Federal Court  Cour fédérale

Date: 20090521

Docket: IMM-4526-08

Citation: 2009 FC 520

OTTAWA, Ontario, May 21, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

JEAN CLAUDE KABENDE EMANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), of the decision by a officer of the Immigration and Refugee Board (the "Board"), dated September 19, 2008, refusing the applicant's request to have his refugee claim reopened.

[2] The applicant, who is a citizen of Cameroon, arrived in Canada on September 11, 2007. He filed his claim for refugee protection two days later.

[3] The applicant retained the services of Saintil Law Office to represent him in his claim. His Personal Information Form ("PIF") was duly submitted by a Legal Assistant of the Saintil Law Office on October 11, 2007, with the column for counsel's contact information mistakenly left blank.

[4] Thereafter, the applicant moved. He advised the Law Office of his legal counsel and the Board of his new address. Later, the applicant again relocated, informing his counsel by e-mail of the change. His e-mail, however, ended up in counsel's "junk mail" and was never read. Counsel did not, therefore, notify the Board of the change of address.

[5] In December 2007, the applicant contacted Citizenship and Immigration Canada ("CIC"), informing CIC of his new address and requesting an application for a work permit.

[6] On April 21, 2008, the Board mailed the applicant a notice to appear on May 9, 2008 for the purpose of setting a date for his refugee claim. He did not appear.

[7] On May 12, 2008, the applicant was sent a notice to appear on May 23, 2008 at an abandonment hearing. A further notice was sent on June 19, 2008 asking him to appear on July 4 for a hearing to allow him to explain why he did had not been present on May 23. When the applicant again did not appear, his claim was declared abandoned.

[8] Neither the applicant nor his counsel received any of the above notices, because the Board did not have the applicant's up-to-date contact information and was not aware that he had legal representation.

[9] On September 8, 2008, the applicant called counsel to inform her of a letter he had received indicating that there was a removal order in force against him.

[10] Counsel responded by bringing an application under Rule 55(1) of the *Refugee Protection Division* Rules, SOR/2002-228 (the "Rules"), requesting that the applicant's claim be reopened. On September 29, 2008, the application was denied. It is that decision that is the subject of the present review.

[11] In a letter dated September 29, 2008, the Board informed the applicant that his request to have his claim reopened had been rejected. In brief reasons, the Board wrote:

> The claimant was well aware of his rights and obligations. In particular, the requirement to notify the Board of any change of address having completed the correct form in October of 2007. The claimant had counsel when he completed his form, who is experienced and knowledgeable about the rules and regulations of the rules and regulations of the Board. Counsel indicates that on two occasions, they have erred. First, is in not indicating that they were, in fact, counsel of record on the Personal Information Form, and the second occasion, when a notice of change of address was sent to counsel via email, which was apparently viewed as junk mail and never actioned. However, the claimant also erred in not informing the Board of his new address as he had done previously.
>
> Ultimately, it is the claimant's responsibility for the actions counsel for which he retains [*sic*]. In this claim, the claimant was clearly aware that he had to notify the Board of his change of address in writing, and failed to do so.
>
> Based on the material presented, the request for a reopening of his case is dismissed.
>
> After a review of the file, no issues of natural justice have been found by the member.

[12] The applicant raises the following issues:

1. What is the correct standard of review with respect to the refusals of the Board to reopen refugee claims?
2. Whether refusal to open a refugee claim, where abandonment of the claim was caused solely by the error of the applicant's counsel, constitutes a breach of the principles of natural justice?
3. Whether the applicant acted with due care and intended to pursue his refugee claim at all times?
4. Whether the omission to provide the Board with the applicant's current address was solely the fault of applicant's counsel?
5. Whether the applicant should be made responsible for the errors of his counsel?

I would summarize the central issue of this claim as follows:

1. Under the circumstances of this particular case, did the Board's refusal to reopen the refugee claim constitute a breach of the principles of natural justice?

[13] The following provisions of the Rules are relevant to this proceeding:

55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	**55.** (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
…	…
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.
[…]	**[…]**
58. (1) A claim may be declared	**58.** (1) La Section peut

abandoned, without giving the claimant an opportunity to explain why the claim should not be declared abandoned, if

(*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

(*b*) the Minister and the claimant's counsel, if any, do not have the claimant's contact information.

(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

(*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.

(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

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) 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) ni le ministre, ni le conseil du demandeur d'asile, le cas échéant, ne connaissent ces coordonnées.

(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) 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) 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,

claimant is ready to start or continue the proceedings.	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.

[14] This application concerns a question of procedural fairness, and therefore will be reviewed on a standard of correctness (*Hamzai v. Canada (M.C.I.)*, [2006] F.C.J. No. 1408, 2006 FC 1108, at para. 15).

[15] At paragraphs 11, 12 and 13 of his affidavit, Josue Jacquelin, Law Clerk at the applicant's counsel's firm, sets out what I take to be the crux of the applicant's submission:

> I am hereby appealing to the Board not to prejudice Mr. Jean-Claude Kabende Emani as the Board's inability to contact him was through no fault of his but ours.
>
> Our Law office takes full responsibility for the omission to provide our contact information as the claimant's counsel and failure to receive the claimant's e-mail regarding his contact information.
>
> We hereby request that Mr. Jean-Claude Kabende Emani's claim be re-opened as he had no intention whatsoever of ever abandoning his refugee claim in Canada. Failure to re-open his refugee claim/application will make the claimant suffer irreparable harm and untold hardship that would unfairly render his statusless in Canada.

[16] For the following reasons, I am prepared to grant this application.

[17] According to subsection 55(4) of the Rules, an application to re-open a refugee claim must be allowed "if it is established that there was a failure to observe a principle of natural justice". It is also clear from subsection 58(1) that a claim may be declared abandoned where the Board has not received the claimant's contact information and PIF within 28 days of the claimant receiving the form and where the Minister and claimant's counsel do not have the claimant's contact information.

[18] In the present case, there is no dispute that the applicant submitted his PIF in a timely manner. The PIF included his contact information at the time. The problem is that the Board was not informed when the applicant changed his address for the second time, due to errors on the part of counsel. Nonetheless, the fact that the applicant's PIF was duly submitted to the Board removes him from the purview of subsection 58(2) and brings him within 58(3). This latter provision requires that "in every other case" the Board "must give the claimant an opportunity to explain why the claim should not be declared abandoned".

[19] The Board did all it could, under the circumstances, to give the applicant his right to be heard under subsection 58(3). It cannot be faulted in this regard. The fact remains, however, that the applicant did not have a meaningful opportunity to explain why his claim should not be declared abandoned because neither he nor his counsel received the notices sent by the Board.

[20] The jurisprudence appears to be clear that the central consideration in regard to abandonment proceedings is whether the applicant's conduct amounts to an expression of his intention to diligently prosecute his claim (*Ahamad v. Canada(M.C.I.)* (T.D.), [2000] 3 F.C. 109, [2000] F.C.J. no. 289, at para. 32). When presented with the application to have the claim re-opened, the Board was furnished for the first time with information explaining the applicant's

failure to appear, and demonstrating that it was due solely to administrative errors on the part of his counsel. In rejecting the application to reopen his claim, the Board failed to consider evidence before it of the applicant's conduct demonstrating his intention to earnestly pursue his claim. I am satisfied that the Board erred in seeing only part of the picture and neglecting this central consideration (*Albarracin v. Canada (M.C.I.)*, [2008] F.C.J. No. 1425, at para. 4).

[21] The facts in *Andreoli v. Canada (M.C.I.)*, [2004] F.C.J. No. 1349, 2004 FC 111, are not unlike those before me. In *Andreoli*, as here, the applicants were not themselves negligent but instead had trusted a representative who bore all responsibility for the procedural error. Justice Harrington, after citing *Ahamad*, *supra*, wrote at paragraph 16:

> In order to assess a case such as this, it is absolutely paramount to opt for a contextual approach and to avoid the mire of procedural dogma. I refer to the words of the Honourable Mr. Justice Pigeon in *Hamel v. Brunette*, [1977] 1 S.C.R. 147, 156, where he very aptly wrote that "procedure [should] be the servant of justice and not its mistress".

[22] In *Medawatte v. Canada (Minister for Public Safety and Emergency Preparedness)*, [2005] F.C.J. No. 1672, 2005 FC 1374, another decision by Justice Harrington, the following is set out at paragraph 10:

> There is a great deal of jurisprudence in these matters to the effect that a party must suffer the consequences of his or her own counsel. I subscribe to that view. If a case has been poorly prepared; if relevant jurisprudence was not brought to the attention of the Court in a civil case; if there was a bad choice in witness selection, the consequences fall on that party. Is there a difference, however, between malfeasance and non-feasance? In

> this case, it is not a question of lawyer doing something poorly. He did not do something he should have done. […]

[23] In this case, the evidence supports the applicant's contention that he did not intend to abandon his claim. Due to the acknowledged administrative oversights of his counsel, he was denied an opportunity to explain the circumstances of his failure to appear. The Board, in dismissing his application to re-open the claim, failed to consider the most central criterion and the applicant was deprived of a hearing of his claim on the merits.

[24] No question of general importance has been submitted for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed and the matter is returned for a new hearing before a different officer in accordance with the above reasons.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Kweku Ackaah-Boafo	FOR THE APPLICANT
Ms. Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kweku Ackaah-Boafo Barrister & Solicitor North York, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT