Federal Court  Cour fédérale

Date: 20150709

Docket: IMM-1704-14

Citation: 2015 FC 845

Toronto, Ontario, July 09, 2015

PRESENT: The Honourable Mr. Justice Diner

Docket: IMM-1704-14

BETWEEN:

SWHA HUSEEN
BATOL MOHAMMAD
HAMZA MOHAMMAD
HUZAIFA MOHAMMAD

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Swha Huseen, a woman of Palestinian ethnicity, was living in Syria with her husband when civil strife intensified in that country in 2013. She was a nurse, and fears persecution on account of her husband's work as a doctor that tended to injured rebel soldiers. For this reason,

her husband was arrested and he disappeared thereafter. He was never heard from again. The Primary Applicant and her three young children eventually fled to Canada, seeking refugee protection. The Huseens' refugee claim was never heard, having been declared abandoned after the Applicants failed to submit certain forms and appear at an abandonment hearing.

[2] This is a judicial review of a Decision of the Refugee Protection Division [RPD] dated February 24, 2014, denying the Applicants' application to reopen their refugee claim. The only issue to be decided in this case is whether that refusal was reasonable in light of the principles of natural justice.

II. OVERVIEW: *What led to the Abandonment of the refugee claim?*

[3] Swha Huseen, the Primary Applicant [PA], is the mother of the three other Applicants, all minor children. She is a stateless Palestinian woman who, before coming to Canada, was living in Syria and was registered with the United Nations Relief and Works Agency. She worked in Syria as a nurse, and her husband was a doctor.

[4] In January 2013, soldiers visited her husband's clinic and told him he would pay heavily if he continued to treat the rebel forces. The family immediately fled Damascus and settled in Jaramana, another city in Syria. According to the Applicant's Affidavit, her husband was arrested in Jaramana in August 2013 and sent to prison for treating rebel soldiers. She has not spoken to or heard from him since that time. This evidence has not been challenged.

[5] The Applicants fled Syria on September 29, 2013, fearing that the authorities would persecute them in retribution of the acts of her husband. They first travelled to and resided in Egypt, but the Applicants' request for extensions to their temporary resident status was denied. Ms. Huseen thereafter began to make plans to come to Canada, where she had relatives.

[6] The Applicants landed in Canada at Toronto's Lester B. Pearson Airport on December 15, 2013, where they made a claim for refugee protection, and her brother-in-law helped the family to complete their paperwork.

[7] The RPD provides a 15-day deadline to submit the Basis of Claim [BOC] form, along with a Notice to Appear for an abandonment hearing, should this deadline be missed. The Applicant failed to follow the BOC instructions and missed her December 30, 2013 deadline. The evidence is not clear as to whether the misunderstanding stemmed from misinformation provided to the Applicant by her brother-in-law, or from her own misreading of the BOC instructions, for which she had an Arabic translation. What is clear is that the Applicant did not have legal representation for the period from her arrival on December 15 until her January 7 abandonment hearing three weeks later.

[8] Almost immediately after landing in Toronto, and well before the BOC filing deadline, the Applicants relocated to Alberta. On December 18, 2013, the PA attended the Calgary Immigration and Refugee Board [IRB] office in person to request a change of venue for her refugee hearing. Her brother-in-law once again assisted her with this request. The PA asserts that she thought that this venue change application suspended the 15-day BOC filing deadline. In

other words, her unchallenged and sworn testimony is that she believed nothing further was required until she received confirmation that her claim had been transferred to Calgary.

[9] The Board moved swiftly towards abandonment: once the Applicants missed their BOC filing deadline, the Board held the abandonment hearing on January 7, 2014 in Toronto. The Applicants, then all living in Alberta, missed this hearing. Their claims were declared abandoned.

[10] The Applicants retained counsel on January 10, 2014, who continues to act for them to this day. Mr. Harsanyi, upon being retained, contacted the IRB-Toronto that day to explain the situation, including the Applicant's misunderstanding of the dates, lack of intention to abandon, and prior absence of legal counsel. On January 14, 2014, Mr. Harsanyi submitted an application to reopen the Refugee Claim on behalf of the Applicants.

[11] The RPD ultimately refused to reopen the claim, finding no failure to observe a principle of natural justice. It noted that nothing in the *Refugee Protection Division Rules* (SOR/2012-256) [Rules], the *Immigration and Refugee Protection Act*, (SC 2001, c 27) [Act], or the BOC forms indicates a hold period pending a venue change request. The Board applied the legal maxim, "ignorance of the law is no defence" in denying the Applicants' request to reopen their refugee claim.

III. ISSUE: *Did the RPD err in refusing to reopen the Applicants' refugee claim?*

[12] The only issue to be decided is whether the RPD made a reviewable error in declining to reopen the Applicants' abandoned claim for refugee protection. I am aware that certain case law referenced by the Applicants holds that the correct standard of review is correctness: *Martinez v Canada (Citizenship and Immigration),* 2009 FC 1306, at paras 19-20; *Emani v Canada (Citizenship and Immigration),* 2009 FC 520, at para 14.

[13] However, the jurisprudence has evolved since these decisions. Recent case law has established that RPD decisions considering applications to re-open are to be reviewed on a reasonableness standard, because the RPD's assessment is a question of mixed fact and law (*Gurgus v Canada (Citizenship and Immigration),* 2014 FC 9, at para 19 [*Gurgus*]; *Yan v Canada (Citizenship and Immigration),* 2010 FC 1270, at para 21).

[14] The RPD's power to reopen a refugee claim is very limited. The Rules are highly prescriptive. Rule 62(6) states the RPD "must not allow the application unless it is established that there was a failure to observe a principle of natural justice" [emphasis added]. This rule updated the Rule 55(4) found in the previous version of the *Refugee Protection Division Rules*, (SOR/2002-228), which was broader in scope and read that the RPD "must allow the application if it is established that there was a failure to observe a principal of natural justice" [emphasis added].

[15] The primary question in this judicial review is whether there was a violation of a principle of natural justice, despite the Applicants' failure to adhere to the precise letter of the

law in submitting her BOC in a timely manner or attending her abandonment hearing. I conclude that there was.

[16] In my view, the door should not slam shut on all those who fail to meet ordinary procedural requirements. Such a restrictive reading would undermine Canada's commitment to its refugee system and underlying international obligations (section 3(2) of the Act). Indeed, one of the purposes of the *Refugee Convention*, to which Canada is a signatory, is to allow refugees the widest possible exercise of fundamental rights and freedoms (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, at para 27).

[17] The opportunity to free a family from the scourge of persecution, the actors of which presumably caused the death of their husband and father, should not rest on an overly rigid application of procedural requirements. This is particularly where, as I shall explain, the Rules themselves allow for the flexibility to safeguard fairness.

[18] I note that the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], address a comparable procedure to the process of reopening a refugee claim: the extension of the timelines required for filing a BOC. Regulation 159.8(3) states that the RDP "may, for reasons of fairness and natural justice, extend the timeline by the number of days that is necessary in the circumstances" [emphasis added].

[19] Regulation 159.8(3) differs from Rule 62(6) in that the latter only employs considerations of "natural justice", whereas the former adds the concept of "fairness". I invited the parties to

provide submissions on whether there is any meaningful difference between the concepts of natural justice and fairness (more commonly referred to as procedural fairness). The Respondent provided the following helpful explanation in its Further Memorandum of Fact and Law (filed May 26, 2015, p. 2), which the Applicant also relied on in his Reply:

> 3. In the past a distinction between procedural fairness and natural justice existed in both the Canadian and English courts. In English Courts, the rules of natural justice were seen as being more "substantial and adjudicative", requiring an oral hearing, notice, legal representation, cross-examination of witnesses, etc.[1] Procedural fairness was seen as less formal, imposing a general duty to act fairly which only required an opportunity to respond.
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> 4. More recently, the distinction between the two terms have been swept aside.[2] Courts now often use the two terms either interchangeably or together, where the "requirements of natural justice and procedural fairness" are treated as encompassing the general duty to be fair.[3] Procedural fairness and the duty to be fair are seen as "overarching terms which incorporate all the rules of natural justice" as they apply to administrative decisions.[4]
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> 5. Generally, it appears that the term "procedural fairness" was initially brought on to differentiate between the stricter rules of natural justice as they applied to judicial or quasi-judicial decisions and those rules of fairness which would apply only to administrative decisions. However, this distinction has been eroded and at present the Courts have accepted a general duty of fairness which can be referred to by using either "natural justice" or "procedural fairness".
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> [1] G Régimbald, *Canadian Administrative Law*, 2d ed (Markham: LexisNexis Canada Inc., 2015) at 265.
> [2] *Nicholson v Haldimand Norfolk (Regional Municipality) Police Commissioners*, [1979] 1 SCR 311; *Ridge v Baldwin*, [1964] AC 40 (HL).
> [3] *ATA v Alberta (Information & Privacy Commissioner*), 2011 SCC 61 at para 82; *Godbout c. Longueuil (Ville)*, [1997] 3 SCR 844 at para 74; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 SCR 879 at para 21; *Baker v Canada*, *supra* note 4 at para 26; *Singh v Canada (Minister of Employment & Immigration)*, [1985] 1 SCR 177 at para 116.

> [4] DP Jones & AD de Villars, *Principles of Administrative Law*, 6th ed (Toronto: Thomson Reuters Canada Limited, 2014) at 263.

[20] Therefore, with respect to this case, one can interpret Rule 62(6) as permitting the RPD to reopen a claim where there has been a denial of natural justice *or* procedural unfairness to the applicant.

[21] Rule 62(7), sets out factors that the RPD must consider in coming to its determination:

> 62(7) In deciding the application, the Division must consider any relevant factors, including
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> (*a*) whether the application was made in a timely manner and the justification for any delay; and
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> (*b*) the reasons why
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> (i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or
>
> (ii) a party did not make an application for leave to apply for judicial review or an application for judicial review.

[22] The language of "including" embedded in the Rule, by the norms of statutory interpretation, connotes that the factors to be considered by the RPD are not limited to whether the application was made in a timely manner (*United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, at para 14). Thus, while the timeliness of submitting a claim is therefore a factor to be considered, it is certainly not the only one.

[23] Even then, the RDP's sole focus on the missed deadlines inhibited analysis of the second portion of Rule 62(7)(a): the justification for any delay. In combination with failing to look at

other factors, this meant that the RPD took an unreasonably restrictive approach to applying the *Rules*.

[24] After citing the missed (i) 15-day timeline for the BOC, and (ii) abandonment hearing, the Board tersely concluded that no violation of natural justice occurred in this case. Absent from this conclusion and reasons was any rationale that took into account the Applicants' personal circumstances surrounding the missed deadline, other than mentioning that the BOC kit was provided in Arabic, their first language. In short, the Board failed to meaningfully consider that the Applicants took appropriate steps to immediately request a change of venue after moving across the country, to engage counsel, and to correct misapprehensions.

[25] The legal maxim the RPD applied, that the "ignorance of the law is no excuse", cannot absolve it from looking at the particular circumstances surrounding a late claim falling within the purview of Rule 62(6). If such were the case, the factors illustrated in Rule 62(7)(a), the timeliness of the application and any justification for its delay, would serve no purpose. In other words, it does not follow that Parliament intended the RPD analyse whether there is a valid justification for a delayed claim, and then have this analysis carry no weight in a decision to reopen. As I see it, Rules 62(6) and 62(7) are meant to relieve the draconian results inevitable in barring every delayed refugee claim, not perpetuate them.

[26] Simply relying on the principle "ignorance of the law is no excuse" constituted unreasonable reasons, because there was no consideration of the other significant factors in play in this case. For example, the Applicants:

i. had no counsel during the entire period under review by the Board;

ii. attended the IRB Office in Calgary in person to present the new address and change of venue request;

iii. mistakenly believed that proceedings were suspended until a decision was taken on the change of venue request;

iv. had difficulty finding a lawyer between the move to Alberta on December 18, 2013 and the January 7, 2014 abandonment hearing due to the Christmas holiday season;

v. immediately addressed the missed date after the first meeting with counsel on January 10, 2014, merely three days after the scheduled abandonment hearing, by informing the IRB that they never had any intention to abandon the claim.

[27] To expand on the last point, as soon as the Applicants retained counsel, which was less than two weeks after the BOC deadline, counsel called the IRB and explained the situation, putting it on notice that an application to reopen would be filed shortly. That occurred four days later, on January 14, 2014. All requisite BOC forms were also filed on that date.

[28] In my view, this conduct cannot reasonably be described as dilatory conduct with unexplained gaps. It cannot reasonably be described as an intentional effort to circumvent or prolong the refugee claim process.

[29] I wish to stress that a failure or delay in engaging counsel is, in itself, not an acceptable panacea to all the harm that results from missteps in the refugee process. Equally unacceptable,

however, is a failure on the Board's part to consider an individual's circumstances in these situations.

[30] Indeed, the PA in this case did not forgo the use of counsel, but obtained legal assistance within weeks of her arrival to help guide her through the process. Counsel moved with haste to rectify the PA's misapprehension, and I see no reason why the claim would not have proceeded smoothly had it been reopened. I cite C*ervenakova v Canada (Citizenship and Immigration)*, 2012 FC 525, at paras 64, 67 to demonstrate not only that applicants are often lost without counsel, but that they can make a significant impact in the smooth progression of a proceeding.

[31] Various cases of this Court have found breaches of natural justice even when an applicant missed a deadline or hearing (*Andreoli v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1111 at para 20-23 [*Andreoli*]; *Matondo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416 at para 21; *Clavijo Albarracin v. Canada (Citizenship and Immigration)*, 2008 FC 1143 at para 4). In each of these cases, the Court found that the decision maker did not consider all the evidence before it, including various reasons that could have justified the delay or conduct

[32] As Justice Harrington noted in *Andreoli*:

> [16] In order to assess a case such as this, it is absolutely paramount to opt for a contextual approach and to avoid the mire of procedural dogma. I refer to the words of the Honourable Mr. Justice Pigeon in Hamel v. Brunelle, [1977] 1 S.C.R. 147, 156., where he very aptly wrote that "procedure [should] be the servant of justice not its mistress."
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> [17] In this case, the evidence establishes that the interpreter forgot to advise the panel and that it was this error alone that led to

> the dismissal of the applicants' claim. We must also remember that the applicants do not speak French or English, which made them particularly vulnerable and dependant on their interpreter. Finding that they were the authors of their own misfortune amounts to punishing them for the carelessness of a third party, which is not only unfair in purely human terms, but also disregards the purpose of the Act….
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> …
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> [19] We can also ask ourselves what harm could possibly be caused to the respondent if a hearing on the merits of the claim were to take place.
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> [20] I am well aware of the abundant case law from this Court to the effect that the applicants are responsible for their files and cannot use their own wrongdoing as a means to justify fatal omissions, procedural though they may be. But it must be understood that in this case the applicants were not negligent and merely trusted their interpreter, on whom rests the entire procedural error.

[33] The same reasoning employed by Justice Harrington in *Andreoli* applies here. I would note that Justice Harrington ruled in a more recent decision that a refusal to reopen was reasonable: *Mendoza Garcia v Canada (Citizenship and Immigration)*, 2011 FC 924 [*Mendoza*]. However, in *Mendoza*, the Applicant could not be located despite (i) several months of both his counsel and the IRB trying unsuccessfully to locate and contact him, and (ii) the IRB thereafter rescheduling the hearing in the hope of giving the applicant a final chance (*Mendoza* at paras 5-8). The factual matrix in *Mendoza* is vastly different from the instant case.

[34] Finally, the Respondent also points out that the IRB Office in Toronto only received the venue change request one day before the abandonment hearing. I would make two observations in response. First, this speaks to the internal communications between regional offices at the IRB, as the Calgary IRB office was handed the change of venue request, in person, about three

weeks prior. It would be unfair to fault the Applicants for the Board's delay in internal communications, over which the Applicants had no control or influence.

[35] Secondly, if anything, the RPD's internal delay underlines that the Board had the opportunity and time to contact the PA to inquire about any desire to abandon her claim. Indeed, the change request form had her telephone number and the address at which the PA could have been reached in Alberta (Certified Tribunal Record [CTR], p. 278). However, the Board did not do so, choosing instead to presume that she intended to have her claim abandoned, despite the message implicit in her change of venue request.

IV. CONCLUSION

[36] The Board relied on the maxim that the ignorance of the law is no defence in its refusal to reopen the Applicants' claim. This Court, however, has held on numerous occasions that refugee applications may be allowed to proceed, despite procedural defects, to ensure that the requirements of natural justice are fulfilled. Natural justice encompasses the overarching right to be heard (*Canada v Garber*, 2008 FCA 53, at para 40), and this should not be denied unreasonably. The matter will therefore be referred back to the RPD so that a differently constituted panel may reconsider the application in light of these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This judicial review is allowed, and the matter is referred back to the RPD for reconsideration by a differently constituted panel.

2. There were no questions raised for certification.

3. There will be no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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