Federal Court  Cour fédérale

Date: 20141204

Docket: IMM-2791-14

Citation: 2014 FC 1163

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, December 4, 2014

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ALEXIS CESAR TAPANES ORSA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a decision dated March 21, 2014, by Member Sophie Roy of the Refugee Protection Division (RPD), dismissing the applicant's

application to reinstate under section 60 of the *Refugee Protection Division Rules*, SOR 2012-256 (RPD Rules).

II. Facts

[2] The applicant, Alexis Cesar Tapanes Orsa, is 50 years old and is originally from Cuba.

[3] He arrived in Canada on September 28, 2013. He claimed refugee protection on November 13, 2013, and the date of his hearing before the RPD was set for January 13, 2014.

[4] Chantal Ianniciello, who represented the applicant when he filed his refugee protection claim, informed the RPD on January 8, 2014, of her withdrawal as counsel of record in the case.

[5] The applicant withdrew his refugee claim on January 9, 2014, by filing a written notice with the registry of the Immigration and Refugee Board (IRB). On the premises, he was offered the services of an interpreter, who read him, in Spanish, all of the information on the notice of withdrawal.

[6] The same day, the applicant appeared at the Canada Border Services Agency (CBSA), where he was informed that he had to leave Canada. Upon returning to the centre where he was staying, the applicant suffered a nervous breakdown and was taken to hospital by ambulance. He was seen by an emergency room doctor, who diagnosed him with anxiety and gave him appropriate advice. It was noted that an assessment was not necessary and no medication was prescribed.

[7] On January 10, 2014, the RPD received a notice of [TRANSLATION] "resumption of representation" from Chantal Ianniciello indicating that she was resuming her role as counsel of record in the matter and requesting that the withdrawal of the claim for refugee protection filed by the applicant on January 9, 2014, be ignored.

[8] The RPD received the application to reinstate on February 3, 2014.

[9] On February 7, 2014, the CBSA informed the panel that it had no contradictory information to provide against the applicant's application and that the matter was left to the discretion of the panel.

[10] The RPD received a medical certificate from the clinique des demandeurs d'asile et des réfugiés (CDAR) of the Centre de santé et de services sociaux de la Montagne on February 26, 2014, which stated that the applicant had been receiving treatment for his [TRANSLATION] "anxiety disorder with panic attacks" since January 23, 2014, that he was on medication for his sleep disorder, and he had been prescribed conservative treatment, that is, exercise, relaxation and recreational activities.

III. Impugned decision

[11] The Minister did not provide contradictory information against the application to reinstate the refugee claim and left the matter to the absolute discretion of the RPD.

[12] The RPD first presented the process to follow under subsection 60(3) of the RPD Rules in deciding whether the reinstatement of a refugee protection claim should be allowed: the RPD must assess whether there was a failure to observe a principle of natural justice or whether it is in the interests of justice to do so.

[13] After assessing the record as a whole, the RPD found that there was no failure to observe a principle of natural justice and that it was not in the interests of justice to reinstate the claim.

[14] The following is concerning the failure to observe a principle of natural justice:

- The RPD accepted that the applicant was suffering from high anxiety on January 9, 2014;
- The RPD considered the medical certificate signed by a doctor at the CDAR stating that the applicant suffers from an anxiety disorder with panic attacks as well as insomnia;
- The RPD noted that the applicant takes medication for his insomnia and that he underwent conservative treatment, without medication, to control his anxiety through exercise, relaxation and recreational activities;
- Even though the RPD was sensitive to the fact that the applicant has anxiety problems, the applicant was only seen by a general practitioner and was not referred to a specialist;
- The doctor's certificate does not state whether the applicant's anxiety problems had an impact on his ability to make decisions. The RPD is therefore of the opinion that that certificate is insufficient to demonstrate that the applicant did not have the ability to make

the decision to withdraw his refugee claim and that he was instead able to understand the consequences of his actions at the time of the withdrawal of his refugee claim;

- Even though the applicant was no longer represented when he withdrew his refugee claim, there is nothing to suggest that he could not consult another lawyer before signing his notice of withdrawal;

- The RPD is of the opinion that the IRB took adequate steps on January 9, 2014, when the applicant appeared to withdraw his refugee claim. A Spanish interpreter read him all of the information on the notice of withdrawal;

- The RPD is therefore of the view that the applicant was informed of the consequences of withdrawing his refugee claim. Therefore, there was no failure to observe a principle of natural justice.

[15] The following is concerning the issue of the interests of justice:

- The RPD considered all of the circumstances surrounding the applicant's file under subsection 60(4) of the RPD Rules, as well as *Ohanyan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078 (*Ohanyan*). That decision discusses the broad discretion of the RPD in reinstating a refugee claim;

- The RPD took into account the applicant's level of education, the fact that he had carefully prepared his refugee claim and that he met with his lawyer regularly to prepare for his hearing;

- Although there was a short delay between the withdrawal of his refugee claim and his application to reinstate, the RPD was of the opinion that there is no evidence that demonstrates that the applicant was unable to make the decision to withdraw his refugee claim on January 9, 2014;

- The RPD is of the view that the Act, the Regulations and the RPD Rules were correctly followed and that there were no irregularities that could undermine the procedure.

IV. Arguments of the parties

[16] The applicant first claims that the RPD did not properly assess his mental state because he was unable to understand the consequences of withdrawing his refugee claim at the time of that action. The applicant adds that the RPD minimized his mental state at paragraph 25 of its decision. He also contends that even though the doctor who treated him was a general practitioner, the doctor was competent to treat him. The respondent replies that the RPD properly assessed the applicant's condition and did not minimize it, given that the RPD considered all of the evidence submitted and recognized that the applicant suffers from anxiety. In the absence of evidence demonstrating that the applicant did not have the ability to make the decision to withdraw his refugee claim, it was reasonable for the RPD to find that he was able to understand the consequences of withdrawing his claim.

[17] The applicant alleges that even though a Spanish interpreter read him a standard clause from the document relating to the withdrawal of his refugee claim, nothing proves that he actually understood what the interpreter was reading to him at the time. The interpreter could

only find that the applicant understood the words that were read to him and could not ensure that he understood the consequences of his actions. The respondent replies that in the absence of evidence demonstrating that the applicant did not have the ability to understand the consequences of withdrawing his refugee claim, it was reasonable for the RPD to find that the applicant fully understood what was translated for him. Furthermore, the wording of the withdrawal clause was clear and unambiguous.

[18] Regarding the interests of justice, the applicant submits that the RPD did not explain why it was not in the interests of justice to grant his application to reinstate. He relies on *Castillo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1185, [2010] FCJ No 1483 (*Castillo*) in that respect. The respondent contends that that decision is distinguishable from the facts in this case because, in that case, the Court noted that "the Board's reasons deal only with the "interests of justice" that militate against reinstatement, not those that favour it" (*Ibid*, at paragraph 18, Respondent's Memorandum at paragraph 43), which is not the case here. The respondent is of the opinion that the RPD clearly explained the reasons for its decision regarding the negative finding in its analysis of the interests of justice.

[19] Finally, the applicant argues that no one would be upset if the RPD was to grant the application to reinstate his refugee protection claim, by giving him the benefit of the doubt regarding his ability to understand the consequences of withdrawing his claim when he had no legal representation and was depressed and suicidal at the time of the withdrawal of his claim. The respondent is, however, of the opinion that the RPD's decision is reasonable.

V. Issues

[20] The applicant submits the following issues:

- Did the RPD fail to sufficiently consider Alexis Cesar Tapanes Orsa's mental state at the time of the withdrawal of his refugee claim?
- Did the RPD provide adequate reasons for its finding with respect to the "interests of justice"?

[21] The respondent does not propose an issue.

[22] After reviewing the parties' arguments and the issues submitted by the applicant, I propose the following issue:

Is the RPD's decision to refuse to reinstate the applicant's refugee claim reasonable?

VI. Standard of review

[23] The parties agree on the reasonable standard for the review of an application to reinstate a refugee protection claim.

[24] Indeed, the issue raised in this case is a question of mixed fact and law. According to the case law of the Court, the question must be reviewed on the standard of reasonableness (*Posada Arcila v Canada (Minister of Citizenship and Immigration)*, 2013 FC 210, [2013] FCJ No 235 at paragraph 15 (*Arcila*); *Castillo*, above, at paragraph 3). This Court will therefore intervene only if the decision is unreasonable, that is, if it does not fall within "a range of

possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47).

VII. Analysis

[25] I agree with the analysis proposed by the respondent. The RPD's decision is reasonable and the intervention of this Court is therefore not warranted.

[26] Under subsection 60(3) of the RPD Rules, the RPD "must not allow the application unless it is established that there was a failure to observe a principle of natural justice or it is otherwise in the interests of justice to allow the application". Subsection 60(4) of the Rules adds that "in deciding the application, the Division must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay".

[27] First, it was reasonable for the RPD to find that there was no failure to observe a principle of natural justice. The applicant argues that the RPD improperly assessed his mental state because he was unable to understand the consequences of withdrawing his refugee claim at the time of that action. In my opinion, the RPD considered the evidence on the applicant's mental state and correctly assessed it. Indeed, it was only after taking into account all of the evidence submitted in the record that the RPD stated that it was not convinced that the applicant's mental state prevented him from understanding the consequences of withdrawing his refugee claim. In this case, the RPD considered the fact that the applicant had a panic attack the evening that he withdrew his refugee claim, the medical certificate submitted in the record, the fact that the applicant was not taking medication for his anxiety disorder, the fact that the applicant was not

represented when he withdrew his claim, but that nothing prevented him from consulting a lawyer before signing his withdrawal, and the fact that a Spanish interpreter read him all of the information on the notice of withdrawal. I therefore agree with the respondent that, for all of these reasons and in the absence of evidence to the contrary, it was reasonable for the RPD to determine that the applicant was well informed and understood the consequences of the decision to withdraw his refugee protection claim. It is common knowledge that the medical evidence is inadequate and that it does not establish that the applicant's mental state was such that he did not know what he was signing. The notes from the emergency room doctor, that evening, when he saw the applicant, mention a state of anxiety, state that the applicant cooperated and did not recommend any assessment or medication. The applicant returned home. If the applicant's mental state had been out of control, the emergency room physician would not have made such recommendations. As a result, there was no failure to observe a principle of natural justice.

[28] The RPD's analysis of the interests of justice was also reasonable. Justice Phelan provided a good summary of that part of the analysis in an application to reinstate:

> The term "otherwise in the interests of justice" [subsection 60(3) of the RPD Rules] are broad words giving the Board a wide discretion to reinstate but which requires the Board to weigh all the circumstances of a case – not just from the vantage point of an applicant's interests. Reinstatement is an exception to the norm and must be interpreted and applied in that context (*Ohanyan*, above, at paragraph 13).

[29] In this case, the RPD considered the positive and negative aspects of reinstating the applicant's refugee protection claim, including those previously mentioned. The RPD also considered the short period of time between the withdrawal of the refugee claim and the applicant's application to reinstate, the resumption of contact between the applicant and his

counsel and the fact that the applicant acted diligently when preparing his refugee claim. The RPD therefore considered all of the circumstances in this case. It is within this frame of analysis that the RPD reached the reasonable conclusion that the applicant freely made his decision to withdraw his refugee protection claim and that he knew the consequences of doing so.

[30] The decision to refuse to reinstate the applicant's refugee protection claim is therefore reasonable and falls within the range of acceptable outcomes in respect of the facts and law.

VIII. Conclusion

[31] Given that the reinstatement of a refugee claim is an exception to the norm (*Arcila*, above, at paragraph 16) and the lack of evidence submitted by the applicant in support of his application to reinstate, I find that the RPD decision is reasonable. It was reasonable for the RPD to find that there was no failure to observe a principle of natural justice and that it was not in the interests of justice to allow the application to reinstate. The intervention of this Court is not warranted.

[32] The parties were invited to submit questions for certification but none were proposed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. There is no question for certification.

"Simon Noël"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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