

Federal Court



Cour fédérale

**Date: 20211224**

**Docket: IMM-209-20**

**Citation: 2021 FC 1470**

**Ottawa, Ontario, December 24, 2021**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**ISAAC KIOI MBUGUA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Mr. Mbugua, is challenging the decision of the Refugee Protection Division (“RPD”) to declare his refugee claim abandoned. The RPD coordinating member (“RPD Member”) found that the medical documentation filed by Mr. Mbugua to explain his

failure to attend his refugee hearing was vague and did not comply with the requirements for medical documentation set out in the rules for the tribunal.

[2] Mr. Mbugua argues that the RPD Member focused exclusively on the deficiencies of the medical documentation instead of considering other relevant factors, including his readiness to proceed with his refugee hearing. I agree with Mr. Mbugua. The RPD Member did not consider the test for abandonment set out in the jurisprudence and the other RPD rules directing that other relevant factors be considered, including a claimant's readiness to proceed.

[3] Based on the reasons set out below, I grant this application for judicial review.

## II. Factual Content

[4] Mr. Mbugua is a citizen of Kenya. He made a claim for refugee protection in January 2018. Mr. Mbugua's hearing before the RPD was scheduled to take place on December 9, 2019.

[5] Mr. Mbugua's former counsel appeared at his hearing at the scheduled time but Mr. Mbugua was not present. After waiting ten minutes, the RPD (a different member than the coordinating member whose decision is under review) allowed counsel to contact Mr. Mbugua. When the parties came back on the record, Mr. Mbugua's former counsel advised that his client told him he was sick and that he could not attend the hearing that morning.

[6] The RPD explained that Mr. Mbugua would have to provide proper medical documentation and adjourned the hearing for a week later, December 16, 2019, for a special hearing to determine whether the claim should be declared abandoned.

[7] Mr. Mbugua and his former counsel both attended the special hearing on December 16, 2019. Mr. Mbugua was a few minutes late for the special hearing, explaining to the RPD Member that there was an emergency on the subway that caused a 20-minute delay.

[8] The RPD Member had begun the hearing in Mr. Mbugua's absence by reviewing the documents that had been filed by Mr. Mbugua and whether they should be accepted despite being filed late. This discussion continued when Mr. Mbugua arrived, but the RPD Member decided not to make a final decision on the admission of the late documents until he had considered whether the claim should be abandoned. No final decision was made about the disclosure of the documents.

[9] Mr. Mbugua testified that on the morning of his refugee hearing, he had fainted. He explained that he tried to call his counsel but his counsel's phone had been off and that he was able to speak to counsel once counsel called him from the hearing room. Mr. Mbugua testified that he went to see a doctor that same day, who advised him that he had high blood pressure and sent him for further testing. Mr. Mbugua provided a medical absence note from his doctors' office indicating that he had attended the clinic for medical reasons on December 9, 2019, and that he was excused from work or study that day. Mr. Mbugua also provided a copy of a laboratory requisition for a follow-up test from his doctor.

[10] The RPD Member found that the medical documentation Mr. Mbugua submitted was not sufficient because it was vague and it did not mention high blood pressure or fainting. While the requisition form stated that the clinic did a test for prostate levels, this did not corroborate Mr. Mbugua's explanation for the reason for his non-attendance at his hearing. When asked about this discrepancy between the test requested and the condition described, Mr. Mbugua explained that there had been a further requisition for the blood pressure issue that could be provided. The RPD Member decided that they would only consider what had been filed to date.

[11] Relying on Rule 65(5) of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules], the RPD Member found that the medical documentation did not comply with the requirement that the letter provide the "particulars of the medical condition... that prevented the claimant from ... appearing for the hearing of the claim..." The RPD Member concluded that Mr. Mbugua failed to give a "reasonable explanation for not attending last week's hearing."

[12] In a written decision, dated January 23, 2020, the RPD Member confirmed their determination that had been given orally at the special hearing on December 16, 2019, and ordered that Mr. Mbugua's refugee claim be declared abandoned.

### III. Issues and Standard of Review

[13] The only issue raised on this judicial review is with respect to the RPD Member's decision to declare the Applicant's refugee claim abandoned. Both parties agree that this decision is to be reviewed on a reasonableness standard. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] confirmed that

reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

[14] The *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] provides that a refugee claim can be declared abandoned if the RPD is of the view that the claimant is “in default of the proceedings, including by failing to appear for a hearing, to provide information required by the [RPD] or to communicate with the [RPD] on being requested to do so” (s 168(1) of IRPA).

[15] The decision to declare a refugee claim abandoned has severe consequences for a claimant. They lose the opportunity to present their claim for protection at a hearing before the RPD. It puts an end to their claim for refugee protection (*Ali v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1107 at para 9).

[16] Before declaring the proceeding to be abandoned, the RPD must give a claimant an opportunity to explain why their case should not be declared abandoned. In this case, the RPD scheduled a special hearing, as is required by Rule 65(1)(b) of the RPD Rules, for December 16, 2019. It was at the December 16, 2019 hearing that Mr. Mbugua was given an opportunity to testify about the reason he failed to appear at his refugee hearing initially scheduled for the week prior.

[17] This Court's jurisprudence has consistently held that the key consideration for declaring a refugee claim abandoned is "whether the refugee claimant's conduct amounts to an expression of intention by that person that he or she does not wish or had shown no interest to pursue his or her claim with diligence" (*Octave v Canada (Minister of Citizenship and Immigration)*, 2015 FC 597 at para 18 [*Octave*]; *Nanava v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1118 at para 12 [*Nanava*]; *Li v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1099 at para 31 [*Li*]).

[18] The RPD Rules also set out that in deciding whether a proceeding should be declared abandoned, the RPD must consider "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" (Rule 65(4)).

[19] The RPD Rules also provide guidance on the requirements for medical documentation where a claimant is alleging their default in the proceeding is because of a medical condition. Rule 65(6)(a) states that the medical certificate must set out "the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant from... appearing for the hearing of the claim..." Rule 65(7) provides that where a medical certificate is not provided as required, the claimant must provide in their explanation for not attending the hearing, the particulars of their medical condition, the reason why the condition prevented them from attending the hearing, and the steps taken to obtain medical documentation.

[20] The RPD Member in this case relied exclusively on the rules relating to the requirements for medical documentation filed in abandonment proceedings. There is no consideration of the claimant's readiness to proceed or whether his actions indicated that he had "shown no interest to pursue his... claim with diligence" (*Octave* at para 18).

[21] In this case, the evidence in the record indicates: 1) the claimant had filed a Basis of Claim form; 2) the claimant's counsel attended his first hearing, expecting to proceed; 3) the claimant communicated with his counsel at his first hearing explaining that he was not well and could not attend; 4) the claimant attended a medical clinic on the day he failed to attend his hearing and provided a note from the medical clinic that explained he should be excused from work or study that day; 5) though filed late, he attempted to file documents in support of his claim; 6) the claimant appeared with his counsel at his special hearing, explaining that he had fainted on the day of the initial hearing and that further documentation on his medical condition should have been included with the package of documents filed and could be provided; and 7) the claimant was ready to proceed with his refugee claim on the day of the special hearing, a week after his initial hearing was scheduled.

[22] The RPD Member did not reference the issue of whether the claimant was ready to proceed or whether his actions demonstrated that he had shown "no intention" to pursue his claim with diligence, despite this being a key consideration as set out in this Court's jurisprudence and in Rule 65(4) of the RPD Rules. The Respondent did not reference or respond to the Applicant's arguments citing this Court's jurisprudence on abandonment proceedings; nor

did the Respondent explain why the RPD did not have to take into account the other rules relating to abandonment proceedings, such as Rule 65(4).

[23] As was the case in *Octave* (paras 23, 24) and *Nanava* (para 12), I find that the RPD Member took an unduly narrow approach to the issue by focusing exclusively on the deficiencies in the medical documentation, failing to consider any other factors, including Mr. Mbugua's readiness to proceed.

[24] Similar to what Justice Norris found in *Li*, I find that denying Mr. Mbugua an opportunity to have his claim for refugee protection heard on the merits by the RPD is disproportionate to his "default in the proceeding", particularly when "considered against the backdrop of the objectives of the IRPA with respect to refugees" (para 38).

[25] Neither party raised a question for certification and I agree that none arises.

[26] As noted by the Respondent, the application improperly names as Respondent the Minister of Citizenship and Immigration Canada. It will be ordered amended with immediate effect to name the proper Respondent, the Minister of Citizenship and Immigration.

[27] Mr. Mbugua's application for judicial review is allowed. The RPD's determination that the claim was abandoned is set aside and, like in *Octave* (para 27) and *Nanava* (para 16), the RPD is directed to determine the Applicant's refugee claim on the merits before a different panel member.



**JUDGMENT IN IMM-209-20**

**THIS COURT'S JUDGMENT is that:**

1. The application is allowed;
2. The decision of the RPD to declare the Applicant's refugee claim abandoned is set aside.
3. The RPD is directed to determine the Applicant's refugee claim before a different panel member;
4. The style of cause is amended to name the Respondent as the Minister of Citizenship and Immigration;
5. No serious question of general importance is certified.

"Lobat Sadrehashemi"

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Judge

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

**DOCKET:** IMM-209-20

**STYLE OF CAUSE:** ISAAC KIOI MBUGUA v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** DECEMBER 16, 2021

**JUDGMENT AND REASONS:** SADREHASHEMI J.

**DATED:** DECEMBER 24, 2021

**APPEARANCES:**

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FOR THE APPLICANT,  
ON HIS OWN BEHALF

Aleksandra Lipska

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