

Federal Court



Cour fédérale

Date: 20110928

Docket: IMM-1019-11

Citation: 2011 FC 1115

Ottawa, Ontario, September 28, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

MARCIA KING

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Marcia King challenging a decision by the Refugee Protection Division of the Immigration and Refugee Board (Board) dismissing her claim to refugee protection on the ground of abandonment. It is common ground that Ms. King failed to appear for a scheduling hearing set by the Board for January 10, 2011 and for a subsequent abandonment hearing set for January 24, 2011. Notices of those hearings were respectively sent on December 16, 2010 and January 13, 2011 by regular post to Ms. King's last known addresses.

[2] It is apparent from the record that Ms. King changed addresses on two occasions during the time the Board was attempting to notify her of its hearings. She deposes that on both occasions she informed the Board of the address changes but documentary corroboration was only produced with respect to her second move. Ms. King's affidavit states that she did not receive a copy of the Board's notice of the scheduling hearing and that she received the notice of the abandonment hearing a week after it had convened.

[3] Ms. King was unrepresented until she received the Board's belated notification of the abandonment hearing at which time she retained Mr. Rocco Galati to intervene on her behalf. Mr. Galati faxed a letter to the Board on February 1, 2011 advising that Ms. King had not received notice of the scheduling hearing and had received notice of the abandonment hearing a week after it had been scheduled. Mr. Galati asked that the scheduling hearing be reconvened.

[4] On February 2, 2011, the Board notified Ms. King that her claim had been declared abandoned. There is no indication in the record that Mr. Galati's letter of February 1, 2011 had been considered by the Board and the Board took no steps to accede to his request for a fresh scheduling hearing.

Issue

[5] Was there a breach of procedural fairness by the Board concerning the delivery of notice to Ms. King?

Analysis

[6] The determinative issue in the proceeding involves a principle of procedural fairness and the appropriate standard of review is correctness.

[7] During the hearing of this application, I raised the issue of when the abandonment decision was actually made and, in particular, whether it was made before or after the Board received Mr. Galati's letter of February 1, 2011. This was of concern because if the decision was made before counsel's submissions were received, the Board was arguably *functus* and unable to consider those submissions. On the other hand, if the decision was made on February 2, 2011, the Board would be required to consider Mr. Galati's submission before the abandonment decision was rendered. In the absence of an affidavit from the Board, the only reasonable inference to draw is that Mr. Galati's letter of February 1, 2011 was not considered before the decision letter was signed on February 2, 2011. Because of these concerns, I invited counsel for the parties to address this issue in writing.

[8] On August 19, 2011, counsel for the Respondent wrote to the Court to advise that an important document had been omitted from the Board's certified tribunal record (CTR). In addition, counsel for the Respondent presented an affidavit deposed by the Deputy Registrar of the Board, Michael Chelsky, disclosing, for the first time, that the Board's Abandonment Decision and Reasons had been inadvertently omitted from the CTR. That document disclosed that the Board member, Joel Bousfield, had declared Ms. King's claim to be abandoned on January 24, 2011 on the basis of her "no show" on that same day.

[9] It is disturbing that the single most important document in the possession of the Board was not included in its CTR. The Court and affected parties necessarily rely on the completeness of the records produced by administrative decision-makers. It is apparent that had this matter not been raised by the Court, the gap in the evidentiary record could have led to an error in the disposition of this application.

[10] It is now clear from the corrected record that Mr. Galati's letter of February 1, 2011 was received after the Board had rendered its abandonment decision. In accordance with the decision of the Federal Court of Appeal in *Tambwe-Lubemba v Canada (MCI)*, [2000] FCJ no 1874 (QL) (FCA), 264 NR 382, (cited for the first time by the Respondent's counsel with its supplementary submissions on August 19th) the Board was *functus* after January 24, 2011 and could not have considered Mr. Galati's letter of February 1st even if Mr. Bousfield had seen it.

[11] That, however, is not the end of the matter. I have Ms. King's affidavit which deposes that she did not receive the Board's notice of the scheduling hearing despite having provided the Board with a change of address notification. She also deposes that the Board's Notice of Abandonment Hearing was not received until seven days after the scheduled hearing date.

[12] The Respondent points to the lack of corroboration in connection with Ms. King's claim to have advised the Board of her first change of address. Nevertheless, she clearly did provide the Board with the change of address notification for her second move and she acknowledges belated receipt of the Board's notification of its abandonment hearing. It is also clear that she moved

quickly to retain experienced counsel to intervene on her behalf upon being belatedly advised of the abandonment hearing.

[13] Given the Board's performance in failing to produce a complete CTR in this case and Ms. King's sworn affirmations, the Board's resistance to hearing her case on the merits based on the supposed regularity of its administrative practices is surprising. Ms. King has established to my satisfaction that she was not advised of the abandonment hearing until after the date for her appearance had passed. That conclusion is based in part on the decision by Justice John D. Richard in *Zaouch v Canada (MCI)*, [1996] FCJ no 982 (QL) (TD), 64 ACWS (3d) 844 where he held:

6 It is clear that the applicant changed his address within the first few days of his arrival in Canada. The evidence that was provided by the respondent to show the subsequent address merely goes to establishing that which is uncontested: that the Board's computer had listed the applicant as residing on St. André. In the absence of any evidence that the applicant provided the St. André address, there is no reason to reject his sworn statement that the change of address was to rue St. Denis and that the Notice was sent to the wrong address presumably through some clerical error by the Board.

...

11 As I have stated above, the applicant is entitled, in the absence of any circumstances tending to cast doubt on it, to the benefit of his uncontradicted evidence that he submitted the correct change of address to the Board. It follows from this that the Notice of the abandonment hearing was sent to the wrong address and that the applicant was therefore denied a fair hearing in accordance with the rules of natural justice to determine whether he had abandoned his claim for refugee status.

12 The Refugee Division was in error in basing its decision not to re-open the claim on the finding that the applicant had not proven that he had taken the proper steps to advise the Board of his address. There is no evidence that the error was not the Board's own; there is no reason to doubt the credibility of the applicant or of this piece of evidence; therefore, there is no reason not to re-open the applicant's refugee claim.

[14] In addition to the above, I find that Ms. King's conduct in immediately retaining Mr. Galati upon being advised of the abandonment hearing but before notice of the abandonment decision was received, belies the Respondent's argument that she had received and simply ignored those notices.

[15] Procedural fairness required that Ms. King be afforded timely notice of these hearings: see *Keymanesh v Canada*, 2006 FC 641, [2007] 2 FCR 206. This is not a question of fault. Fairness requires effective notice and Ms. King did not receive it. The Board's decision is therefore set aside.

[16] I accept Mr. Galati's point that no purpose would be served by a re-visitation by the Board of the abandonment issue. It is quite obvious on the basis of my findings that Ms. King did not intend to abandon her claim. In accordance with the determination by Justice Sandra J. Simpson in *Atwal v Canada (MCI)*, 157 FTR 258 at para 29, [1998] FCJ no 1693 (QL) (TD), this matter is returned to the Board for a hearing of the Applicant's refugee claim on the merits before a different member of the Board.

[17] This may be a case for an award of costs. Mr. Galati will have 10 days to make a submission in writing with respect to costs and counsel for the Respondent will have 7 days to respond. Neither submission is to exceed 5 pages in length.

[18] Having regard to the disposition of this matter, the question posed by Mr. Galati for certification is moot. The Respondent declined to propose a certified question and no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the Board's abandonment decision is set aside. The Board is directed to proceed to a hearing of the Applicant's refugee claim on the merits before another panel of the Board.

THIS COURT RESERVES ITS JUDGMENT with respect to a potential award of costs pending the receipt of further submissions in writing by the parties.

"R.L. Barnes"

Judge

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1019-11
STYLE OF CAUSE: KING v MCI
PLACE OF HEARING: Toronto, ON
DATE OF HEARING: August 18, 2011
REASONS FOR JUDGMENT: BARNES J.
DATED: September 28, 2011

APPEARANCES:

Rocco Galati FOR THE APPLICANT
Teresa Ramnarine FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rocco Galati Law Firm FOR THE APPLICANT
Toronto, ON
Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, ON