Federal Court Cour fédérale

Date: 20191213

Docket: IMM-1646-19

Citation: 2019 FC 1600

Ottawa, Ontario, December 13, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

JUAN CARLOS CASTRO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Juan Carlos Castro, is a citizen of Columbia who sought refugee protection in 2012 because of alleged fear of persecution at the hands of the Revolutionary Armed Forces of Columbia [LA FARC].

[2] Mr. Castro hired a lawyer to assist him with his refugee claim, with whom he communicated periodically over the years while waiting for the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] to schedule his refugee claim hearing.

[3] In the meantime, Mr. Castro moved several times. His first move was to Jane Street in 2012 [First Move], and a local community centre notified the RPD in October 2012 of this move on his behalf. Mr. Castro's second move was to Frith Road in 2014 [Second Move], and his lawyer notified the RPD in July 2014 of the change of address. He moved for a third time, also in 2014, to Exbury Road [Third Move]. Mr. Castro states he attended his lawyer's office again to inform him of the move, and understood that his lawyer's office would again forward the change of address to the RPD. The RPD, however, had no record of the Third Move and consequently, his Frith Road address remained in its records.

[4] As of December 2017, Mr. Castro was unable to contact his lawyer. He went to the lawyer's office twice and tried to call him a few more times between January and May 2018, to no avail. While the office was closed, there was no indication that the law practice itself ceased to exist.

[5] On or about August 31, 2018, Mr. Castro moved for a fourth time to Driftwood Avenue [Fourth Move]. As his lawyer was unavailable to help him notify the RPD of this change of address, Mr. Castro went in person to the RPD on October 12, 2018. For reasons unclear from

the record, he was directed to a different floor in the same building where the RPD was located and filed his change of address with the Canada Border Services Agency [CBSA] instead.

[6] Unbeknownst to Mr. Castro, his lawyer had become ill in January 2017 and stopped working. An assistant managed the practice until the office closed in December 2017. The office was placed under trusteeship of the Law Society of Ontario, and the client files were transferred to another counsel, who confirmed in February 2018 that he received hundreds of files from the former lawyer's office but was unable to locate Mr. Castro's file.

[7] Starting mid 2018, the RPD sent three notifications to Mr. Castro's Frith Road address. These notifications were also sent to his former lawyer, as the lawyer had not removed himself from the RPD record nor set up a mail forwarding system to the trustee's office. The first notification was a letter dated June 4, 2018 enclosing an *Intention to Proceed* form to be completed and returned to the RPD. The second notification dated August 9, 2019 was a *Notice to Appear for a Hearing* informing Mr. Castro of his RPD hearing scheduled for September 17, 2018. The third notification dated August 28, 2018 was an *Amended Notice to Appear for a Conference* informing Mr. Castro that because the RPD did not receive his completed *Intention to Proceed* form, he was required to participate in a conference on September 17, 2019 to set the date for his hearing. Failure to attend at the conference would necessitate attendance at a Special Hearing on September 24, 2019 to allow him to explain his failure to attend the September 17, 2019 conference; "[o]therwise [his] claim may be declared abandoned." The three notifications were returned to the IRB, but the "received" stamp on two of them reflects the date of January 25, 2019.

[8] The RPD issued an oral decision declaring Mr. Castro's claim for refugee protection abandoned at the Special Hearing on September 24, 2019, and subsequently issued its written *Notice of Decision* on October 1, 2018. Mr. Castro retained new counsel to represent him on January 22, 2019, at which time he learned his claim had been declared abandoned. He sought to reopen his refugee claim on February 11, 2019, maintaining his fear of persecution continues to be well-founded. The RPD denied his request on February 15, 2019; hence this judicial review application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This Court granted Mr. Castro a stay of removal on June 4, 2019, further to a CBSA Direction to Report for Removal, pending the outcome of this application.

[9] For the reasons that follow, the judicial review application is granted. The matter is to be remitted to a differently constituted PRD for redetermination.

II. Impugned Decision

[10] In the February 15, 2019 decision dismissing Mr. Castro's application to reopen the claim, the RPD was not persuaded there had been a failure to observe a principle of natural justice justifying reopening the claim: Rule 62(6) of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules].

[11] In response to Mr. Castro's assertion that he had filed an address change [regarding the Fourth Move] with the Board in person, the RPD observed he did so only on October 12, 2018, nearly three weeks after the Division had declared his claim abandoned. The RPD also noted that when the claimant moved from the Frith Road address in mid-2014, he did not file a change of

address. I note, however, Mr. Castro's evidence was he thought his lawyer at the time looked after notifying the RPD of the address change [for the Third Move] as he had done with Mr. Castro's Second Move. In fact, the RPD acknowledged "the claimant stated that whenever he moved to a new apartment he always went to his lawyer's office where he would fill out a form, sign it and it would then be faxed to the Board," but concluded "an examination of his moves belies the claim."

[12] The RPD similarly noted he did not file a change of address when he moved again on August 31, 2018. Further, by that time he already had been alerted to a possible problem with his former lawyer, as he had been trying to contact his office to no avail and he knew that another counsel had taken over the files of his previous lawyer. The RPD also noted the Applicant was well aware of the location of the RPD's offices, and knew he was obligated to notify the RPD of changes in his contact information. From the RPD's perspective, he moved twice without notifying the RPD of his changes of address; when he finally notified or attempted to notify the RPD of last change of address [for the Fourth Move], it was within weeks of the decision to declare his claim abandoned. The RPD stated, "[h]e seeks to misrepresent the timing of this notification."

[13] In response to the Applicant's submission that he was waiting for a hearing since 2012, the RPD indicated he should have been more diligent in ensuring that the Board had up-to-date contact information for him, since he maintains his fear continues to be well-founded. Consequently, the RPD found Mr. Castro's failure to notify the RPD of his address changes did not support a continuing interest in pursuing his refugee claim. The RPD thus concluded his

failure to follow the rules and the RPD's abandonment in his claim did not constitute a breach of natural justice or breach of procedural fairness.

III. Issue

[14] The only issue for consideration is whether the RPD's conclusion that there was no breach of natural justice, and hence its refusal to reopen Mr. Castro's refugee protection claim, were unreasonable.

IV. Standard of Review

[15] The parties agree, as do I, that the applicable standard of review in this case is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48, 51 and 53. Whether the applicant has established the RPD failed to observe a principle of natural justice is a question of mixed fact and law, as demonstrated by the RPD Rules 62(6) and 62(7), which attracts the reasonableness standard: *Anni v Canada (Citizenship and Immigration)*, 2017 FC 134 at paras 13-14; *Noel v Canada (Citizenship and Immigration)*, 2018 FC 271 at para 24; *Djilal v Canada (Citizenship and Immigration)*, 2014 FC 812 at paras 5-7; *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 [*Huseen*] at paras 12-13.

V. Relevant Provisions

[16] Rule 62 of the RPD Rules governs applications to reopen a claim. Rule 62(1) reads as follows:

Application to reopen claim	**Demande de réouverture**

	d'une demande d'asile
62(1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.	**62 (1)** À tout moment avant que la Section d'appel des réfugiés ou la Cour fédérale rende une décision en dernier ressort à l'égard de la demande d'asile qui a fait l'objet d'une décision ou dont le désistement a été prononcé, le demandeur d'asile ou le ministre peut demander à la Section de rouvrir cette demande d'asile.

[17] The applicable test and factors to be considered in an application to reopen a claim are set out in RPD Rules 62(6) and 62(7):

Factor	**Élément à considérer**
(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	**(6)** La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.
Factors	**Éléments à considérer**
(7) In deciding the application, the Division must consider any relevant factors, including	**(7)** Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :
(a) whether the application was made in a timely manner and the justification for any delay; and	**a)** la question de savoir si la demande a été faite en temps opportun et, le cas échéant, la justification du retard;
(b) the reasons why	**b)** les raisons pour lesquelles :
(i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or	**(i)** soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés,
(ii) a party did not make an application for leave to apply for judicial review or an application for judicial review.	**(ii)** soit une partie n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire.

VI. Analysis

[18] Recognizing that the outcome of any judicial review application is dependant on fact-specific analysis, I nonetheless find the following comments in *Husseen*, above at paras 15-16, resonate in this case (particularly if one reads "her" as "his" and "BOC" as "address changes"):

> [15] The primary question in this judicial review is whether there was a violation of a principle of natural justice, despite the Applicants' failure to adhere to the precise letter of the law in submitting her BOC in a timely manner or attending her abandonment hearing. I conclude that there was.
>
> [16] In my view, the door should not slam shut on all those who fail to meet ordinary procedural requirements. Such a restrictive reading would undermine Canada's commitment to its refugee system and underlying international obligations (section 3(2) of the Act). Indeed, one of the purposes of the Refugee Convention, to which Canada is a signatory, is to allow refugees the widest possible exercise of fundamental rights and freedoms (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 (CanLII), at para 27).

[19] Further, as stated in *Zaytoun*: "[t]he Refugee Protection Division is required to make negative credibility findings in clear and unmistakeable terms": *Zaytoun v Canada (Citizenship and Immigration)*, 2014 FC 939 [*Zaytoun*] at para 7, citing *Hilo v Canada (Minister of Employment & Immigration)* (1991), 130 NR 236 (FCA). That is not what the RPD did in this case. Instead, as noted above, the RPD stated first "an examination of his moves belies the claim" regarding Mr. Castro's alleged visit to his lawyer's office to inform him of the Third Move, and then regarding the Fourth Move, "[h]e seeks to misrepresent the timing of this notification" without any explanation of what was meant in either case. It is possible the RPD may have doubted whether Mr. Castro attended his lawyer's office regarding the Third Move in 2014, or whether he mistakenly filed a change of address regarding the Fourth Move in person

with the CBSA instead of the RPD. It certainly did not make such findings in "clear and unmistakable terms" however, nor am I prepared to make any inferences about what the RPD meant by these statements, as they are amenable to more than one meaning. Further, the RPD acknowledged that Mr. Castro provided a copy of the change of address for the Fourth Move with his application to reopen the claim ("[it] is on the letterhead of the Canada Border Services Agency (CBSA)"). Accordingly, I find in the circumstances these RPD findings lack justification, transparency and intelligibility.

[20] Moreover, it is undeniable that Mr. Castro waited more than six (6) years to have his claim heard. For the first five of those six years, he had the same legal representation until, through not fault of his own, his lawyer fell ill and the counsel to whom the lawyer's files were transferred about one year later could not locate Mr. Castro's file. Then, in the span of less than four (4) months (from June 4 to September 24, 2018), his claim was declared abandoned. As soon as he retained new counsel in January 2019 (less than 4 months after the decision to declare the claim abandoned) and discovered the status of his claim, he moved with speed to reopen the claim which was denied just 4 days after the filing of the application to reopen. The harshness and unreasonableness of the result in these circumstances are inescapable. As further noted by Justice Diner in *Husseen*, above at para 36:

> "This Court … has held on numerous occasions that refugee applications may be allowed to proceed, despite procedural defects, to ensure that the requirements of natural justice are fulfilled. Natural justice encompasses the overarching right to be heard (*Canada v Garber*, 2008 FCA 53 (CanLII), at para 40), and this should not be denied unreasonably."

[21] Finally, I note the following comments of Justice Strickland in the recent decision in *Hegedus v Canada (Citizenship and Immigration)*, 2019 FC 428 at para 23:

> [23] This Court has held that the RPD's power to re-open a claim is very limited as demonstrated by the restrictive language used in RPD Rule 62(6) (*Huseen* at para 14) but that the RPD can re-open a claim where there has been a denial of natural justice or procedural unfairness to the applicant (*Huseen* at paras 19-20). The burden of proof is on the Applicant (*Djilal* at para 28). Further, a failure to observe a principle of natural justice does not have to be the result of an error or mistake of the RPD (*Djilal* at para 29). Negligence on the part of an applicant's counsel has been recognized, in certain circumstances, as being sufficient to cause the applicant to have been denied natural justice in relation to an abandonment hearing (*Osagie v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368 (CanLII) at para 27 [*Osagie*]; *Khan v Canada (Citizenship and Immigration)*, 2005 FC 833 (CanLII) paras 26-30).

[22] The RPD does not appear to have considered that while Mr. Castro may have attended at his lawyer's office in 2014 about his Third Move as alleged, the lawyer may not have communicated the change of address to the RPD or it was communicated but the RPD did not receive it. Rather, the RPD appears not to have believed Mr. Castro without any clear explanation why.

VII. Conclusion

[23] I find in the circumstances, the RPD's conclusion that there was no breach of natural justice, and hence its refusal to reopen Mr. Castro's refugee protection claim, were unreasonable. The February 15, 2019 decision will be set aside and the matter remitted to a differently constituted RPD for redetermination.

[24] Neither party proposed a serious question of general importance for certification.

JUDGMENT in IMM-1646-19

THIS COURT'S JUDGMENT is that the judicial review application is granted; the RPD's February 15, 2019 decision denying the Applicant's application to reopen his refugee claim is set aside and the matter is to be remitted to a differently constituted RPD for redetermination; there is no serious question of general importance for certification.

"Janet M. Fuhrer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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