

Federal Court



Cour fédérale

**Date: 20100729**

**Docket: IMM-3902-09  
IMM-4413-09**

**Citation: 2010 FC 792**

**Ottawa, Ontario, July 29, 2010**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**JOSE LUIS AYALA ALVAREZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Mr. Jose Luis Ayala Alvarez fled El Salvador in 2008 and claimed refugee protection in Canada. He claims that he was attacked and tortured by a gang he refused to join.

[2] Mr. Ayala Alvarez applied for legal aid to help him with his refugee claim and the Legal Services Society (LSS) of British Columbia granted his request. Subsequently, the LSS cancelled his legal aid certificate, but invited Mr. Ayala Alvarez to re-apply after he received his notice to

appear before the Immigration and Refugee Board. The Board sent his notice to appear on April 24, 2009, setting a hearing date of May 22, 2009. He went back to the LSS which approved his application for legal aid on May 13, 2009. Since the hearing was only 9 days away and his lawyer was not available, Mr. Ayala Alvarez requested an adjournment. The Board denied his request.

[3] In any case, Mr. Ayala Alvarez appeared before the Board on May 22, 2009 without counsel. Just prior to the hearing, he discussed the possibility of an adjournment with the Refugee Protection Officer (RPO) and a representative of the United Nations High Commission for Refugees (UNHCR). Both conversations were recorded. In the latter, the UNHCR representative suggested that Mr. Ayala Alvarez request an adjournment from the Board directly. It was clear that Mr. Ayala Alvarez's skills in English were rudimentary and that his vision was impaired.

[4] However, when the presiding member entered the room, Mr. Ayala Alvarez became nervous and failed to request an adjournment. The hearing proceeded with the assistance of an interpreter. In the end, the Board dismissed Mr. Ayala Alvarez's application.

[5] Mr. Ayala Alvarez challenges both the Board's decision refusing his request for an adjournment and its decision denying him refugee protection. In respect of the former, the question is whether the Board considered the relevant factors before denying the adjournment. In respect of the latter, the question is whether Mr. Ayala Alvarez had a fair hearing before the Board. For the reasons that follow, I have concluded that the Board failed to consider the relevant factors and that the hearing was unfair. Therefore, I must allow these applications for judicial review and order a

new hearing.

## II. Issues

[6] There are two issues:

1. Was the Board's decision refusing an adjournment reasonable?
2. Was the hearing before the Board unfair?

### (a) Factual Background

[7] On May 13, 2009, Mr. Ayala Alvarez requested a postponement of his hearing given that his lawyer was not available until September 2009. The Board responded by dismissing his application, noting that Mr. Ayala Alvarez's application was filed a year earlier and that he had been given sufficient time to prepare for his hearing.

[8] Just before the hearing, the RPO asked Mr. Ayala Alvarez if he would be pursuing his request for an adjournment. The RPO confirmed that Mr. Ayala Alvarez had secured legal aid. The RPO then approached the UNHCR representative and asked her if she would be assisting Mr. Ayala Alvarez at the hearing. He hoped that she would. However, she stated that she was merely monitoring the proceedings. The UNHCR representative suggested to Mr. Ayala Alvarez that he would be disadvantaged by proceeding without counsel, especially because of his visual disability, and that he should ask for an adjournment.

[9] However, as mentioned, nothing more was said on the subject.

[10] The Board rejected Mr. Ayala Alvarez's claim mainly because it disbelieved his evidence.

(1) *Was the Board's decision refusing an adjournment reasonable?*

[11] Under Rule 48(4) of the *Refugee Protection Division Rules*, SOR/2002-228, the Board must consider numerous factors in deciding whether to grant an adjournment (see Annex A). They include:

- when the request was made;
- how much time the applicant had to prepare for the hearing;
- the efforts made by the applicant to proceed;
- whether the applicant has counsel;
- whether there were previous delays;
- whether the hearing date was peremptory;
- whether an unreasonable delay or injustice would be caused; and
- the nature and complexity of the matter to be heard.

[12] In dismissing Mr. Ayala Alvarez's application, the Board seemed to rely solely on the fact that the Mr. Ayala Alvarez had sufficient time to prepare for the hearing. It would have been aware, surely, of other pertinent factors, such as the complexity of the claim, the unavailability of counsel,

the absence of previous delays, the circumstances surrounding the position taken by the LSS, and the short time frame between the request to appear and the date of the hearing. However, it did not appear to consider these circumstances.

[13] On the facts of this case, I conclude that the decision refusing an adjournment was unreasonable.

(2) *Was the hearing before the Board unfair?*

[14] The Minister argues that because the Board never received a direct request from Mr. Ayala Alvarez for an adjournment, the ensuing hearing was not unfair to him. He points out that there is no absolute right to counsel in immigration proceedings (*Austria v. Canada (Citizenship and Immigration)*, 2006 FC 423).

[15] In my view, in the circumstances of this case, proceeding in the absence of counsel resulted in unfairness to Mr. Ayala Alvarez. The Board relied on a substantial body of documentary evidence that was entirely in English. While Mr. Ayala Alvarez had the assistance of an interpreter and was given an opportunity to look over the documents before the hearing, he could not have absorbed their content or prepared any response to them without further time and assistance.

[16] Further, it was clear that Mr. Ayala Alvarez had a visual disability that made it even more difficult for him to understand and respond to the documentary evidence on which the Board relied. It also made it difficult for him to follow the proceedings. Both the RPO and the UNHCR

representative were aware of Mr. Ayala Alvarez's circumstances and were concerned about his capacity to proceed. But their concern for his predicament did not cause them to suggest to the Board that proceeding in the absence of counsel might prejudice him.

[17] Mr. Ayala Alvarez was entitled to a fair hearing before the Board. Under the circumstances, I am not satisfied that he received one.

#### IV. Conclusion and Disposition

[18] The Board's refusal to grant Mr. Ayala Alvarez's request for an adjournment was unreasonable. In addition, its decision to proceed in the absence of counsel was unfair. Accordingly, I must allow this application for judicial review and order a new hearing before a different panel of the Board. Neither party proposed a question of general importance for me to certify, and none is stated.

**JUDGMENT**

**THIS COURT'S JUDGMENT IS that:**

1. The application for judicial review is allowed. A new hearing before a different panel is ordered;
2. No question of general importance is stated.

“James W. O’Reilly”

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Judge

## Annex

*Refugee Protection Division Rules, SOR/2002-228*

*Règles de la Section de la protection des réfugiés, DORS/2002-228*

**48.** (4) In deciding the application, the Division must consider any relevant factors, including

- (a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;
- (b) when the party made the application;
- (c) the time the party has had to prepare for the proceeding;
- (d) the efforts made by the party to be ready to start or continue the proceeding;
- (e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;
- (f) whether the party has counsel;
- (g) the knowledge and experience of any counsel who represents the party;
- (h) any previous delays and the reasons for them;
- (i) whether the date and time fixed were preemptory;
- (j) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and
- (k) the nature and complexity of the matter to be heard.

**48.** (4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :

- a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
- b) le moment auquel la demande a été faite;
- c) le temps dont la partie a disposé pour se préparer;
- d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
- e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
- f) si la partie est représentée;
- g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
- h) tout report antérieur et sa justification;
- i) si la date et l'heure qui avaient été fixées étaient péremptoires;
- j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;
- k) la nature et la complexité de l'affaire.



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3902-09 & IMM-4413-09

**STYLE OF CAUSE:** AYALA ALVAREZ v. MCI

**PLACE OF HEARING:** Vancouver, B.C.

**DATE OF HEARING:** June 8, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** July 29, 2010

**APPEARANCES:**

Peter Edelmann FOR THE APPLICANT

Jennifer Dagsvik FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

PETER EDELMANN FOR THE APPLICANT  
Vancouver, B.C.

MYLES J. KIRVAN FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Ottawa, ON.