

Federal Court



Cour fédérale

Date: 20140918

Docket: IMM-3166-13

Citation: 2014 FC 882

Ottawa, Ontario, September 18, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

NA ZHANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

Overview

[1] This is a highly unusual case. The applicant, Ms. Zhang, is a refugee claimant from the People's Republic of China. She fears persecution because of her identity as an underground Christian. At one point during the proceeding before the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD), she decided she would answer no further

questions from the RPD on the basis that she had learned that the member of the RPD presiding over the proceedings (the Presiding Member) had not approved a single refugee claim in over two years. Her refusal to answer any further questions formed the basis of a recusal request which was dismissed by the Presiding Member.

[2] Following the dismissal of the recusal request, Ms. Zhang indicated she had no intention of answering any further questions. The Presiding Member then invited Ms. Zhang to explain why, in these circumstances, her claim should not be held to have been abandoned under s 168(1) of the *Immigration and Refugee Protection Act*, (SC 2001, c 27) (the Act). She indicated that she did not intend to abandon her claim but wanted to proceed before a different RPD member who, in her opinion, could provide her with a fair hearing. The Presiding Member ruled that this amounted to a “default in the proceedings” for failure to communicate with the RPD and declared, as a result, the proceedings abandoned.

[3] The sole issue to be decided in this case is whether it was open to the Presiding Member, both on the law and the facts, to conclude as he did.

[4] For the reasons that follow, I am of the view that it was.

I. Background

A. *The Applicant's Refugee Claim Proceedings*

[5] Ms. Zhang's refugee claim was filed in January 2010 and was first scheduled to be heard by the RPD on February 28, 2012. However, Ms. Zhang did not attend the hearing due to illness. The hearing was then rescheduled for May 23, 2012, at which time Ms. Zhang did appear before the RPD and provided identity documents which were sent to the RCMP for verification. The hearing had to be interrupted, however, as Ms. Zhang was again bothered by a health problem.

[6] A follow-up hearing was then scheduled for November 27, 2012 but Ms. Zhang did not show up due again, allegedly, to some health problem. As she failed to provide a medical certificate to justify her absence, the RPD rescheduled the hearing to December 3, 2012 as a peremptory abandonment hearing. Ms. Zhang's counsel then complained that her client was not provided sufficient notice of that peremptory hearing. The Presiding Member adjourned the hearing to March 12, 2013.

[7] When the hearing resumed on that date, Ms. Zhang stated at the very outset that she would not answer any further questions from the Presiding Member as she had heard from friends and former claimants that he had not approved any claims since 2011. She indicated that, considering this information, she could only expect her claim to be rejected and that her ultimate goal in refusing to answer any further questions from the Presiding Member was that her claim be heard by a different RPD member.

[8] Ms. Zhang then made an oral request for recusal to the Presiding Member on the basis that his 0% approval rate gave rise to a reasonable apprehension of bias. This request was dismissed on the basis that approval rates, in and of themselves, could not form the basis of a bias argument.

[9] Ms. Zhang was then asked again whether she intended to answer any further questions. She responded that she would not. The Presiding Member then moved to abandonment proceedings under s 168(1) of the Act and asked Ms. Zhang to explain why her claim should not be declared abandoned.

[10] Ms. Zhang explained that proceeding to abandonment in this case was a breach of procedural fairness and an abuse of process. She also explained that she had shown an intention to proceed with her claim, not to abandon it, and that all she wanted was to proceed before a different RPD member who, in her opinion, could provide her with a fair hearing.

B. *The Decision of the Presiding Member*

[11] The Presiding Member found that by refusing to answer any further questions, Ms. Zhang failed to communicate with the RPD upon being requested to do so and found herself, as a result, in default in the proceedings within the meaning of s 168(1) of the Act. Based on those findings, he determined Ms. Zhang's refugee claim to be abandoned.

[12] In particular, the Presiding Member found that by refusing to answer his questions, Ms. Zhang had not only prevented the RPD from gathering the evidence it deemed necessary to

assess the credibility of her claim but also showed, despite being informed of the consequences of her action, a lack of diligence in pursuing her claim and a refusal to continue her hearing.

[13] The Presiding Member also observed that Ms. Zhang was in fact engaged in “member shopping”, something, he said, which could not be condoned. He added that Ms. Zhang had, under the Act, legal recourses available to her in relation to her procedural fairness or bias concerns:

Refusing to answer the panel’s questions is not a remedy which is provided for in the IRPA or the RPD Rules. Claimants have access to avenues of recourses if they feel that their rights to procedural fairness and natural justice have been violated. Refusing to answer a panel’s questions is not an appropriate response to a claimant’s opinion regarding fairness in refugee determination proceedings. The system has within it checks and balances to abuses of power by decision-makers.

[14] Finally, the Presiding Member stressed the importance of a person answering questions put to him or her at a proceeding held under the Act and that knowingly refusing to do so is an offence under the Act.

II. Issue and Standard of Review

[15] The issue to be decided in this case is whether the Presiding Member, in declaring Ms. Zhang’s refugee claim proceeding abandoned because of her refusal to answer any further questions following the dismissal of her recusal request, has committed a reviewable error, as contemplated by ss 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7.

[16] The parties disagree as to the standard of review applicable to the resolution of that issue. Ms. Zhang contends that s 168(1) of the Act, when properly interpreted, does not allow for abandonment of proceedings in such circumstances. As a result, she says, the issue before the Court raises a pure question of law and is therefore reviewable on a standard of correctness.

[17] The respondent Minister (the Minister) claims that a decision declaring the abandonment of a refugee claim is reviewable on a standard of reasonableness. The Minister contends that the Court should only interfere with such a decision if it falls outside the range of possible, acceptable outcomes, defensible both in fact and in law.

[18] I agree with the Minister. The RPD holds its authority to declare the abandonment of a proceeding before it from s 168(1) of the Act. This provision confers on the RPD a broad discretion: it provides that the RPD may make such a determination in cases where, in its opinion, a refugee claimant is “in default in the proceedings”, something which includes a failure on the part of a claimant “to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so”.

[19] Determining, therefore, whether a proceeding before the RPD has been abandoned involves questions of mixed fact and law in an area – the conduct of its own proceedings – over which the RPD has expertise (*Xu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 718, at para 22). As is now well settled, in such context, deference is owed not only to the decision-maker’s factual findings but also to its interpretation of its own constitutive statute and

related enactments (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 25).

[20] Deference to a decision-maker's interpretation of its own statute flows from the fact that there might be more than one valid interpretation of a statutory provision or answer to a legal dispute. As a result, reviewing courts ought not to interfere with such interpretation or answer in cases where the decision-maker's decision is rationally supported (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para. 41 and 54; see also *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654 [*Alberta Teachers*]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 16, [2011] 3 SCR 471 [*Mowat*]; *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 34, [2011] 1 SCR 3 [*Celgene*]; *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7 at para 28, [2011] 1 SCR 160 [*Smith*]).

[21] I am therefore of the view that the Presiding Member's decision in this case, both on the law and the facts, attracts deference and is reviewable on a standard of reasonableness. I shall therefore not interfere with this decision unless it lacks justification, transparency and intelligibility and falls outside the range of possible, acceptable outcomes, defensible in fact and in law (*Dunsmuir*, above at para 47; *Khosa*, above at para 59).

III. Analysis

A. *The RPD's General Functioning*

[22] The RPD is one of four divisions of the Immigration and Refugee Board of Canada established under s 151 of the Act. It has sole and exclusive jurisdiction to hear and determine refugee protection claims referred to it under the Act (s 162(1)). It accepts such a claim where it determines that the claimant is a Convention refugee or a person in need of protection within the meaning of the Act. Otherwise, it rejects the claim (s 107 of the Act).

[23] In the exercise of its jurisdiction, the RPD is entitled to determine all questions of law and fact, including questions of jurisdiction (s 162(1) of the Act). Also, each of its members has the powers and authority of a commissioner appointed under Part I of the *Inquiries Act*, RSC, 1985, c I-11, which includes the power to compel testimony, and is entitled to do any other thing it considers necessary in order “to provide a full and proper hearing” (s 165 of the Act).

[24] Any proceeding before the RPD is to be dealt with “informally and quickly as the circumstances and the considerations of fairness and natural justice permit” (s 163 of the Act).

In particular, the RPD, in any such proceeding:

- a. May inquire into any matter that it considers relevant to establishing whether a refugee protection claim is well-founded (s 170(a) of the Act);
- b. May question witnesses, including the claimant (s 170(d.1) of the Act);
- c. Is not bound by any legal or technical rules of evidence (s 170(g) of the Act);

- d. Is to make its decision on credible and trustworthy evidence (s 170(h) of the Act);
- e. Must hold a hearing (s 170(b) of the Act); and
- f. Must give the parties before it, including the claimant, a reasonable opportunity to present evidence, question witnesses and make representations (s 170(e) of the Act).

[25] The RPD's functioning is governed in more details by the *Refugee Protection Division Rules*, (SOR/2012-256) (the Rules) adopted under s 161 of the Act. The Rules contain provisions regarding, *inter alia*, the fixing of the date, time and location of a hearing (Rule 3), the importance of obtaining relevant documentary evidence from a refugee protection claimant without delay (Rule 3(4)(c)(ii)), the conduct of a hearing, including the standard order of questioning by which the refugee protection claimant is first questioned by the RPD (Rule 10), how applications seeking a decision from the RPD on any matter in a proceeding are to be made (Rules 50 to 52) and the process by which a refugee protection claim can be withdrawn, reinstated or reopened (Rules 59 to 62).

[26] In particular, the Rules govern the changing of the location, date and time of a proceeding (Rules 53 and 54). In the case of an application for a change in the date or time of a proceeding, the Rules provide that, but for one exception, such application ought not to be allowed "unless there are exceptional circumstances" (Rule 54(4)).

B. *The RPD's Jurisdiction to Declare a Proceeding Abandoned*

[27] As indicated previously, s 168(1) of the Act provides the RPD with the authority to determine that a proceeding before it has been abandoned. Such will be the case where it finds that a refugee protection claimant is in default in the proceedings. Section 168(1) reads as follows:

Immigration and Refugee Protection Act (SC 2001, c 27)	Loi sur l'immigration et la protection des réfugiés (LC 2001, ch. 27)
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Abandonment of proceeding	Désistement
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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.	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.
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Abuse of process	Abus de procédure
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(2) A Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules.	(2) Chacune des sections peut refuser le retrait de l'affaire dont elle est saisie si elle constate qu'il y a abus de procédure, au sens des règles, de la part de l'intéressé.
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[28] For their part, the Rules speak to the instances where a refugee protection claimant must be given an opportunity to explain why his or her claim should not be declared abandoned and to those where this will not be deemed as necessary. They also speak to the instances where such

explanation, when it is deemed necessary, ought to be made immediately or in the course of a special hearing.

[29] The Rules also require the RPD, in deciding whether a claim should be declared abandoned, to take into consideration the explanations given by the claimant as well as “any other relevant factors”, including the fact that the claimant is ready to start or continue the proceedings.

[30] At the time the proceedings respecting Ms. Zhang’s claim were commenced, the applicable rule, Rule 58, read as followed:

Refugee Protection Division Rules, SOR/2002-228	(1) Règles de la Section de la protection des réfugiés, DORS/2002-228
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ABANDONMENT

DÉSISTEMENT

Abandonment without hearing the claimant

Désistement sans audition du demandeur d’asile

58. (1) A claim may be declared abandoned, without giving the claimant an opportunity to explain why the claim should not be declared abandoned, if

58. (1) La Section peut prononcer le désistement d’une demande d’asile sans donner au demandeur d’asile la possibilité d’expliquer pourquoi le désistement ne devrait pas être prononcé si, à la fois:

(a) the Division has not received the claimant's contact information and their Personal Information Form within 28 days after the claimant received the form; and

(b) the Minister and the claimant's counsel, if any, do not have the claimant's contact information.

a) elle n'a reçu ni les coordonnées, ni le formulaire sur les renseignements personnels du demandeur d'asile dans les vingt-huit jours suivant la date à laquelle ce dernier a reçu le formulaire;

b) ni le ministre, ni le conseil du demandeur d'asile, le cas échéant, ne connaissent ces coordonnées.

Opportunity to explain

(2) In every other case, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned. The Division must give this opportunity

(a) immediately, if the claimant is present at the hearing and the Division considers that it is fair to do so; or

(b) in any other case, by way of a special hearing after notifying the claimant in writing.

Possibilité de s'expliquer

(2) Dans tout autre cas, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé. Elle lui donne cette possibilité:

a) sur-le-champ, dans le cas où il est présent à l'audience et où la Section juge qu'il est équitable de le faire;

b) dans le cas contraire, au cours d'une audience spéciale dont la Section l'a avisé par écrit.

Factors to consider**Éléments à considérer**

(3) The Division must consider, in deciding if the claim should be declared abandoned, the explanations given by the claimant at the hearing and any other relevant information, including the fact that the claimant is ready to start or continue the proceedings.

(3) Pour décider si elle prononce le désistement, la Section prend en considération les explications données par le demandeur d'asile à l'audience et tout autre élément pertinent, notamment le fait que le demandeur d'asile est prêt à commencer ou à poursuivre l'affaire.

Decision to start or continue the proceedings**Poursuite de l'affaire**

(4) If the Division decides not to declare the claim abandoned, it must start or continue the proceedings without delay.

(4) Si la Section décide de ne pas prononcer le désistement, elle commence ou poursuit l'affaire sans délai.

C. Ms. Zhang's Position

[31] Ms. Zhang submits that her failure to answer any further questions from the Presiding Member did not constitute a default in the proceeding under a proper interpretation of s 168(1) of the Act. She argues that the notion of "default", in the context of this provision, implies purely procedural or administrative failings on the part of a claimant, such as the failure to appear on the date scheduled for a hearing or to submit to the RPD the required forms or other administrative information. It does not, as a result, include witnesses' non-responsiveness.

[32] This interpretation of s 168(1), she says, is supported by the Rules through which that provision is carried out, both as they read at the time Ms. Zhang's proceedings before the RPD were commenced and as they currently read. This interpretation, she adds, is also consistent with

the object of that provision which is to ensure that refugee protection claims are heard without undue delay. This is most evident, according to her, from the fact that the Rules require the RPD to consider, in determining if a claim has been abandoned, whether the claimant is ready to start or continue the proceedings.

[33] She concludes by stressing that the impugned finding, when taken to its logical conclusion, sets a dangerous precedent empowering the RPD to declare the abandonment of a refugee protection claim each time it finds a claimant to be insufficiently responsive to its questioning. She contends that the non-responsiveness of a claimant is an issue that properly goes to his or her credibility rather than to the abandonment of his or her claim. In any event, she says, the Presiding Member had, following the May 23, 2011 sitting, sufficient evidence before him to make a determination on the merits of her claim so that proceeding to the abandonment of her claim in such context was an even greater abuse of process.

D. *The Impugned Finding is Reasonable in the Particular Circumstances of this Case*

[34] By the very wording of s 168(1), the power to declare the abandonment of a proceeding is in the nature of a discretionary power. The RPD is indeed entitled to make such a declaration “if it is of the opinion” that the refugee protection claimant is in default in the proceedings. The notion of “default in the proceedings” is not defined in the Act but s 168(1) describes three instances where such a default may occur: a failure to appear for a hearing, a failure to provide information required by the RPD or a failure to communicate with the RPD on being required to do so. However, s 168(1) is drafted in such a way that this list of potential defaults is not exhaustive.

[35] That being said, the text of s 168(1), as is well established, must be read in its entire context and harmoniously with the scheme of the Act, its object and the intention of the legislator (Ruth Sullivan, *Statutory Interpretation*, 2nd ed, Toronto: Irwin Law Inc., 2007, at p. 40).

[36] This Court, in interpreting s 168(1) of the Act, has consistently held that the key consideration with respect to abandonment proceedings is whether the claimant's conduct amounts to an expression of his or her intention to diligently prosecute his or her claim (*Csikos v Canada (Minister of Citizenship and Immigration)*, 2013 FC 632, at para 25).

[37] In *Anjum v Canada (Minister of Citizenship and Immigration)*, 2004 FC 496, 250 FTR 311, this Court expressed the view that the words "default in the proceedings" in s 168(1), when read in the context of the whole provision, were indicative of a legislative intent to deal with the disregard of the RPD's process, deliberate or negligent (*Anjum*, at para 24).

[38] This interpretation is wholly consistent with the scheme and object of the Act. One of the main objectives of the Act is to establish fair and efficient procedures aimed at ensuring the integrity of the Canadian refugee protection system (s 3(2)(e) of the Act). In order to attain that objective, Parliament has entrusted the RPD with the task of dealing with any proceeding before it "informally and quickly as the circumstances and the considerations of fairness and natural justice permit" (s 162(2) of the Act).

[39] To that end, Parliament has vested the RPD with broad powers in the conduct of its proceedings, including that of doing what it considers necessary to provide a full and proper hearing (s 165 of the Act), of inquiring into any matter it considers relevant to establishing whether a claim is well-founded (s 170(a) of the Act) and of declaring the abandonment of a claim in cases of default in the proceedings. Parliament has also determined that refusal to answer questions at a proceeding held under the Act could lead to penal sanctions.

[40] Therefore, this legislative scheme requires a certain level of discipline on the part of refugee protection claimants: their conduct must amount to an expression of their intention not only to prosecute their claims but to do so diligently and in a manner that is respectful of the RPD's process, which includes providing information to the RPD when requested to do so.

[41] This is exactly what Ms. Zhang did not do. Although she claims that she always intended to pursue her refugee protection claim, it is safe to say that she had no intention whatsoever of pursuing it before the RDP, as it was constituted for the purpose of determining whether her claim was well founded. Her actions were the result of a tactical, conscious decision aimed at derailing the RPD's process in the hope that her claim would be reprocessed the way she wished. In order to achieve that goal, she deliberately chose not to answer any further questions from the President Member. This, in my view, amounted to a refusal to pursue her proceeding the way it had been commenced and continued to that point.

[42] As the Minister points out, rather than using the established avenue available in the Act to challenge the Presiding Member's decision not to recuse himself, Ms. Zhang maintained her

unwillingness to communicate with the RPD. I agree with the Minister that her conduct was abusive of the RPD's process as it circumvented the dismissal of her recusal motion, ran contrary to her obligation to answer questions, amounted to "member shopping" and was in the nature of delaying that process.

[43] In this regard, it is well settled that conduct giving rise to a reasonable apprehension of bias does not automatically deprive the decision-maker of jurisdiction and nullify the proceedings before it. The proper course for a party affected by the bias is to move promptly for recusal of the decision-maker. Absent an order disqualifying the decision-maker, he or she retains jurisdiction unless and until his or her decision on the motion for recusal is overturned by a higher authority (*R. v Curragh Inc.* [1997] 1 SCR 537, at para 114).

[44] Consistent with that principle, this Court has consistently held that there must be exceptional circumstances to justify the exercise of discretion to allow judicial review to proceed when bias is alleged before the completion of the administrative process as determination of bias at the interlocutory stage runs the risk of proliferating litigation unduly (*Air Canada v Lorenz (T.D.)*, [2000] 1 FC 494, [1999] FCJ No. 1383 (QL), at para 19 to 22; *Douglas v Canada (Attorney General)*, 2014 FC 299, at para 128-129).

[45] Ms. Zhang was therefore ill-advised in refusing to continue the proceeding once her recusal request had been dismissed. The Presiding Member still had jurisdiction at that point to pursue the hearing and to seek further information from her and compel her to testify, as the Act empowers the RPD to do.

[46] By refusing to answer any further questions, Ms. Zhang failed to convey information deemed necessary to assess whether her refugee protection claim was supported by credible and trustworthy evidence. This impeded the workings of the RPD in relation to a function which is at the very heart of its mandate.

[47] In such context, it was open to the Presiding Member, in my view, to conclude that Ms. Zhang's conduct was captured by s 168(1) of the Act. More particularly, it was open to him to find that Ms. Zhang had acted in a way that amounted to a failure to communicate with the RPD upon being requested to do so and, as a result, to a default in the proceedings. This interpretation is consistent with the ordinary meaning of the word "communicate", which is defined as the action of conveying, transmitting and passing on information (Oxford Dictionary of English, 3rd ed, *sub verbo* "communicate"). It is also consistent with the entire context of s 168(1) as well as the scheme and object of the Act, as described above. In other words, this interpretation of s 168(1) on the part of the Presiding Member was entirely reasonable.

[48] Ms. Zhang relies on the Rules in support of her position that s 168(1) shall be read so as to apply solely to purely administrative defaults. First, it is inappropriate to solely rely on regulations, as does Ms. Zhang, to interpret a provision of the governing legislation (*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 CSC 2, [2010] 1 RCS 6, at para 31). Indeed, to the extent it leaves aside the reminder of the legislative context, such an approach to statutory interpretation is not desirable. As I have indicated previously, the entire legislative context does not favour Ms. Zhang's interpretation of s 168(1).

[49] Second, I see nothing in the Rules that supports her position. On the contrary, the wording of Rule 58 (SOR/2002-228), which was in effect at the time of Ms. Zhang's proceeding, is broad enough to encompass situations not limited to administrative defaults. Rule 58 contemplates two different categories of situations but does so for the purposes of defining in which cases the RPD will be required to hear the refugee protection claimant before declaring abandonment and in which cases it will not be so required.

[50] The situations where the RPD is not required to hear claimants before declaring abandonment are restricted to failure on their part to provide their personal contact information to the RPD, the Minister and, as the case may be, their counsel, or to provide the RPD with their Personal Information Form within the prescribed timeline (Rule 58(1)).

[51] The situations where the RPD is required to hear claimants before declaring abandonment concerns, however, "every other case". There is nothing in that wording that restricts abandonment proceedings to administrative defaults.

[52] Moreover, the Rules stress the importance for refugee protection claimants to be ready to proceed with their claim. This is evidenced by the fact that any changes to the date of a hearing will normally only be allowed in exceptional circumstances (Rule 54(4)). It is also evidenced by the fact their readiness to proceed is one of the factors the RPD must consider in the context of abandonment proceedings (Rule 58(3) SOR/2002-228; 65(4) SOR/2012-256). These provisions are entirely consistent with the purpose of s 168(1) of the Act which is to ensure that refugee

protection claimants prosecute their claim diligently and in a manner respectful of the RPD's process.

[53] Ms. Zhang's argument that the current version of the Rules, supports her interpretation of s 168(1) cannot be sustained either. Rule 65, which replaced Rule 58, has not changed the substance of that Rule. The main change concerns cases where a refugee protection claimant's explanation in response to an abandonment proceeding is medical. In such cases, Rule 65 requires that a medical certificate be provided by the claimant and prescribes the information such certificate must contain. Like Rule 58 before it, Rule 65 does not address every possible explanation for abandonment.

[54] Ms. Zhang's position on s 168(1) of the Act ignores the overall legislative context and as a result mischaracterizes the abandonment rule. As I previously pointed out, the Act confers broad discretion on the RPD to conduct its proceedings. It empowers it to compel testimony, to question the claimant and to inquire into any matter that it considers relevant to establishing whether a refugee protection claim is well-founded on the basis of credible and trustworthy evidence, and requires it to perform these tasks informally and quickly as the circumstances and the considerations of fairness and natural justice permit. In turn, the Act requires refugee protection claimants to answer questions put to them at a proceeding, a requirement deemed so important by Parliament that a failure to abide by it can lead to penal sanctions.

[55] Keeping in mind these factors, it was open to the Presiding Member to find that Ms. Zhang had abandoned her claim given her refusal to answer any further questions. This finding

is not contrary to the Rules as they read when the impugned decision was rendered or as they read now.

[56] I neither share nor agree with Ms. Zhang's concern that the abandonment of her claim sets a dangerous precedent empowering the RPD to declare the abandonment of a refugee protection claim each time it finds a claimant to be insufficiently responsive to its questioning. Again, the circumstances that lead to the abandonment of her claim are unique: her non-responsiveness was the result of a deliberate, conscious and tactical choice aimed at bringing an end to the RPD's process, as it was commenced and continued to that point, in the hope of having her claim processed in a way that, in her view, would enhance her chances of success. It is this type of conduct which is likely to set a dangerous precedent, not the Presiding Member's decision in the particular circumstances of this case.

[57] Whether the non-responsiveness of a witness or of a refugee protection claimant may lead to abandonment of a proceeding will depend on the circumstances of each case. It may be that in most instances, such a situation will go to credibility, not abandonment. However, where non-responsiveness of a claimant so clearly has elements of both disregard for the RPD's process and lack of diligence in the pursuance of a claim, as is the case here, it is not unreasonable to find, as did the Presiding Member, that such conduct falls within the scope of s 168(1) of the Act.

[58] Finally, Ms. Zhang's contention that the abandonment of her claim is an even greater abuse of process given that the Presiding Member had, following the May 23, 2011 sitting,

sufficient evidence before him to make a determination on the merits of the claim, must be rejected.

[59] First, I have not been shown that there was nothing further to inquire into Ms. Zhang's claim when the May 23, 2011 sitting ended. The contrary would have been highly surprising given that this sitting had to be interrupted because of Ms. Zhang's medical condition. There is no indication on the record that the Presiding Member had, at that point, completed his questioning of Ms. Zhang. Second, Ms. Zhang, who was represented by counsel throughout her proceedings before the Presiding Member, did not object to the setting of a follow-up hearing, which was to take place on November 27 of that year. This must mean that the proceeding was not yet concluded.

[60] Third, this argument was never raised as a basis for Ms. Zhang's refusal to answer any further questions when the hearing resumed in March 2013. Her silence was solely prompted by her recently formed apprehension that she had no chance of succeeding with her claim given the Presiding Member claims' approval rate.

[61] There is therefore no merit to that argument.

[62] As this Court has pointed out in *Singh v The Minister of Citizenship and Immigration*, 2012 FC 224, 405 FTR 293, the consequences of an abandonment declaration may be severe and even fatal to a refugee protection claimant. All that means, however, is that the RPD must ensure that the claimant was given a full opportunity to explain why his or her claim should not

be declared abandoned and must fully consider the case presented to it in this respect (*Singh*, at para 75).

[63] Here, as the record shows, Ms. Zhang was warned about the consequences of her actions and she was provided with every opportunity required by law to pursue her claim. She preferred to defy the RPD's process.

[64] In *Gapchenko v Canada (Minister of Citizenship and Immigration)*, 2004 FC 427, the claimants had changed counsel shortly before the hearing before the RPD. When they appeared at the hearing, they sought, but were denied, an adjournment. The RPD offered them the opportunity to proceed but they declined to do so in the absence of their new counsel. Their refugee protection claim was declared abandoned on the ground that it was the claimants' duty to make sure that their new counsel would be available to attend the hearing on the date scheduled. This Court found nothing unreasonable with the RPD's decision as the claimants had failed to pursue their claim with diligence.

[65] *Gapchenko* was also a case of a claimant's non-responsiveness occurring in the course of a hearing before the RPD. It seems to me that if it was reasonably opened to the RPD in that case to proceed with the abandonment of the proceedings, it was at least equally so in the circumstances of the present case.

[66] Ms. Zhang's judicial review application is therefore dismissed.

E. *This Case does not Warrant a Certified Question*

[67] Ms. Zhang has proposed the following question for certification pursuant to ss 74(d) of the Act:

Can the Refugee Protection Division declare a claim abandoned where a refugee claimant states that he or she will not answer the Panel's questions?

[68] The test for certification consist in finding whether there is a serious question of general importance and of broad significance which would be dispositive of the appeal and which transcends the interests of the parties to the litigation (*Zazai v Canada (Minister of Citizenship and Immigration)* 2004 FCA 89 at para 11; *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, 176 NR 4, at para 4, [1994] FCJ No. 1637).

[69] In assessing whether to certify a question the Court must be mindful of the fact that the certification process is not to be used as a tool to obtain from the Court of Appeal declaratory judgments on questions which need not be decided in order to dispose of the case. It is to be mindful too of the fact this process is not to be equated with the reference process established by the *Federal Courts Act* (*Zazai* above, at para 13).

[70] Ms. Zhang alleges, in support of her request for certification that the circumstances under which a claim can be declared abandoned under s 168(1) of the Act is of broad significance and an issue of general importance since abandonment of a proceeding amounts to the loss of a substantive right arising under international law. She contends in that regard that the word "default" in s 168(1) is ambiguous as to whether a "failure to communicate" relates to an

administrative failing or to a literal failure to orally communicate with the RPD at a hearing, and therefore needs clarification in the interest of all refugee protection claimants.

[71] I do not agree. As the Minister rightfully points out, this case is fact specific and dependant upon a unique set of circumstances. There is a fairly large body of jurisprudence from this Court on abandonment of proceedings in the context of refugee protection claims. This jurisprudence has clarified the legislative intent behind the notion of “default in the proceedings” in the context of s 168(1) of the Act as including the deliberate or negligent disregard of the RPD’s process and lack of diligence in pursuing a refugee protection claim.

[72] As I have found, Ms. Zhang, in a highly unique way, has shown deliberate disregard and lack of diligence. She attempted to circumvent the dismissal of her recusal motion, deliberately opted, in so doing, to disregard her obligation to answer questions, “member shopped” and consciously acted in a way so as to delay the process. In such context, her proposed question does not transcend the facts of this case and is therefore not of general importance and of broad significance.

[73] Given the unique circumstances of this case, I find that no further clarification of s 168(1) of the Act is needed by means of a certified question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and
2. No question is certified.

“René LeBlanc”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: NA ZHANG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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JUDGMENT AND REASONS: LEBLANC J.

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