Federal Court  Cour fédérale

Date: 20160912

Docket: IMM-938-16

Citation: 2016 FC 1036

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 12, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

HAMDI LETAIF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Hamdi Letaif, the applicant, is a citizen of Tunisia who applied for refugee status or to be declared a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [the IRPA]. That application was determined to be abandoned as allowed under section 168 of the Act. He is seeking judicial review of that decision under section 72 of the Act.

[2] There is only one question to be answered before this Court. Questions of abandonment under section 168 are subject to the reasonableness standard of review. The case law of this Court shows this (*Ndomba v. Canada (Citizenship and Immigration)*, 2014 FC 189; *Csikos v. Canada (Citizenship and Immigration)*, 2013 FC 632; *Singh v. Canada (Citizenship and Immigration)*, 2012 FC 224). As a result, this Court will not intervene solely on the basis that it would have exercised its discretionary jurisdiction differently from the administrative tribunal. A decision with qualities of reasonableness, according to paragraph 47 of *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*], shall be immunized from judicial review. These qualities were described as follows in paragraph 47: "In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

I. The facts

[3] The facts in this case are quite straightforward. The applicant, now age 27, came to Canada on a student visa. He applied for the visa on August 29, 2012. It was granted on September 10, 2012, and was used immediately, as the applicant arrived in Montreal to study from his native Tunisia on September 17, 2012. The visa expired on June 30, 2013.

[4] The record does not indicate the applicant's current status. However, we know that he applied for refugee status on December 10, 2015, and that his claim was supposed to be heard on February 4, 2016. According to the "Basis of claim" form, it seems the applicant is basing his

refugee claim on the fact that the lifestyle that existed in Tunisia in 2012 did not suit him and that he prefers a Western lifestyle. However, on February 4, 2016, the applicant did not attend his hearing before the Refugee Protection Division (RPD). The applicant's counsel was there.

[5] The transcript of the hearing on February 4 shows that the applicant's counsel indicated at the hearing that his client was sick. His counsel apparently advised him that he needed to obtain a medical report to explain his illness.

[6] A special hearing was therefore convened to allow the refugee claimant to explain why the claim should not be determined to be abandoned given his absence from the hearing convened for his refugee claim. That special hearing was held six days later, on February 10, 2016. Once again, the hearing transcript shows that the applicant tried, as best he could, to provide an explanation. He said he went to a clinic at10:00 a.m. on February 4 to try to see a doctor (the hearing before the RPD was scheduled for 8:15 a.m. on February 4). The applicant did not obtain a medical certificate, although he said he suffered from vomiting and a depressive state. He even said that pain medication was prescribed. When the RPD pointed out that medication of that sort would not help vomiting or a depressive state, the applicant specified that he also had stomach pains. Neither the applicant nor his counsel suggested at the hearing on February 10 that they were ready to begin proceedings. At the judicial review hearing, the applicant's counsel indicated that that was understood, or should have been understood.

[7] In a brief decision at the hearing, the RPD member rejected the applicant's explanations. Based on rule 65 of the *Refugee Protection Division Rules* (SOR/2012-256) [the Rules], she noted that subrule 5 of rule 65 stipulates that if the refugee claimant claims medical reasons, a

certificate is required to prove his or her condition. If a certificate is not provided, subrule 7 requires particulars about the claimant's health condition. The member found that those particulars were not provided.

[8] As for the applicant's depressive state, the member noted that he did not have a psychological assessment or even a medical certificate. Finally, she indicated that the applicant did not submit any documentation to support his refugee claim. Based on these considerations, the member found that the case was abandoned.

II. Parties' positions

[9] Through the application for judicial review, the applicant is contesting the decision made on February 10, 2016. More specifically, the applicant applied to reopen his refugee claim, an application that was dismissed in a decision dated April 6, 2016. However, that decision is not being contested before this Court in this case.

[10] The applicant claims that the RPD committed an error. He claims that the RPD did not explain how it reached that conclusion, given that the applicant wanted to pursue his refugee claim. It seems to me that while it is fair to claim that the applicant's presence at the special hearing on February 10 demonstrated his intention to pursue his refugee claim, I did not find any indication that either he or his counsel asked that the refugee claim hearing take place at that time.

[11] The applicant insists that abandonment must result from a claimant's conduct that amounts to an expression of his or her intention not to diligently prosecute his or her claim. Since the RPD did not take into consideration the applicant's efforts to obtain a medical certificate, an error was apparently committed, opening the door for judicial review.

[12] Obviously, the Minister argues that the decision is reasonable. Given that the RPD appropriately considered the factors included in rule 65 of the *Refugee Protection Division Rules*, and did not accept the explanations that were presented, one of the possible acceptable outcomes was abandonment of the refugee claim. It falls to the RPD to determine the probative value of any piece of evidence. Simple disagreement with the findings of the RPD does not constitute grounds for concluding that the decision is not reasonable.

III. Analysis

[13] Under the Act, the RPD may rule on abandonment. In this case, subsection 168(1) of the IRPA applies. It reads as follows:

Abandonment of proceeding	**Désistement**
168 (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.	168 (1) Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication.

[14] Regulations were adopted to provide a framework for the discretion conferred by section 168 of the IRPA. The *Refugee Protection Division Rules* are these regulations. Subrule 65(1) of the Rules introduces the subject:

Abandonment	**Désistement**
Opportunity to explain	**Possibilité de s'expliquer**
65 (1) In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned,	65 (1) Lorsqu'elle détermine si elle prononce ou non le désistement d'une demande d'asile aux termes du paragraphe 168(1) de la Loi, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé :
(a) immediately, if the claimant is present at the proceeding and the Division considers that it is fair to do so; or	a) sur-le-champ, dans le cas où le demandeur d'asile est présent à la procédure et où la Section juge qu'il est équitable de le faire;
(b) in any other case, by way of a special hearing.	b) au cours d'une audience spéciale, dans tout autre cas.

The regulations state that this special hearing must be held in a timely manner (subrule 65(3)). The Rules also stipulate what the RPD must consider in its decision:

Factors to consider	**Éléments à considérer**
(4) The Division must consider, in deciding if the claim should be declared abandoned, the explanation given by the claimant and any other relevant factors, including the fact that the claimant is ready to start or continue the proceedings.	(4) Pour décider si elle prononce le désistement de la demande d'asile, la Section prend en considération l'explication donnée par le demandeur d'asile et tout autre élément pertinent, notamment le fait qu'il est prêt à commencer ou à poursuivre les procédures.

[15] In our case, the applicant invoked medical reasons, which the Rules address:

Medical reasons	**Raisons médicales**
(5) If the claimant's explanation includes medical reasons, other than those related to their counsel, they must provide, together with the explanation, the original of a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate.	(5) Si l'explication du demandeur d'asile comporte des raisons médicales, à l'exception de celles ayant trait à son conseil, le demandeur d'asile transmet avec l'explication un certificat médical original, récent, daté et lisible, signé par un médecin qualifié, et sur lequel sont imprimés ou estampillés les nom et adresse de ce dernier.

[16] In passing, I note the particularly imperative tone in the English version of the rule with regard to providing a medical certificate ("they must provide").

[17] Finally, subrule 7 of rule 65 applies in cases where a medical certificate is not submitted. The subrule reads as follows:

Failure to provide medical certificate	**Défaut de transmettre un certificat médical**
(7) If a claimant fails to provide a medical certificate in accordance with subrules (5) and (6), the claimant must include in their explanation	(7) À défaut de transmettre un certificat médical, conformément aux paragraphes (5) et (6), le demandeur d'asile inclut dans son explication :
(a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;	a) des précisions quant aux efforts qu'il a faits pour obtenir le certificat médical requis ainsi que des éléments de preuve à l'appui;
(b) particulars of the medical reasons included in the explanation, supported by	b) des précisions quant aux raisons médicales incluses dans l'explication ainsi que des

corroborating evidence; and	éléments de preuve à l'appui;
(c) an explanation of how the medical condition prevented them from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim or otherwise pursuing their claim, as the case may be.	c) une explication de la raison pour laquelle la situation médicale l'a empêché de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à laquelle il devait être transmis ou de se présenter à l'audience relative à la demande d'asile.

As seen in the transcript of the hearing on February 10, 2016, the RPD did not accept the explanation given. One can understand why. The applicant was unable to explain why he was able to try to contact a doctor on February 4, the day of the hearing, but was unable to attend his hearing to obtain refugee status. Nor is it clear why he could not have visited the doctor before February 4, 2016. I could not find in the transcript any indication that the applicant wanted to proceed with his refugee claim hearing on February 10. His counsel did not request it and the member noted that no documentation appeared to be on file. The applicant's alleged medical problems are not supported by any serious evidence. In fact, his explanation of his medical problems seemed to change over the course of the hearing.

[18] It seems to me that my colleague, The Honourable Mr. Justice Leblanc, correctly captured the issue in applying section 168 of the IRPA. He wrote the following in paragraph 36 of his decision in *Zhang v. Canada (Citizenship and Immigration)*, 2014 FC 882:

> [36] This Court, in interpreting s 168(1) of the Act, has consistently held that the key consideration with respect to abandonment proceedings is whether the claimant's conduct amounts to an expression of his or her intention to diligently prosecute his or her claim (*Csikos v Canada (Minister of Citizenship and Immigration*, 2013 FC 632 (CanLII), at para 25).

Thus, it is the applicant's conduct that is under examination.

[19] In our case, it is the examination of this conduct that is at issue; the member found that this conduct did not express the intention to prosecute the claim, given that the applicant did not provide a credible explanation for the health difficulties that apparently prevented him from prosecuting diligently (this includes the absence of a medical certificate or any evidence of a psychological assessment), and the fact that he did not submit any documentation to support his refugee claim. In fact, during the hearing on February 4, 2016, the applicant's counsel indicated that he had difficulty communicating with his client to prepare for his hearing.

[20] The onus on the applicant was to show that the member's decision was not reasonable, within the meaning of paragraph 47 of the *Dunsmuir* decision. Rather than trying to show the lack of reasonableness, the applicant attempted to allege an error. The standard of review in these matters is not that of correctness, where, for example, the Court may have a different view of the matter and may therefore overturn the administrative tribunal's decision. That is not the role of this Court. Rather, it is to determine whether the conclusion constitutes a possible acceptable outcome. The applicant failed to show that such was not the case, as required.

[21] Consequently, the application for judicial review is dismissed. There is no question to be certified under section 74 of the IRPA.

JUDGMENT

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

There is no question to be certified under section 74 of the IRPA.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Anthony Karkar	FOR THE APPLICANT
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anthony Karkar Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT