Federal Court  Cour fédérale

Date: 20131022

Docket: IMM-11928-12

Citation: 2013 FC 1063

Ottawa, Ontario, October 22, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MARY EFUA GYARCHIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns an allegation of counsel's negligence and the Refugee Protection Division's [RPD] refusal to re-open the Applicant's refugee claim.

[2] The refugee claim was denied by the RPD and leave was denied by Justice Kelen.

[3] The application to reopen is governed by Rule 55 of the *Refugee Protection Division Rules*, SOR/2002-228. The central issue is whether there was a failure to observe a principle of natural justice.

55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	55. (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
(2) The application must be made under rule 44.	(2) La demande est faite selon la règle 44.
(3) A claimant who makes an application must include the claimant's contact information in the application and provide a copy of the application to the Minister.	(3) Si la demande est faite par le demandeur d'asile, celui-ci y indique ses coordonnées et en transmet une copie au ministre.
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

Rule 55 was amended on December 15, 2011. The above version was in effect when the decision under review was made.

II. BACKGROUND

[4] The Applicant, a citizen of Ghana, utilized the legal services of Mr. Atuobi-Danso, a lawyer and fellow Ghanaian. On August 11, 2010, Mr. Atuobi-Danso filed the application for refugee status on the grounds of the Applicant being a victim of domestic abuse and an accused witch.

[5] In October 2010, Mr. Atuobi-Danso was disciplined by the Law Society of Upper Canada and in January 2011 he was suspended for refusing to produce records and for failing to cooperate with an investigation. The subject matter of these disciplinary proceedings had nothing to do with the Applicant. He ultimately permanently surrendered his license to practice law.

[6] In March 2011, Mr. Atuobi-Danso advised the Applicant that his licence was suspended due to some problem with his files. Despite knowledge of the suspension, the Applicant continued to rely on Mr. Atuobi-Danso for advice.

[7] The Applicant said that she did not understand that suspension meant that Mr. Atuobi-Danso could not represent her. When she asked whether she needed to retain another lawyer to appear at the RPD hearing, Mr. Atuobi-Danso is reputed to have told her that she was sufficiently prepared and could attend the hearing alone.

[8] It is noteworthy that the Law Society requires any suspended lawyer to tell clients that they should retain alternate counsel. Why the Law Society would leave this issue of retaining other counsel to a lawyer who had committed such a serious breach of professional responsibility as to warrant suspension is unclear.

[9] The Applicant attended the RPD hearing on September 14, 2011 without counsel. The RPD raised the issue of her lawyer's suspension, and asked her if she was ready to proceed without counsel. She responded that she was.

[10] The Applicant affirmed in this Court that she elected to proceed on her own on the basis of the advice from Mr. Atuobi-Danso.

[11] The RPD denied the Applicant's claim on the grounds of credibility primarily on the basis that the Applicant's failure to claim refugee status in countries she visited or lived in (United States and Jamaica) was inconsistent with subjective fear. The RPD apparently saw no reason to address allegations of her being a witch presumably because the lack of subjective fear embraces all grounds of the Applicant's claim.

[12] Following the negative decision, the Applicant again returned to Mr. Atuobi-Danso for assistance. He then "ghosted" her leave application which was denied. Even after denial of the leave, the Applicant sought Mr. Atuobi-Danso's advice regarding a PRRA.

[13] The Applicant finally put her fate in solid hands in retaining pro-bono counsel to handle her application to re-open.

[14] The RPD dismissed the application to re-open the refugee claim which was based on the allegation that the incompetence of counsel led to a denial of natural justice.

[15] The RPD decided against the Applicant for the following reasons:

- given her education (she had a nursing certificate), her reliance on Mr. Atuobi-Danso after he advised her that he was suspended was unreasonable;

- the Applicant waived her right to counsel when she advised the RPD that she was ready to proceed unrepresented by counsel at the hearing;
- the Applicant's decision to seek Mr. Atuobi-Danso's advice after the dismissal of her claim was "bizarre and unexplained" but was "her own choice"; and
- the Applicant was forum shopping and engaged in an abuse of process because she did not complain to the Law Society and did not seek to re-open at the earliest opportunity.

III. ANALYSIS

[16] It is settled law that the question of re-opening on the basis of denial of natural justice/procedural fairness is to be determined on the correctness standard of review (*Hillary v Canada (Minister of Citizenship and Immigration)*, 2010 FC 638, [2011] 4 FCR 440).

[17] The breach of natural justice need not be caused by the RPD to justify a re-opening. The overriding principle is that a decision tainted by such a breach is one made outside of the decision maker's jurisdiction. The RPD need not be at fault as a precondition to re-opening.

[18] The RPD's comments concerning forum shopping and abuse of process are largely irrelevant. The comments concerning continuing to seek Mr. Atuobi-Danso's advice are relevant as they address the Applicant's choice and her complaint that she had been misled by the lawyer.

[19] The Applicant asks this Court to accept that the test for sustaining a waiver of the right to counsel is that of "free and informed" waiver (see *Korpanay v Attorney General of Canada*, [1982]

1 SCR 41, 1982 CanLII 12). The Applicant says that her waiver of the right to counsel was not "free and informed" made with full knowledge of the effect of such waiver.

[20] The Applicant's reliance on criminal law principles and the waiver of a section 10*(b)* *Charter* right is not apt in this circumstance. A detained or arrested person has a right under section 10*(b)* of the *Charter* to retain and instruct counsel without delay, and counsel will be provided by the state if necessary. When such a person refuses counsel, he or she waives the section 10*(b)* right to be represented and a waiver analysis may be appropriate.

[21] There is no such right in play in the refugee claim process. Section 10*(b)* rights are premised in part on the need to protect against unwarranted detention and to protect against self-incrimination. These considerations do not arise in the immigration context.

[22] This matter is not a true waiver of a right to counsel situation as it was a decision on the Applicant's part not to engage counsel. A refugee claimant before the RPD has the right, under section 167 of *Immigration and Refugee Protection Act*, SC 2001, c 27, to obtain representation at his or her own expense. When he or she chooses not to obtain representation or chooses a representative that he or she later regrets, no waiver of the right to choose to be represented has occurred. Exercising the right to choose to be represented does not result in the waiver of that right.

[23] The law of waiver, in the criminal and civil law context, is essentially the same. However, in the criminal context, the scrutiny of waiver may be more intense in practice. In both contexts the

waiver must be an informed and unequivocal representation, by word or conduct, to forgo certain rights.

> To constitute waiver, two essential prerequisites are in general necessary. There must be knowledge of the existence of the right or privilege relinquished and of the possessor's right to enjoy it, and there must be a clear intention of foregoing the exercise of such right.
>
> *Western Canada Investment Co v McDiarmid* (1922), 15 Sask LR 142 at 146 (CA)

[24] The Applicant knew of her lawyer's suspension and yet she chose to take his advice that she could handle her case herself. That may have been bad advice and the lawyer may have been negligent. However, acting on bad advice is not itself a breach of natural justice. She did not act under duress nor was she under some legal infirmity.

[25] The RPD did all that it could reasonably do to ensure that the Applicant was willingly proceeding including asking whether she wished to proceed with a lawyer and then outlining the matters to be considered.

[26] The Applicant is responsible for her choice of counsel and when to engage him. She continued to do so not only in the face of the lawyer's suspension but also after the hearing and after a negative result.

[27] In addition to the Applicant's own responsibility in the conduct of the refugee hearing, the Applicant has not established that the lack of counsel had an adverse impact on the decision. There were multiple grounds for the negative decision, none of which has been shown to be impacted by the absence of counsel. There is no "but for" evidence in this case.

[28] Case law in this Court (see, for example, *Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 173, 165 ACWS (3d) 337, and *Shirvan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509, 143 ACWS (3d) 1098) established that it is only in exceptional cases that incompetence of counsel can be a basis for re-opening. The applicant must establish that "but for" counsel's incompetence, there is a reasonable probability that the results would have been different.

[29] In my view, the RPD's decision not to re-open is correct for the above reasons.

IV. CONCLUSION

[30] Therefore, this judicial review is dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11928-12
STYLE OF CAUSE:	MARY EFUA GYARCHIE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 8, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	PHELAN J.
DATED:	OCTOBER 22, 2013

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