

Federal Court



Cour fédérale

Date: 20190206

Docket: IMM-1280-18

Citation: 2019 FC 155

Ottawa, Ontario, February 6, 2019

PRESENT: The Honourable Madam Justice Gagné A.C.J.

BETWEEN:

MUDASSAR PARVEEN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mudassar Parveen is a 44-year-old citizen of Pakistan. In 2012, she requested refugee protection in Canada. She disagrees with the determination of the Refugee Protection Division [RPD] that her claim should be deemed to have been abandoned and applied for judicial review of that decision.

[2] This application raises the issue of whether the RPD acted fairly and without bias, and whether the Applicant has shown a credible intention to diligently pursue her claim.

II. Facts

[3] The Applicant is a citizen of Pakistan. She claimed refugee protection in Canada in 2012 due to alleged death threats by religious fanatics.

[4] On January 2, 2018, she was served with a Notice to Appear for a Hearing on February 16, 2018. However, she claims that she could not attend for medical reasons. Her counsel also failed to appear because he had an emergency medical appointment on the same day.

[5] A show cause hearing was scheduled on February 23, 2018 in order to determine whether the Applicant's claim should be deemed to have been abandoned for failing to appear on February 16, 2018.

[6] After giving a chance to the Applicant to explain why she failed to appear on February 16, 2018, the RPD rendered an oral decision determining that the Applicant's claim had been abandoned, pursuant to section 168 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*.

III. Impugned Decision

[7] The Applicant provided a prescription and the results of a blood test, both dated February 15, 2018. However, these documents do not explain why the Applicant was not able to attend on February 16, 2018 or when the Applicant is expected to be able to pursue her claim. As such, the medical disclosure does not comply with the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules].

[8] The RPD found the Applicant's testimony with respect to her illness to be not credible. The Applicant first testified that she got a prescription because of her illness and that she filled that prescription. However, at the show cause hearing, she presented the original prescription which clearly indicated that she had not filled the prescription. The Applicant's testimony that she made a mistake and that she had taken Tylenol instead of the prescribed drugs because she had given the prescription to her landlord was rejected by the RPD.

[9] Further, the Applicant had no information on her doctor, and the exact nature of her illness was unknown. It was the Applicant's duty to provide the medical evidence requested by the RPD.

[10] The RPD considered the fact that the Applicant has not tendered any document in support of her refugee claim other than her Personal Information Form, despite the fact that her claim has been pending for over six years, and that in July 2017, she indicated in writing that she was ready to proceed.

[11] A person whose safety is threatened in his or her country of origin and who is seeking the protection of a country of refuge is necessarily keen to comply with the legal framework that has been established for that purpose, and should not tolerate laxity (*Barrientos v Canada (Ministre de la Citoyenneté et de l'Immigration)*, 1997 CanLII 5278). The Applicant lacked diligence in pursuing her claim by presenting neither the required medical documentation nor credible testimony to explain the delay. The RPD found that the Applicant's claim had been abandoned.

IV. Issues and Standard of Review

[12] The Applicant raises one issue, along with three sub-issues:

Did the RPD err in its determination that the Applicant's claim has been abandoned?

A. *Was there a breach of procedural fairness?*

B. *Is there a reasonable apprehension of bias?*

C. *Were there errors in the assessment of the Applicant's intentions and credibility?*

[13] If this Court concludes that there was a breach of procedural fairness or apprehension of bias, its intervention would be warranted; absent such a breach however, the RPD's decision is reviewable on a standard of reasonableness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69).

V. Analysis

[14] The key consideration is whether the Applicant has the intention to diligently pursue her claim (*Csikos v Canada (Citizenship and Immigration)*, 2013 FC 632 at paras 25-26). The Applicant has the onus to establish why her claim should not be deemed to have been abandoned.

[15] According to Rule 65 of the RPD Rules, the RPD must consider the reason(s) given by the Applicant why her claim should not be declared abandoned, along with any other relevant factor, including whether the Applicant is ready to start or continue the proceedings. The RPD has a discretionary power to find the Applicant in default (*Zhang v Canada (Citizenship and Immigration)*, 2014 FC 882 at paras 34-36).

A. *Breach of procedural fairness*

[16] The Applicant argues that the RPD's failure to provide written reasons amounts to a breach of procedural fairness.

[17] First, this case can be distinguished from *Jang v Canada (Minister of Citizenship and Immigration)*, 2004 FC 486, where the RPD had provided no written reasons and since no transcript of the hearing existed, it was impossible to know if oral reasons were provided. In the present case, the record shows that the RPD provided detailed reasons orally.

[18] Second, it could be argued that the determination that a proceeding has been abandoned is a final decision which entails the rejection of the refugee claim, and that the RPD has an obligation to provide reasons in written form, as per paragraph 169(d) of the IRPA:

Decisions and reasons	Décisions
169 In the case of a decision of a Division, other than an interlocutory decision:	169 Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections :
...	[...]
(d) if the Refugee Protection Division rejects a claim, written reasons must be provided to the claimant and the Minister;	d) le rejet de la demande d'asile par la Section de la protection des réfugiés est motivé par écrit et les motifs sont transmis au demandeur et au ministre;

[19] On the other hand, it can be said that a determination that a claim has been abandoned is not a decision under section 169 of the IRPA, because it does not decide the merits of a claim, but the more circumscribed question of whether an applicant has abandoned his or her claim.

This abandonment of a proceeding is rather dealt with in subsection 168(1) of the IRPA:

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.

[20] Here, the RPD's decision was rendered orally and in the presence of the Applicant, her counsel and an interpreter. It is detailed and comprehensive, setting out not only the findings but also the reasons they were made. The Applicant has since obtained a copy of the transcript of the hearing.

[21] In the circumstances, while the letter of the law may impose a duty to provide written reasons, it would be odd to set aside the RPD's decision on the sole basis that a written copy of the decision has not been provided to the Applicant. I do not think there has been any breach of the fairness standard. Deciding otherwise would appear to me to be a triumph of form over substance. I find there has been no substantial wrong or miscarriage of justice (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at paras 55-56). Subsection 18.1(5) of the *Federal Courts Act*, RSC 1985, c F-7 empowers this Court to decline to grant relief in such a case.

B. *Apprehension of bias*

[22] I agree with the Respondent that the Applicant has not met the high threshold to show there was a reasonable apprehension of bias (*Koky v Canada (Citizenship and Immigration)*, 2015 FC 562 at para 48). The questions asked to the Applicant regarding the filing of supporting documents were meant to explore whether or not she was ready to proceed with her claim. The questions about her treating doctor were meant to explore her allegation that she was medically unable to attend her hearing on February 16, 2018.

[23] Furthermore, the RPD was entitled to decline to hear the Applicant's landlord's testimony because no notice was given that he would be called as a witness, and he had not been excluded from the Applicant's testimony.

[24] Similarly, the RPD did not act improperly in refusing counsel's request for an adjournment of the show cause hearing on February 23, 2018. Counsel was advised on February 19, 2018 that his other hearing at the RPD on February 23, 2018 had been postponed. Furthermore, his application for a change of date and time did not comply with Rules 50 and 54 of the RPD Rules. Lastly, the Applicant and her counsel were present on February 23, 2018.

C. *The assessment of the Applicant's intentions, credibility and medical evidence*

[25] Rule 65 sets out the factors to be considered in order to determine that a claim has been abandoned. It also sets out the requirements for medical evidence purporting to show that a refugee claimant was medically unable to attend a proceeding. For ease of reference, I reproduce below the relevant provisions of the RPD Rules.

Abandonment

...

Factors to consider

(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.

Désistement

[...]

Éléments à considérer

(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.

Medical reasons

(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.

Content of certificate

(6) The medical certificate must set out

(a) the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant 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; and

(b) the date on which the claimant is expected to be able to pursue their claim.

Failure to provide medical certificate

(7) If a claimant fails to provide a medical certificate in accordance with subrules (5) and (6), the claimant must

Raisons médicales

(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.

Contenu du certificat

(6) Le certificat médical indique, à la fois :

a) sans mentionner de diagnostic, les particularités de la situation médicale qui ont empêché le demandeur d'asile 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;

b) la date à laquelle il devrait être en mesure de poursuivre l'affaire.

Défaut de transmettre un certificat médical

(7) À défaut de transmettre un certificat médical, conformément aux paragraphes (5) et (6), le demandeur d'asile

include in their explanation	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 corroborating evidence; and	b) des précisions quant aux raisons médicales incluses dans l'explication ainsi que des 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.

[26] It is clear that the medical evidence submitted by the Applicant does not comply with Rule 65. The Applicant submitted a prescription and blood test results, but they do not explain why the Applicant was unable to attend on February 16, 2018, or when the Applicant would be able to pursue her claim. Furthermore, no explanation was submitted as to why the Applicant was unable to provide a medical certificate containing the required information in the form prescribed by subrules 65(5) and 65(6) of the RPD Rules.

[27] At the show cause hearing, the RPD made no reviewable error by rejecting the Applicant's testimony on the grounds that it lacked credibility. Her testimony was inconsistent

and changed as she was being questioned. For instance, the Applicant testified having purchased and taken the medication that had been prescribed, but when questioned about it, she admitted that she had not done so, and that she had instead taken Tylenol. The Applicant was also unable to give any information with respect to her treating doctor. In these circumstances, it was reasonable for the RPD to make an adverse credibility finding.

[28] Lastly, the RPD reasonably found that the Applicant had not pursued her claim with diligence. Subrule 65(4) directs the RPD to consider, in determining if a claim should be declared abandoned, whether “the claimant is ready to start or continue the proceedings”, as well as “any other relevant factors”. The RPD must decide whether the Applicant’s conduct showed that she did not wish or had no interest in pursuing her claim with diligence (*Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 109 at para 32).

[29] While her claim has been pending for over six years, the Applicant has not submitted any supporting documents and has not given notice of any witnesses to be called. When asked why she had not submitted any supporting documents, the Applicant answered: “They are ... they are there. If you give me two to three weeks, yes, I can come along with those documents”. In these circumstances, it was reasonable for the RPD to find that the Applicant was not ready to pursue her claim on the date originally scheduled or on the date of the show cause hearing.

VI. Conclusion

[30] The Applicant has not met the threshold to demonstrate that the RPD acted unfairly or that its conduct gave rise to a reasonable apprehension of bias. The RPD considered the medical

evidence submitted by the Applicant and reasonably determined that it did not comply with the RPD Rules. The RPD reasonably concluded that the Applicant had not pursued her claim with diligence and that it should be declared abandoned. This application for judicial review is therefore dismissed. The parties have proposed no question of general importance for certification and none arises from the facts of this case.

JUDGMENT in IMM-1280-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. The style of cause is amended to replace the “Minister of Immigration, Refugees and Citizenship” with the “Minister of Citizenship and Immigration”;
3. No question of general importance is certified.

“Jocelyne Gagné”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1280-18

STYLE OF CAUSE: MUDASSAR PARVEEN v THE MINISTER
CITIZENSHIP AND IMMIGRATION

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