Federal Court  Cour fédérale

Date: 20110720

Docket: IMM-7295-10

Citation: 2011 FC 908

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, July 20, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MARIA ARACELI LOPEZ AGUILAR
SAIRI LIZBETH CHAVARRIA LOPEZ
ABRAHAM CHAVARRIA LOPEZ
ANGEL URIEL CHAVARRIA LOPEZ

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Lopez Aguilar, her husband (her now ex-husband), and their three children came from Mexico to Canada, through the United States, to claim refugee protection. Their claim was originally based on the husband's fear of persecution, as indicated in his personal information form (PIF). While she was in Canada, Ms. Lopez Aguilar was the victim of domestic violence. As a result, she and her husband divorced. Afterwards, she separated her claim and that of her children from that of her ex-husband. She provided an amended PIF containing information that

had not been provided in her original PIF. Specifically, she stated there that she had been raped in Mexico and that she was afraid of her ex-husband. She also provided a later arrival date in the United States. If the information in her ex-husband's PIF turns out to be true, Ms. Lopez Aguilar was already in the United States on the day she claims to have been raped in Mexico.

[2] Her claim and those of her children were denied by a member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board. This is the judicial review of that decision.

[3] At the end of the hearing, I confirmed to the parties that I would allow the judicial review solely because the rules of natural justice had been breached. Consequently, the Court does not have to examine the other points raised in support of the judicial review.

[4] These are my reasons.

[5] The RPD panel, comprising a single member, heard the ex-husband's claim in the morning and the claims of the wife and the children in the afternoon. That in itself does not support a finding that there was breach of procedural fairness. The same member can hear various claims from various members of the same family. There is a presumption that members reach their decisions by relying solely on the evidence before them in the record and that they are able to ignore any other evidence from other files. See, for example, *Ianvarashvili v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 695, at paragraph 7, which reads:

> Indeed, in *Borissotcheva v. Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No. 494 (Q.L.) and *Borissotchev v.*

> *Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No. 495 (Q.L.), von Finckenstein J. dismissed an appeal by the father from a decision of a Citizenship judge, but granted the appeal with respect to his daughter. Each case is judged on its own facts.

[6] In this case, Ms. Lopez Aguilar's amended PIF unfortunately ended up in her ex-husband's file. At pages 536 and 539 of the Certified Tribunal Record, the RPD member had the following to say:

> [TRANSLATION]
>
> [Page 536] That's all; that's what I said. Like this morning, I had the applicant's file, and, unusually, Ms. Lopez Aguilar's PIF was in it, which was problematic right in the middle of the hearing.
>
> [Page 539] And it turned out that he completely denied that version of the facts. Because her, it was in his file this morning.

[7] The member rightly had to disclose this situation, since he is undoubtedly an honest man. However, Ms. Lopez Aguilar's amended PIF should not have been in her ex-husband's file and should not have been discussed during the hearing of his claim.

[8] The principles of natural justice are clear. Persons are entitled to have their case, or their defence, heard before an impartial decision-maker. The present matter is not a case of real or apprehended bias on the part of the member; it is a case where the member should not have had at his disposal Ms. Lopez Aguilar's amended PIF while hearing her ex-husband's claim. To reiterate what Justice de Grandpré, dissenting, had to say in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, at pages 394 to 395:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by

> reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[9] In *Ianvarashvili*, above, I wrote as follows paragraph 8:

> In *Arthur*, [*Arthur v. Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 94], MacGuigan J.A. considered the decision of Jackett P., as he then was, in *Nord-Deutsche Versicherungs Gesellschaft v. Her Majesty the Queen, et al*, [1968] 1 Ex.C.R. 443, where the Attorney General unsuccessfully argued that judges who sat on an appeal relating to some of the questions in issue were debarred by natural justice from sitting on a subsequent trial. In that case, Jackett P. adopted the words of Hyde J. in *Regina v. Barthe* (1963), 45 DLR (2d) 612 where he said:
>
> > The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process.
>
> It would be quite wrong to assume that a judge would apply personal knowledge derived from a recollection of the evidence taken in an earlier case. It is not reasonable to apprehend that there is a "real likelihood that a judge will be so derelict in his duty as to decide one case in whole or in part on the evidence heard in an earlier case."

[10] However, I note that there is a distinction between admissible evidence, at issue in *Regina v Barthe*, and inadmissible evidence, at issue in the present matter. In *Kane v University of British Columbia*, [1980] 1 SCR 1105, Justice Dickson, as he then was, writing for the

majority, referred to Lord Denning's decision in *Kanda v Government of the Federation of Malaya*, [1962] AC 322, in which Lord Denning wrote at page 337:

> . . . know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other.

[11] In the present matter, the principles of natural justice were breached because of the presence of extrinsic evidence in the ex-husband's claim file. See *T.H.S.B. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 354, [2011] FCJ No 462, at paragraph 23:

> I find that the decision was tainted with procedural unfairness. In *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (FCA), [1998] FCJ No 565 (QL), Mr. Justice Décary pointed out that if a board is to rely on extrinsic evidence not brought forth by the applicant himself, an opportunity must be given to respond thereto. At paragraph 16, he quoted from a speech of Lord Loreburn in *Board of Education v Rice*, [1911] AC 179 (HL), at page 182:
>
> > They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statements prejudicial to their view […].

ORDER

FOR THE REASONS GIVEN;

THIS COURT ORDERS that

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

"Sean Harrington"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7295-10
STYLE OF CAUSE:	LOPEZ AGUILAR ET AL v MCI
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