

Federal Court



Cour fédérale

Date: 20171207

Docket: IMM-1641-17

Citation: 2017 FC 1118

Ottawa, Ontario, December 7, 2017

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

TSOTNE NANAVA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench in Toronto, Ontario on November 20, 2017)

[1] This matter relates to an application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated March 27, 2017, in respect of hearings that took place on March 15, 2017, and March 22, 2017 [Decision]. In this Decision, a member of the RPD [Member] determined that the applicant, Mr. Tsotne Nanava [Mr. Nanava], had abandoned his claim for Convention refugee or person in

need of protection status under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], effectively putting an end to the claim.

I. Facts

[2] Mr. Nanava is a citizen of Georgia. On August 7, 2016, he arrived in Canada on a visitor's visa, which he admittedly obtained through false declarations relating to his employment, training, and plans while in Canada. Three months later, he applied for refugee protection at an inland office pursuant to sections 96 and 97 of the *IRPA*. His refugee claim was referred to the RPD on January 6, 2017.

[3] A hearing before the RPD was commenced on March 2, 2017. At that hearing, Mr. Nanava became ill and fainted. Security personnel attended to him until emergency medical staff arrived. Mr. Nanava eventually regained consciousness and was transported to Mount Sinai Hospital in Toronto, Ontario by the emergency medical staff.

[4] After Mr. Nanava had been removed from the hearing room, the presiding RPD member posed several questions to Mr. Nanava's counsel [Counsel] about what had transpired between the applicant and emergency personnel. In particular, he posed questions with respect to the state of Mr. Nanava's health and the language in which Mr. Nanava had replied to the emergency personnel. The presiding member then stated as follows (line 25, page 199 of the Certified Tribunal Record and page 21 of the Transcript of the March 2 hearing):

Okay. So my decision is to permit the claimant to is going to – he's going to be seen medically at the hospital today and no doubt they'll be some medical documentation that arises from the visit

and that may assist him and you in showing cause why the claim should not be declared abandoned.

So my decision on the CDT request is that the request is denied, but the relief is that the claimant has a chance to show cause why his claim should not be declared abandoned. There is a special date already noted in the Notice to Appear.

The special hearing as if a claimant does not appear at the hearing of the claim, in this case the claimant has been here, so the show cause date will be on March 9th at the time specified on the Notice to Appear. If there's any change in that you'll be notified.

That brings the sitting to a close. Thank you, Mr. Interpreter.

(Emphasis added).

[5] The March 9 date specified in the Reasons issued by the presiding member was eventually amended to March 15, 2017.

[6] Mr. Nanava was unable to attend the abandonment hearing on March 15, 2017. However, Counsel appeared on his behalf. Counsel presented medical evidence to show cause for Mr. Nanava's departure from the March 2 hearing, as well as his failure to appear at the March 15 hearing. Counsel also submitted documents pertaining to a substantive part of Mr. Nanava's refugee claim, stating that the submissions should help to show Mr. Nanava's intention to proceed with his claim.

[7] The presiding member reviewed the medical evidence and concluded that it did not comply with the requirements to show cause for medical reasons. The member adjourned the matter to March 22, 2017 for Mr. Nanava and Counsel to present a medical certificate showing cause why Mr. Nanava's refugee claim should not be declared abandoned. Before leaving the

March 15 hearing, Counsel advised the presiding member that he had another hearing scheduled on March 22, 2017, and was not available on that date. Counsel proposed that the hearing be set for the Monday prior to March 22, on March 20, 2017. The member denied this request and maintained the March 22 hearing date.

[8] On March 22, 2017, neither Mr. Nanava nor his Counsel appeared for the scheduled hearing. The Member noted that the medical evidence produced on March 15 did not adequately explain Mr. Nanava's absence, that Counsel had been advised of the deficiencies, and that there was no additional information and no phone call to explain Mr. Nanava's absence. The Member declared Mr. Nanava's refugee claim to be abandoned. That Decision, written and dated March 27, 2017, is the subject of this application for judicial review.

II. The Relevant Legislation and Rules

[9] See Appendix 'A' attached to these reasons.

III. Standard of Review

[10] When reviewing the abandonment decision of a member of the RPD, the Court must apply a "reasonableness" standard of review (*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1248, [2009] F.C.J. No. 1600 at paras 14-16; *Letaif v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1036, [2016] F.C.J. No. 1001 at paras 2, 20; *Ndomba v Canada (Minister of Citizenship and Immigration)*, 2014 FC 189, [2014] F.C.J. No. 188 at para. 9; *Csikos v Canada (Minister of Citizenship and Immigration)*, 2013 FC 632, [2013] F.C.J.

No. 680 at para. 23 [*Csikos*]; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 224, [2012] F.C.J. No. 242 at para. 22).

IV. Analysis

[11] Mr. Nanava contends the Member's Decision was unreasonable in light of plain and obvious evidence that he was ill, having collapsed on the floor during the March 2 hearing, and that he had not intended to abandon his claim for refugee protection. Conversely, the respondent contends the Member reasonably decided that Mr. Nanava had abandoned his claim after Mr. Nanava failed to show on two separate occasions, and failed to provide a proper medical certificate as evidence of his inability to attend. I agree with Mr. Nanava.

[12] In order to decide whether the Member's abandonment decision was reasonable, the Court must determine whether Mr. Nanava's absences could reasonably be deemed an expression of his intention to no longer pursue his refugee claim with diligence, bearing in mind his obligation to provide a reasonable excuse for his failure to appear, as well as all of the other relevant factors which bear upon the matter (*Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 109, [2000] F.C.J. No. 289 at para. 32-33 [*Ahamad*]; *Csikos* at paras 25-26, 35). Under the circumstances, I am not satisfied the Member considered any factors other than the purported inadequacy of Mr. Nanava's medical evidence. Such an approach is inconsistent with the broad language of subsection 65(4) of the *Rules* and with the jurisprudence (see e.g: *Ahamad* at para. 33; *Octave v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 597, [2015] F.C.J. No. 609 at para. 23; *Guo v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 533, [2015] F.C.J. No. 544).

[13] Indeed, based on the evidence that was before the Member, it was unreasonable for the Member to conclude that Mr. Nanava had shown no interest in pursuing his claim with diligence. This evidence includes: (1) the fact that Mr. Nanava and Counsel were at Mr. Nanava's scheduled refugee claim hearing on March 2, 2017 in order to pursue Mr. Nanava's substantive claim; (2) the fact that Mr. Nanava collapsed on the floor and received emergency medical services during his refugee claim hearing before being transported from the hearing room to Mount Sinai Hospital by emergency services staff; (3) Counsel's appearance at the March 15 abandonment hearing with documents pertaining to a substantive part of Mr. Nanava's refugee claim in order to reiterate his client's intent to pursue his claim, as well as medical evidence to show cause for Mr. Nanava's absence from the abandonment hearing; and (4) Counsel's attempt to reschedule the March 22 abandonment hearing to an earlier date so he could again reiterate his client's intent to pursue his claim and show cause for Mr. Nanava's absence.

[14] In short, I conclude that the Member unreasonably fixated upon the technical deficiencies of Mr. Nanava's medical certificates and failed to consider other relevant factors in assessing whether Mr. Nanava had abandoned his claim. As noted above, such an approach is contrary to subsection 65(4) of the *Rules* and the jurisprudence. As a result, the Decision is unreasonable.

[15] In addition to the above, I note that the RPD's decision to embark upon a show cause hearing was also unreasonable. Given that Mr. Nanava and Counsel attended the scheduled March 2 hearing fully prepared to argue Mr. Nanava's refugee claim, and that they were interrupted during the hearing by medical circumstances beyond Mr. Nanava's control, it would have been appropriate to adjourn the substantive hearing to another date. In my view,

Mr. Nanava was not in default in the proceedings. It follows that the conditions necessary to move into a show cause hearing were not met.

[16] I would allow the judicial review, set aside the Decision of the Member, and direct the RPD to determine Mr. Nanava's substantive refugee claim before a different Member. No costs are awarded and no question is certified for consideration by the Federal Court of Appeal.

JUDGMENT in IMM-1641-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed without costs;
2. The decision of the Member is quashed;
3. A new hearing is ordered on the substantive issue, namely a refugee claim made by the Applicant, before a different Member of the Division; and,
4. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"

Judge

APPENDIX A

Subsection 168 (1) of the *IRPA* reads:

Abandonment of proceeding	Désistement
<p>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.</p>	<p>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.</p>

Rules 65(1), 65(3), and 65(4) to 65(6) of the *Refugee Protection Division Rules [Rules]*,

SOR/2012-256, read:

Abandonment	Désistement
<p>Opportunity to explain</p> <p>65 (1) In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned,</p> <p>(a) immediately, if the claimant is present at the proceeding and the Division considers that it is fair to do so; or</p>	<p>Possibilité de s'expliquer</p> <p>65 (1) Lorsqu'elle détermine si elle prononce ou non le désistement d'une demande d'asile aux termes du paragraphe 168(1) de la Loi, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé :</p> <p>a) sur-le-champ, dans le cas où le demandeur d'asile est présent à la procédure et où la Section juge qu'il est équitable de le faire;</p>

(b) in any other case, by way of a special hearing.

b) au cours d'une audience spéciale, dans tout autre cas.

[...]

[...]

Special hearing — failure to appear

Audience spéciale — omission de se présenter

(3) The special hearing on the abandonment of the claim for the failure to appear for the hearing of the claim must be held no later than five working days after the day originally fixed for the hearing of the claim.

(3) L'audience spéciale sur le désistement de la demande d'asile pour défaut de se présenter à l'audience relative à la demande d'asile est tenue au plus tard cinq jours ouvrables après la date initialement fixée pour l'audience relative à la demande d'asile.

Factors to consider

Éléments à considérer

(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.

Medical reasons

Raisons médicales

(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.

Content of certificate

(6) The medical certificate must set out

(a) the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant 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; and

(b) the date on which the claimant is expected to be able to pursue their claim.

Contenu du certificat

(6) Le certificat médical indique, à la fois :

a) sans mentionner de diagnostic, les particularités de la situation médicale qui ont empêché le demandeur d'asile 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;

b) la date à laquelle il devrait être en mesure de poursuivre l'affaire.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1641-17

STYLE OF CAUSE: TSOTNE NANAVA v THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

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