Federal Court  Cour fédérale

Date: 20120510

Docket: IMM-3917-11

Citation: 2012 FC 568

Ottawa, Ontario, May 10, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

GUSTAVO ADOLFO SAENZ GOMEZ

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*, SC 2001, c 27 [the Act] for judicial review of the decision rendered by the Refugee Protection Division of the Immigration and Refugee Board (the Board) rendered on May 12, 2011, and signed on May 19, 2011, which refused the applicant's claim to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant seeks an order setting aside the decision and remitting the matter for redetermination by a differently constituted panel of the Board.

Factual Background

[3] Mr. Gustavo Adolfo Saenz Gomez (the applicant) is a citizen of Colombia. The applicant seeks protection in Canada as he fears persecution at the hands of Colombian state authorities in light of his ties with the leftist Patriotic Union political party.

[4] In 1985, the applicant submits that he and his father became members of the Patriotic Union, which was perceived as a threat by the State. Consequently, the applicant alleges that the Colombian government would regularly persecute and torture members of the party.

[5] On September 28, 1991, the applicant alleges that his father was assassinated. Subsequently, the applicant went into hiding as his life was also in danger. As well, the applicant alleges that his family members were also under threat and, as a result, they were forced to move more than thirty (30) times over the course of ten (10) years.

[6] In 1996, the applicant alleges that he was the victim of an armed attack when he was residing in Cali, a costal city of Colombia.

[7] On April 12, 1997, the applicant asserts that he was forced to leave his country and flee to the United States of America.

[8] On June 6, 2004, the applicant's cousin was tortured and killed by the police. His brother Rodrigo was also assassinated on October 3, 2004 after participating in student revolts. The applicant alleges that both his cousin and brother were killed by state authorities due to the legal proceedings that they had launched in relation to the applicant's father's death.

[9] The applicant lived in the United States from April 12, 1997 to March 5, 2009, at which point he arrived in Canada and sought asylum.

[10] The applicant's refugee claim was heard by the Board on May 12, 2011.

[11] The Board denied the claim on the basis that the applicant's allegations were not credible.

Issue

[12] This matter raises the following issue: was the applicant denied a fair hearing due to the ineffective assistance of counsel?

[13] The Supreme Court of Canada in *R v GDB*, 2000 SCC 22 at para 27, [2000] 1 SRC 520, instructed that incompetence is to be determined using the reasonableness standard. The Court agrees with Justice Zinn's view that when incompetence of a counsel is alleged, "caution is particularly relevant because the former representative [counsel] is not before the Court to explain his actions" (*TKM v Canada (Minister of Citizenship and Immigration)*, 2011 FC 927 at para 4, [2011] FCJ No 1154.

[14] Indeed, in the present case the Court is left to assess the applicant's allegations on solely the basis of the facts disclosed in the record.

Applicant's Submissions

[15] The applicant submits that he did not have a fair hearing due to the ineffective assistance of his former counsel.

[16] The applicant alleges that the omissions in his Personal Information Form (PIF) were the fault of his lawyer because he was never informed that his PIF had to be detailed and complete. The applicant contends that his lawyer did not interview him in order to prepare his PIF and that the preparation of the applicant's PIF was relegated to the lawyer's assistant/interpreter. As well, the applicant alleges that the lawyer's interpreter had prepared his PIF narrative in French, based on a statement that the applicant had written in Spanish. The applicant asserts that he speaks no French and that the agent did not translate his narrative back into Spanish in order to ensure that it was accurate and complete, though the agent signed a declaration to that effect.

[17] Moreover, the applicant advances that he had very limited contact with his lawyer, despite the fact that the applicant had made concrete efforts to do so and his lawyer ignored his requests for guidance prior to the hearing and failed to advise him on how to obtain corroborating documentation in support of his allegations.

[18] In addition, the applicant affirms that before the hearing he gave his lawyer certain corroborating documents that he had in his possession but his lawyer failed to submit a key

document from the Colombian Attorney General's office, dated April 28, 2011 (confirming the existence of proceedings in relation to the applicant's father's murder) which was "exactly the type of document that the Board found that the applicant had not tried to obtain, which seriously affected his credibility in the Board's eyes" (Applicant's Memorandum of Argument, para 15).

[19] The applicant also submits that he has filed a complaint with the Barreau du Québec on or about June 24, 2011, concerning his lawyer's conduct.

Respondent's Submissions

[20] For its part, the respondent argues that the Board's decision was reasonable and that the applicant failed to provide sufficient corroborating evidence that he was denied a fair hearing due to the ineffective assistance from his former counsel.

Analysis

[21] After reviewing the documentary material, the applicant's testimony, the arguments of the parties and the pertinent case law, the Court cannot accept the applicant's assertion that a breach of natural justice occurred in the case at hand. The Court is of the view that the applicant failed to demonstrate that there was a reasonable probability that, but for his former counsel's incompetence, the result of the hearing would have been different.

[22] The Court reminds that the heavy burden of establishing a breach of procedural fairness falls upon the shoulders of the applicant. The Court reminds that a counsel's incompetence will only amount to a breach of procedural fairness in clearly established and exceptional cases.

[23] The test for whether the incompetence of counsel amounts to a breach of natural justice and procedural fairness is whether counsel's actions "constituted incompetence" and whether counsel's actions resulted in a "miscarriage of justice" (*GDB*, above, at paras 26-27,; *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196, [2010] FCJ No 1493; *T.K.M. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 927, [2011] FCJ No 1154; *Gulishvili* v Canada (Minister of Citizenship and Immigration), 2002 FCT 1200, [2002] FCJ No 1667, and *Shirwa v Canada (Minister of Employment and Immigration)* (TD), [1993] FCJ No 1345 at paras 60-64, [1994] 2 FC 51).

[24] In the case of *GDB*, above, the Supreme Court of Canada outlined the following:

> [27] Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.
> …

[25] Moreover, the comments of Justice De Montigny in the case of *Bedoya v Canada (Minister of Citizenship and Immigration*), 2007 FC 505 at paras 18 – 20, [2007] FCJ No 680, are apposite:

> [18] This Court has made it clear that a party should not be allowed to raise the incompetence of his lawyer unless that lawyer has had an opportunity to explain his conduct, or without evidence that the matter has been referred to the governing body for investigation: see, for example, *Nunez v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D.); *Sathasivam v. Canada (Minister of Citizenship and Immigration)*, *Kizil v. Canada (Minister of Citizenship and Immigration)*, *Gonzalez v. Canada (Minister of Citizenship and Immigration)*. As mentioned, this requirement has been met in the present instance.
>
> [19] The standard for this Court to conclude that the lawyer's incompetence was so severe as to amount to a breach of natural justice is very high, as we can see from the following extract of *Shirwa v. Canada*

> *(Minister of Employment and Immigration)* (F.C.T.D.) at paragraphs 11 and 12:
>
> > In a situation where through no fault of the applicant the effect of counsel's misconduct is to completely deny the applicant the opportunity of a hearing, a reviewable breach of fundamental justice has occurred ...
> >
> > In other circumstances where a hearing does occur, the decision can only be reviewed in "extraordinary circumstances", where there is sufficient evidence to establish the "exact dimensions of the problem" and where the review is based on a "precise factual foundation." These latter limitations are necessary, in my opinion, to heed the concerns expressed by Justices MacGuigan and Rothstein that general dissatisfaction with the quality of representation freely chosen by the applicant should not provide grounds for judicial review of a negative decision. However, where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.
>
> [20] In addition, the applicants must show that there is a reasonable probability that but for this alleged incompetence, the result of the original hearing would have been different: *Shirvan v. Canada (Minister of Citizenship and Immigration)*, *Jeffrey v. Canada (Minister of Citizenship and Immigration)*, *Olia v. Canada (Minister of Citizenship and Immigration)*.

[26] The Board noted in its decision that the applicant's credibility had been compromised due to key omissions in his PIF and the lack of corroborating documentation. There is no factual basis for the Court to agree with the applicant and find incompetence of counsel for the reasons that follow.

[27] A review of the documentary materials demonstrates the following:

- The applicant chose not to modify or correct his PIF during his interview prior to the hearing before the Board (Tribunal Record, p. 100);

- At the hearing the Board gave the applicant the opportunity to file his documents though they were late (Tribunal Record, p. 176);
- The Board invited the applicant to make corrections to his PIF at the beginning of the hearing and amendments to the transcript were accepted by the Board (Tribunal Record, pp. 189-193);
- The applicant was provided with an opportunity to mention to the Board the existence of the document but failed to do so (Tribunal Record, pp. 205-207).

[28] Consequently, the Court finds that the applicant had ample time to correct or modify the omissions in his PIF and submit his documentation, which he failed to do. Thus, in light of the comments above, the Court concludes that the applicant has failed to demonstrate that, but for his former counsel's incompetence, the result of the hearing would have been different.

[29] In the present case, the Board noted that the applicant's credibility had been compromised due to key omissions in his PIF and his Port of Entry (POE) and the applicant also failed to show corroborating evidence (Tribunal Record, pp. 201-208, 213, and 218). Moreover, the applicant admitted that he took no steps to obtain such documentation in support of his claim (Tribunal's decision, paras 13 and 14). Also, (i) the applicant's PIF is written in English, (ii) question 31 of the PIF is a clear question and, (iii) the evidence does not demonstrate that the applicant does not understand English. Thus, the applicant's failure to mention the legal proceedings/denunciation that were instituted following his father's death was not insignificant, as the applicant affirmed that he feared returning to Colombia as he would face persecution in light of this action.

[30] Although the applicant attests in his affidavit (para 17) that he made a complaint to the Barreau du Québec concerning his former counsel, no convincing evidence was adduced that such a

complaint has been made or that the applicant's counsel has been held professionally liable. In sum, the applicant's allegations are not supported by the evidence.

[31] Finally, the applicant argued that the decision in *El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234, [2011] FCJ No 1518, in which Justice Near found that a breach of procedural fairness had occurred, had a similar factual background and thus applied in this case. However, the Court does not agree with the applicant as the present case is clearly distinguishable. It is worthy of note that Justice Near emphasized that "extraordinary circumstances" arose in *El Kaissi*. More particularly, in *El Kaissi*, the evidence demonstrated that counsel for the applicant was in possession of evidence (a letter) which he failed to produce. No evidence to that effect was adduced before the Court. As such, the *El Kaissi* case does not apply to the case at bar.

[32] For all of the above reasons, the Court concludes that the applicant has not demonstrated that a breach of procedural fairness occurred in the present case. The application for judicial review will be dismissed.

[33] As neither party has proposed a question for certification, none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. There is no question for certification.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3917-11
STYLE OF CAUSE:	**Gustavo Adolfo Saenz Gomez v MCI**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 27, 2012
REASONS FOR JUDGMENT:	BOIVIN J.
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