

Federal Court



Cour fédérale

**Date: 20150928**

**Docket: IMM-7194-14**

**Citation: 2015 FC 1107**

**Ottawa, Ontario, September 28, 2015**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**SHAFQAT MUHABBAT ALI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for the judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) which declared the Applicant’s claim to refugee protection abandoned.

[2] It is common ground that the Applicant sustained severe and multiple injuries in a motor vehicle accident in late November 2012. His refugee hearing was scheduled for April 22, 2013.

The Applicant's immigration consultant requested an adjournment by letter dated April 1, 2013 supported by a physiotherapist's report describing in detail the Applicant's injuries. The physiotherapist recommended the adjournment based on the Applicant's pain and limited tolerances for sitting, standing, and walking. The Board requested information about when the Applicant would be able to attend for his refugee hearing. This was answered with a further letter from the consultant sent on April 9, 2013 advising that the Applicant was scheduled for a surgical consultation after which better information would be available. Nevertheless, the consultant offered tentative dates to proceed, all within the following two months. The Board appears not to have confirmed the adjournment and, surprisingly, the consultant failed to make an appearance at the hearing on April 22, 2013. The Board then initiated abandonment proceedings and dismissed the claim in a brief decision rendered on May 6, 2014. It is that decision that is the subject of this review.

[3] The issues raised by the Applicant concern the Board's assessment of the evidence relevant to the abandonment finding, for which the standard of review is reasonableness.

[4] The quality of Mr. Ali's representation before the Board left much to be desired. His consultant was seemingly negligent in failing to attend before the Board on the scheduled hearing date of April 22, 2013. It appears he simply assumed that his request for an adjournment would be granted. He also failed to fully address the Board's request for more medical information - in particular, as it related to Mr. Ali's capacity to attend his refugee hearing. If the consultant was having difficulty in obtaining the necessary information, he had a professional obligation to inform the Board. His representation of Mr. Ali during the abandonment hearing

was also profoundly deficient. When the Board asked the consultant if he had anything to say, he attempted unsuccessfully to introduce hearsay evidence. When that proved unsuccessful, he declined to make any further submissions. This was inexcusable and inexplicable in the face of Mr. Ali's well documented and very severe accident-related injuries.

[5] Notwithstanding the above lapses, the Board had current, detailed and reliable medical information explaining why Mr. Ali could not attend the scheduled refugee hearing. The primary report was authored by Mr. Ali's physiotherapist less than four weeks before the hearing. The report indicated that Mr. Ali was in pain with limited tolerances for sitting, standing, and walking. He remained under active treatment. The physiotherapist indicated that multiple x-ray, MRI, and CT scans were outstanding and he supported Mr. Ali's request for an adjournment. The report detailed multiple fracture injuries to Mr. Ali's spine including bilateral transverse process fractures at C7, endplate compression fractures at T3 and T4, a T5 anterior vertebral body fracture, a T11 comminuted fracture with 50% retropulsion (pushed backwards), a right T-12 transverse process fracture, transverse process fractures at L1 and L2, and an L3 oblique vertebral body fracture. All of these spinal injuries were surgically managed. In addition, Mr. Ali sustained occipital, scapular and clavicle fractures.

[6] A further report produced to the Board two weeks before the scheduled hearing described the recent discovery of a comminuted displaced fracture of the left talar neck with a poor prognosis for recovery. At that time, Mr. Ali's consultant advised the Board that Mr. Ali was to be assessed by a surgeon in the following two to three weeks. The consultant, nevertheless, proposed six tentative dates for rescheduling the hearing beginning on May 16, 2013 and ending

on June 12, 2013. All of those dates and several others later fell away due to the consultant's intervening serious health problem requiring liver transplant surgery.

[7] The Board's abandonment finding was based on the Applicant's supposed failure to provide sufficient evidence to justify his failure to proceed with the scheduled hearing, or to explain when he would otherwise be able to do so.

[8] Having regard to Mr. Ali's medical history, it should have been obvious to the Board that he was in no shape to proceed with the scheduled hearing. Yet, notwithstanding the physiotherapist's opinion, the Board, during its abandonment hearing, pressed Mr. Ali to explain or justify why he had failed to appear. This is confirmed in the following exchange:

PRESIDING MEMBER: Well you're asking, you're under a burden to appear at this hearing. You're telling me that you were unable to appear because of a car accident. I would expect you to be able to provide proof of that.

CLAIMANT: For the truck accident?

PRESIDING MEMBER: Yes.

CLAIMANT: Right now I don't have it.

PRESIDING MEMBER: This is your opportunity to show why your claim should not be abandoned. And you're saying that you have no evidence to explain to me why you were so absent.

CLAIMANT: At this time I don't have it.

PRESIDING MEMBER: (Inaudible). Do you any further and are you ready to proceed with the claim today?

CLAIMANT: Yes.

This exchange, among others in the transcript, is very strange. The Board knew full well Mr. Ali had sustained severe injuries in a motor vehicle accident and it did not require any further

explanation on that point. The physiotherapist also advised that Mr. Ali was not then medically fit to attend a hearing. None of the Board's questions to Mr. Ali or his consultant addressed the issue that the Board then found to be determinative – that being the failure by the consultant to produce a medical opinion about when Mr. Ali would be medically fit to testify, or to provide an explanation for why that information could not be obtained. In the absence of any questioning on these issues by the Board, the finding that no efforts had been made is unsupported. Even those concerns were mitigated somewhat when the consultant provided early tentative dates to proceed. Nowhere in the Board's decision is that evidence addressed. I would add that the Board's statement that the Applicant's medical reports failed to explain how his medical condition prevented him from appearing mischaracterizes that evidence. No reasonable assessment of the physiotherapist's reports could have left any serious doubt about the Applicant's incapacities or the need for an adjournment.

[9] The consultant's incompetence should have been patently obvious to the Board. That, too, was an issue the Board ought to have addressed in its reasons. Indeed, having regard to the significance of the decision the Board was required to make, its cursory treatment of the evidentiary record was entirely inadequate. Refugee abandonment cases are deserving of a far deeper evidentiary analysis than was afforded by the Board to Mr. Ali: see *Octave v Canada (Citizenship and Immigration)* 2015 FC 597 at paras 24-25, 2015 CarswellNat 1496 per Justice Keith Boswell and *Guo v Canada (Citizenship and Immigration)* 2015 FC 533 at para 13, 2015 CarswellNat 1354 per Justice George Locke.

[10] On the basis of the above, I find the Board's decision to be unreasonable and it is set aside. This matter is to be redetermined on the merits by a different decision-maker.

[11] Neither party proposed a certified question and no issue of general importance arises on this record.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the Board's decision is set aside with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7194-14

**STYLE OF CAUSE:** SHAFQAT MUHABBAT ALI v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 16, 2015

**JUDGMENT AND REASONS  
BY:** BARNES J.

**DATED:** SEPTEMBER 28, 2015

**APPEARANCES:**

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