Federal Court Cour fédérale

Date: 20240301

Docket: IMM-3229-23

Citation: 2024 FC 354

Vancouver, British Columbia, March 1, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CENGIZ AVCI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD], originally issued without reasons on February 8, 2023, and amended to include reasons on February 21, 2023 [Decision], denying the Applicant’s request to reopen a refugee claim pursuant to section 62(6) of the *Refugee Protection Division Rules*, SOR/2012-256 [*Rules*], after the RPD had determined his claim to have been abandoned.

[2] To succeed in his reopening application, section 62(6) of the *Rules* required the Applicant to establish before the RPD a failure to observe a principle of natural justice in the process leading to the determination of abandonment. He argued that he had not received notice of the abandonment hearing that led to that determination. In the Decision, the RPD identified no failure of natural justice, because the required notice was sent to the Applicant's last known address.

[3] As explained in greater detail below, this application for judicial review is allowed, because the Decision does not demonstrate analysis supporting the RPD's conclusion that the notice was sent.

II. Background

[4] The Applicant is a citizen of Turkey. He fled Turkey to seek political asylum based on his Kurdish identity and his support of the Peoples' Democratic Party.

[5] The Applicant left Turkey on March 21, 2022, and entered the United States [US] through Mexico on March 30, 2022. He was detained by US immigration authorities for 21 days. The Applicant did not make an asylum claim in the US.

[6] The Applicant entered Canada on April 15, 2022, via the Niagara Falls Rainbow Bridge. The Canada Border Services Agency [CBSA] permitted the Applicant to file a refugee claim under the *Safe Third Country Agreement*, because he has three brothers in Canada.
On August 19, 2022, the Applicant received a Refugee Claimant ID at the CBSA Office in Mississauga, Ontario.

[7] The Applicant did not retain a lawyer to help him with his refugee claim, but relied instead on the assistance of his three brothers, who had previously been through the refugee process in Canada, although many years ago.

[8] On August 23, 2022, the Applicant's claim for refugee protection was referred to the RPD, and he received a number of forms and documents [the Referral Package]. One of the documents in the Referral Package was a *Confirmation of Referral and Notice to Appear*, which states that the RPD must receive the Applicant's completed Basis of Claim [BOC] form no later than 15 days after the date the claim was referred to the RPD. The *Confirmation of Referral and Notice to Appear* also states:

> If the RPD does not receive your Basis of Claim Form on time, you must appear on September 16, 2022 at 9:00 am, at the same location indicated above, to explain why your Basis of Claim Form was not received by the RPD within the specified period.

[9] The Applicant did not submit a BOC. The Certified Tribunal Record [CTR] includes a document entitled "Notice to Appear - Abandonment of a Claim for Refugee Protection", bearing a date of October 19, 2022, and advising the Applicant that a special hearing would be held on November 18, 2022, to allow him to explain why he did not submit his BOC [Notice to Appear]. The Notice to Appear states: "If you do not appear at the special hearing, the RPD may declare your claim abandoned. If your claim is declared abandoned, this means that your refugee protection claim has ended."

[10] At the bottom of the Notice to Appear, following an indication that the document was signed by a Registry Support Assistant for the Registrar of the RPD, appears a reference to the

document having been transmitted by regular mail to the Applicant, at an address in Brampton, Ontario, on October 19, 2022. It is not disputed that this was the correct address for the Applicant.

[11] The Applicant did not appear at the special hearing. On November 21, 2022, the RPD sent the Applicant a notice advising him that the RPD had determined his claim to be abandoned [Notice of Decision]. The Applicant received the Notice of Decision at the end of November 2022.

[12] The Applicant filed an application to reopen the claim, dated January 3, 2023. In that application, the Applicant stated that he did not receive the Notice to Appear, although he did receive the Notice of Decision at the end of November 2022, which informed him that his claim had been abandoned. The Applicant also explained that he did not have legal assistance for the refugee claim process and had been relying on his brothers' experience and knowledge of the refugee claim process from over 20 years ago. The application materials also highlighted the Applicant's inability to speak English and poor mental health due to his persecution in Turkey and his detainment in the US.

[13] In February 2023, in the Decision that is the subject of this application for judicial review, the RPD rejected the Applicant's application to reopen his claim.

III. Decision under Review

[14] The RPD referred to the Applicant's submission that he was unaware that he could access Legal Aid to obtain free legal services, as well as his submission that he was unable to submit a

completed BOC form and attend the special hearing due to his lack of assistance in Canada, his inability to speak English, outdated advice from his brothers in Canada, and his poor mental health. The RPD noted the Applicant's statement, in his affidavit included with this application, that he did not know he had to submit his BOC within a specified time. The RPD also noted the Applicant's statement that he did not appear for the show cause hearing, because he did not receive any notification to appear for the hearing, although he did receive the notification that his claim had been abandoned.

[15] The RPD observed that it must not allow an application to reopen an application unless it was established that there was a failure to observe a principle of natural justice.

[16] In analysing whether a failure of natural justice had occurred, the RPD considered that the Applicant did not appear at the hearing held on November 18, 2022, and that the Notice to Appear was sent to the Applicant's most updated address on file, in Brampton, Ontario.
The RPD also noted that the Notice of Decision was sent to the same Brampton address and that the Applicant had confirmed receipt thereof.

[17] The RPD then observed that it is not the RPD's function, at a hearing for an application to reopen, to consider issues that should have been raised in a judicial review application of the abandonment hearing. The RPD found there was no failure to observe a principle of natural justice on the part of the RPD, as the required notice was sent to the last known address of the Applicant.

[18] The RPD also considered the timing of the application to reopen and found that there had not been a considerable delay, given the intervention of the holiday period, but concluded that the lack of delay did not impact its finding that there was no breach of natural justice.

IV. Issues

[19] The sole issue for the Court's determination in this application for judicial review is whether the Decision was reasonable. As suggested by that articulation of the issue, the Decision is to be reviewed on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*]).

V. Analysis

[20] Consistent with the Respondent's position in this application, I read the Decision as based on the RPD concluding that the Applicant had received the Notice to Appear such that, having been afforded an opportunity to be heard as to why his refugee claim should not be abandoned, there had been no breach of the principles of natural justice or procedural fairness.

[21] The Applicant submits that the Decision is unreasonable, because it lacks the intelligible justification required by *Vavilov* (at para 98), in that it does not engage with the Applicant's evidence that he did not receive the Notice to Appear.

[22] The Respondent argues that, as there was evidence that the Notice to Appear had been sent to the Applicant's correct address, there was a presumption that he received it, and the RPD did not accept that his bare assertion that he did not receive it served to rebut this presumption, particularly given that the Applicant confirmed receipt of other correspondence that had been

sent by the same method. The Respondent submits that this reasoning is intelligible and provides the justification required to withstand reasonableness review.

[23] In support of these submissions, the Respondent refers the Court to authority that informs the required analysis when there is a dispute as to whether a document has been received. In *Ghaloghlyan v Canada (Citizenship and Immigration)*, 2011 FC 1252 [*Ghaloghlyan*], the Court found the relevant principle to be as follows: upon proof on a balance of probabilities that a document was sent to an applicant, a rebuttable presumption arises that the applicant received it, and the applicant's statement that it was not received, on its own, does not rebut the presumption (at para 8).

[24] While the Decision does not expressly set out an analysis applying this principle, I agree with the Respondent that this could well be the reasoning that is implicit in the Decision. However, the Applicant emphasizes that the rebuttable presumption underlying this analysis only arises upon proof on a balance of probabilities that the relevant document was sent. *Ghaloghlyan* explained this requirement as follows (at paras 9-10):

> 9. Thus, the question becomes: what does it take to prove on a balance of probabilities that a document was sent? In my opinion, to find that a document was "correctly sent", as that term is used in *Kaur*, it must have been sent to the address supplied by an applicant by a means capable of verifying that the document actually <u>went on its way</u> to the applicant.
>
> 10. For example, with respect to documents, proving that a letter went on its way is verified by sending it by registered mail and producing documentation that this was the manner of sending, or by producing an affidavit from the person who actually posted the letter. Proving that a fax went on its way is verified by producing a fax log of sent messages confirming the sending. Proving that an email went on its way is verified by producing a printout of the sender's e-mail sent box showing the message concerned was addressed to the e-mail address supplied for

> sending, and as no indication of non-delivery, the e-mail did not "bounce back". Other evidence that a document went on its way might suffice; the determination in each case depends on the evidence advanced.
>
> (Emphasis in original)

[25] Invoking this explanation, the Applicant argues that the case at hand lacks the required evidence that the Notice to Appear "went on its way" to the Applicant. The Applicant submits that, in the absence of evidence that the Notice to Appear was actually sent to the Applicant, the rebuttable presumption that he received it does not apply. The Applicant notes that the evidence does not include, for instance, an affidavit from the person who actually mailed the document, as contemplated by *Ghaloghlyan* at paragraph 10.

[26] The Respondent submits that, although the arguments in this application for judicial review surround issues of procedural fairness, it was the RPD, in making the Decision on the reopening application, that was required to make the finding as to whether procedural fairness requirements were met. The Court's role is not to assess procedural fairness, employing the standard of correctness, but rather to assess whether the RPD's procedural fairness analysis was reasonable. In that context, the Court's review of the Decision must be based on the evidence that was before the RPD, and it would not have been available for the Respondent to adduce evidence in this judicial review such as an affidavit from the Registry Support Assistant who signed the Notice to Appear, or whoever else was responsible for mailing the document, to establish that it was sent on its way.

[27] I agree with these submissions by the Respondent. However, it remains the case that the evidence before the RPD, as to whether the Notice to Appear was actually mailed, is limited to the information that appears on the face of the document. As noted earlier in these Reasons, the

reference to it being transmitted by regular mail to the Applicant appears at the bottom of the document, following the location where the Registry Support Assistant signed. In that respect, this document differs from the Notice of Decision, which advised the Applicant that has his claim had been abandoned and which he acknowledges receiving. As the Respondent noted at the hearing, the Notice of Decision is accompanied in the CTR by a document entitled "Statement that a Document was Provided", which contains an express statement that the Notice of Decision was served on a particular date and which a Registry Officer appears to have signed at the bottom.

[28] I pause to emphasize that it is not the Court's role to analyse this evidence so as to conclude whether or not it serves to establish that the Notice to Appear was mailed to the Applicant. That was the role of the RPD, and the Court's task is to assess the reasonableness of the RPD's analysis. The difficulty is that the Decision does not demonstrate any such analysis. It is not possible to understand how the RPD concluded that the evidence established that the Notice to Appear was sent on its way, so as to support invocation of the rebuttable presumption that the Applicant had received it.

[29] In the absence of any such analysis, I agree with the Applicant's position that the Decision is unreasonable and that this application for judicial review should be allowed.

[30] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-3229-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision is set aside, and the matter is returned to a different member of the Refugee Protection Division for redetermination.

2. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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