Date: 20071219

Docket: IMM-623-07

Citation: 2007 FC 1337

Ottawa, Ontario, December 19, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

YUN QING LIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant failed to file a personal information form in support of her claim for refugee protection within the prescribed 28 days. She was provided with an opportunity to present an explanation for her default at a hearing convened for that purpose. A member of the Refugee Protection Division found that her explanation was not persuasive. The applicant seeks to have the decision overturned on the grounds that she was denied competent interpretation and fairness in the conduct of the hearing and that the Board member's reasons disclose errors of fact and law.

[2] Ms. Lin arrived on November 3, 2005 from China via Malaysia and the United Kingdom and made her claim at Pearson airport. She had been previously refused a visa to enter Canada and was travelling on a false passport. At the port of entry she was provided with the personal information form ("PIF") and was told that it was to be completed and returned by December 1, 2005. The port interview was conducted with the aid of a Mandarin interpreter and there is no issue as to the applicant's knowledge of the PIF deadline.

[3] The applicant had limited funds when she arrived in Canada, and spent time trying to find inexpensive accommodation and work in order to afford to pay for legal assistance in pursuing her claim. The deadline for returning the PIF passed before she was able to do so. An abandonment hearing was scheduled for December 14th, but notices of that hearing, sent to her last known address, were returned as she had moved.

[4] The applicant then obtained the assistance of a lawyer despite her lack of funds, and through him learned that an abandonment hearing had been rescheduled for December 19, 2005. The applicant and her counsel attended the abandonment hearing with her completed PIF. A Board certified Mandarin interpreter was present to assist the applicant with her testimony.

[5] The hearing opened with counsel's submissions summarizing the applicant's explanation for defaulting on the deadline. The member then proceeded to ask questions of the applicant. At the close, counsel presented further submissions. The transcript of the hearing shows that there was some confusion in translation of the member's questions and the applicant's answers.

[6] In a decision issued on February 28, 2006 the Board member found that Ms. Lin was aware of the deadline for filling the PIF and that she did not provide any persuasive explanation for the delay. The member further found that Ms Lin did not demonstrate the requisite diligence in prosecuting her claim. Notice of abandonment was thereafter issued.

ISSUES:

1. Did the member deny the applicant procedural fairness?
2. Was the applicant provided competent interpretation?
3. Did the member err in declaring the claim abandoned?

STATUTORY PROVISIONS

Refugee Protection Division Rules, SOR/2002-228

58. (1) A claim may be declared abandoned, without giving the claimant an opportunity to explain why the claim should not be declared abandoned, if	**58.** (1) La Section peut prononcer le désistement d'une demande d'asile sans donner au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé si, à la fois :
(a) the Division has not received the claimant's contact information and their Personal Information Form within 28 days after the claimant received the form; and	a) elle n'a reçu ni les coordonnées, ni le formulaire sur les renseignements personnels du demandeur d'asile dans les vingt-huit jours suivant la date à laquelle ce dernier a reçu le formulaire;
(b) the Minister and the claimant's counsel, if any, do not have the claimant's contact information.	b) ni le ministre, ni le conseil du demandeur d'asile, le cas échéant, ne connaissent ces coordonnées.
(2) In every other case, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned. The Division must give this opportunity	(2) Dans tout autre cas, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé. Elle lui donne cette possibilité :

(a) immediately, if the claimant is present at the hearing and the Division considers that it is fair to do so; or (b) in any other case, by way of a special hearing after notifying the claimant in writing.	a) sur-le-champ, dans le cas où il est présent à l'audience et où la Section juge qu'il est équitable de le faire; b) dans le cas contraire, au cours d'une audience spéciale dont la Section l'a avisé par écrit.
(3) The Division must consider, in deciding if the claim should be declared abandoned, the explanations given by the claimant at the hearing and any other relevant information, including the fact that the claimant is ready to start or continue the proceedings.	(3) Pour décider si elle prononce le désistement, la Section prend en considération les explications données par le demandeur d'asile à l'audience et tout autre élément pertinent, notamment le fait que le demandeur d'asile est prêt à commencer ou à poursuivre l'affaire.
(4) If the Division decides not to declare the claim abandoned, it must start or continue the proceedings without delay.	(4) Si la Section décide de ne pas prononcer le désistement, elle commence ou poursuit l'affaire sans délai.

ARGUMENT & ANALYSIS

Standard of Review:

[7] There is no dispute between the parties that the standard for review of an abandonment decision is reasonableness. My colleague Justice François J. Lemieux reached that conclusion after having conducted a pragmatic and functional analysis in the context of an abandonment decision made under the former legislation: *Ahamad v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 109, 184 F.T.R. 283. As determined in *Anjun v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 496, [2000] F.C.J. No. 617 and *Xu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 718, [2006] F.C.J. No.915, that analysis and conclusion remains valid under the present legislation.

[8] In applying the reasonableness standard, as stated by Justice Johanne Gauthier in *Xu*, above, at paragraph 32, a Court cannot simply substitute its own appreciation of the evidence but must determine whether it is supported by reasons that can withstand a “somewhat probing examination”.

[9] Questions of procedural fairness are reviewed against a standard of correctness. As stated in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056, at paragraph 53, the Court is required to isolate any act or omission relevant to procedural fairness. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances or has breached his duty.

[10] The question of the adequacy of translation is one of procedural fairness and no deference is due the tribunal: *Saravia v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1296, [2005] F.C.J. No. 1575 at paragraph 3.

Was the applicant denied procedural fairness?

[11] The applicant submits that the member failed to listen appropriately to the applicant, her counsel or the interpreter. Bias or a reasonable apprehension of bias is not alleged but the applicant states that the member appears to have created a climate of annoyance and impatience. Many of the questions posed to the applicant were not relevant to the issue of abandonment, in the applicant’s view, and the conduct of the member amounted to ‘gross interference in the orderly presentation of the case’: *Reginald v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 568, [2002] F.C.J. No. 741.

[12] The respondent contends that these complaints are not made out by a careful review of the hearing transcript. The transcript and the member's reasons disclose that the member accurately understood the applicant's explanations for her default. An argument based upon the applicant's subjective view of the member's state of mind during a hearing provides no basis for legal analysis. The member said nothing inappropriate during the hearing but was seeking direct answers to questions to which the applicant gave meandering non-responsive testimony.

[13] The member at one point during the hearing referred to the Port of Entry notes which counsel for the applicant had not received at that point. The applicant submits that she was denied a fair hearing in that the member did not then provide copies of the notes to her counsel or adjourn the hearing to allow him to obtain them. The respondent's position is that the member was not required to stop the hearing to enable counsel to obtain documentation counsel should already have requested. Such accommodation may be provided, but there is no requirement to do so.

[14] I agree with the respondent that the transcript does not disclose the use of inappropriate language or an intemperate attitude on the part of the member. There were difficulties in obtaining the applicant's evidence at the outset of the proceedings but this did not result in the denial of a fair hearing. The member's questions appear from the transcript to have been related to her attempts to clarify contradictory or unclear statements by the applicant. I am satisfied that as the hearing progressed, the applicant was fully able to provide her explanation for why she had not filed the PIF on time. Her testimony was consistent with the summary provided by her counsel at the outset and with his closing submissions.

[15] As for the relevance of the member's questions, some of them do not appear on their face to relate to the issue of abandonment but the member was entitled to explore the applicant's credibility to determine whether her explanation was to be believed. To that end, the member asked questions about the applicant's passports, the route that she had travelled and her accommodation in Toronto. It was in these areas that most of the confusion arose, and the applicant's answers seemed non-responsive and inconsistent.

[16] In *Reginald*, above, cited by the applicant, Justice Frederick E. Gibson dealt with the review of a refugee determination decision in which the Board members repeatedly intervened in counsel's efforts to elicit his client's testimony and chastised both counsel and the applicant. The Court found that the members exhibited an "unwarranted degree of impatience" and "an almost palpable disdain for counsel's presentation" which was also evidenced in the tribunal's reasons for its decision. In my view, there was nothing comparable to these concerns in the member's conduct of the hearing in this case or in her reasons.

[17] I also agree with the respondent's submission that while it may have been courteous to have done so, procedural fairness did not require that the member provide a copy of the Port of Entry notes to counsel at the hearing or adjourn it to allow him to obtain them. The notes were referenced briefly in relation to the fact that the applicant had acknowledged having an aunt in the US. If they were material to the issues at the hearing, counsel should have requested them in advance. Regardless, it does not appear that the applicant suffered any prejudice as a result.

Was the applicant provided competent interpretation?

[18] The applicant submits that the services provided to Ms. Lin were insufficient to provide "continuous, precise, competent, impartial and contemporaneous" interpretation as required for a fair hearing under section 14 of the *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11: *R. v. Tran*, [1994] 2 S.C.R. 951, 117 D.L.R. (4th) 7, applied to refugee determination hearings in *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] F.C.J. No. 916.

[19] In *Tran*, a case dealing with the rights of a criminal accused to adequate interpretation, the Supreme Court held that interpretation must be held to a high standard, but not to a standard of perfection given that it is a human endeavour often undertaken in less than ideal circumstances. In *Mohammadian,* the Court of Appeal affirmed that the applications judge had been correct to apply the *Tran* principles to refugee determination proceedings.

[20] The respondent's position is that the problems with translation related to facts which were not in issue and which formed no part of the basis for decision.

[21] Chief Justice Antonio Lamer stressed at paragraph 74 of *Tran* that if a breach of the *Charter* right is established, actual prejudice need not be demonstrated. I take that to mean in this context that the applicant need not show that the result would have been different had she received more effective interpretation.

[22] In *Saravia,* above, the hearing before the Refugee Protection Division had been conducted by videoconference with the panel and interpreter in one city, the claimant and her counsel in another. There was considerable difficulty with sound quality. A second interpreter was brought in who struggled with several words going to the heart of the claim. Justice Eleanor R. Dawson found that there were omissions of substance in the interpretation of the claimant's testimony. It could not be said that the interpretation had been "continuous, precise and competent" and the quality and fairness of the hearing was very much in doubt.

[23] That is not the conclusion that I have reached from reading the transcript in this matter, despite the very able argument of counsel for the applicant.

[24] At one point, the transcript shows that counsel for the applicant, who speaks both English and Mandarin, interjected stating "I think there is a little bit of difference between your question and her translation." The difference related to when the applicant had obtained her valid passport from the Chinese government. While it might have taken a few different questions to get the applicant's story clearly before the member, I conclude that the minor translation issues did not result in any omission of the substance of the applicant's explanation. The applicant was, therefore, provided with sufficient translation for the purpose of the hearing.

Did the member err in declaring the claim abandoned?

[25] The final contention of the applicant is that the member's decision was unreasonable. As I noted at the outset, the standard of my review of that decision is patent unreasonableness. I can,

therefore, not overturn the decision unless it was perverse or made without regard to the evidence. It is not sufficient that I see the reasonableness of the applicant's submission.

[26] In the instant case, I do not find the member's decision perverse, and the applicant has failed to show how it was made without due regard to the evidence she presented for the hearing. The decision was not patently unreasonable, and must stand. No serious questions of general importance were submitted and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-623-07
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