

Federal Court



Cour fédérale

Date: 20121210

Docket: IMM-2841-12

Citation: 2012 FC 1455

Ottawa, Ontario, December 10, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

VALENTINA MORYAKINA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2007, Ms Valentina Moryakina claimed refugee protection in Canada based on her fear of political persecution in Russia. Ms Moryakina protested against the lack of compensation for property she and her husband lost during a flood in 2002. She alleges that Russian authorities have pursued her and her husband to punish them for their political stance. Her husband remains in Russia.

[2] A panel of the Immigration and Refugee Board dismissed Ms Moryakina's claim, concluding that her version of events was simply not credible. After the Board rendered its decision, Ms Moryakina learned that her brother-in-law was beaten, shot and drowned in Russia. She believes that authorities mistook her brother-in-law for her husband. In addition, she found out that her husband had been stabbed. She obtained medical reports confirming both incidents.

[3] In 2011, Ms Moryakina filed an application for a pre-removal risk assessment (PRRA). In her application, she mentioned that she would be submitting the medical reports relating to her husband and brother-in-law. She hired a lawyer to submit her PRRA application. She says she gave the medical reports to him.

[4] The officer who decided Ms Moryakina's PRRA application noted that the promised medical reports were never filed. There being no new evidence before her, and no documentary evidence supporting Ms Moryakina's allegation of risk, the officer dismissed her application.

[5] Ms Moryakina complained to the Law Society of Upper Canada about her lawyer's failure to file the medical reports in her PRRA application. The lawyer responded by stating that Ms Moryakina had never given him those reports. The Law Society, finding the evidence of Ms Moryakina and her lawyer to be conflicting, concluded that there was insufficient evidence of professional misconduct and dismissed the complaint.

[6] Ms Moryakina now seeks judicial review of her PRRA decision on the basis that she was denied natural justice because of her lawyer's incompetence. She asks me to overturn the officer's decision and order another officer to reconsider her application.

[7] I am not satisfied that a breach of natural justice has occurred. Therefore, I must dismiss this application for judicial review.

[8] The sole issue is whether a miscarriage of justice occurred due to the lawyer's incompetence.

II. Was there a miscarriage of justice?

1. The test

[9] To succeed, Ms Moryakina must show that her lawyer's incompetent behaviour resulted in a miscarriage of justice (*R v GDB*, 2000 SCC 22, at paras 26-27). Her allegations must be specific and supported by the evidence (*Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196, at para 36). She must also show that the lawyer's conduct caused her prejudice in the sense that the outcome of the decision would likely have been different if the lawyer had acted competently (*Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605, at para 9). This is a very strict test (*Betesh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 173, at para 15).

2. The evidence

[10] The Law Society found the evidence to be equivocal. Accordingly, it could not conclude that Ms Moryakina had made out a case of incompetence against her lawyer. Ms Moryakina argues that the Law Society's conclusion is not binding on me, and that the PRRA officer's decision could well have been different had the medical reports been filed.

[11] I agree that the Law Society's conclusion is not binding on me; equally it cannot be ignored (*Dukuzumuremyi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 278, at para 10; *Teganya v Canada (Minister of Citizenship and Immigration)*, 2011 FC 336 at para 34). The relevant evidence was put before the Law Society, and it concluded that Ms Moryakina had not established her complaint. Its conclusion was that incompetence had not been proved. Ms Moryakina neither responded to her lawyer's evidence nor appealed the Law Society's conclusions. Essentially the same evidence is before me, and that evidence goes both ways.

[12] Ms Moryakina argues that the evidence supports her claim that her lawyer was incompetent. First, the lawyer attached a blank "use of representative" form to Ms Moryakina's PRRA application even though he had been retained to act on that application. Second, the lawyer said that he included in the application a letter from Ms Moryakina's father, but the record shows no such letter was provided. Third, in 2010, the lawyer acknowledged receipt of a payment of \$1,000 from Ms Moryakina for the filing of an application for leave and judicial review of the decision on her refugee claim, but the application was denied because no application record was filed.

[13] Ms Moryakina maintains that this evidence shows that her lawyer probably failed to file the medical reports that she supplied him. Such inaction, she says, would be consistent with his other errors on her file.

[14] It would certainly be possible to infer from the evidence that Ms Moryakina's lawyer failed to file the medical reports supporting her PRRA application. But that is not the test. The test is whether it is clear that the lawyer's conduct resulted in a miscarriage of justice.

[15] Here, it is not clear that the lawyer's incompetence caused the medical reports not to be filed. Ms Moryakina did not respond to the lawyer's suggestion that she had never provided him those reports.

[16] Further, it is unclear that prejudice resulted from any act or omission by the lawyer. It is uncertain whether the medical reports would have affected the outcome of the officer's decision. Ms Moryakina had already been found by the Board not to be credible in respect of her allegations about government officials in Russia. The medical reports showed that her brother-in-law had been murdered and her husband stabbed. However, there was no evidence that those incidents had anything to do with Ms Moryakina's allegation of risk. Whether that evidence might have influenced the PRRA officer is a matter for speculation.

III. Conclusion and Disposition

[17] I am not satisfied that Ms Moryakina's counsel's conduct was incompetent or that his conduct resulted in a miscarriage of justice in this case. Therefore, I must dismiss this application for judicial review.

[18] Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2841-12

STYLE OF CAUSE: VALENTINA MORYAKINA
v
MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 27, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: December 10, 2012

APPEARANCES:

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Nicole Paduraru FOR THE RESPONDENT

SOLICITORS OF RECORD:

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