

Federal Court



Cour fédérale

Date: 20150505

Docket: IMM-4186-14

Citation: 2015 FC 582

Ottawa, Ontario, May 5, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**ALEXANDRE ZAGROUDNITSKI
KONSTANTZIA ZAGROUDNITSKI-AZA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS
(rendered on the bench on May 4, 2015)

I. Overview

[1] If an Applicant's application to reinstate was previously denied, as is the case at bar, he or she must demonstrate "exceptional circumstances supported by new evidence" in order for a subsequent application to be reinstated in order to succeed (subsection 60(5) of the RPD Rules).

II. Introduction

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Refugee Protection Division [RPD], dismissing the Applicants' subsequent application to reinstate a withdrawn claim under subsection 60(5) of the *Refugee Protection Division Rules*, SOR 2012/256 [RPD Rules].

III. Factual Background

[3] The principal Applicant and his minor daughter [the Applicants] are citizens of France who traveled to Canada on October 23, 2013. The Applicants claimed refugee protection on the basis of a threat posed by the principal Applicant's wife and her friends towards himself and his daughter. Upon arrival, the Applicants were detained under suspicion of parental abduction by the father ("childnapping", as opposed to kidnapping, childnapping is abduction by one parent to the detriment of the other).

[4] At the hearing held before the RPD on March 3, 2014, the Applicants withdrew their refugee claims – the minor Applicant having done so through her previously appointed designated representative – but subsequently applied for reinstatement of their withdrawn claims shortly thereafter.

[5] The Applicants' application and subsequent application to reinstate their withdrawn claims were denied by the RPD on April 1 and April 16, 2014, respectively, on the basis that they did not meet the requirements of subsections 60(3) and 60(5) of the RPD Rules.

[6] On May 2, 2014, in the context of an *Application under the Convention on Civil Aspects of International Child Abduction*, [1983] Can TS 35 (the Hague Convention), filed by the minor Applicant's mother, who lives in France, Justice L.S. Parent of the Ontario Court of Justice ordered the return of the minor Applicant to France, and held that the mother had custody rights in respect of the child at the time of father's removal of the child. The father's removal and retention of the child was wrongful and breached the mother's rights under the Hague Convention (*N.A. v A.Z.*, 2014 ONCJ 293; Affidavit of Irena Kakowska, dated March 11, 2015).

[7] The minor Applicant was removed to France on August 21, 2014, and the principal Applicant was removed on August 25, 2014 (Affidavit of Jeremy Clipsham, dated March 11, 2015).

IV. Legislative Provisions

[8] Section 60 of the RPD Rules applies to proceeding for reinstating a withdrawn claim or application:

**REINSTATING A
WITHDRAWN CLAIM OR
APPLICATION**

**Application to reinstate
withdrawn claim**

60. (1) A person may make an

**RÉTABLISSEMENT
D'UNE DEMANDE**

**Demande de rétablissement
d'une demande d'asile
retirée**

60. (1) Toute personne peut

application to the Division to reinstate a claim that was made by the person and was withdrawn.

Form and content of application

(2) The person must make the application in accordance with rule 50, include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer, and provide a copy of the application to the Minister.

Factors

(3) The Division 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.

Factors

(4) 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.

Subsequent application

(5) If the person made a previous application to reinstate that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.

demander à la Section de rétablir une demande d'asile qu'elle a faite et ensuite retirée.

Forme et contenu de la demande

(2) La personne fait sa demande conformément à la règle 50, elle y indique ses coordonnées et, si elle est représentée par un conseil, les coordonnées de celui-ci et toute restriction à son mandat et en transmet une copie au ministre.

Éléments à considérer

(3) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi ou qu'il est par ailleurs dans l'intérêt de la justice de le faire.

Éléments à considérer

(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment le fait que la demande a été faite en temps opportun et, le cas échéant, la justification du retard.

Demande subséquente

(5) Si la personne a déjà présenté une demande de rétablissement qui a été refusée, la Section prend en considération les motifs du refus et ne peut accueillir la demande subséquente, sauf en cas de circonstances exceptionnelles fondées sur

l'existence de nouveaux
éléments de preuve.

V. Issue

[9] The sole issue arising in the application is whether the RPD's decision to refuse the reinstatement of the Applicants' refugee claims is reasonable.

VI. Standard of Review

[10] The applicable standard of review of the RPD's decision is that of reasonableness (*Castillo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1185 at para 3). Accordingly, the factors to be considered in reviewing the RPD's decision are justification, transparency and intelligibility within the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

VII. Analysis

[11] According to subsection 60(3) of the RPD Rules, the RPD must not allow an application for reinstatement unless it is established that:

- 1) there was a failure to observe a principle of natural justice or;
- 2) it is otherwise in the interests of justice to allow the application.

[12] Correspondingly, the reinstatement of a withdrawn claim is an exception to the norm. As provided by Justice Michael L. Phelan in *Ohanyan v Canada (Minister of Citizenship and*

Immigration), 2006 FC 1078 at para 13 (see also: *Arcila v Canada (Minister of Citizenship and Immigration)*, 2013 FC 210 at para 16):

[13] The term "otherwise in the interests of justice" 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.

[13] In addition, if an Applicant's application to reinstate was previously denied, as is the case at bar, he or she must demonstrate "exceptional circumstances supported by new evidence" in order for a subsequent application to be reinstated in order to succeed (subsection 60(5) of the RPD Rules).

[14] Upon review of the Certified Tribunal Record and the parties' submissions, which depict an alarming portrait, to say the least, of allegations of parental abduction, abuse, instability and detention in regard to the child in the proceedings, it is clear that the application cannot succeed.

[15] The RPD's decision and reasons are reasonable and anchored in the evidence.

[16] In its decision, the RPD considered its original decision and reasons as well as the Applicants' allegation that he had been pressured into withdrawing his claim out of fear of being separated from his daughter. The RPD also took cognizance of the fact that the principal Applicant was unrepresented at the hearing and that it took corresponding measures to ensure that the Applicant understood the consequences of the withdrawal of his refugee claim.

[17] It was reasonable for the RPD to conclude that the Applicants' subsequent application to reinstate their withdrawn claim lacked an evidentiary basis and did not warrant exceptional circumstances, as required by subsection 60(5) of the RPD Rules.

VIII. Conclusion

[18] In light of the foregoing, the application is dismissed.

JUDGMENT

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

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4186-14

STYLE OF CAUSE: ALEXANDRE ZAGROUDNITSKI, KONSTANTSIA
ZAGROUDNITSKI-AZA v THE MINISTER OF
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