

Federal Court



Cour fédérale

**Date: 20151102**

**Docket: IMM-953-15**

**Citation: 2015 FC 1240**

**Toronto, Ontario, November 2, 2015**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**TETYANA TUMANOVA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION AND  
THE MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS**

**Respondents**

**JUDGMENT AND REASONS**

[1] Tetyana Tumanova seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board dismissing her second request to re-open her refugee claim. The Board concluded that Ms. Tumanova had not established that there were exceptional circumstances that would justify the re-opening of a claim that had previously been determined to have been abandoned, and Ms. Tumanova has not persuaded me that the Board's decision was unreasonable.

**I. Background**

[2] Ms. Tumanova is a citizen of Ukraine. In June of 2014, she applied for refugee protection in Canada claiming to be a victim of domestic violence at the hands of her former common-law husband. Her refugee hearing was scheduled for August 20, 2014. Ms. Tumanova failed to appear for her hearing because of a dental emergency, although her counsel was present at the appointed time. Ms. Tumanova was then scheduled to appear at an abandonment hearing on August 27, 2014 at 9:00 a.m.

[3] Ms. Tumanova failed to appear for her abandonment hearing as scheduled, although her counsel was once again present. Ms. Tumanova eventually appeared several hours late, claiming that she had gotten lost while taking public transit to the hearing. The presiding member allowed the hearing to proceed later in the day.

[4] The Board was not satisfied with Ms. Tumanova's explanation for her failure to appear for her August 20 hearing. The member found that Ms. Tumanova was also not prepared to proceed with her proceeding, and declared her claim abandoned, providing oral reasons for that decision.

[5] Ms. Tumanova did not seek judicial review of the Board's abandonment decision. She did, however, retain an immigration consultant to bring an application to have her refugee claim re-opened. In this application, Ms. Tumanova blamed her interpreter and her former counsel for not meeting with her in advance of her refugee hearing. She also admitted that she had lied to the Board at the abandonment hearing as to the reason that she had not appeared at 9:00 a.m., claiming that the interpreter had been late in picking her up, and that the interpreter had

counselled Ms. Tumanova to tell the Board that she had taken public transit to the hearing and had gotten lost. Ms. Tumanova also provided the Board with a sworn statement in which she confirmed that she had lied to the Board on the advice of her interpreter.

[6] Ms. Tumanova concluded her application to re-open her refugee claim by repeating her assertion that she was at risk in Ukraine, and by asking that she be allowed to present her case. It should be noted that nowhere in this request does Ms. Tumanova take issue with the Board's finding that she was not ready to proceed with her claim on August 27, 2014.

[7] Ms. Tumanova subsequently provided the Board with an affidavit sworn on November 28, 2014, referring to the problems that she says that she had encountered with her representation, her dental problems, and her explanation for her late arrival at her abandonment hearing. She also provided the Board with receipts confirming that she had received dental treatment on the date that had been set for her refugee hearing.

[8] The Board held that Ms. Tumanova had not been provided with inadequate legal representation at her abandonment hearing, but had suffered the misfortune of relying on the poor advice of her interpreter, who was essentially a lay person. The Board noted that Rule 62(6) of the Refugee Protection Division's Rules only allowed for a refugee application to be re-opened where there had been a failure to observe a principle of natural justice, and it found that none of the evidence presented by Ms. Tumanova established that there was a breach of natural justice in connection with her abandonment hearing. As a result, the presiding member dismissed Ms. Tumanova's application to have her claim re-opened in a decision dated December 8, 2014.

[9] Ms. Tumanova sought judicial review of this decision, but she failed to perfect her application and it was subsequently dismissed.

[10] Ms. Tumanova then brought a second application to have her refugee claim re-opened. In support of this application, she provided the Board with another copy of her affidavit of November 28, 2014, along with her dental records and written submissions by her new counsel.

## **II. The Board's Decision**

[11] The Board began by noting that this was Ms. Tumanova's second application to re-open her claim. It also noted that the evidence submitted was, for the most part, identical to the evidence that had been submitted in Ms. Tumanova's first application to have her claim re-opened.

[12] The Board noted that Rule 62(8) of the Refugee Protection Division's Rules provides that where a party has already brought an unsuccessful motion to have an abandoned refugee claim re-opened, the Board must consider the reason for the refusal, and that it "must not allow the subsequent application unless there are **exceptional circumstances supported by new evidence**" [the Board's emphasis].

[13] The Board found that Ms. Tumanova had raised one new argument in her second motion to re-open, which was that her immigration consultant was inexperienced in dealing with motions to re-open refugee claims. The Board noted, however, that this claim was not supported by any evidence, nor had Ms. Tumanova explained how this alleged inexperience caused her any unfairness or how this circumstance was exceptional.

[14] The Board also noted that Ms. Tumanova had repeated her earlier allegation of ineffective representation by her former counsel. The Board held that not only was this not a new circumstance, but one that was once again not supported by any new evidence.

[15] The Board also pointed out that no notice of Ms. Tumanova's allegations of inadequate representation had been given to either the immigration consultant or Ms. Tumanova's former counsel, as required by Rule 62(4) of the Refugee Protection Division's Rules.

[16] As a result, the Board held that Ms. Tumanova had failed to establish the existence of exceptional circumstances that would justify the re-opening of her refugee claim.

Ms. Tumanova submits that this decision was unreasonable.

### **III. Analysis**

[17] Many of Ms. Tumanova's submissions were addressed to alleged errors in the Board's decision to declare her refugee claim to have been abandoned, particularly its finding that Ms. Tumanova was not ready to proceed with her refugee claim on the date set for the abandonment hearing. The abandonment decision is not, however, the decision under review in this application. Ms. Tumanova chose not to seek judicial review of the Board's abandonment decision, and that decision is now final.

[18] Ms. Tumanova argues that she could not have sought judicial review of the Board's abandonment decision, as she would first have had to pursue her remedies before the Board – namely to seek to have her refugee claim re-opened. I do not accept this submission.

[19] This Court regularly deals with applications to judicially review abandonment decisions: see, for example, *Sarran v Canada (Minister of Citizenship and Immigration)*, 2014 FC 62, [2014] F.C.J. No. 235. Moreover, as this Court pointed out in *Lin v Canada (Minister of Citizenship and Immigration)*, 2005 FC 512 at paras. 10-16, [2005] F.C.J. No. 634, abandonment decisions and decisions to re-open refugee claims are different decisions based upon different criteria: see paras. 10-16. Each is a reviewable decision, and having failed to review the Board's abandonment decision, Ms. Tumanova must now accept its findings as final.

[20] Because Ms. Tumanova chose not to perfect her application for judicial review of the Board's first decision refusing to re-open her refugee claim, that decision is also final.

[21] To the extent that Ms. Tumanova addressed the decision under review in her submissions, she argued that the Board erred by failing to apply a "contextual approach" that took into consideration her personal situation, in deciding whether or not her refugee claim should be re-opened. Counsel could not explain, however, how Ms. Tumanova's status as an alleged victim of domestic violence from Ukraine was relevant to the issues that the Board had to decide in relation to her second application to re-open.

[22] Ms. Tumanova also argues that the Board erred by failing to consider her immigration consultant's lack of experience in dealing with motions to re-open refugee claims. The Board acknowledged that this was a new issue, and addressed Ms. Tumanova's argument in this regard. The Board found, however, that there was no evidence to support the allegation, with the result that this did not constitute an 'exceptional circumstance *supported by new evidence*' that would justify the re-opening of Ms. Tumanova's refugee claim [emphasis added].

[23] I also do not accept counsel's suggestion that the immigration consultant's lack of experience was evident on the face of the record. While more fulsome submissions could have been made in support of the motion to re-open, the submissions of the immigration consultant were not so poor as to indicate any lack of experience on her part.

[24] Finally, although it does not go to the reasonableness of the Board's decision on this point, I would also note that the immigration consultant provided an affidavit in support of Ms. Tumanova's application for judicial review and nowhere in that affidavit does she suggest that she lacked experience with applications to re-open refugee claims.

#### **IV. Conclusion**

[25] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

**JUDGMENT**

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

"Anne L. Mactavish"

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Judge



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

**DOCKET:** IMM-953-15

**STYLE OF CAUSE:** TETYANA TUMANOVA v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION AND THE  
MINISTER OF PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 29, 2015

**JUDGMENT AND REASONS:** MACTAVISH J.

**DATED:** NOVEMBER 2, 2015

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