Federal Court of Appeal | Cour d'appel fédérale

Date: 20160829

Docket: A-503-15

Citation: 2016 FCA 211

CORAM: **NADON J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

CAROLINA DEL VALLE PARAMO DE GUTIERREZ and IVAN JESUS GUTIERREZ DOMINGUEZ

Respondents

Heard at Vancouver, British Columbia, on June 15, 2016.

Judgment delivered at Ottawa, Ontario, on August 29, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160829

Docket: A-503-15

Citation: 2016 FCA 211

CORAM: **NADON J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

CAROLINA DEL VALLE PARAMO DE GUTIERREZ and IVAN JESUS GUTIERREZ DOMINGUEZ

Respondents

REASONS FOR JUDGMENT

DAWSON J.A.

[1] Carolina Del Valle PARAMO DE GUTIERREZ and her husband Ivan Jesus GUTIERREZ DOMINGUEZ (the respondents) are citizens of Venezuela who lawfully entered Canada pursuant to study permits. While in Canada they claimed refugee protection.

[2] The Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD) denied their claims in a decision dated October 31, 2014. An appeal from that decision was allowed by the Refugee Appeal Division of the Immigration and Refugee Board of Canada (RAD) in a decision dated April 8, 2015. The RAD returned the refugee claims to the RPD for redetermination by a different member of the RPD "for different reasons".

[3] The Minister of Citizenship and Immigration (Minister) sought and obtained leave to file an application for judicial review of the decision of the RAD. For reasons cited as 2015 FC 1198, a judge of the Federal Court dismissed the application for judicial review. The judge certified and stated two questions of general importance:

> 1. Does an officer have jurisdiction and authority to examine a refugee claimant pursuant to subsection 15(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, after the claim has been referred to the Refugee Protection Division for determination?
>
> 2. If a refugee claimant has indicated on the Basis of Claim form or elsewhere that he or she has counsel of record, is it a breach of procedural fairness for an officer to examine the refugee claimant after the claim has been referred to the Refugee Protection Division for determination without advising counsel of record of the proposed examination and providing counsel an opportunity to attend?

[4] This is an appeal from the judgment of the Federal Court.

I. Factual Background

[5] The facts are fully developed in the reasons of the Federal Court. The following brief statement of facts will situate the certified questions within the factual matrix that gives rise to this appeal.

[6] After completing "basis of claim" forms in which the respondents claimed refugee protection, the respondents were interviewed by an officer with what was then Citizenship and Immigration Canada (CIC). The officer found the respondents were eligible to claim refugee protection and referred their claims to the RPD. A hearing before the RPD was scheduled for July 10, 2014.

[7] On June 26, 2014, a "hearing advisor" employed by the Canada Border Services Agency (CBSA) required the respondents to attend before him that day for an interview. The hearing advisor knew the respondents were represented by counsel on their refugee claims. Notwithstanding, the hearing advisor did not advise the respondents' lawyer about the interview, nor did he ask the respondents if they wished their counsel to be present at the interview. The respondents went to the interview. They did not ask the hearing advisor if their lawyer could attend with them. The interview proceeded in the absence of counsel.

[8] At the interview, the hearing advisor asked the respondents questions about statements they made in their basis of claim forms.

[9] Four days later, on June 30, 2014 a notice of intention to intervene in the respondents' refugee claims was filed on behalf of the Minister of Public Safety and Emergency Preparedness (Minister of Public Safety). The intervention was confined to filing documents: two solemn declarations made by the hearing advisor and two documents prepared by third parties relating to country conditions in Venezuela. In the first solemn declaration the hearing advisor gave evidence about what transpired at the June 26, 2014 interview, including what questions were asked of the respondents and what answers they gave. In the second solemn declaration the hearing advisor gave evidence about advice he received from the translator who accompanied him at the interview about the content of certain email messages that the respondents showed the hearing advisor during the interview. The hearing advisor also gave evidence about information he received from the Canadian school the respondents had planned on attending.

[10] At the hearing before the RPD, counsel for the respondents applied to exclude from evidence the two solemn declarations. Counsel for the respondents made two submissions to the RPD. First, she submitted that the hearing advisor lacked jurisdiction to conduct the interview. Second, she submitted that because the hearing advisor had failed to notify her about the interview admitting the solemn declarations would breach the respondents' right to counsel and therefore their right to procedural fairness.

II. The Decision of the RPD

[11] The RPD rejected the submissions of counsel for the respondents and received the two solemn declarations into evidence.

[12] On the issue of the jurisdiction of the hearing advisor to conduct the June 26, 2014 interview, the RPD reasoned that:

- Section 28 of the *Immigration and Refugee Protection Regulations*, S.O.R. /2002-227 (Regulations) provides that a person makes an "application" when, among other things, they make a claim for refugee protection. Sections 15 and 16 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) authorize an officer to examine a person who makes an application at an interview at which the person making the application is required to answer questions (reasons, at paragraph 10).
- Section 37 of the Regulations stipulates when, in certain circumstances, an examination ends. It does not specify when an examination of a person who makes a refugee claim ends (reasons, at paragraph 11).
- The Act envisions that the Minister of Public Safety has a role through the entire refugee determination process. Thus, the Minister of Public Safety may intervene in a refugee claim as a party to the proceeding pursuant to section 170 of the Act (reasons, at paragraph 12).
- Counsel for the respondents argued that the Minister's authority to conduct an interview of a refugee claimant pursuant to sections 15 and 16 of the Act ends upon the Minister's determination that the claimant is eligible to have their refugee claim heard by the RPD. Subsection 100(1) of the Act requires the determination of eligibility to be made within three working days of receipt of the refugee claim. In the view of the RPD, limiting the scope of sections 15 and 16 of the Act in the manner suggested by counsel for the respondents would be

inconsistent with the objectives of the Act as set out in paragraphs 3(2)(*g*) and (*h*) of the Act. The RPD reasoned that, on the respondents' interpretation, in a situation where information came to the attention of the Minister, suggesting that a claimant had been involved in, for example, a serious crime, the Minister would be prevented from questioning the claimant until either an admissibility hearing or the refugee protection hearing. This in turn would prevent the Minister from obtaining additional evidence through other investigative measures that might become apparent only after an interview of the claimant was conducted (reasons, at paragraph 13).

- In consequence, and in the absence of any specific statutory provision outlining when the examination of a person making a refugee claim ends, the RPD found that on the plain meaning of subsection 28(*d*) of the Regulations a person making a refugee claim is no longer under an examination when their claim has been decided. It followed that the Minister was authorized to conduct the June 26, 2014 interview of the respondents (reasons, at paragraph 14).

[13] On the issue of the right to counsel, the RPD reasoned that:

- Notwithstanding the submissions of counsel for the respondents, section 10(b) of the *Canadian Charter of Rights and Freedoms* had no application because the respondents were not arrested or detained when they were interviewed (reasons, at paragraph 17).
- Relying upon the decision of the Supreme Court in *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, the respondents' rights

guaranteed under section 7 of the *Charter* did not require that they be provided with counsel at the interview stage (reasons, at paragraphs 19 and 20).

- This was because the interview conducted by the hearing advisor was more analogous to routine information-gathering, as opposed to an inquiry or decision-making process. Nothing prevented the claimants from having counsel attend the interview with them; they chose not to request this or to make arrangements for their counsel to be present. There was no obligation for the hearing advisor to notify counsel that the interview was scheduled to occur (reasons, at paragraph 20).

[14] The RPD went on to dismiss the claims for refugee protection. It found that the respondents were not credible witnesses. The RPD also found that the incidents the respondents suffered in Venezuela were not a result of their opposition to the government of Venezuela. The country condition documentation did not establish that the government of Venezuela had either the ability or the motivation to mobilize armed bands of criminals to track down any person in the country who either signed a petition or voted against the government (reasons, at paragraphs 30, 39 and 40).

III. The Decision of the RAD

[15] The RAD concluded that the solemn declarations ought to have been excluded from evidence by the RPD because the failure of the hearing advisor to advise the respondents' counsel about the scheduled interview breached principles of natural justice and fairness. Any and all communications related to the respondents' refugee claims, including the requirement

that they attend at an interview, should have included the respondents' counsel (reasons, at paragraphs 18 and 19).

[16] In the view of the RAD, it was obliged to rely on the evidence gathered in the course of the hearing before the RPD. This evidence was inextricably linked to the contents of the solemn declarations. It followed that to use the evidence tendered before the RPD would perpetuate the breach of procedural fairness. Accordingly, the appropriate remedy was to refer the refugee claims back to the RPD for redetermination by a different member for different reasons (reasons, at paragraphs 22 and 28).

[17] The RAD declined to make findings about the scope of authority for continued investigation by the CBSA after a refugee claim is referred to the RPD for determination (reasons, at paragraph 24).

IV. The Decision of the Federal Court

[18] After setting out the facts that led to the application for judicial review, the Federal Court turned to the issues before it. Although the RAD had not addressed the issue of the authority of an officer of the CBSA to interview the respondents, the Federal Court decided to address the issue because the issue would need to be addressed if the decision of the RAD was set aside on the basis of the right to counsel issue (reasons, at paragraph 16).

[19] The Federal Court then accepted the submission of counsel for the respondents that the evidence did not support the suggestion that the Minister had any security or criminality

concerns. The Federal Court noted that the questions posed by the hearing advisor during the interview were connected to the facts asserted by the respondents as the basis of their claims for refugee protection. This raised the question of why an officer employed by the CBSA, not an officer employed by CIC, conducted the interview (reasons, at paragraph 18).

[20] The Federal Court then turned to the issue of the standard of review. It accepted the Minister's submission that the decision of the RAD to exclude the evidence of the June 26, 2014 interview was subject to review on the correctness standard. This was because the decision was based upon principles of fairness and natural justice (reasons, at paragraph 21).

[21] With respect to the second issue, the Federal Court did not "necessarily agree that the interpretation of the legislative provisions, dealing with the jurisdiction of an officer to interview a refugee claimant, are not questions of law of general importance; however, it is irrelevant which standard applies because I have determined that there is only one reasonable interpretation of the relevant legislative provisions, and it is not that found by the RPD" (reasons, at paragraph 22).

[22] On this issue, the Federal Court found that the "RPD was clearly considering the jurisdictional issue in a much broader context than the application before it" because neither of the objectives found in paragraphs 3(2)(*g*) and (*h*) of the Act were engaged on the facts of this case (reasons, at paragraph 32). The Federal Court found that the RPD's interpretation of the Act was "unreasonable and frankly incorrect" (reasons, at paragraph 33). On a purposive reading of subsection 15(1) of the Act, "an officer's jurisdiction to examine an individual ends once the

claim has been referred to the RPD" (reasons, at paragraph 33). The matter that gives rise to the right to interview a refugee claimant is the fact that a claimant has made "'an application to the officer' under subsection 15(1) of the Act" (emphasis in original). Once an officer completes the examination of a refugee claimant and determined that the claimant is eligible to make a refugee claim, the officer has fulfilled his or her statutory obligations. The claimant's application is then no longer before the officer, and the officer has no continuing jurisdiction to require the claimant to attend for other examinations (reasons, at paragraph 34). Any concerns about the security objectives of the Act are addressed by subsection 16(2.1) of the Act (reasons, at paragraph 36).

[23] On the issue of the respondents' right to counsel, the Federal Court agreed that this right does not arise during an eligibility examination (reasons, at paragraph 39). However, the Federal Court went on to find that language contained in subsection 167(1) of the Act, which permits a person who is the subject of proceedings before any division of the Immigration and Refugee Board to be represented by counsel, is "broad enough to encompass persons who are required to attend pre-hearing interviews that are conducted for the purpose of gathering evidence for a hearing". The right to counsel could not be restricted to the hearing itself (reasons, at paragraph 42). The Federal Court rejected the conclusion of the RPD that the interview was a "routine information gathering exercise". In the view of the Federal Court (reasons, at paragraph 45):

> In this case, the information gathering stage was over. The officer had already determined the correct procedure and referred the Respondents' claims to the RPD for determination. At that point, the Respondents had a statutory right to retain counsel to represent them in respect of their hearing. They took advantage of that right. The right to retain counsel must include the right to have that counsel present during any material aspect of the proceeding and that must include any part of the proceeding that involves the gathering of information from the claimants for the purposes of the proceeding. Accordingly, the right was breached by the officer when he directed the Respondents to attend an interview for the purpose of gathering evidence for the upcoming hearing, without informing the

> Respondents' counsel. That right was further breached when the RPD failed to exclude from evidence documents pertaining to the June 26th Interview.
>
> (emphasis added)

V. The Issues

[24] Two issues are raised on this appeal:

1. Did the Federal Court err in finding that the hearing advisor had no authority to examine the respondents after their claims for refugee protection were found to be eligible and were forwarded to the RPD for determination?
2. Did the Federal Court err in finding that the respondents had the right to have their counsel present at the interview?

VI. Did the Federal Court err in finding that the hearing advisor had no authority to examine the respondents after their claims for refugee protection were found to be eligible and were forwarded to the RPD for determination?

[25] On judicial review, this Court is to determine whether the Federal Court identified the appropriate standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraph 45).

[26] In the present case, the Federal Court determined that it was irrelevant which standard of review applied because it found the decision of the RPD to be flawed even on the more deferential standard of reasonableness. On this point, as noted above, the Federal Court did not "necessarily" agree that the question of the hearing advisor's authority to interview the respondents was not a question of law of general importance.

[27] In my view, the issue of the hearing advisor's authority is not a question of law of central importance to the legal system as a whole. It is a question specific to the administrative regime for the determination of refugee status.

[28] Consequently, in my view, there is nothing to displace the presumption that the deferential standard of reasonableness applies when a decision-maker is interpreting the decision-maker's own statute and where the decision-maker has particular familiarity with the statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 30).

[29] The question for this Court is therefore whether the Federal Court applied the reasonableness standard properly when it found there was only one reasonable interpretation of the relevant legislation, and that interpretation was that the hearing advisor lacked the authority to require the respondents to attend an interview after their refugee claims had been referred to the RPD for determination.

[30] The nub of the Federal Court's criticism of the decision of the RPD is found at paragraphs 33 and 34 of its reasons:

> [33] In my opinion, this is an unreasonable and frankly incorrect interpretation of the relevant statutory provisions. The Member has ignored or read out a relevant part of subsection 15(1), which gives an officer jurisdiction to conduct an examination "if a person makes an application to the officer in accordance with this Act" [emphasis added]. The Member correctly found that "the Minister's jurisdiction to determine a refugee claim ends upon a determination of whether the claimant is eligible to appear before the Division for a hearing." On a purposive interpretation of subsection 15(1), according to which the scope of the legislative tools conferred by the Act is to be determined by reference to their

> ultimate function, an officer's jurisdiction to examine an individual ends once the claim has been referred to the RPD.
>
> [34] The RPD and the Applicant suggest that an officer's jurisdiction to examine a person continues as long as that person is making a refugee claim. However, the fact that a person is making a refugee claim is not what gives rise to the right to examine. What gives rise to that right is the fact that a person has made "an application to the officer" under subsection 15(1) of the Act, and is then required, pursuant to subsection 16(1.1), to "appear for an examination" [emphasis added]. Once an officer has finished examining a person and has determined that person to be eligible, the officer has fulfilled his or her statutory obligations. The person's application is no longer before the officer and therefore, in my view, the officer has no continuing jurisdiction to require that person to attend for other and additional examinations.
>
> (emphasis in the original)

[31] In my respectful view, in this analysis the Federal Court failed to have regard to the fact that the RPD based its analysis upon both sections 15 and 16 of the Act (RPD reasons, at paragraphs 6, 7, 8, 10 and 13).

[32] Thus, the RPD began its analysis by noting that a person makes an application when they make a claim for refugee protection (subsection 28(d) of the Regulations). Thereafter, subsection 16(1.1) of the Act authorizes "an officer" to request a person who has made an application appear for an examination. Neither the Act nor the Regulations specify when the application of a refugee claimant ends. The Act envisions that both the Minister of Citizenship and Immigration and the Minister of Public Safety have a role in the refugee determination process. Thus, the Minister of Citizenship and Immigration can suspend a refugee claim in certain circumstances (section 103 of the Act) or re-determine eligibility (section 104 of the Act). The Minister of Public Safety may present evidence, question witnesses and make representations at a refugee hearing (subsection 170(e) of the Act).[1]

[33] On the basis of this legislative scheme, the RPD found that a refugee claimant's application exists until the claimant's claim has been decided. It followed that pursuant to subsection 16(1.1) of the Act, the Minister of Public Safety was authorized to conduct the interview, as was his delegate.

[34] The RPD went on to find this interpretation was consistent with the objectives of the Act, particularly the objectives of maintaining the security of Canadian society and denying access to Canada to persons who are security risks or serious criminals (paragraphs 3(2)(*g*) and (*h*) of the Act). To this I would add that this interpretation furthers the objective of establishing fair and efficient procedures that maintain the integrity of the refugee protection system (paragraph 3(2)(*e*) of the Act).

[35] In my view, the RPD construed the legislative scheme as required by law: it read the relevant provisions in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21).

[36] The reasons of the RPD are transparent and intelligible and fully justify the RPD's interpretation of subsection 16(1.1) of the Act. The outcome of the RPD's decision is within the range of possible, acceptable outcomes and is defensible in respect of the facts and the law. In other words, the RPD's interpretation of subsection 16(1.1) of the Act and the scope of the hearing advisor's authority to interview the respondents was reasonable. The Federal Court erred by setting aside the decision of the RPD on this point.

[37] I now move to the next issue.

VII. Did the Federal Court err in finding that the respondents had the right to have their counsel present at the interview?

[38] I will address at the outset two preliminary issues.

[39] First, I reject the appellant's submission that the Federal Court erred in law by certifying the second certified question. The appellant asserts that the Federal Court did not determine whether there had been a breach of procedural fairness and, in the absence of such a finding, it was an error of law to certify the question. While the Federal Court did not use the phrase "procedural fairness" in its reasons, the Federal Court found that the hearing advisor breached the respondents' right to have counsel present at the interview. This finding is sufficient to properly ground the certified question.

[40] This said, the second preliminary issue relates to the scope of the certified question, which I repeat for ease of reference:

> If a refugee claimant has indicated on the Basis of Claim form or elsewhere that he or she has counsel of record, is it a breach of procedural fairness for an officer to examine the refugee claimant after the claim has been referred to the Refugee Protection Division for determination without advising counsel of record of the proposed examination and providing counsel an opportunity to attend?

[41] The content of the duty of fairness is fact specific. Thus, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the majority wrote at paragraph 21:

> … "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness:

> *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.

[42] As a result, in the present case the Court must instead answer the question of whether the duty of procedural fairness was breached in the facts and circumstances of this case. This conclusion is consistent with the decision of this Court in *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195, at paragraphs 40-41, where the Court reformulated a certified question similar to the one at issue on this appeal.

[43] Having dealt with these preliminary issues I now turn to consider the applicable standard of review to be applied to the decision of the Federal Court on this issue.

[44] The parties each submit that the decision of the RAD to exclude evidence was a decision based upon the application of principles of fairness and natural justice. As such, they submit that the issue should be reviewed on the standard of correctness. I agree (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraph 79; *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289, 480 N.R. 236, at paragraph 35.

[45] To determine whether the Federal Court applied the standard of correctness properly, it is helpful to recap the decisions of both the RPD and the RAD.

[46] According to the reasons of the RPD, the respondents based their arguments on their right to counsel upon sections 7 and 10 of the *Charter*. The RPD rejected the submission based on section 10 of the *Charter* on the ground that the respondents were not under arrest or detention

when interviewed by the CBSA. The submission based on section 7 of the *Charter* was rejected on the ground that in *Dehghani* the Supreme Court found that the principles of fundamental justice do not require that a refugee claimant be provided with counsel at the pre-inquiry or pre-hearing phase of the refugee claim determination process. The RPD did not consider the application of subsection 167(1) when it found the respondents were not entitled to have counsel present at the interview.

[47] This decision is to be contrasted with that of the RAD which based its decision on the right to counsel in subsection 167(1) of the Act, which provides:

167 (1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.	167 (1) L'intéressé qui fait l'objet de procédures devant une section de la Commission ainsi que le ministre peuvent se faire représenter, à leurs frais, par un conseiller juridique ou un autre conseil.

[48] Citing subsection 167(1) in a footnote, the RAD reasoned at paragraph18:

> I agree with the Appellants' Counsel that the CBSA June 26, 2014 interview evidence ought to have been excluded by the RPD because of breach of natural justice and fairness in not communicating with the Appellants' Counsel about the interviews. The Appellants had Counsel of Record from the time that the claims were submitted so any and all communications related to the claims, including to attend an interview at the CBSA, should have included the Appellants' Counsel. It is well-established in law and reflected throughout the immigration-related rules, that when an individual has elected to have representation in a proceeding at the IRB and has provided contact information for that representative, all subsequent communications must be through and include that representative unless there are indications that the representation is for limited purposes, which was not the case in this claim. The requirement to communicate with Counsel was tacitly conceded by the Minister in his response to initial objection by the Appellants' Counsel by indicating that there is a general 'courtesy' of notifying counsel about CBSA interviews and that this courtesy would be extended in any similar future event. The Minister's representative attempted to distinguish between courtesy and legal requirements but that position is inconsistent with the legal principles regarding

> the nature of representation, which is that the representative stands in the place of the person being represented.

[49] The Federal Court agreed with the RAD.

[50] The Federal Court began its analysis by making the important point that the interview in question was held for the purpose of assessing the validity of the respondents' refugee claims (reasons, at paragraph 40). To this I would add another important point: the interview not only led to the decision of the Minister of Public Safety to intervene in the respondents' refugee hearing as he was entitled to do pursuant to section 170 of the Act, but the interview also furnished most of the evidence tendered by the Minister of Public Safety at the refugee hearing.

[51] The Federal Court then rejected the submission that subsection 167(1) conferred a right to counsel only at hearings before the Board. This submission was rejected on the ground that it was too narrow an interpretation of the Act. At paragraph 42 of its reasons the Federal Court wrote:

> … The subsection confers a right to counsel on anyone who is "the subject of proceedings before…the Board." This phrase is broad enough to encompass persons who are required to attend pre-hearing interviews that are conducted for the purpose of gathering evidence for a hearing. It would severely impinge on the effectiveness of a refugee claimant's right to counsel if that right only allowed counsel to make submissions at a hearing itself, and provided him or her with no opportunity to participate in the fact-finding process upon which the hearing is based. Nothing in the Act compels such a narrow interpretation.

[52] I agree with the analysis of the Federal Court. In my view, the Federal Court correctly interpreted the scope of subsection 167(1) to include the right to have counsel present at an

interview held in respect of a refugee claim. The failure of the hearing advisor to respect the respondents' right to counsel constituted a breach of procedural fairness.

[53] It follows that I agree with the Federal Court that the RAD did not err in returning the matter to the RPD for redetermination without regard to the solemn declarations of the hearing advisor.

[54] Before leaving this issue it is also important to confirm that the Federal Court correctly distinguished the interview at issue on this appeal from an interview conducted for another purpose. Thus, in my view, a refugee claimant does not have a right to counsel at an interview relating to their eligibility to claim refugee status (*Dehghani*, at page 1077).

VIII. Conclusion

[55] The Federal Court dismissed the application for judicial review of the decision of the RAD. The consequence of this was that the matter was to be referred back to the RPD so that it may redetermine the matter without regard to the two solemn declarations. As I agree with this disposition I would dismiss this appeal. It follows that the respondents' refugee claims are remitted to the RPD for determination by a different member in accordance with these reasons.

[56] I would reformulate the certified questions and answer them as follows:

> Question: Does a delegate of the Minister of Public Safety and Emergency Preparedness have jurisdiction and authority to examine a refugee claimant pursuant to subsection 16(1.1) of the *Immigration and Refugee Protection Act* about his or her

refugee claim after the claim has been referred to the Refugee Protection Division for determination?

Answer: Yes.

Question: If a refugee claimant has indicated on the basis of claim form or elsewhere so that it appears on the record of the Refugee Protection Division that the claimant has counsel of record, is it a breach of subsection 167(1) of the *Immigration and Refugee Protection Act* and a breach of procedural fairness for an officer to examine the refugee claimant about their refugee claim after the claim has been referred to the Refugee Protection Division for determination without advising counsel of record of the proposed examination and providing counsel an opportunity to attend?

Answer: Yes.

"Eleanor R. Dawson"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Wyman W. Webb J.A."

[1]The respective roles of the Minister of Citizenship and Immigration and the Minister of Public Safety are set out in subsections 4(1) and (2) of the Act, and in any specification ordered by the Governor in Council pursuant to subsection 4(3) of the Act. At the time the respondents were required to attend the interview, the relevant specification was found in the Order Setting Out the Respective Responsibilities of the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness Under the Act, SI/2005-120. The respective responsibilities of the two Ministers set out above at paragraph 32 reflects their respective responsibilities under this Statutory Instrument. This Statutory Instrument has been repealed by SI/2015-52 which sets out the current ministerial responsibilities [see tabs 8 and 9 of the joint book of authorities].

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-503-15
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. CAROLINA DEL VALLE PARAMO DE GUTIERREZ and IVAN JESUS GUTIERREZ DOMINGUEZ
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 15, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NADON J.A. WEBB J.A.
DATED:	AUGUST 29, 2016

APPEARANCES:

Cheryl D. Mitchell Mark E. W. East	FOR THE APPELLANT
Mojdeh Shahriari	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPELLANT
Mojdeh Shahriari Barrister and Solicitor Vancouver, British Columbia	FOR THE RESPONDENTS