Federal Court  Cour fédérale

Date: 20130506

Docket: IMM-6595-12

Citation: 2013 FC 468

Ottawa, Ontario, May 6, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

RECILIOME SAINVRY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision rendered by the Refugee Protection Division of the Immigration and Refugee Board [the Board] refusing the applicant's request that his claim for refugee protection be reopened.

FACTS

[2] The applicant is a citizen of Haiti. He applied for refugee protection in Canada in 2008.

[3] The applicant alleges that he is functionally illiterate. On his French language personal information form which he submitted to the Board on September 25, 2008, he also stated that he required a Creole interpreter.

[4] On January 16, 2012 the Board advised the applicant in writing to attend a scheduling conference which he attended. The applicant was unrepresented at the time. He was given the peremptory hearing date of March 8, 2012, but he claims he understood the hearing date to be May 8, 2012. An interpreter was not present at the scheduling conference.

[5] The applicant did not ask anyone to read the written hearing notice to him when he left the scheduling conference because he assumed he understood the date of the hearing. Thus, he did not attend the March 8, 2012 refugee hearing.

[6] The applicant received a written notice of an abandonment hearing scheduled for March 30, 2012, but he alleges he assumed it was a second notice reminding him of his May hearing. As he did not attend the abandonment hearing, the Board declared his claim abandoned and sent a written notice to the applicant. He showed this notice to a friend, who brought the applicant to a lawyer. The lawyer applied to the Board to have the claim reopened. The resulting decision is the subject of the present application for judicial review.

[7] The Board noted that during a scheduling conference, the date of the hearing is spoken aloud to the applicants present and repeated orally several times for an applicant to hear. It was the applicant's choice to ignore a subsequent document the Board sent him, due to assumptions he had

made. The Board found no reasonable explanation had been provided for the applicant's failure to attend his peremptory hearing date and abandonment hearing.

[8] The issue in this application is whether the Board reasonably determined that there was no failure to observe a principle of natural justice.

[9] Rule 55 of the Board's *Refugee Protection Division Rules*, SOR/2002-228 [Repealed, SOR/2012-256, s. 73] [the Rules] sets out how an abandoned refugee claim may be reopened:

Application to reopen a claim	Demande de réouverture d'une demande d'asile
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.
Form of application	Forme de la demande
(2) The application must be made under rule 44.	(2) La demande est faite selon la règle 44.
Claimant's application	Contenu de la demande faite par le demandeur d'asile
(3) A claimant who makes an application must include the claimant's contact information in the application and provide a copy of the application to the Minister.	(3) Si la demande est faite par le demandeur d'asile, celui-ci y indique ses coordonnées et en transmet une copie au ministre.
Factor	Élément à considérer
(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.

[10] Justice Rennie observed in *Karagoz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1479 at para 6 that the jurisdiction of the Board to reopen a refugee claim is narrowly prescribed (see also *Lopez Diaz v Canada (Citizenship and Immigration)*, 2010 FC 131 at para 11). As the Court of Appeal stated in *Nazifpour v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 35 at para 82:

> The Federal Court has rejected the argument that, while Rule 55 expressly obliges the Division to reopen for breach of natural justice, since this is not stated to be the only ground for reopening, it does not preclude the Division from reopening decisions on other grounds, including the existence of new evidence. The Court has held that Rule 55 does not expand the jurisdiction to reopen refugee and protection determinations. The Division may reopen only for breach of a principle of natural justice...
>
> [Emphasis added]

[11] The applicant first submits that the Board violated natural justice by not informing him that it would take judicial notice of the fact that Board staff repeatedly tell claimants the date of their hearing at a scheduling conference. Had the applicant been informed, he could have addressed the Board's concern with further evidence, such as a further affidavit and further pleadings.

[12] The respondent maintains in his written submissions that as Rule 21 of the Rules states that a scheduling hearing helps the Board fix a date for a proceeding, it is common sense that at a scheduling hearing there would be an exchange between a claimant and the Board with respect to when the hearing would be held and that the actual date of the hearing would be given to the claimant.

[13] I agree with the respondent that it is common sense that at a scheduling hearing there would be an exchange between a claimant and the Board with respect to when the hearing would be held and that the actual date of the hearing would be given to the claimant and does not amount to specialized knowledge.

[14] The applicant further argues that he was innocently mistaken about the hearing date and cannot be blamed for the simple fact of not being more capable than he is.

[15] The respondent notes that on three occasions the applicant was given a written notice for a hearing at the Board. He attended the scheduling hearing, yet failed to attend the refugee and abandonment hearings. The respondent contends that the applicant's treatment of the written notices for the refugee and abandonment hearings indicates a level of indifference which cannot be explained merely as an inadvertent misunderstanding or shame regarding his literacy level.

[16] I agree with the respondent. At a certain point, the applicant must take some responsibility to ensure that he understood the written correspondence he received regarding his refugee claim **(***Capelos v Canada (Minister of Employment and Immigration)*, [1991] FCJ 217 at para 5; *Wackowski v Canada (Minister of Citizenship and Immigration)*, 2004 FC 280 at para 13). Despite the fact that the applicant identifies himself as having limited literacy, he chose not to ask anyone to verify the date on the written notice he had received at the scheduling hearing. He even had a friend waiting for him in the reception area of the Board while he was attending the scheduling hearing, yet did not show her the written hearing notice when he exited the hearing.

[17] Again, the applicant ignored a written notice of the date of his abandonment hearing, allegedly because he assumed it was a second notice reminding him of his hearing. The applicant chose not to ask anyone to verify what the letter said. This behaviour was simply not that of a person diligently pursuing a refugee claim and the applicant must bear the onus for these irresponsible decisions. Therefore, given the totality of the circumstances, I am satisfied that there was no breach of the principles of natural justice and that the Board did not commit a reviewable error in refusing to reopen the refugee claim.

[18] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application for judicial review is dismissed. There is no question for certification.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6595-12
STYLE OF CAUSE:	*Reciliome Sainvry v The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
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