Federal Court  Cour fédérale

Date: 20140227

Docket: IMM-3294-13

Citation: 2014 FC 189

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 27, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

Marie Josée BOLOMBU NDOMBA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review brought under section 72 of the *Immigration and Refugee Protection Act*, SC (2001), c 27 (Act). In this case, the Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD) found that the applicant had abandoned her refugee claim.

[2] Section 168 of the Act allows each division of the Board to determine that a proceeding before it has been abandoned. Clearly, the Act will not allow immigration proceedings to be drawn out; a person who is in Canada and who does not want to leave it quite often has no interest in moving forward with those proceedings. The Act allows the RPD to declare a claim abandoned when the refugee claimant is not advancing the file. The decision to declare a claim abandoned is discretionary, but cannot be arbitrary. In this case, section 65 of the *Refugee Protection Division Rules*, SOR/2012-256 (Rules), applies. Subsections (4), (5) and (7) of section 65 of the Rules, which address abandonment cases before the Refugee Protection Division, may be examined to find that they were followed in this case. Those subsections read as follows:

(4) The Division must consider, in deciding if the claim should be declared abandoned, the explanation given by the claimant and any other relevant factors, including the fact that the claimant is ready to start or continue the proceedings.	(4) Pour décider si elle prononce le désistement de la demande d'asile, la Section prend en considération l'explication donnée par le demandeur d'asile et tout autre élément pertinent, notamment le fait qu'il est prêt à commencer ou à poursuivre les procédures.
(5) If the claimant's explanation includes medical reasons, other than those related to their counsel, they must provide, together with the explanation, the original of a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate.	(5) Si l'explication du demandeur d'asile comporte des raisons médicales, à l'exception de celles ayant trait à son conseil, le demandeur d'asile transmet avec l'explication un certificat médical original, récent, daté et lisible, signé par un médecin qualifié, et sur lequel sont imprimés ou estampillés les nom et adresse de ce dernier.
. . .	[…]

(7) If a claimant fails to provide a medical certificate in accordance with subrules (5) and (6), the claimant must include in their explanation	(7) À défaut de transmettre un certificat médical, conformément aux paragraphes (5) et (6), le demandeur d'asile inclut dans son explication :
(*a*) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;	*a*) des précisions quant aux efforts qu'il a faits pour obtenir le certificat médical requis ainsi que des éléments de preuve à l'appui;
(*b*) particulars of the medical reasons included in the explanation, supported by corroborating evidence; and	*b*) des précisions quant aux raisons médicales incluses dans l'explication ainsi que des éléments de preuve à l'appui;
(*c*) an explanation of how the medical condition prevented them from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim or otherwise pursuing their claim, as the case may be.	*c*) une explication de la raison pour laquelle la situation médicale l'a empêché de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à laquelle il devait être transmis ou de se présenter à l'audience relative à la demande d'asile.

[3] The applicant claimed refugee protection on June 8, 2012. She arrived in the country from Congo-Kinshasa in May of that same year. Essentially, she states that she was a victim of the police system in the Congo. A hearing before the Refugee Protection Division was held on March 8 to address her refugee claim, following a notice issued on February 15, 2013.

[4] However, an abandonment hearing had already taken place on September 12, 2012, because the Personal Information Form had not been provided. Contrary to what was claimed at

the hearing, the abandonment had not been lifted: none had been declared. At the end of the hearing, the refugee claim was allowed to continue because the form was produced (subsection 65(2) of the Rules). In fact, in September 2012, the presiding member noted the need for a medical certificate because counsel for the applicant had already mentioned his client's health problems. As will be discussed, none was ever produced.

[5] On March 8, 2013, counsel for the applicant, who was her counsel in September 2012 and is her counsel before this Court, argued that he had not had contact with his client for some time, even though the refugee claim was supposed to be heard that day. The abandonment issue was again raised given that the applicant did not want to proceed. Counsel again stated that the applicant has health problems, without further explanation. The abandonment could have been declared immediately (subsection 65(1) of the Rules) but was not. The applicant, who had already been notified on September 12, 2012, was notified again. Counsel complained that the notice to appear for the hearing on March 8 was not sufficient (February 15) and that a bit more time was needed to obtain the medical evidence. At the hearing itself, the date of March 21 was chosen after counsel argued that the proposed date of March 15 was a bit too soon. He thus communicated with his office while at the hearing itself in the presence of the applicant and her niece, as stated in the hearing transcript, to confirm his availability.

[6] The hearing was therefore scheduled for March 21, 2013. On that date, neither the applicant nor her counsel was present and the proceeding did not advance to abandonment or the granting of refugee status; a notice to appear was issued for a hearing to be held on April 3.

[7] On April 3, counsel for the applicant requested an adjournment because he was held up at the Federal Court. The applicant was present at the hearing.

[8] The special hearing regarding the abandonment finally took place on April 19, 2013. The explanations for the absences on March 21 were short, and the medical certificates, which had been previously mentioned in September 2012, were still unavailable, despite the hearings on March 8, March 21, April 3 and April 19. Moreover, the applicant was not prepared to proceed with her refugee claim on April 19.

[9] It is the reasonableness standard of review that applies to these issues (*Abrazaldo v The Minister of Citizenship and Immigration*, 2005 FC 1295; *Revich v The Minister of Citizenship and Immigration*, 2004 FC 1064; *Gonzalez v The Minister of Citizenship and Immigration*, 2009 FC 1248; *Singh v The Minister of Citizenship and Immigration*, 2012 FC 224 (*Singh*); *Csikos v The Minister of Citizenship and Immigration*, 2013 FC 632 (*Csikos*)). Evidently, as a result, this Court must show deference to the decision ordering the abandonment. Only decisions with no basis of reasonableness should be overturned. As stated by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[10] In judicial review, the applicant simply repeated that her state of health is the reason for her delay in proceeding. The explanations provided are simply inadequate. To this day, the problems

affecting the applicant are unbeknownst to us apart from her counsel's pleading/testimony. To claim that physical suffering is visible, as counsel for the applicant did repeatedly, is no reason, in my opinion, to overturn the decision by the Refugee Protection Division, which was there to see it. In particular, I note the following observation by the RPD, which seems very informative:

> [TRANSLATION]
>
> . . . As for myself, what I can tell you about my point of view or about what I have thought up until now, I looked in the file and there is no medical document that tells me what state of health you are in, in those medical documents there is no indication. I see your discomfort, at least I observe your conduct in the room and the fact that you are in a wheelchair, but I have no information from an expert like, for example, a doctor, who can explain your specific medical condition and who can explain how you are unable to continue with the proceeding.

[11] The RPD was alert from the start, and certainly starting from March 8, 2013, to the applicant's health situation. In fact, she was questioned in that respect. Furthermore, the abandonment issue was addressed and the need to prove the medical condition was once again raised. Counsel for the applicant opposed the suggestion that the hearing continue on March 15 because he needed [TRANSLATION] "a little more time to be able to seek medical evidence". As indicated above, the March 21 date was agreed upon, but neither the counsel, nor the applicant nor her niece, all of whom were present on March 8, were present on March 21.

[12] On April 3, the applicant was present but her counsel was not. The medical evidence supporting the counsel's statements were still not produced on April 19. There were numerous opportunities for the medical evidence, if it exists, to be produced. The applicant and her counsel knew that it had been required since September 2012 and most certainly to justify the March 21

absence. Persons seeking to avail themselves of the protection of the Canadian state must be diligent and prompt. In the words of the Honourable Yvon Pinard in *Csikos*, above, " . . . [i]n the case at bar, considering the relevant statutory provisions and case-law, . . . it was reasonable for the RPD to find that the applicants were in default in the proceedings and declare their proceedings abandoned". I find that the decision to declare the claim abandoned was a possible acceptable outcome based on the law and the facts.

[13] I agree with the following observation by Justice James Russell in *Singh, supra*:

> [75] The Court notes that the consequences of a declaration that a claim has been abandoned may be severe, even fatal to a claimant. This does not, however, absolve claimants of the onus on them to establish why their claims should not be abandoned. It also does not mean that the RPD is always bound to accept claimants' arguments as to why their claims should not be abandoned. The severity of consequences means only that the RPD must ensure that claimants have a full opportunity to present their case and that it fully considers the case presented to it. In this case, both of these things occurred, and I see no reason to interfere with the Decision.

[14] *In extremis*, the applicant also argues that the principles of natural justice and, in particular, the so-called *audi alteram partem* rule, were breached.

[15] I can find no basis for agreeing with that claim. The applicant was notified of the issues and, when she was provided with the opportunity to give explanations during the hearing on April 19, those explanations were nothing more than what had been said before and do not fulfil the requirements for such explanations. Consequently, the decision by the Refugee Protection Division is not inappropriate because it is the product of a process launched in September 2012,

with hearings held on September 12, 2012; March 8, 2013; March 21, 2013; April 3, 2013; and April 19, 2013.

[16] Moreover, there is no need to address the argument that the RPD breached the guideline on procedures with respect to vulnerable persons appearing before the IRB (December 15, 2006). First, that text is not as binding as the applicant would like. In fact, the Act gives the Chairperson of the Board the power to issue guidelines "to assist members in carrying out their duties" (paragraph 159(1)(*h*) of the Act). In addition, however, in a more fundamental way, the RPD, in this case, showed as much concern as the applicant could have expected. I read all of the transcripts and found nothing to repeat. Counsel for the applicant was always present. In fact, more than once his intervention could have been mistaken for testimony. While the applicant might have wanted to proceed on April 3 despite her counsel's absence, intervention by someone from her counsel's office resulted in the matter being adjourned. The guideline is in no way useful to the applicant.

[17] The RPD demonstrated patience, but it could not substitute itself for the applicant, who is the only one who could obtain the medical evidence. There can be no confusion as to its need and to the fact that no effort was made to obtain it, as indicated by the evidence at the hearings.

[18] Some might argue that the RPD could have demonstrated more understanding with respect to the applicant. Two observations can be made. In as much as increased understanding could have led to a final adjournment, the fact remains that the decision to declare the claim abandoned was a possible and acceptable outcome: the Court cannot intervene. Furthermore, the RPD acted

in a systematic manner, giving the applicant time to obtain the essential documents; when they were not produced, the applicant refused the holding of a hearing of her refugee claim that same day and indicated that she would probably be unable to do so at future hearings. It is difficult to think of any other available options, especially since the RPD even stated at the hearing that the applicant could make an application to reopen, which she did not do.

[19] The decision to declare the claim abandoned is reasonable and, evidently, the application for judicial review must be dismissed. The parties did not submit a serious question of general importance for certification and I found none.

ORDER

The application for judicial review of the decision dated June 6, 2013, by the Refugee Protection Division of the Immigration and Refugee Board is dismissed. There is no question for certification.

"Yvan Roy"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3294-13
STYLE OF CAUSE:	Marie Josée BOLOMBU NDOMBA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 19, 2014
REASONS FOR ORDER AND ORDER:	Roy J.
DATED:	February 27, 2014

APPEARANCES:

Stewart Istvanffy Anne Castagner	FOR THE APPLICANT
Suzon Létourneau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Étude légale Stewart Istvanffy Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT