

Date: 20060314

Docket: IMM-1986-05

Citation: 2006 FC 328

Ottawa, Ontario, March 14, 2006

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

OSCAR OBED ESPINOZA PINEDA

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 11, 2005, which declared that the applicant's refugee claim had been abandoned as a result of his delay in filing his Personal Information Form (PIF).

[2] The applicant seeks an order quashing the decision and referring the matter to a differently constituted panel of the Board for re-determination.

Background

[3] The applicant, a citizen of Honduras, came to Canada on January 28, 2005 and claimed refugee protection at the border. He was given a blank Personal Information Form (PIF) to fill out. The PIF was due 28 days later, on February 25, 2005. He filed his address notification within 10 days as required, and his medical examinations within 28 days. On March 2, 2005, he received a notice of an abandonment hearing as he had not filed a PIF within the time required. On March 3, 2005, he filed his PIF.

[4] The Board held an abandonment show cause hearing on March 9, 2005 to provide the applicant with an opportunity to explain why the Board should proceed with the refugee claim. The applicant represented himself at the hearing. He apologized for the delay and stated that he had confused the deadlines with respect to different documents. He testified that he thought he had 60 days to file the PIF and 28 days to file the medical examinations. He testified that he did not know that he was mistaken about the deadlines until he had someone translate the notice of the abandonment hearing. He stated that he had everything almost ready anyway.

[5] The Board member emphasized at the hearing that while the applicant may have been confused, he had an obligation to comply with the rules, and the 28-day deadline is clearly written on the front of the PIF package and on the brochure that is handed out to every claimant. The Board member stated that the applicant had an obligation to seek out someone who could translate the documents for him if he felt that he needed clarification. The Board member further stated that sometimes there are circumstances that make it impossible or impractical for a claimant to comply with the rule, but that is not the case here. The Board member noted that the applicant had filed the PIF and had indicated that he was ready to proceed.

[6] In this case, the Board member was not prepared to extend the deadline, and at the conclusion of the hearing, determined that the applicant's claim had been abandoned. This is the judicial review of that decision.

Issues

[7] The applicant submitted the following issues for consideration:

1. Did the Board reach an unreasonable conclusion in determining that the applicant's claim had been abandoned?

2. Did the Board violate the principles of natural justice in determining that the applicant's claim had been abandoned?

Applicant's Submissions

[8] The applicant submitted that the Board's decision to declare a claim abandoned is reviewable on a standard of reasonableness *simpliciter* and should be subject to serious scrutiny (see *Ahamad v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 109 at paragraph 27 (T.D.)).

[9] The applicant submitted that this decision does not withstand serious scrutiny, as the Board has made errors of fact and law. It was submitted that the Board applied the wrong test because it asked whether filing on time would have been "impossible or impractical" for the applicant. The Board was required instead to determine whether the claim is abandoned (see *Matondo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 at paragraph 16). The Board found that the applicant "took no steps to try to make sure, to understand what was going on." It was submitted that this finding was unreasonable, given that at the time the applicant received the notice of the abandonment hearing, he had already arranged for a translator to help him draft his PIF and he had nearly completed it, which is evidenced by the fact that he submitted the PIF immediately upon receiving the notice.

[10] The applicant submitted that the problem was not that he felt he needed clarification and failed to seek it, the problem was that he did not know he needed clarification because he was mistaken about the deadlines. It was submitted that in failing to appreciate this human error, which due diligence cannot always prevent, the Board member made an unreasonable conclusion.

[11] The applicant submitted that the case of *Matondo*, above, makes clear that where there is clear and uncontested evidence that the claimant has always intended to pursue his claim, declaring it abandoned is capricious and a violation of the principles of natural justice, and therefore, the decision cannot stand.

Respondent's Submissions

[12] The respondent submitted that in determining whether a claim is to be abandoned, the test is whether the claimant's conduct amounts to an expression of intention by that person that he or she does not wish to pursue his or her claim (see *Markandu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1596 at paragraph 10). It was submitted that the Board need not consider the merits of the refugee claim and a claimant's readiness to continue with the claim is a factor to be considered, but is not determinative (see *Markandu* at paragraphs 11 and 24).

[13] The respondent submitted that the Board considered all of the evidence on abandonment and exercised its discretion accordingly. It was submitted that it was open to the Board to conclude that the applicant was not diligent in advancing his claim for protection.

[14] Further, the respondent submitted that the *Matondo* decision relied upon by the applicant can be distinguished on the facts. First, Mr. Matondo challenged the Board's failure to reopen a refugee claim under Rule 55, whereas here, the applicant is challenging the decision to declare his claim abandoned. Second, Mr. Matondo was not given an opportunity to be heard at an abandonment hearing, whereas the applicant in this case appeared at a hearing and was given an opportunity to show cause. Third, Mr. Matondo's identity documents had been seized and he required these documents to complete his PIF, but his counsel's requests for these documents were unanswered.

Analysis

[15] Standard of Review

The standard of review to be applied to an abandonment decision by the Board, is reasonableness *simpliciter* (see *Anjum v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 496 at paragraph 17).

[16] **Issue 1**

Did the Board reach an unreasonable conclusion in determining that the applicant's claim had been abandoned?

In *Ahamad v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 109 (T.D.), Justice Lemieux stated at paragraph 32:

The decided cases of the Court on a review of abandonment claim decisions by the CRDD indicate the test or question to be asked is whether the refugee claimant's conduct amounts to an expression of intention by that person, he or she did not wish or had shown no interest to pursue the refugee claim with diligence; this assessment is to be made in the context of the obligation of a claimant who breaches one of the elements of subsection 69.1(6) to provide a reasonable excuse (*Perez v. Canada (Solicitor General)* (1994), 93 F.T.R. 256 (F.C.T.D.), Joyal J.; *Izauierdo v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1669 (T.D.) (QL), Rouleau J.; *Ressam v. Canada (Minister of Citizenship and Immigration)* (1996), 110 F.T.R. 50 (F.C.T.D.), Pinard J.; *Alegria-Ramos v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 150 (F.C.T.D.), Dubé J.).

[17] In the present case, the applicant filed his address notification on time and his medical examination on time. His PIF was due on February 25, 2005 but he did not file the PIF until March 3, 2005. The applicant stated he was late in filing his PIF because he was mistaken about the deadline. He was under the impression that he had 60 days to file a PIF and 28 days to file his medical examination. The Board did not disbelieve what the applicant stated, but did not accept this as a sufficient reason to extend the deadline.

[18] In order to deny the applicant relief on an abandonment hearing, the Board must have evidence of an intention by the applicant to abandon the claim. I am of the opinion that the Board's decision was unreasonable as I can find no evidence that the applicant had an intention to abandon his claim. The applicant filed his address document and his medical examination and according to the evidence, had his PIF almost ready to file when he received the notice of abandonment hearing.

[19] The Board member stated at the hearing that the applicant could have taken the documents to someone who spoke English to explain to him what his obligations were. I would note that the applicant did not raise his lack of English ability as an excuse. He said he made a mistake. The Board member raised the language issue.

[20] Accordingly, the Board's decision must be set aside and the matter referred to a different panel of the Board for re-determination.

[21] Because of my finding on Issue 1, I need not deal with the remaining issue.

[22] Neither party proposed a serious question of general importance for my consideration for certification.

JUDGMENT

[23] **IT IS ORDERED that** the application for judicial review is allowed and the decision of the Board set aside. The matter is referred to a different panel of the Board for re-determination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Legislation

Subsection 168(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 provides the Board with jurisdiction to determine that a proceeding has been abandoned. It reads as follows:

168. (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

168. (1) Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication.

Concerning the discretion that may be exercised by the Board in determining that a claim has been abandoned, rule 58 of the *Refugee Protection Division Rules*, SOR/2002-228 provides that:

58. (1) A claim may be declared abandoned, without giving the claimant an opportunity to explain why the claim should not be declared abandoned, if

(a) the Division has not

58. (1) La Section peut prononcer le désistement d'une demande d'asile sans donner au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé si, à la fois:

a) elle n'a reçu ni les

received the claimant's contact information and their Personal Information Form within 28 days after the claimant received the form; and

coordonnées, ni le formulaire sur les renseignements personnels du demandeur d'asile dans les vingt-huit jours suivant la date à laquelle ce dernier a reçu le formulaire;

(b) the Minister and the claimant's counsel, if any, do not have the claimant's contact information.

b) ni le ministre, ni le conseil du demandeur d'asile, le cas échéant, ne connaissent ces coordonnées.

(2) In every other case, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned. The Division must give this opportunity

(2) Dans tout autre cas, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé. Elle lui donne cette possibilité:

(a) immediately, if the claimant is present at the hearing and the Division considers that it is fair to do so; or

a) sur-le-champ, dans le cas où il est présent à l'audience et où la Section juge qu'il est équitable de le faire;

(b) in any other case, by way of a special hearing after notifying the claimant in writing.

b) dans le cas contraire, au cours d'une audience spéciale dont la Section l'a avisé par écrit.

(3) The Division must consider, in deciding if the claim should be declared abandoned, the explanations given by the claimant at the hearing and any other relevant information, including the fact that the claimant is ready to start or continue the proceedings.

(3) Pour décider si elle prononce le désistement, la Section prend en considération les explications données par le demandeur d'asile à l'audience et tout autre élément pertinent, notamment le fait que le demandeur d'asile est prêt à commencer ou à poursuivre l'affaire.

(4) If the Division decides not

(4) Si la Section décide de ne

to declare the claim abandoned, it must start or continue the proceedings without delay.	pas prononcer le désistement, elle commence ou poursuit l'affaire sans délai.
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FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1986-05

STYLE OF CAUSE: OSCAR OBED ESPINOZA PINEDA
- and -
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THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 2, 2006

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: March 14, 2006

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