

Federal Court



Cour fédérale

Date: 20150508

Docket: IMM-7555-13

Citation: 2015 FC 597

Ottawa, Ontario, May 8, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

LORNA NORETTA OCTAVE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, the Applicant seeks judicial review of a determination by the Refugee Protection Division [RPD] that she had abandoned her claim for refugee protection. The Applicant asks the Court to set aside the RPD's decision and order the RPD to afford her a full hearing.

[2] The Applicant is a 45-year-old citizen of Saint Lucia who came to Canada on August 24, 2008, and asked for refugee protection on October 21, 2011. She claims that she is bisexual and that her ex-boyfriend had beaten her and threatened to kill her after he caught her having sex with a woman.

[3] The RPD was scheduled to hear the Applicant's claim on August 12, 2013, but on August 8, 2013, her counsel asked for an adjournment because his client was confined to bed for medical reasons. He enclosed letters from physicians which said that the Applicant was scheduled for surgery on September 9, 2013, and that she would need at least six weeks to recover. The RPD agreed to postpone the hearing until October 8, 2013, and the member commented on the disposition record that, "[d]ue to nature of time regarding post surgery recuperation date may have to be changed. Counsel will keep us informed."

[4] The Applicant's surgery was successful and she was discharged from hospital on September 10, 2013. As the hearing approached, however, she informed her counsel that she was still in pain, had no energy, was short of breath, had trouble walking, and was unable to hold lengthy conversations. Her counsel again asked for an adjournment on October 1, 2013, but offered no new medical evidence. This time, the RPD refused the request, stating that: "There is no medical evidence to support claimant's request. Request does not comply with RPD Rules. Surgery was September 09, 2013 - medical note suggests 4-6 wks recovery."

[5] On October 7, 2013, the Applicant's counsel again requested an adjournment, this time supplying a note from a nurse at Unison Health & Community Services [Unison Health] which

stated that the Applicant “is recovering from recent surgery (Sept (/2013) and will need some time to fully recover. She will likely another 4weeks of rest for full recovery” (errors in original). The Applicant's counsel stated in the cover letter with this note that the Applicant “is still very much interested in pursuing this matter” and provided the RPD with nine alternative dates to hear the Applicant's claim between November 7 and 15, 2013. When the Applicant's counsel attended the hearing on October 8, 2013, the RPD member advised him that the note from the nurse was insufficient, and set the matter over to October 29, 2013, for a show cause hearing to provide the Applicant an opportunity to convince the RPD that her claim had not been abandoned.

II. Decision under Review

[6] On October 29, 2013, the Applicant arrived at the hearing an hour late from the stated check-in time and supplied another note from Unison Health. This one said that she had been a patient since October 12, 2011, and identified her diagnosis and surgery. Still, the RPD determined that the claim had been abandoned, noting on the “Show Cause Hearing” form that the “[c]laimant failed to provide a medical certificate which complies with 65(5)(6).”

[7] The transcript of the hearing discloses more detailed reasons. While he was asking the Applicant questions, the RPD member noted that there was no evidence to explain why her medical conditions prevented her from attending the hearing on October 8, 2013. The first letters said that she would need at least six weeks to recover, but the member noted that “[r]ecovery period means a lot of different things” and that those letters did not “tell me that the claimant could not be here in front of us. It doesn't tell me that she was bedridden.” For the same reason,

the RPD dismissed the most recent letters from Unison Health. Further, the member observed that the discharge record from the hospital stated that the Applicant was alert, awake, ambulatory, and was eating and bathing independently.

[8] Overall, the RPD determined that the medical evidence did not comply with subsection 65(6)(a) of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], which states that a medical certificate “must” set out “the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant from ... appearing for the hearing of the claim.” The RPD member said that this rule was “not optional.” When the Applicant's counsel submitted that the member still had discretion to take into account other factors and excuse non-compliance with the rule, the member responded that he was not aware of any such discretion. Even if he had it though, the member said that he was not “convinced that the claimant really wanted to pursue this actively,” because:

Her being here today an hour late is indicative of, to me, of a lack of subjective fear. If she was so fearful of going back to Saint Lucia, then the number one thing on her mind would and should be this refugee protection hearing. And showing up an hour late for check-in, to me, is indicative of a lack of concern about it. ... That's – on top of the fact that she has not provided the documents and Counsel has said that you advised her to produce the proper documents.

[9] The RPD member finished the hearing by giving brief reasons that were consistent with the doubts he had expressed throughout, and concluded that, “after looking at the totality of the evidence, I find there's no persuasive evidence to continue this claim and therefore, I find that on a balance of probabilities, you, the claimant, have not shown cause. So ... I hereby declare that this claim is abandoned.”

III. Issues

[10] The Applicant submitted three issues for the Court's consideration in her written arguments, but argued only the first two at the hearing of this matter:

1. Whether the RPD's decision to declare the Applicant's claim abandoned was reasonable;
2. Whether the RPD's reasons were adequate; and
3. Whether the RPD breached the Applicant's right to procedural fairness by denying her the opportunity to fully present her case.

IV. The Parties' Arguments

[11] The Applicant argues that it was unreasonable for the RPD to decide that her claim had been abandoned and, further, that the RPD's reasons for this determination were inadequate.

[12] The Applicant notes that she had diligently completed her personal information form on time and supplied supporting documents, sent her counsel to both of her previous hearings to explain her absence, and supplied letters from medical professionals attesting to her medical condition. While she acknowledges that those letters did not meet all the criteria of subsection 65(6) of the *RPD Rules* and that she was late to the hearing, the Applicant and her counsel were both prepared to proceed with the claim on October 29, 2013. In the Applicant's view, the RPD failed, contrary to subsection 65(4) of the *RPD Rules*, to consider any factors other than the inadequacy of her medical certificates.

[13] In addition, the Applicant argues that the RPD erred by declaring that her claim was abandoned without explaining how it arrived at that conclusion based on the medical notes provided and the willingness of the Applicant to proceed with her claim at the show cause hearing.

[14] The Respondent states that reasonableness is the standard of review (citing *Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FCR 109 at paragraph 27, 184 FTR 283 (TD) [*Ahamad*]). According to the Respondent, a declaration of abandonment is a highly discretionary decision which should only be interfered with if there was no evidence to support the declaration.

[15] The Respondent submits that the test for abandonment is “whether the refugee claimant's conduct amounts to an expression of intention by that person that he or she does not wish or had shown no interest to pursue his or her claim with diligence” (*Markandu v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1596 at paragraph 10 [*Markandu*], citing *Ahamad* at paragraph 32). The onus to prove that a claim should not be abandoned rests on the claimant (*Singh v Canada (Citizenship and Immigration)*, 2012 FC 224 at paragraph 75, 405 FTR 293 [*Singh*]), and the Respondent argues that the Applicant's medical certificates did not explain why she could not attend the hearing on October 8, 2013. She thus violated subrule 65(6), and she gave no excuse for that which could satisfy subrule 65(7). The Respondent argues that it was therefore reasonable for the RPD to declare that the Applicant had abandoned her claim, and that this Court has upheld similar decisions in the past (citing e.g. *Keiselis v Canada (Citizenship and*

Immigration), 2013 FC 815 [*Keiselis*]; *Csikos v Canada (Citizenship and Immigration)*, 2013 FC 632 at paragraph 29 [*Csikos*]).

[16] As for the adequacy of the reasons, the Respondent contends that they meet the standard set out in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 16 and 18, [2011] 3 SCR 708. The RPD was only required to determine whether the Applicant complied with rule 65 and the Respondent argues that the reasons reasonably and sufficiently explain why she did not.

V. Analysis

[17] The RPD's decision attracts deference and is reviewable by this Court on a standard of reasonableness. Its decision should not be interfered with unless it lacks justification, transparency and intelligibility, or falls outside the range of possible, acceptable outcomes, defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339).

[18] I agree with the Respondent that the test for abandonment is “whether the refugee claimant's conduct amounts to an expression of intention by that person that he or she does not wish or had shown no interest to pursue his or her claim with diligence” (*Markandu* at paragraph 10, citing *Ahamad* at paragraph 32). I disagree with the Respondent, however, that it was reasonable for the RPD to declare that the Applicant had abandoned her claim.

[19] None of the somewhat similar cases upon which the Respondent relies supports an argument that the RPD's decision to declare the Applicant's claim as abandoned was reasonable. Each is readily distinguishable. In *Keiselis*, the applicant had failed to appear at his hearing on four occasions and none of the medical letters said anything that would excuse the Applicant from going to his hearing. In *Csikos*, the applicants had not complied with the RPD's request for more detailed medical information and never submitted the Certificate of Readiness form in advance of their hearing (despite being warned that failure to do so could lead to abandonment proceedings). In *Singh*, the applicant had never proven that he had ever had any medical problems, both the applicant and his counsel had failed to appear at the scheduled hearing, and neither were prepared to proceed with the claim at the abandonment hearing. Lastly, in *Bolombu Ndomba v Canada (Citizenship and Immigration)*, 2014 FC 189, the applicant was also unprepared to proceed and produced no medical certificate whatsoever to support the claim that his health problems had caused four previously scheduled hearings to be postponed (despite being told that one was required over 6 months earlier).

[20] The present case is also unlike the recent decision in *Uandara v Canada (Citizenship and Immigration)*, 2015 FC 254, where the claim had been outstanding for 3 years and, the day before the abandonment hearing, the applicants had submitted a doctor's note that stated the female applicant (who was allegedly eight months pregnant) "probably should not be flying on an airplane to Toronto at this time." The hearing could have been held by teleconference though, and the Court stated the following when determining that a finding of abandonment was reasonable:

[36] For people who claim to fear returning to Namibia, the Applicants appear to have made little effort to establish their claim

for refugee protection in Canada. The record suggests repeated accommodation by the Board and failures to appear by the Applicants that are more consistent with an attitude of avoidance than an attempt to assert a claim.

[37] In any event, as far as the Decision under review is concerned there is clearly no legal error. The Applicants were made fully aware of the consequences for non-attendance at the July 18, 2013 hearing and of what they needed to provide in order to avoid an abandonment decision. Yet, once again, they failed to appear and did not provide the Board with convincing evidence of their inability to attend....

[21] As noted above, the question to be asked by the RPD is whether the Applicant's conduct indicates that she has no interest in diligently pursuing her refugee claim. The answer to that question "is to be given in relation to the facts of a particular case but taking into account all of the relevant factors which bear upon the matter" (*Ahamad* at paragraph 33).

[22] After the Applicant arrived nearly 30 minutes after the scheduled start-time of the hearing, the RPD asked her why her claim should not be declared abandoned. Although the Applicant and her counsel explained her medical issues, these explanations failed to satisfy the RPD member who stated that the provisions of subrule 65(6)(a) were "non-optional" and, consequently, rejected the medical certificate offered to explain the Applicant's non-attendance at the October 8, 2013 hearing.

[23] The RPD did not appear to be aware that paragraph 70(c) of the *RPD Rules* permits it to "excuse a person from a requirement of a rule." More importantly though, the RPD did not consider the provisions of subrule 65(4). In this case, at the abandonment hearing, the Applicant and her counsel were clearly ready to start proceedings in respect of her claim and stated as

much. The Applicant's documentation (which totalled some 19 exhibits) was before the RPD. Moreover, although the Applicant herself was not in the hearing room at the start of the hearing on October 29, 2013, her counsel was, and the transcript shows that he had informed the member that the Applicant "walks very slowly" and had "just left the subway near here." It was unreasonable to find that the Applicant's misjudgment about the time it would take for her to get to the hearing alone indicated a lack of subjective fear, which in any event is a factor relating primarily to the merits of her claim.

[24] The transcript of the hearing further shows that the RPD member unreasonably fixated upon the technical deficiencies of the Applicant's medical certificates offered to explain the reasons for her two failures to attend. I agree with the Applicant that the RPD failed, contrary to subsection 65(4) of the *RPD Rules* and the guidance in *Ahamad* at paragraph 33, to consider any factors other than the inadequacy of her medical certificates in assessing whether the Applicant had abandoned her claim.

[25] It was also unreasonable for the RPD to conclude that the Applicant had shown no interest in pursuing her claim with diligence. The RPD was scheduled to hear the Applicant's claim initially on August 12, 2013, but this hearing was validly postponed until October 8, 2013, and the abandonment hearing occurred just three weeks later on October 29, 2013. During this period of some two and a half months, the Applicant's illness was severe enough that she required major surgery on September 9, 2013, and her doctors said she would need at least 6 weeks to recover. The Applicant's counsel personally appeared at the first two scheduled hearing dates to explain the reason and need for an adjournment, and he and the Applicant were prepared

to proceed with a full hearing of the claim on October 29, 2013. This conduct shows that the Applicant pursued her claim as diligently as was possible in the circumstances.

VI. Conclusion

[26] It was not reasonable for the RPD to declare the Applicant's claim was abandoned in the circumstances of this case. This outcome is not defensible in fact and in law and cannot be justified.

[27] Accordingly, the Applicant's application for judicial review is allowed and the RPD's determination that the Applicant's claim was abandoned is set aside, and the RPD is directed to determine the Applicant's refugee claim before a different panel member.

[28] Neither party raised a question of general importance for certification, so none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the Refugee Protection Division's determination that the Applicant's claim was abandoned is set aside, and the Refugee Protection Division is directed to determine the Applicant's refugee claim before a different panel member. No serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7555-13

STYLE OF CAUSE: LORNA NORETTA OCTAVE v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 16, 2015

JUDGMENT AND REASONS: BOSWELL J.

DATED: MAY 8, 2015

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