

Date: 20080422

Docket: IMM-2367-07

Citation: 2008 FC 526

Ottawa, Ontario, April 22, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

GREGORY BARRY GITTENS

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

FURTHER REASONS FOR JUDGMENT

[1] On March 25, 2008, I issued reasons in this matter. At the request of counsel at the hearing, I agreed to withhold judgment until they had an opportunity to review my reasons in order to decide whether to request that I certify questions for consideration in a possible appeal to the Federal Court of Appeal.

[2] On April 9, 2008, counsel for the Applicant requested that I certify the following questions:

1. *Does procedural fairness require the IAD to review the factors set out in s. 48(4) of the IAD Rules in determining whether or not an adjournment should be granted or is this provision merely a guide?*

2. *When the Board considers a request for an adjournment under subsection 48(4) of the Appeal Division Rules, do subsections*
 - (g) any previous delays and the reasons for them; and*
 - (i) whether allowing the application would unreasonably delay the proceedings*

refer to delays in relation to the specific proceeding before the Board or to the entire length of time since the Appellant was first ordered removed? Is the Appellant's right to procedural fairness breached if a negative decision is arrived at and only the latter was considered?

3. *When the Board considers a request for an adjournment under subsection 48(4) of the Appeal Division Rules, is subsection*
 - (h) whether the time and date fixed for the proceeding were peremptory an irrelevant consideration if the time and date fixed for the proceeding were not peremptory; or does it remain a relevant factor that must be considered insofar as it provides the Board more latitude to grant an adjournment? Is the Appellant's right to procedural fairness violated if a negative decision is arrived at and the latter consideration was ignored?*

4. *When the best interests of children are under consideration, is the IAD required to assess factors relevant to each child as opposed to merely accepting that the best interests of all of a person's children would be negatively impacted by the removal of a parent?*

[3] On April 16, 2008 counsel for the Respondent made submissions opposing the certification of any of these questions.

[4] By paragraph 74(d) of the *Immigration and Refugee Protection Act*, I can only certify such a question if it is a “serious” one “of general importance”. I do not believe any of the proposed questions are of this nature.

[5] The first three questions relate to the refusal of the Immigration Appeal Division (IAD) to grant an adjournment to enable a psychologist to testify orally in place of the written report he provided. Basically whether an adjournment is granted is for the discretion of the tribunal subject to the need to avoid a denial of fairness, and in this particular situation the need to “consider any *relevant factors*” listed in subsection 48(4) of the *Immigration Appeal Division Rules*.

[6] I have made findings that in the particular circumstances of this case the IAD did have regard to all the *relevant factors* in subsection 48(4), and also that in the circumstances of this case there was no denial of fairness. The Applicant's proposed questions would really be seeking to appeal these findings of fact and fact and law and could have little importance beyond this case and

its particular circumstances. Furthermore, I believe the questions of law suggested are not serious questions in the sense of raising matters of significant doubt.

[7] The suggestion implicit is question 2 that the IAD should only have regard to delays in respect of this particular hearing is untenable: this hearing was part of an ongoing process of reviews of the stay of the deportation order made in 2000, such review having been continued ever since 2002. As for question 3, it is certainly not clear but it seems to raise the issue as to whether the date fixed was “peremptory”. I do not accept that characterization of the date. Consultations with counsel for the Applicant began in July, 2006 when a date was set for December 15, 2006. Subsequent discussions with counsel concerned the invalidity of Dr. Russell to attend as a witness on that date. Counsel requested a delay and later suggested a postponement for over four months. The IAD after considering this confirmed on November 9, 2006 that the date originally fixed would be adhered to. However, the matter was raised again by counsel at the beginning of the hearing, but in her opening submission for a delay she also said “we are prepared to go”. At this time the panel ruled against further delay and gave reasons for doing so. In the circumstances I cannot regard this as the “peremptory” fixing of a date unless that term means that any date inconvenient to one party is “peremptory”. In any event, subsection 48(4) of the Rules does not suggest that factor (h) is determinative of the need for an adjournment. It is clear that the panel considered the request for an adjournment yet again on the hearing date and again found that a delay was not justified. Therefore the question if certified would make no difference to the outcome of this case.

[8] As for the fourth question, it appears to take issue with the IAD's findings that the best interests of both children would be negatively affected. I am unable to see how a separate consideration of each that might have revealed that only one child would be negatively affected, or that one could be affected more than another, could alter the outcome of the IAD's decision. I observed that the IAD, although having found both children could be negatively affected, nevertheless concluded that the protection of the Canadian public must be given more weight. I concluded that this was a decision open to the IAD, and the particular question proposed by the Applicant, even if answered in the affirmative, could not change the outcome were a new hearing ordered.

[9] I will therefore not certify any question.

JUDGMENT

IT IS THEREBY ORDERED AND ADJUDGED THAT:

- (1) The application for judicial review of a decision of the Immigration and Refugee Board (Immigration Appeal Division) of May 25, 2007, cancelling the Applicant's stay of deportation and dismissing his appeal of the deportation order be dismissed; and
- (2) No question be certified.

"Barry L. Strayer"
Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2367-07

STYLE OF CAUSE: GREGORY BARRY GITTENS

v.

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 13, 2008

**FURTHER REASONS
FOR JUDGMENT :** Strayer, D.J.

DATED: April 22, 2008

APPEARANCES:

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