

Federal Court



Cour fédérale

Date: 20151120

Docket: IMM-6683-14

Citation: 2015 FC 1296

Ottawa, Ontario, November 20, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

DO MEE TUNG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In April 2014, the Minister applied to the Immigration and Refugee Board to cease Ms Do Mee Tung's refugee status. At the time, Ms Tung was out of the country. She learned about the Minister's application in early June 2014. By then, the hearing had been set down for July 18, 2014.

[2] Ms Tung engaged an immigration consultant who sought an adjournment from the Board so that he could prepare properly for the hearing. The Board refused. The consultant asked again at the hearing but the Board again refused to adjourn. The Board proceeded with the hearing and, in due course, found that Ms Tung's refugee status had ceased because she had reavailed herself of the protection of her native China.

[3] Ms Tung maintains that the Board treated her unfairly by denying her an adjournment without considering the relevant circumstances. She asks me to overturn the Board's decision and order another panel to reconsider the question of cessation.

[4] I agree that the Board unreasonably denied Ms Tung an adjournment and will allow this application for judicial review on that basis. Ms Tung also argued that the Board's decision on cessation was unreasonable, but I need not deal with that question given my conclusion on the issue of fairness.

II. Adjournments before the Board

[5] A person can apply to change the date or time of a hearing before the Board, but a change can only occur in exceptional circumstances, including where it is necessary to accommodate a vulnerable person, or to respond to an emergency or other development beyond the person's control (*Refugee Protection Division Rules*, SOR/2012-256, s 54(1)(4)). The Rules also permit a person to request a change of date or time where counsel was engaged after the hearing date has been fixed (s 54(5)). In certain circumstances (not applicable here), the Board must grant the person's request.

[6] The Board's discretion must generally take into account all relevant factors, including:

- whether the applicant has done everything in her power to be represented by counsel;
- the number of previous adjournments granted, including any peremptory adjournments;
- the duration of the requested adjournment;
- the effect on the immigration system;
- whether needless delay would result; and
- whether the applicant is to blame.

(Siloch v Canada (Minister of Employment and Immigration), [1993] FCJ No 10.)

III. Did the Board unreasonably refuse an adjournment?

[7] In my view, the Board failed to take into account the relevant factors cited above and, therefore, unreasonably denied Ms Tung an adjournment. The Board refused an adjournment because Ms Tung had not shown that there were exceptional circumstances, such as vulnerability or an emergency beyond her control. But the latter are merely examples of exceptional circumstances. The Board appeared not to consider whether Ms Tung's personal situation amounted to exceptional circumstances in the broader sense.

[8] In addition, the Board did not consider the applicability of Rule 54(5). As mentioned above, there are circumstances where the Board must grant an adjournment under that provision. Where those circumstances do not exist, the Board nonetheless has the discretion to grant an adjournment where the applicant's personal situation warrants it.

[9] Had the Board taken account of Ms Tung's personal situation, it would have considered that:

- Ms Tung had not made any prior adjournment requests;
- She was requesting a short delay;
- There was no evidence of any prejudice; and
- Neither Ms Tung nor her counsel was prepared for the hearing.

[10] In the circumstances, therefore, I find that the Board's rejection of Ms Tung's request was unreasonable for failure to consider her personal situation.

IV. Conclusion and Disposition

[11] The Board failed to take into account the relevant Rules and factors in refusing Ms Tung's adjournment. I must, therefore, allow this application for judicial review and order another panel to reconsider the issue of cessation. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is referred back to the Board for reconsideration by a new panel; and
3. No question of general importance is stated.

"James W. O'Reilly"

Judge

Annex

*Refugee Protection Division Rules,
SOR/2012-256*

*Règles de la Section de la protection des
réfugiés, DORS/2012-256*

Application in writing

Demande par écrit

54. (1) Subject to subrule (5), an application to change the date or time of a proceeding must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.

54. (1) Sous réserve du paragraphe (5), la demande de changer la date ou l'heure d'une procédure est faite conformément à la règle 50, mais la partie n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle.

[...]

...

Factors

Éléments à considérer

(4) Subject to subrule (5), the Division must not allow the application unless there are exceptional circumstances, such as

(4) Sous réserve du paragraphe (5), la Section ne peut accueillir la demande, sauf en cas des circonstances exceptionnelles, notamment :

(a) the change is required to accommodate a vulnerable person; or

a) le changement est nécessaire pour accommoder une personne vulnérable;

(b) an emergency or other development outside the party's control and the party has acted diligently.

b) dans le cas d'une urgence ou d'un autre développement hors du contrôle de la partie, lorsque celle-ci s'est conduite avec diligence.

Counsel retained or availability of counsel provided after hearing date fixed

Conseil retenu ou disponibilités du conseil transmises après la date à laquelle l'audience a été fixée

(5) If, at the time the officer fixed the hearing date under subrule 3(1), a claimant did not have counsel or was unable to provide the dates when their counsel would be available to attend a hearing, the claimant may make an application to change the date or time of the hearing. Subject to operational limitations, the Division must allow the application if

(5) Si, au moment où l'agent a fixé la date d'une audience en vertu du paragraphe 3(1), il n'avait pas de conseil ou était incapable de transmettre les dates auxquelles son conseil serait disponible pour se présenter à une audience, le demandeur d'asile peut faire une demande pour changer la date ou l'heure de l'audience. Sous réserve de restrictions d'ordre fonctionnel, la Section accueille la demande si, à la fois :

(a) the claimant retains counsel no later than five working days after the day on which the hearing date was fixed by the officer;

(b) the counsel retained is not available on the date fixed for the hearing;

(c) the application is made in writing;

(d) the application is made without delay and no later than five working days after the day on which the hearing date was fixed by the officer; and

(e) the claimant provides at least three dates and times when counsel is available, which are within the time limits set out in the Regulations for the hearing of the claim.

a) le demandeur d'asile retient les services d'un conseil au plus tard cinq jours ouvrables après la date à laquelle l'audience a été fixée par l'agent;

b) le conseil n'est pas disponible à la date fixée pour l'audience;

c) la demande est faite par écrit;

d) la demande est faite sans délai et au plus tard cinq jours ouvrables après la date à laquelle l'audience a été fixée par l'agent;

e) le demandeur d'asile transmet au moins trois dates et heures auxquelles le conseil est disponible, qui sont dans les délais prévus par le Règlement pour l'audience relative à la demande d'asile.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6683-14

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