Federal Court  Cour fédérale

Date: 20100118

Docket: IMM-1995-09

Citation: 2010 FC 29

Ottawa, Ontario, this 18th day of January 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Jean Herard GASPARD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of the decision made by Naomie Alfred, Minister's Delegate, Canada Border Services Agency ("CBSA") dated April 18, 2009, who determined that the applicant was ineligible for refugee protection because he had been granted refugee status in another country.

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[2] The applicant is a citizen of Haiti. He fled that country on March 1, 2000 and used a false American passport to travel to the United States. Upon arrival at the airport in Miami, Florida, he claimed asylum. The applicant was granted asylum by an Immigration Judge on October 18, 2004 in the United States. He applied for adjustment of status to permanent residence in May 2006 that was denied on March 2, 2009.

[3] During his time in the United States he built a life in that country. He completed his high school education and trained to work as an auto mechanic. In his affidavit, dated May 18, 2009, the applicant asserts that he has been employed by Firestone since January 2000. This appears to be an error since he had not yet fled Haiti by this date. According to his Personal Information Form ("PIF") he has worked at Firestone since January 2008. On December 3, 2006 his son, Marc Andrew, was born. The applicant is not married and has another child, a daughter, living in Haiti.

[4] He claims to have been in shock upon receipt of the letter informing him of the decision of the U.S. Citizenship and Immigration Services to deny his application for permanent residence. In the letter sent to him on March 2, 2009 the authorities stated that as a consequence of the denial, the applicant was now "without lawful immigration status" and he is present in the United States "in violation of the law" and he is "required to depart the United States". Furthermore, should the applicant stay in the United States it "may result in the initiation of removal proceedings".

[5] The applicant came to Canada on April 18, 2009 and claimed refugee status. He disclosed his status to CBSA and was detained on the basis that he was a flight risk. His first detention review was on April 21, 2009 at which time he was informed the removal order against him was effective seven days after the decision was made and that CBSA may proceed with his removal at any time. At the second detention review, he was informed that a deportation had been scheduled for April 30, 2009 and the detention was again maintained. On April 29, 2009, the applicant signed a declaration that he wished to return to the United States. That same day the CBSA decided to cancel the removal order in order to make verifications with the American authorities.

[6] On May 6, 2009 the applicant had his third detention review at which time the Minister consented to the applicant's release.

[7] According to Exhibit "A" to the Supplementary Affidavit of Omid Maani, Senior Policy Advisor, Citizenship and Immigration Canada, filed October 26, 2009, the applicant's asylum status was not terminated. In a Supplementary Affidavit dated November 27, 2009, Mr. Maani notes that he received additional information from a Jennifer Wetmore, Asylum Officer, Asylum Division, Operations, at the U.S. Citizenship and Immigration Services ("CIS"), that the "denial of adjustment status was incorrect and the office having jurisdiction over the case has reopened it, and it currently remains pending with that office". Furthermore, CIS had informed the applicant of their decision to review the previous decision to deny adjustment.

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[8] The following provisions of the Act are relevant to this judicial review:

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if
(*a*) refugee protection has been conferred on the claimant under this Act;
(*b*) a claim for refugee protection by the claimant has been rejected by the Board;
(*c*) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;
(*d*) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;
(*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or
(*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).

101. (1) La demande est irrecevable dans les cas suivants :
a) l'asile a été conféré au demandeur au titre de la présente loi;
b) rejet antérieur de la demande d'asile par la Commission;
c) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;
d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;
e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)*c*) — , grande criminalité ou criminalité organisée.

48. (1) A removal order is enforceable if it has come into force and is not stayed.

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.

48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

49. (1) A removal order comes into force on the latest of the following dates:
(*a*) the day the removal order is made, if there is no right to appeal;
(*b*) the day the appeal period expires, if there

49. (1) La mesure de renvoi non susceptible d'appel prend effet immédiatement; celle susceptible d'appel prend effet à l'expiration du délai d'appel, s'il n'est pas formé, ou quand est rendue la

is a right to appeal and no appeal is made; and
(*c*) the day of the final determination of the appeal, if an appeal is made.

(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:
(*a*) the day the claim is determined to be ineligible only under paragraph 101(1)(*e*);
(*b*) in a case other than that set out in paragraph (*a*), seven days after the claim is determined to be ineligible;
(*c*) 15 days after notification that the claim is rejected by the Refugee Protection Division, if no appeal is made, or by the Refugee Appeal Division, if an appeal is made;
(*d*) 15 days after notification that the claim is declared withdrawn or abandoned; and
(*e*) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(*c*) or (*d*).

décision qui a pour résultat le maintien définitif de la mesure.

(2) Toutefois, celle visant le demandeur d'asile est conditionnelle et prend effet :
a) sur constat d'irrecevabilité au seul titre de l'alinéa 101(1)*e*);
b) sept jours après le constat, dans les autres cas d'irrecevabilité prévus au paragraphe 101(1);
c) quinze jours après la notification du rejet de sa demande par la Section de la protection des réfugiés ou, en cas d'appel, par la Section d'appel des réfugiés;
d) quinze jours après la notification de la décision prononçant le désistement ou le retrait de sa demande;
e) quinze jours après le classement de l'affaire au titre de l'avis visé aux alinéas 104(1)*c*) ou *d*).

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[9] The CBSA made a decision that the applicant is ineligible for refugee status in Canada. This decision was based on the applicant's PIF, the interview held on April 18, 2009, and additional documentation submitted by the applicant including the March 2, 2009 letter and record of the Immigration Judge who accepted the applicant's request for asylum in the U.S. in 2004. The CBSA notes also indicate that the officer contacted U.S. Immigration authorities and confirmed that the applicant had refugee status in the U.S., a country to which he can be returned. Because he had been

recognized as a Convention refugee by a country other than Canada paragraph 101(1)(*d*) was triggered and he was statutorily ineligible.

[10] The officer signed an exclusion order against Mr. Gaspard. Pursuant to paragraph 49(2)(*b*) of the Act, the order did not come into force for seven days. However, Mr. Gaspard was not required to return to the U.S. immediately. His removal to the United States was cancelled by CBSA in order to have time to obtain further verification of the applicant's status from U.S. authorities.

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[11] The applicant presents two arguments: (1) the CBSA officer ignored the evidence before her, specifically the March 2, 2009 letter from U.S. Citizenship and Immigration Services provided by the applicant, that the U.S. no longer was offering the applicant protection despite an earlier decision that he was a Convention refugee; and (2) that the U.S. decision to deny him permanent residence was in violation of the country's international obligations and should be ignored.

[12] Clearly, the latter argument must be dismissed as this Court is not the appropriate forum to review a decision of a U.S. Immigration Judge. However, the first argument while worthy of consideration is now effectively moot.

[13] The crucial issue on this application is whether the CBSA officer misapprehended the evidence before her when she accepted assurances from U.S. Citizenship and Immigration that the

applicant's asylum status had not be altered. It appears that the applicant is arguing that this decision was not reasonable given the clear wording of the March 2, 2009 letter indicating that the applicant no longer has lawful immigration status in the U.S.

[14] The appropriate standard of review is reasonableness because the decision is one of fact: was the applicant recognized as a Convention refugee in a country other than Canada? Justice Richard Mosley determined this to be the appropriate standard of review in *Wangden v. The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness*, 2008 FC 1230, at paragraphs 15 and 17. This decision was appealed to the Federal Court of Appeal and a final judgment was rendered by Madame Justice Sharlow on November 23, 2009, upholding Justice Mosley's decision (*Wangden v. The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness*, 2009 FCA 344). It is interesting to note that the Court, in that case, had to consider whether the decision of the officer was based on a material error of fact: whether the officer erred in finding that the applicant was ineligible to be referred to the Refugee Protection Division because she found "withholding of removal" under United States law to be equivalent to Convention refugee status.

[15] The respondents provide evidence, by way of affidavit by Professor David A. Martin, that the asylum status and the application for adjustment of status as a permanent resident are two different processes. An applicant's asylum status or protected person status is not affected because his application for permanent residence was refused. In other words, the applicant mistakenly thought his asylum status had been revoked. The CBSA was correct in determining the fact it was maintained and thus the applicant falls under paragraph 101(1)(*d*) of the Act.

[16] The onus was on the applicant to establish eligibility for referral to the Refugee Protection Division and he failed to do so. The officer based her determination of ineligibility on the information that she obtained from the U.S. Immigration and Naturalization Service in addition to the letter provided by the applicant. Upon considering the evidence available to her, the officer was satisfied that the applicant's asylum status had not been altered.

[17] In my opinion the Minister's Delegate did not base her decision on a finding of fact made in a perverse or capricious manner or without regard to the material before her.

[18] Furthermore, I note that regardless of the outcome of a review of the officer's decision, it appears that the Supplementary Affidavit of Omid Maani dated November 27, 2009 provides clear evidence that the U.S. Immigration authorities consider the applicant to have maintained his asylum status.

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[19] For all the above reasons, the intervention of the Court is not warranted and the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the decision made by Naomie Alfred, Minister's Delegate, Canada Border Services Agency dated April 18, 2009, who determined that the applicant was ineligible for refugee protection because he had been granted refugee status in another country, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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