

**Date: 20081027**

**Docket: IMM-5445-07**

**Citation: 2008 FC 1207**

**Ottawa, Ontario, October 27, 2008**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**ALFONSO ESCORCIA TREJO  
AND  
ASSOCIATED CLAIMS  
(TA7-10402-5)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Alfonso Escorcía Trejo and his family apply for judicial review of a Refugee Protection Division (the “Board”) decision dismissing their application to have their refugee application reopened after the Board decided they had abandoned their claim for refugee status.

[2] Did the Board make a reviewable error when it refused to re-open the Trejo's application for refugee status?

[3] I have decided that the Board had committed a breach of natural justice when it decided that the Trejo's refugee application had been abandoned and made a reviewable error in refusing to reopen the Trejo application for refugee status.

## **BACKGROUND**

[4] Mr. Trejo, his wife and two children arrived in Canada from Mexico on October 9, 2007 and made a claim for refugee status that same day. They were detained until October 12, 2007 when they were given documents by the Canada Immigration Centre officials including Personal Information Forms (PIFs) that were to be completed and then they were released.

[5] The same day they were released, they went to the FCJ Refugee Centre (FCJ) where they were assisted by a caseworker. The caseworker gave them Spanish language PIFs to complete. The Trejos completed the Spanish PIFs and returned them to the FCJ on October 14, 2007. The caseworker undertook to have their PIFs translated into English language forms.

[6] Mr. Trejo returned to the FCJ on October 19, 2007 to meet with a lawyer, Mr. Warkwa Wanyioke, but the lawyer could not take up the case because the Trejos did not yet have approval for legal aid assistance. The FCJ representative promised to complete and file the PIFs while the

Trejos awaited approval from Legal Aid. Mr. Trejo called FCJ several times and was reassured the PIFs would be sent to the Board.

[7] On November 2, 2007 Mr. Trejo received a letter from the Board. He does not understand English so he took the letter to FCJ to have it translated. The FCJ staff informed him that the letter was to remind him of the 28 day deadline limit to file the PIFs. Mr. Trejo states that the FCJ employee did not tell him the Board letter also required him to attend an abandonment hearing scheduled for November 21, 2007 should the PIFs not be filed in time. The FCJ staff did reassure Mr. Trejo that the FCJ would file their PIFs in time.

[8] The lawyer, Mr. Wanyioke, requested Mr. Trejo provide him with copies of the PIFs so he could prepare an opinion letter for Legal Aid Ontario. Mr. Trejo called the FCJ but could not contact the assigned caseworker. He went to FCJ in person on November 19, 2007 to obtain English copies of the Trejo family's PIFs. It was at that time that Mr. Trejo learned that the PIFs had not been filed.

[9] That same day, November 19, 2007, FCJ gave Mr. Trejo the English language PIFS to file as well as a letter from the FCJ to the Board advising the failure to file the PIFs was due to an FCJ error and requesting an extension of time.

[10] The following day, November 20, 2007, Mr. Trejo filed the English language PIFs and the FCJ letter requesting an extension of time with the Board. He remained unaware of the November 21, 2007 abandonment hearing date.

[11] On November 21, 2007, no one having appeared, the Board decided that the Trejos had abandoned their refugee claim. A letter was sent to Mr. Trejo advising him of the abandonment decision on November 26, 2007.

[12] The lawyer, Mr. Wanyioke, who had not yet been retained, assisted the Trejos file an application to reopen their claim for refugee status. Accompanying their application was Mr. Trejo's affidavit chronicling the above events and attesting that the FCJ employee did not interpret the Board notice to appear at the November 21, 2007 abandonment hearing.

#### **DECISION UNDER REVIEW**

[13] On January 18, 2008 the Board denied the Trejo's application to reopen their refugee claim. The Trejos' lawyer requested reasons and received as a response:

“As there was no statutory requirement, no formal reasons were given for the decision; however, the following endorsement was on file.

*Claimants were properly served with Notice to Appear for November 21, 2007. Claimants also had the benefit of an interpreter. No breach of Natural Justice.”*

## **STANDARD OF REVIEW**

[14] The Trejos' application to re-open their claim for refugee status was made pursuant to s.55 of the *Refugee Protection Division Rules*, SOR/2002–228, subsection 55(4) provides:

55(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.

If a principle of natural justice was breached in the dismissal of the Trejos' application for refugee status the Branch must grant the application to reopen their refugee claim.

[15] In *Ding v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 454 at para. 6, Justice Campbell observed that if the only jurisdiction open to the IRB to reopen is to consider whether a breach of nature of justice occurred, it follows “that to fail to recognize a breach of natural justice when it exists constitute reviewable error.”

## **ANALYSIS**

[16] The Respondent acknowledges that a breach of natural justice is the one basis upon which the Board may reopen an application but submits that a breach of natural justice will only be found in exceptional cases.

[17] The Respondent also submits that an application to reopen is an interlocutory matter for which only minimal reasons are required. Even though minimal reasons were offered, the Board is presumed to have considered all of the evidence.

[18] Finally, to support its submission that the application to reconsider is merely an interlocutory matter, the Respondent notes that the Trejos are not at the end of the refugee process in that they may still pursue an application for permanent residence status on humanitarian and compassionate grounds or may request a pre-risk removal assessment before removal.

[19] The Respondent relies on the decisions of Justice Mosley in *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153 and Justice Layden-Stevenson in *Lin v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 512.

[20] In *Ali*, the applicant did not file his PIF because of delays in securing a lawyer through legal aid. He attended the Abandonment hearing with legal counsel, submitting his PIF and offering his explanation for the delay. The Board was not satisfied that Mr. Ali's explanation demonstrated a clear intention to pursue his refugee claim. Mr. Ali did not apply for judicial review. Instead he applied to reopen his claim. Justice Mosley concluded that, since Mr. Ali had notice of the abandonment hearing, attended the hearing with counsel, and had the opportunity to provide his explanation for not filing his PIF on time, he did not demonstrate the existence of a breach of natural justice.

[21] In *Lin*, Madam Justice Layden-Stevenson also considered a challenge to a Board refusal to reopen a refugee claim. In this case, Mr. Lin had relocated from Vancouver to Toronto. He was given an extension to file his PIF but was advised the PIF was not received by May 20, 2002 a notice to appear for abandonment would be issued. Mr. Lin's PIF was not filed on time due to a

delay in the delivery of the Port of Entry Notes to his lawyer. The Board issued a notice to appear for an abandonment hearing on June 6. Mr. Lin submitted his PIF on June 18. The abandonment hearing was held on July 2, 2002 with Mr. Lin and counsel in attendance by teleconference. Mr. Lin chose not to testify at the abandonment hearing. The Board decided he had not sufficiently demonstrated an intention to pursue his refugee claim and deemed his claim had been abandoned. Mr. Lin sought leave of the Court for judicial review of the Board's abandonment decision which was denied. He applied to reopen his refugee claim which the Board denied. He then applied to the Court for a review of the refusal to reopen. Madam Justice Layden-Stevenson considered Mr. Lin's application as a collateral attack on the Board's abandonment decision and the Court's denial to grant leave for a judicial review of that decision. She considered the Board's refusal reasons, brief as they were, to be adequate and dismissed Mr. Lin's challenge.

[22] I do not disagree with these cases but I find they are factually different from the Trejos' circumstances. In both *Ali* and *Lin*, the applicants had the opportunity to attend the abandonment hearing with counsel. In this case, the Trejo family did not attend the abandonment hearing nor did they have the assistance of counsel.

[23] I note that the Notice of an Abandonment Hearing was given provisionally, prior to the deadline for the Trejos to file their PIFs. The Board's reminder to file a PIF before the deadline is for the Trejos' benefit; however, the practice of sending a provisional Notice of Abandonment in the same letter, while no doubt a convenience for the Board, increases the complexity of the reminder letter and the opportunity for error.

[24] The FCJ is a non-profit organization which provides assistance to refugee claimants. It is not a governmental agency and its interpreters are not government interpreters. In that respect, one cannot assume that interpretation by FCJ interpreters will be maintained at a consistent level of competency. The accuracy or completeness of non-official interpreters is a matter of evidence. The only evidence in the Record is Mr. Trejo's affidavit stating that he was not told of the abandonment hearing date. Given his affidavit evidence was not challenged, the evidence is that Mr. Trejo was not aware of the abandonment hearing date set for November 21, 2007. The fact that he physically attended to file the PIFs and deliver the FCJ letter the day before, on November 20, 2007, confirms that he was doing what he could to advance his refugee claim. Mr. Trejo's evidence establishing that an error, a failure in the process of giving notice of the abandonment hearing, did occur.

[25] The Respondent also submitted that arguments of incompetent counsel are only relevant at the abandonment hearing or judicial review of that hearing and not thereafter at an application to reopen.

[26] The Board would have had at its abandonment hearing the FCJ letter taking full responsibility for the late filing of the Trejos' PIFs. That FCJ letter also placed a request for an extension of time for filing the PIFs before the Board. The FCJ letter states:

"... We are helping the above-mentioned Refugee Claimants; Mr. Escorica came to Canada from Mexico. Mr. Escorica received the Personal Information Form on October 11, 2007. Mr. Escorica came to us for help regarding his refugee claim. Due to a technical error we lost all of Mr. Escorica's information including his PIF and other personal information. Therefore we had not realized that his PIF was overdue until the deadline had passed. I assume full responsibility for the tardiness

of his PIF, as Mr. Escorica made all attempts possible to try to have his PIF at the IRB in time. Please accept this request of an extension at this time..."  
(underlining added)

[27] The Board, in its abandonment decision reasons, only referred to the non-attendance of the Trejos or any representative. It did not consider the FCJ's acknowledgement of responsibility for the late filing nor did it consider the request for an extension of time.

[28] The error by the FCJ is not the sort of error that should be attributed to the Trejo family. It is the type of error that must be considered by the Board because it indicates that the late filing of the PIFs has gone amiss through no fault of the Trejos.

[29] The short answer is that, unlike Mr. Ali or Mr. Lin, Mr. Trejo has not been heard. He had an explanation to offer and it should have been considered. The Board was bound to consider the FCJ letter.

[30] I find a breach of natural justice occurred when the Board failed to have regard to the FCJ letter which was before it.

[31] Finding as I have there was a breach of natural justice; I conclude the Board committed a reviewable error in deciding there was no breach of natural justice in refusing to reopen the Trejo application for refugee status.

[32] The refusal to reopen is set aside and the Trejo application is referred to the Board for reconsideration.

[33] In *Ding* at para 11, Justice Campbell set aside a Board refusal to reopen and directed the options were to rehear the issue of abandonment or proceed with the refugee claim. I direct that the options available on reconsideration in conformity with these reasons are either to rehear the issue of abandonment or to reopen the Trejo's refugee claim.

**ORDER**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The decision of the Board is set aside;
2. The matter is referred to the Board for reconsideration either to rehear the issue of abandonment or to reopen the refugee claim.

“Leonard S. Mandamin”

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Judge

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

**DOCKET:** IMM-5445-07

**STYLE OF CAUSE:** Alfonso Escorcía Trejo and Associated Claims (TA7-10402-5) v. The Minister of Citizenship and Immigration

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 15, 2008

**REASONS FOR ORDER  
AND ORDER:** MANDAMIN J.

**DATED:** October 27, 2008

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