis that Justice Dawson could not "safely conclude that the failure to appoint a designated representative could not have an adverse effect on the outcome of the claim."

[24] Accordingly, what is important is whether the failure to appoint a designated representative *could* have affected the final outcome of the claim. The Applicant stresses the low legal threshold that exists to consider whether a designated representative ought to have been appointed. Indeed, this consideration should be determined on possibility rather than certainty. The Applicant submits that the purpose of this low threshold is to ensure fairness for the most vulnerable individuals (children and individuals living with mental illness) in the legal system.

[25] The IAD erred in applying a higher threshold than that set out by Justice Dawson in *Duale*: rather than considering whether a designated representative *could* have changed the outcome, the IAD instead considered whether the presence of a designated representative *would* have changed the outcome. The Applicant's application to reopen his appeal was rejected on the basis that "one cannot look at the Member's observations about the failings in the appellant's case and deduce that a designated representative *would* have dealt with those failings in a manner that *would* have provided a different outcome" [emphasis added]. Furthermore, the IAD stated that

> similarly there is no basis to conclude that a designated representative would have instructed counsel to present evidence

> about country condition in relation to HIV and schizophrenia treatment or arranged for the appellant's mother or sister to testify.

The IAD erred in applying a higher legal threshold to this issue than was necessary, as per the case of *Duale*.

Role of a Designated Representative

[26] In creating a role for a designated representative, it is clear that Parliament intended to provide a higher threshold of protection for individuals who would be considered vulnerable by the Board. The Applicant submits that a large part of a designated representative's role is to instruct counsel and ensure they are performing their duties. While the IAD determined that the Applicant was able to "tell his story," it also found that the Applicant's counsel was not effective. The IAD erred in failing to make the connection between the absence of a designated representative and a client's not being effectively represented by counsel. A designated representative is intended to serve as a protection against negligent counsel.

[27] Important tasks of the designated representative include ensuring that necessary evidence is brought to the attention of the panel and ensuring that counsel is being properly instructed. The Panel's reasons make it clear that the lack of medical evidence from Jamaica with regard to health care was detrimental to the Applicant's application. The IAD failed to consider that it is the role of a designated representative to instruct and monitor counsel as well as to present evidence. Because of the lack of a designated representative, proper instruction of counsel did not occur in this case and

the necessary evidence was not adduced to support the Applicant's claim. This resulted in severe detriment to the Applicant's application.

[28] The Applicant submitted to the Panel as a humanitarian and compassionate argument that he would lose access to life-saving medications upon his return to Jamaica. This could ultimately result in his death. The Panel, however, did not accept this argument because it found little or no evidence to support it.

[29] The provision of a designated representative could have affected the Panel's findings significantly. First, being familiar with the process, the designated representative would have understood the necessity of submitting country documentation with regard to Jamaica as well as updated medical documentation. Second, the designated representative could have ensured that this evidence was submitted on the Applicant's behalf. In this case, the lack of a designated representative was directly related to the failure to adduce adequate evidence. This failure to adduce evidence then affected the outcome of the Applicant's application.

[30] The Applicant likens the case at hand to *Black v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 703, [2009] F.C.J. No. 872 where the Court determined that

> there are problems of care, homelessness and incarceration, and human rights abuses in which the Jamaican authorities are often implicated, that would have been placed before the IAD by a designated representative who understood the nature of her role. These matters could well have led the IAD to a different conclusion. The breach of procedural fairness was highly material to [the] outcome in this case.

The Need for a Designated Representative

[31] In this instance, the IAD determined that "where it is apparent to a Member that the appellant may not appreciate the nature of the proceedings, then further inquiry and possibly the appointment of a designated representative is required." The Applicant contends that it is necessary for the Court in this case to determine the point at which it should have become apparent to the Panel that the possible appointment of a designated representative was required to deal with issues of mental health.

[32] The Applicant contends that, based on *Duale,* this is a low threshold that is passed as soon as the issue of mental health arises in a proceeding. Indeed, procedural fairness requires that the Applicant be notified of the possibility of having a designated representative, and a panel must conduct an inquiry to satisfy itself that the Applicant understands the nature of the proceedings. This is comparable to the jurisprudence regarding children – as soon as the board is made aware that an applicant is under 18 years of age, a designated representative must be appointed. See, for example, *Duale* and *Stumf*, above.

[33] The Applicant recognizes that children attract different requirements of procedural fairness than people with mental health problems. Nevertheless, he submits that the Immigration and Refugee Board is required to notify an applicant of the possibility of a designated representative when an applicant's mental illness is brought to light. From there, the panel must undertake an inquiry to satisfy itself that an applicant is able to understand the nature of the proceedings.

[34] The IAD essentially found that the determination of whether or not a designated representative is required is based on whether a request is made by an applicant, or on whether an incident occurs that alerts the panel to this requirement. The Applicant submits that this threshold is too high. Board members have no training in symptoms of mental health. Moreover, individuals who live with mental health issues may learn to "cover up" their symptoms over time so that no behavioural actions or incidents occur. The Panel has an obligation to ensure that the rules of procedural fairness are being met, and it cannot rely on an applicant's counsel to ensure this; rather, this obligation must be discharged by conducting an inquiry "at first instance when the Board becomes aware of the issue."

[35] The Respondent contends that the Applicant waived his right to procedural fairness because he did not request a designated representative sooner; however, the Applicant was unaware of the possibility of having a designated representative until he acquired new counsel two years after the application. The Applicant was never informed of this possibility. As such, it cannot be argued that he waived this right.

The Respondent

Guidelines

[36] The Respondent contends that Citizenship and Immigration Canada's "Guideline 8: The Chairperson's Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB," December 2006 (Guideline 8), holds that it is the counsel for the person who may be

considered vulnerable who is in the best position to bring this vulnerability to the attention of the panel. Counsel is expected to do this as soon as possible. Other parties, such as counsel for the Minister, who may be aware of the vulnerability, are also encouraged to bring this vulnerability to the attention of the panel.

[37] Guideline 8 also states that, before protections are made available to a vulnerable person in an adversarial hearing, the Minister must have the opportunity to make submissions to ensure that the Minister's case can also be presented fairly and completely.

No Evidence

[38] No expert evidence was presented to bolster the Applicant's claim that a designated representative was required in this instance. The Respondent submits that, absent evidence to show the requisite incapacity, it cannot be presumed that all persons suffering from schizophrenia are incapable of appreciating the nature of the proceedings and/or of fully participating in the hearing.

Waiver of Rights

[39] It was necessary for the Applicant to raise his objection with regard to the failure to appoint a designated representative at the earliest opportunity possible. This is especially so where the Applicant was represented by counsel. The Respondent submits that the appropriate time would have been "at the hearing of the appeal at the very latest." However, the Applicant did not raise this

issue until over two years after the refusal of the appeal. As such, the Applicant waived his right to claim a breach of procedural fairness after having received a negative result. See, for example, *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] F.C.J. No. 631 at paragraphs 212-214.

All Material Considered

[40] It was open to the IAD to determine that the Applicant's schizophrenia was not in and of itself an adequate reason for the appointment of a designated representative. Indeed, there is no indication that the Applicant did not understand the proceedings. Furthermore, not all persons suffering from schizophrenia are incapable of understanding proceedings and participating in them. Each case must be considered on its own merits.

[41] In this case, the Applicant was represented by counsel and he testified on his own behalf. Neither the Applicant nor his counsel raised any concern that the Applicant could not properly instruct counsel or fully participate in the hearing. As determined by the IAD, the fact that the Applicant would have liked to have presented his case better does not mean that his right to procedural fairness was breached.

[42] The Applicant has submitted that the Panel should have been sensitive to his need for a designated representative, and subsequently appointed one. To support this statement, the Applicant cites a number of cases that relate to minors, such as *Duale* and *Stumf*, above. However, there is a

statutory requirement that a designated representative be appointed in the case of minors. This is not the case for those with mental illness. Pursuant to the Act and Guideline 8, where there is no presumption of an inability to appreciate the nature of the proceedings, counsel is best placed to bring the need for a designated representative to the attention of the panel.

ANALYSIS

Section 167(2) Issues

[43] Both the *Duale* and *Vashee* cases relied upon by the Applicant dealt with minors. In the case of minors, section 167(2) of the Act says that the relevant Division "shall designate a person to represent the person."

[44] In the case of the Applicant, who was not a minor (and who now claims that throughout the hearing he was "extremely confused as to what was happening," so that he could not follow the proceedings and that he "would have benefited by having a designated representative) the obligation of the Panel to appoint a personal representative only arises if the Applicant was unable "in the opinion of the [Panel], to appreciate the nature of the proceedings."

[45] The Applicant concedes that "it is not the obligation of the [Panel] to appoint a designated representative in every case where mental health is asserted." What he does say, though, is as follows:

> Procedural fairness does require that the [Panel] inform applicants with mental health illnesses of their ability to appoint a designated

> representative and to make at least some inquiry to determine whether one is necessary to ensure a fair hearing.

[46] The Applicant cites no authority for this proposition. The Applicant is, in effect, asserting that there is a positive duty on the Panel to inquire about whether a designated representative is needed – at least on the facts of this case where the Panel was aware of the Applicant's schizophrenia. He says it is not enough for a panel, in reaching an opinion under section 167(2) as to whether or not someone is unable to understand the nature of the proceedings, to simply rely upon the contextual factors that were present in this case. Those contextual factors are as follows:

a. The Applicant had been through similar proceedings before and there was nothing to suggest that he did not know what was required of him;
b. If the Applicant was confused at the hearing, he did not mention this to anyone;
c. There is no evidence to suggest from the Applicant's conduct as the hearing that the Panel should have formed an opinion that he needed a designated representative;
d. The Applicant was represented at all material times by counsel and there is no evidence to suggest that counsel did not understand the nature of the proceedings or what was required by way of evidence or argument to support the Applicant's case;
e. The Applicant waited almost two years before making an application to re-open his appeal on the basis that he was confused at the time and could have benefited from a personal representative.

[47] In his affidavit, the Applicant does not say that he was unable to instruct his legal counsel appropriately before the Panel hearing. He says that the problems occurred at the hearing:

> Throughout the hearing I was extremely confused as to what was happening. I felt that the proceedings were moving extremely quickly and I could not follow them. My lawyer did not counsel me properly or advise me accurately as to what to expect. I was unable to decipher what was happening and was left to trust him to represent me. I do not know what he submitted on my behalf as he never informed me.

[48] In my view, this amounts to an allegation of incompetent counsel several years after the fact. There is no evidence before me to support these allegations apart from the Applicant's affidavit. What is more, the Applicant does not say that there was anything about his conduct at the hearing that should have alerted the Panel to his confusion and/or the need for a designated representative. His position is simply that, because there was evidence he was schizophrenic, the Panel should have embarked upon an inquiry into whether he needed a designated representative.

[49] There is no authority that the Applicant can point to that would support such an absolute obligation. Section 167(2) says that whether or not someone is able to appreciate the nature of the proceedings is a matter for "the opinion of the applicable Division."

[50] In the present case, the IAD accepted the proposition that where it is apparent to a member that an applicant may not appreciate the nature of the proceedings "then further inquiry and possibly the appointment of a designated representative is required." However, the IAD pointed out that there was "nothing in the panel's reasons that indicates that the appellant did not understand the nature of the proceedings":

> The appellant has not argued that any request for a designated representative was put forth or that anything in the appellant's behavior or demeanor should have alerted the panel to the need for a

> designated representative. The argument is fundamentally that given that the panel was aware of the appellant's schizophrenia the appointment of a designated representative must be explored.

[51] The IAD then reviewed the contextual factors and concluded that "the evidence implies that the appellant would like to have presented his case better" and not that the Panel should have been alerted to the need for a designated representative. I cannot say this conclusion was either unreasonable or incorrect. The Applicant says that section 167(2) is unclear as to what is required by way of procedural fairness when a "Division" is dealing with someone with a mental illness. He says that, once the Panel knew he suffered from schizophrenia, it was required to:

a. Notify the Applicant of the possibility that he might need a designated representative; and
b. Undertake an inquiry with the Applicant in order to decide whether or not he understood the nature of the proceedings.

He says that such a high level of procedural fairness is required when vulnerable people are involved and that the Panel was obliged to satisfy itself that the Applicant understood the nature of the proceedings. He says it was not sufficient for the Panel to rely upon the contextual factors listed above.

[52] The Applicant is asking the Court to read into section 167(2) an obligation for a "Division" to embark upon an inquiry into the understanding of someone who has an acknowledged mental illness, even in a situation where such an applicant is represented by counsel and displays no outward sign at the hearing that he is unable to understand the nature of the proceedings.

[53] In my view, the plain reading of section 167(2) read in context says that a Division need only designate a representative for someone who is not a minor if it forms an opinion that the person in question is unable to appreciate the nature of the proceedings. In my view, then, what is required to achieve procedural fairness will depend upon the full context of each case. In this case, the Panel knew that the Applicant had schizophrenia, but there was nothing to indicate that his schizophrenia prevented him from understanding the nature of the proceedings. In fact, the Applicant has a long history of appearing in legal proceedings and there is no evidence to suggest that his schizophrenia has prevented him from understanding what has taken place. There may well be situations where a Division is obliged to advise an applicant and undertake a formal inquiry into his understanding of the proceedings, but I do not think that such a procedure was required in the full context of this case.

The Guidelines

[54] According to Guideline 8, vulnerable persons are defined as

a. Individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution.

Based on this definition, it appears that there is a recognition that the mentally ill may be included in the class of vulnerable people, but that this is not necessarily the case. Mental illness does not automatically equate to an inability to present the case in hand.

[55] The objectives of Guideline 8 include the following:

> 3.1 To recognize that certain individuals face particular difficulties when they appear for their hearings or other IRB processes because their ability to present their cases is severely impaired.
>
> **3.2 To ensure that such vulnerable persons are identified and appropriate procedural accommodations are made** [emphasis added].
>
> 3.3 To the extent possible, to prevent vulnerable persons from becoming traumatized or re-traumatized by the hearing process or other IRB process.
>
> 3.4 To ensure the on-going sensitization of members and other hearing room participants.

[56] Guideline 8 suggests ways to address the barriers encountered by vulnerable people, and provides that the Division has a “broad discretion to tailor procedures to meet the particular needs of a vulnerable person, and, where appropriate and permitted by law, the Division may accommodate a person's vulnerability by various means.”

[57] While Guideline 8 may be of some relevance in a general sense to the present case, the most relevant guidance in this area is, in my view, found in the Immigration and Refugee Board of Canada’s “Guide to Proceedings Before the Immigration Division” (Guide). Chapter 7 of the Guide focuses specifically on persons who are unable to appreciate the nature of the proceedings.

[58] Section 7.3.1 of the Guide canvasses the steps that should be taken before a hearing:

> **Rules 3(*o*)** and **8(1)(*m*)** provide that **the Minister must inform the Immigration Division** if **he or she believes that a person** who is to be the subject of an admissibility hearing or a detention review **is less than 18 years of age or is unable to appreciate the nature of the proceedings** [emphasis in original].

This duty is also imposed on counsel. In fact, according to Guideline 8, above, "counsel for a person who may be considered vulnerable is best placed to bring the vulnerability to the attention of the IRB, and is expected to do so as soon as possible." Under Guideline 8, a similar duty is also extended to others: Guideline 8 holds that "others who are associated with the person or who have knowledge of facts indicating that the person may be vulnerable (counsel for the Minister or any other person) are encouraged to do the same."

[59] Chapter 7 also indicates who should be represented by a designated representative. It holds that "the member must designate a representative for any person who, in the member's opinion, is unable to appreciate the nature of the proceedings. Moreover, **"if there is no indication to the contrary, it is reasonable to assume that the person concerned can appreciate the nature of the proceedings"** [emphasis added].

[60] In accordance with the Guide, the member's opinion is generally to be based on: a) medical reports concerning the mental state of intellectual ability of the person concerned; or b) difficulties noted in meetings or discussions with the person concerned before the hearing.

[61] The Guide states that "it is up to the member to determine whether the person concerned is able to appreciate the nature of the proceedings of which he or she is the subject." Several factors for consideration are listed in Section 7.5.1:

> **7.5.1 Determining the inability to appreciate the nature of the proceedings**
>
> To decide whether the person concerned is able to appreciate the nature of the proceedings, the member may base himself on the following factors:
>
> - admissions by the person who is the subject of the proceedings concerning his or her inability to understand what is going on;
>
> - the testimony or report of an expert on the mental health or cognitive abilities of the person who is the subject of the proceedings;
>
> - the behaviour observed at the hearing (namely, the responses of the person who is the subject of the proceedings to the questions that are put to him or her); and
>
> - the observations of the parties.

[62] The Guide also includes a test of sorts to determine if a person appreciates the nature of the proceedings. Chapter 7 suggests that "the member should explain the possible consequences of the hearing in very simple terms and, then, ask the person to explain them in his or her own words." If the person is unable to do this, it "usually demonstrate[s] the person's inability to appreciate the nature of the proceedings and will justify the designation of a representative."

[63] It is important to note, however, that Chapter 7 considers mental illness in the context of understanding the nature of the proceedings. The Guide says that "a person may have a mental illness or limited intellectual skills but still be able to appreciate the nature of the proceedings."

[64] Although medical reports may be "sufficiently precise and detailed to indicate" that a designated representative may be necessary, the member must also consider other factors and "in particular, the behaviour of the person concerned, before designating a representative."

[65] The Guide notes further that "the member only has to form an opinion that the person is unable to appreciate the nature of the proceedings of which he or she is to be the subject."

Jurisprudence

[66] The jurisprudence in this area of the law is not fully developed. However, in my view, there are two cases that provide guidance on the issues before me.

[67] The case of *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 908, [2008] F.C.J. No. 1142 dealt with a psychologically vulnerable couple. In determining whether the couple should have had a designated representative, Justice Legacé stated at paragraph 19 that

> the applicants' psychological vulnerability should not be confused with that of a person who is unable to appreciate the nature and proceedings or the questions at a hearing before the Board. **It is for the Board to determine whether an applicant requires a designated representative, based on the individual's apparent**

> **understanding (or lack thereof) of the proceedings and the questions** [emphasis added].

[68] Justice Legacé also noted at paragraph 25 of *Sharma* that "neither the intervenor who accompanied the applicants for moral support nor their counsel made any objection that would suggest that the applicants did not understand the questions or the procedure."

[69] Justice Legacé then reviewed the transcript of the testimony and determined that the applicants "appeared to have understood both the questions and the nature of the proceedings." As a result, he decided it was open to the Board to dismiss the applicants' application for a representative and for him to uphold that decision, "absent evidence before or during the hearing that the applicants were unable to understand the nature of the proceedings or the questions." See *Sharma*, above, at paragraph 26.

[70] The case of *Abdousafi v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1372, [2001] F.C.J. No. 1891 involved a situation where the Board had expressed concern with regard to the applicant's ability to appreciate the nature of the proceedings. However, after further consideration based on its own observations and experiences with the applicant, the Board determined that the applicant was capable of appreciating the nature of the proceedings. The Court held in paragraph 13 of *Abdousafi* that "the Act does not require that the CCRD must rely on a medical assessment rather than its own assessment of the applicant's ability. The onus was on the applicant to bring forward medical evidence of his alleged deficiency." As a result, the Court concluded that

> the applicant did not satisfy the test set out in the Act, namely, that the applicant is unable to appreciate the nature of the proceedings in order to require the designation of a representative at the hearing.

[71] Furthermore, the Court held at paragraph 14 of *Abdousafi* that there was no evidentiary basis to establish "the necessary factual foundation to support the allegation that [the] applicant's counsel was aware of his mental health deficiency and neglected to obtain a medical assessment."

Conclusion on First Point

[72] I believe that both Chapter 7 of the Guide and the above-mentioned jurisprudence may be applied to the facts at hand to limit the onus the Applicant has attempted to place on the Panel with regard to the obligation to advise him of the possibility of a designated representative.

[73] Both *Sharma* and the Guide discuss the onus on the Panel to determine whether an applicant requires a designated representative. This determination is to be made based on the individual's apparent understanding of the proceedings and the questions asked by the Panel. In this instance, the Applicant's understanding was not considered an issue by the Panel either before or during the hearing. As such, it appears that if the Applicant or his counsel had concerns about the Applicant's appreciation of the nature of the proceedings, it was the Applicant's onus to prove the lack of understanding, as discussed in *Abdousafi*. There does not appear to be any onus on the Panel other than to consider the appointment of a designated representative if the Panel feels it is necessary based on its own opinion.

[74] In the facts before me, the Applicant made no admissions before or during the hearing with regard to his inability to understand the proceedings. It was only after the Applicant's claim failed that he expressed an inability to understand what was going on.

[75] The observed behaviour of the Applicant during the hearing did not lead the Panel to believe that the Applicant did not understand the nature of the proceedings. Furthermore, during the proceedings, neither the parties nor counsel suggested that the Applicant was unable to understand what was going on.

[76] While the Panel was aware that the Applicant has schizophrenia, there was no indication that the Applicant did not understand the nature of the proceedings. As such, according to the Guide, "it is reasonable to assume that the person concerned can appreciate the nature of the proceedings." This could also be compared to the situation in *Sharma*, in which the applicants were psychologically vulnerable.

[77] The Guide and the jurisprudence do not suggest that there is an automatic obligation for a panel to undertake an inquiry as to an applicant's understanding of the proceedings simply because he/she has been diagnosed with schizophrenia or any other mental illness. Rather, both the jurisprudence and the Guide suggest that such an inquiry is triggered by the Panel's own opinion, which is generally based on medical reports with regard to the person's mental state and/or any difficulties noted in meetings or discussions prior to the hearing or during the hearing itself.

[78] In this instance, the Panel observed nothing to suggest that a designated representative was necessary. Furthermore, neither counsel nor the parties to the hearing (including the Applicant) reported any concern with regard to the Applicant's ability to appreciate the nature of the proceedings either before or during the hearing. Accordingly, I do not believe that the Applicant's procedural fairness was breached in this instance. Moreover, the law and policy in this area do not suggest that there is an onus on a panel to inform an applicant of the possibility of a designated representative, unless the member feels it is necessary based on his or her own opinion.

The Correct Test

[79] The IAD's findings about whether a designated representative would have made any difference and its use of the word "would" instead of "could", in my view, are to be considered in conjunction with the IAD's finding that there was nothing "in the appellant's behavior or demeanor [that] should have alerted the panel to the need for a designated representative." I do not read the jurisprudence of this Court as saying that, even if there was nothing that should have alerted the IAD to the need for a designated representative, then procedural unfairness still occurs provided a designated representative "could have affected the outcome of the case."

[80] I agree with the Applicant that, on this aspect of the Decision, the IAD applied too high a test and should have inquired whether a designated representative "could" have made a difference. See *Duale* at paragraphs 20-21 and *Vashee* at paragraph 12. However, this still leaves the matter of whether the Panel correctly complied with section 167(2) in this case and whether the panel

correctly assessed this issue. In my view, there was no reviewable error in this regard so that the Decision must stand. Whether or not a designated representative could, or would, have made a difference was an alternative finding and ground for refusing the application to re-open.

Certification

[81] The Applicant has proposed the following question for certification:

> When evidence is presented that an appellant is suffering from a mental illness, does a duty arise in the IAD to determine in accordance with s. 167(2), whether or not the appellant is capable of understanding the nature of the appeal proceedings? If so, what formal procedural steps must be taken by the Board to meet this duty?

Parties' Submissions

Applicant

[82] The Applicant contends that this question meets the test for certification, since it is a serious question of general importance that would be dispositive of the appeal. *See Zazai v. Canada (MCI)*, [2004] F.C.J. No. 368 at paragraph 11.

[83] The question is one of general importance because it applies to all individuals with mental illness that appear before the Panel. People with mental illness constitute a vulnerable group, and it is imperative that the procedural protections they receive are clear and well defined in order to ensure that they are able to participate effectively in the hearing.

[84] Although subsection 167(2) of the Act grants discretion to decision makers when determining whether a designated representative is required, this discretion must still be exercised in a manner that ensures procedural fairness. According to the Applicant, “the rules and limitations on the exercise of this discretion are not inherent in the statute and jurisprudence is required to determine what they are.”

[85] Addressing the question posed by the Applicant would determine if the Panel has a duty to exercise its discretion under section 167(2) and form an opinion as to whether a person is capable of understanding the nature of the proceedings. Furthermore, it would clarify the procedural fairness obligations that must be met in exercising this discretion.

[86] Finally, the Applicant submits that this question is dispositive of the Applicant’s appeal, since his argument is based on the Panel’s failure to meet its statutory duty to determine whether he was capable of understanding the nature of the proceedings. This is important to consider, since the parties in this instance disagree as to whether a duty exists in this instance and, if so, what this duty entails.

Respondent

[87] The Respondent says that it is “of the view that a certified question is not appropriate in this instance, on the basis that the factual record is insufficient to justify a question that meets the test for certification.”

Conclusions on Certification

[88] I agree with the Applicant that certification is appropriate for the question at hand. While there is discretion granted to the Panel under subsection 167(2) to determine whether an applicant can appreciate the nature of the proceedings, it is important that this discretion be exercised in a procedurally fair manner.

[89] The issue at hand is certainly a serious question of general importance. See *Zazai*, above, and *Varela v. Canada (MCI)*, 2009 FCA 145. This issue is also one that is dispositive of the appeal. Indeed, in determining whether the Panel adhered to principles of procedural fairness by discharging its onus under subsection 167(2) of the Act, it must first be determined exactly what (if any) duty the Panel has to the mentally ill based on this subsection of the Act.

[90] Furthermore, the question arises from the basic issue in this case, and it is an issue that is addressed in the reasons. Based on these considerations, it continues to meet the threshold for a certified question under *Varela*, above.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed.

2. The following question is certified:

   When evidence is presented that an appellant is suffering from a mental illness, does a duty arise in the IAD to determine in accordance with s. 167(2), whether or not the appellant is capable of understanding the nature of the appeal proceedings? If so, what formal procedural steps must be taken by the Board to meet this duty?

"James Russell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-4357-09
STYLE OF CAUSE:	***WAYNE ANTHONY HILLARY*** ***v.*** ***THE MINISTER OF CITIZENSHIP AND IMMIGRATION***
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	March 30, 2010
REASONS FOR JUDGMENT And JUDGMENT:	RUSSELL J.
DATED:	June 11, 2010

WRITTEN REPRESENTATIONS BY:

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