Federal Court Cour fédérale

Date: 20240129

Docket: IMM-2840-22

Citation: 2024 FC 140

Ottawa, Ontario, January 29, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

JHON ALEXANDER REYES CHACON
JULIANA REYES CRUZ
SANDRA CRUZ CASTILLO
JUAN SEBASTIAN REYES CRUZ

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Jhon Alexander Reyes Chacon [PA], his wife, Sandra Cruz Castillo, and their two minor children are citizens of Colombia. They initiated a claim for

protection in 2019 but failed to appear for their hearings. The claims were declared abandoned in 2021.

[2] An application to reopen the claims was refused by the Refugee Protection Division [RPD] in a decision dated March 14, 2022. The Applicants apply under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the March 14, 2022 refusal decision.

[3] The Application is granted for the reasons that follow.

II. Background

[4] The PA states the Applicants seek protection from a "neo-paramilitary group" in Colombia that is pursuing the PA because of his social activism. The Applicants' Basis of Claim [BOC] forms were received by the Immigration and Refugee Board [IRB] on November 25, 2019.

[5] After completing the BOC, the Applicants relocated in December 2019. They report that notice of their address change was provided to the Canada Border Services Agency [CBSA] by fax transmission. The Applicants moved a second time in February 2021, and again, they report that notice of their address change was faxed to the CBSA. The IRB was not given notice of either address change.

[6] The Applicants did not appear for their scheduled hearing before the RPD in August 2021. After notice having been provided to the Applicants at the address provided in the original BOC, an abandonment hearing was held on October 7, 2021. The Applicants again failed to appear and the RPD declared that the Applicants had abandoned their claim for protection.

[7] In November 2021, the PA learned that his family was no longer eligible for health coverage when seeking health care services. He contacted the IRB and was advised of the abandonment decision. An application to reopen the claim was filed with the RPD in December 2021.

III. Applicable rules

[8] Rule 62 of the *Refugee Protection Division Rules*, SOR/2012-256 provides for the reopening of a claim that has been declared abandoned where the RPD, after considering the relevant factors, is satisfied there was a failure to observe a principle of natural justice:

Application to reopen claim	**Demande de réouverture d'une demande d'asile**
62 (1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.	**62 (1)** À tout moment avant que la Section d'appel des réfugiés ou la Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.
[…]	

Factor

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

Factors

(7) In deciding the application, the Division must consider any relevant factors, including

(a) whether the application was made in a timely manner and the justification for any delay; and

(b) the reasons why

(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.

[…]

Élément à considérer

(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

Éléments à considérer

(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :

a) la question de savoir si la demande a été faite en temps opportun et, le cas échéant, la justification du retard;

b) les raisons pour lesquelles :

(i) soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés,

(ii) soit une partie n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire.

IV. Decision under review

[9] In the application to reopen, the Applicants explained that they did not receive the Notices to Appear. They submitted that, when filing the BOC forms, the Applicants asked about

changes of address because they planned to move. They submitted to the RPD that someone at the IRB advised them that they could change their contact information by sending a Notification of Client Contact Information [NCCI] to either the CBSA or the IRB, and gave them the addresses and fax numbers for both. The PA acknowledged he might have misunderstood the instructions because of his limited knowledge of English.

[10] The RPD described the fax transmission receipts provided by the Applicants as evidence to the effect that they had provided notice of address changes to the CBSA. The RPD noted the fax receipt for the notice of the second change of address was dated January 31, 2013. The Applicants submit this is an obvious error because the NCCI forms that were faxed are dated March 8, 2021, and because the Applicants were in Colombia in 2013. The discrepancy arises, the Applicants state, because the fax machine displayed the wrong date.

[11] The RPD found that, in the absence of knowledge of the Applicants' previous travel history, it was not possible to ascertain that the Applicants were in Colombia in 2013. The RPD found "[t]hey may have been in Colombia but may have not." The RPD noted the document could have actually been faxed in 2013, finding it unreasonable that the fax confirmation would bear the wrong date of 2013. The RPD gave no weight to the second fax confirmation sheet submitted as proof that the Applicants notified CBSA of their second address change.

[12] The RPD found that the relevant documentation clearly stated that claimants must provide their contact information to the IRB, and inform the RPD, in addition to Immigration, Refugees and Citizenship Canada or the CBSA, of any address changes. The RPD also noted

that, on the NCCI forms faxed to the CBSA, it was stated that the forms had to be sent to the IRB.

[13] The RPD member concluded that the PA had not given a reasonable explanation for not updating his address, as well as the address of the other Applicants, with the RPD.

[14] In the absence of a reasonable explanation for not updating contact information, the RPD found there was no breach of natural justice. In support of this conclusion, the RPD also noted that the Notices to Appear sent to the address on file had not been returned to the RPD and that the Applicants had originally provided a NCCI form by mail to the IRB in November 2019. The RPD further noted that the PA had been in touch with the IRB in February 2020, after the first move, when the PA was accepted as a designated representative of the minor claimants.

V. Issues and standard of review

[15] The Application raises a single issue:

A. Did the RPD reasonably conclude there was not a failure to observe a principle of natural justice that would justify reopening the claim?

[16] The RPD's decision is to be reviewed on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 10 [*Vavilov*]; *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at para 13 [*Huseen*]; *Hegedus v Canada (Citizenship and Immigration)*, 2019 FC 428 at paragraph 16).

[17] Reasonableness review focuses on the decision made and the justification provided. A decision may be unreasonable where, when read holistically and in light of the record, it does not reveal a rational chain of analysis that demonstrates, within the constraints of the facts and law, the hallmarks of justification, transparency and intelligibility (*Vavilov* at paras 15, 85, 97, 100 and 103).

VI. Analysis

[18] The Applicants argue that the RPD erred by giving no weight to their evidence establishing that notice of the second address change was provided to the CBSA and by concluding, instead, that the document could have been faxed in 2013. Citing *Huseen* at para 16, the Applicants submit the door should not slam shut where procedural requirements are not met through inadvertence. They argue the Applicants did not knowingly abandon their claim and took timely and immediate steps to remedy the situation when they became aware of the abandonment declaration. In this case, they submit the denial of the right to have their claim considered is a breach of natural justice.

[19] The Respondent submits that the RPD has no inherent or continuing jurisdiction to reopen a claim (*Longia v Canada (Minister of Employment and Immigration)*, 1990 CanLII 12987 (FCA) at 293), and that a breach of natural justice is a necessary condition for reopening a claim, although it may not be sufficient on its own (*Attalla v Canada (Citizenship and Immigration)*, 2019 FC 771 at para 12). The Respondent argues it was reasonable to deny the application to reopen because the Applicants knew, or should have known, they had to provide notice of changes of contact information to the IRB and because they were provided notice of the

hearings. Finally, in the absence of evidence indicating when the Applicants entered Canada and explaining how the fax date could be wrong, the Respondent submits the RPD reasonably concluded the evidence relating to the second address change was to be given no weight.

[20] I disagree with the Respondent. The Applicants changed addresses twice during the period in issue. The PA's evidence was to the effect that he understood that notice to the CBSA of an address change by fax transmission was sufficient, although he acknowledged he might have misunderstood the advice he was given in this regard. The RPD did not take issue with this evidence, nor did the RPD take issue with the Applicants' evidence that the first address change was notified to the CBSA by fax. However, the RPD gave no weight to the second notice due to a date discrepancy and the fact that the evidence did not establish whether the Applicants were in Colombia in 2013.

[21] The RPD's analysis uniquely focused on the inability of the evidence to foreclose the possibility that the Applicants could have been in Canada in 2013 and ignored the Applicants' evidence that (1) the PA understood that he had been verbally instructed to the effect that notification to CBSA of any address change would be sufficient; and that (2) timely notices were in fact provided to CBSA by fax after the first change of address.

[22] Although the RPD may have preferred different or better evidence relating to the Applicants' entry into Canada, the RPD was nonetheless required to engage in a reasonable assessment of the evidence before it. The reasonableness of the RPD's conclusion is seriously

undermined by the RPD's failure to engage with the totality of the record in deciding that no weight was to be given to the evidence of notice to the CBSA of the second address change.

[23] The analysis is further undermined by the RPD's bald conclusion that "it seems to me that it is not reasonable that the fax confirmation would bear the wrong date […]." This finding is not justified.

[24] The RPD's unreasonable consideration of the notification evidence taints the remainder of the RPD's analysis, including the finding that the abandonment decision was not a failure of natural justice. As was noted by Justice Alan Diner in *Huseen*, "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" (at para 36).

VII. Conclusion

[25] For the above reasons, the Application is granted. The parties have not identified a question of general importance and none arises.

JUDGMENT IN IMM-2840-22

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision maker.

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JHON ALEXANDER REYES CHACON, JULIANA REYES CRUZ, SANDRA CRUZ CASTILLO, JUAN SEBASTIAN REYES CRUZ v MINISTER OF CITIZENSHIP AND IMMIGRATION
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