

Federal Court



Cour fédérale

**Date: 20130725**

**Docket: IMM-9193-12**

**Citation: 2013 FC 818**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Ottawa, Ontario, July 25, 2013**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**TAJINDER SINGH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Court is faced with an application for judicial review submitted under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [the Act] of a decision by the Refugee Protection Division of the Immigration and Refugee Board of Canada [tribunal] dated August 23, 2012 (rendered orally, with written reasons dated October 23, 2012). The tribunal declared that the claim was abandoned pursuant to Rule 58 of the *Refugee Protection Division*

*Rules*, SOR/2002-228 [the Rules], in force at the time of the decision, and subsection 168(1) of the Act.

### Facts

[2] Tajinder Singh (the applicant) is a citizen of India. He lived in the US from 1991 to 2009 (Board file, p. 27), arrived in Canada in December 2009 and claimed refugee status on August 11, 2010. The applicant completed his Personal Information Form (PIF) on October 12, 2010 (Tribunal file, pp. 38-50), and sent it to the tribunal on October 14, 2010 (Applicant's file, Affidavit of Tajinder Singh, p. 12). This document does not contain an interpreter's declaration, although the applicant needed an interpreter to understand its contents.

[3] A first hearing date before the tribunal was scheduled for July 20, 2012. The applicant was absent at this hearing because he was ill, as confirmed in a medical note submitted to the file (tribunal file, p. 286). At this hearing, the presiding member advised the applicant's representative that the PIF was incomplete, since under Rule 5(3), the interpreter's declaration is necessary when an applicant uses an interpreter to complete his or her PIF as it was in this case. The presiding member advised the applicant's representative that it was his responsibility to ensure that this declaration be completed for the next hearing, either by having the form interpreted again by a different interpreter, or by obtaining an affidavit from the original interpreter.

[4] A notice to appear dated July 25, 2012, was sent to the applicant, his representative and the Minister's representative (Tribunal file, pp. 290-91), requiring the applicant to attend a new hearing on August 23, 2012. The instructions indicated that the applicant was to be ready to explain why the application should not be considered abandoned. The instructions noted that the tribunal could

declare the application abandoned, resulting in the applicant's losing the right to have his application heard. The instructions also indicated that if the tribunal did not declare the application abandoned, the applicant should be ready to proceed.

[5] During the period of July 20, 2012, to August 23, 2012, counsel for the applicant allegedly phoned and wrote to the applicant many times for him to go to his office, but he never did (Tribunal file, pp. 301-03). The applicant appeared one month later at the August 23, 2012, hearing, and his PIF was still not completed.

#### Impugned decision

[6] The tribunal summarized the facts and stated that a notice had been sent to the applicant, indicating that he was to be ready to proceed should the claim not be declared abandoned. The tribunal noted that one of the factors to consider, under Rule 58(3), is whether the applicant is ready to start or continue the case. The tribunal also noted that under Rule 58(4), if it does not declare the claim abandoned, it must start or continue the case without delay.

[7] The tribunal found that the applicant's PIF was clearly incomplete since the interpreter's statement was missing. The tribunal noted that the applicant's representative had advised him that the document was incomplete at the preceding hearing on July 20, 2012. The tribunal found that the applicant could not continue without a properly interpreted PIF, and Rule 58(4) indicates that the case must proceed without delay if the claim is not declared abandoned; however, the tribunal found it could not proceed without delay because a new hearing date was required.

[8] The tribunal noted the reason the PIF was still incomplete: despite the many attempts by his representative during the five weeks preceding the second hearing of August 23, 2012, he did not appear at the representative's office. The tribunal found that the applicant was not ready to proceed with the hearing and he did not show diligence in processing his application. The tribunal therefore declared it abandoned.

[9] Before concluding, the tribunal noted the presence of the applicant's spouse and children in the courtroom. The tribunal noted that these individuals were not mentioned in the applicant's PIF, which was another indication that the PIF was incomplete.

#### Issue

[10] This application for judicial review raises the following question: Was the tribunal's decision to declare the claim abandoned reasonable?

#### Legislative provisions

[11] The following provision from the *Immigration and Refugee Protection Act* is relevant in this case:

PART 4	PARTIE 4
IMMIGRATION AND REFUGEE BOARD	COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ
...	[...]
PROVISIONS THAT APPLY TO ALL DIVISIONS	ATTRIBUTIONS COMMUNES
...	[...]

## Abandonment of proceeding

## Désistement

**168.** (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

**168.** (1) Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication.

[12] The following provisions from the *Refugee Protection Division Rules*, in force at the time of the decision, are relevant to the present application for judicial review:

## PERSONAL INFORMATION FORM

FORMULAIRE SUR LES  
RENSEIGNEMENTS PERSONNELS

## Personal Information Form

Formulaire sur les  
renseignements personnels

**5.** (1) The claimant must complete the Personal Information Form and sign and date the included declaration that states that

**5.** (1) Le demandeur d'asile remplit le formulaire sur les renseignements personnels et signe et date la déclaration figurant sur le formulaire portant :

(a) the information given by the claimant is complete, true and correct; and

a) que les renseignements qu'il fournit sont complets, vrais et exacts;

(b) the claimant knows that the declaration is of the same force and effect as if made under oath.

b) qu'il sait que la déclaration a la même force et le même effet que si elle était faite sous serment.

Form completed without interpreter

Formulaire rempli sans interprète

(2) If the claimant completes the Personal Information Form

(2) Le demandeur d'asile qui remplit le formulaire sur les

without an interpreter, the claimant must also sign and date the included declaration that states that the claimant can read the language of the form and understands what information is requested.

renseignements personnels sans l'aide d'un interprète signe et date la déclaration figurant sur le formulaire portant qu'il peut lire la langue du formulaire et qu'il comprend les renseignements demandés.

#### Interpreter's declaration

#### Déclaration de l'interprète

(3) If the claimant completes the Personal Information Form with an interpreter, the interpreter must sign and date the included declaration that states

(3) Si le demandeur d'asile remplit le formulaire sur les renseignements personnels avec l'aide d'un interprète, ce dernier signe et date la déclaration y apparaissant attestant :

(a) the interpreter is proficient in the languages or dialects used, and was able to communicate fully with the claimant;

a) qu'il maîtrise les langues ou dialectes utilisés et qu'il a pu communiquer parfaitement avec le demandeur d'asile;

(b) the completed form and all attached documents were interpreted to the claimant; and

b) qu'il a interprété pour le demandeur d'asile le formulaire rempli et tout document joint à celui-ci;

(c) the claimant assured the interpreter that the claimant understood what was interpreted.

c) que le demandeur d'asile lui a assuré qu'il avait bien compris ce qui avait été interprété pour lui.

...

[...]

#### ABANDONMENT

#### DÉSISTEMENT

Abandonment without hearing the claimant

Désistement sans audition du demandeur d'asile

**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.

Opportunity to explain

Possibilité de s'expliquer

(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

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) in any other case, by way of a special hearing after notifying the claimant in writing.

b) dans le cas contraire, au cours d'une audience spéciale dont la Section l'a avisé par écrit.

Factors to consider

Éléments à considérer

(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.

Decision to start or continue the proceedings	Poursuite de l'affaire
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(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.
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[13] Rule 58 in force at the time of the hearing, is now Rule 65 of the *Refugee Protection Division Rules*, SOR/2012-256.

#### Standard of review

[14] The appropriate standard of review for a tribunal decision declaring a claim abandoned is reasonableness (*Gonzales v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1248 at paras 14-15, [2009] FCJ No. 1600 (QL); *Csikos v Canada (Minister of Citizenship and Immigration)*, 2013 FC 632 at para 23, [2013] FCJ No. 680 (QL) [*Csikos*]). To determine whether the tribunal's decision is reasonable, the Court shall examine the "justification, transparency and intelligibility within the decision-making process...also...whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

#### Analysis

[15] The fundamental issue is whether the applicant's behaviour expresses an intention to pursue his refugee claim with diligence and an interest in his claim (*Csikos, supra*, at para 25; *Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 109, at para 32, [2000] FCJ No 89



(QL); *Peredo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 390, at para 30, 363 FTR 300; *Mayilvahanam v Canada (Minister of Citizenship and Immigration)*, 2013 FC 136, at para 9, [2013] FCJ No 116 (QL)).

[16] In the present case, two elements led the tribunal to declare the claim abandoned: (i) the applicant did not appear at the July 20, 2012, hearing and (ii) the PIF was still incomplete at the August 23, 2012 hearing.

[17] The applicant claims that at the August 22, 2012, hearing, the tribunal withdrew the abandonment at the beginning of the hearing, permanently, by asking if he was ready to proceed, and stating:

All right. On that basis then I determine that cause has been shown why the claim should not be declared abandoned. We will therefore proceed with the hearing on the merits.

(Minutes of hearing; tribunal file, p 300.)

[18] According to the applicant, from that moment on, the matter was *res judicata* and the abandonment was permanently withdrawn. The tribunal could not, a few minutes later, render a second decision declaring the claim abandoned, thereby sabotaging its own initial decision to withdraw the abandonment. The applicant feels the tribunal was *functus officio*.

[19] The Court cannot accept the applicant's argument. On one hand, the issue of abandonment may be raised more than once depending on the circumstances. On the other, the two decisions in this case arise from distinct factual situations. The first decision therefore has no impact on the

subsequent finding of the tribunal under which the applicant was not ready to proceed because his PIF was still non-compliant.

[20] More specifically, it is worth noting that at the August 23, 2012, hearing, the applicant was to explain why he did not appear at the July 20, 2012, hearing and convince the tribunal that there should not be an abandonment. At this hearing, the applicant presented a medical note to justify his absence from the July 20, 2012, hearing. This explanation was satisfactory to the tribunal, which withdrew the abandonment for the July 20, 2012, hearing. (Tribunal file, p 300).

[21] Once the abandonment was withdrawn regarding the applicant's failure to appear at the July 20, 2012, hearing, the tribunal continued with the merits. The tribunal quickly noted, however, that the applicant was still not ready to proceed, because his PIF was still incomplete, despite the tribunal's July 20, 2012, directive. A review of the minutes from the August 23, 2012, hearing reveals the following passage, indicating that although the applicant claimed to be ready to proceed, in fact, he was not ready, considering the absence of a complete PIF:

**MEMBER:** So it would seem to me then we're not ready to proceed this morning are we?

**COUNSEL FOR CLAIMANT:** (Inaudible).

**MEMBER:** What do you mean?

**COUNSEL FOR CLAIMANT:** We are (inaudible).

**MEMBER:** I'm sorry?

**COUNSEL FOR CLAIMANT:** We are not – not ready.

**MEMBER:** Thank you.

Any submissions? I'm going to revisit the issue of abandonment now. You're saying you're not ready to proceed.

(Tribunal file, p 302)

[22] Pursuant to Rule 58(2), the tribunal must give the applicant the opportunity to explain why the claim should not be declared abandoned. More specifically, paragraph 58(2)(a) indicates that the tribunal may ask the individual for an immediate explanation if the applicant is present and it is fair to do so; otherwise, paragraph 58(2)(b) indicates that the applicant should be asked to explain at a special hearing, for which notification is to be given in writing. In this case, the applicant was present at the August 23, 2012, hearing, and it is important to note that his representative had already been advised of the deficiencies in the July 20, 2012, PIF. It was therefore reasonable for the tribunal to ask the applicant for an explanation immediately, as to why the PIF was still incomplete :

**MEMBER:** ... Why not? Why is the declaration not completed? Moreover, why did you not obtain an interpreter's declaration in preparation for today's hearing as I instructed?

**COUNSEL FOR CLAIMANT:** It was no show by Mr. Singh –

**MEMBER:** I instructed you, sir, last time, to get this dealt with.

**COUNSEL FOR CLAIMANT:** Yeah, but Mr. Singh didn't show until – for that (inaudible) this morning.

**MEMBER:** So you're saying you're not ready to proceed with the hearing because of your oversight?

**COUNSEL FOR CLAIMANT:** It was for me, he didn't show up, not even once to – at our office or for consultation, for preparation at all. Even day before yesterday a request was made and he did not go.

This is the first time we are seeing him since that – he never came, not even once. We made so many request (*sic*) to join us in the sittings for the preparation. He never –

...

**MEMBER:** ... Anything else?

**COUNSEL FOR CLAIMANT:** He never came out (inaudible) when he came to our office because even the request were made day before yesterday to do the preparations he didn't turn up.

**MEMBER:** Anything else?

**COUNSEL FOR CLAIMANT:** That's it.

...

**MEMBER:** ... May I ask you, to the Claimant, Mr. Tajinder Singh, how do you respond to what counsel just told me? Do you have any response?

**INTERPRETER:** He says, "I went to his office two, three times and I met him".

**COUNSEL FOR CLAIMANT:** That was prior to our hearing, not after this – not after July 22<sup>nd</sup> (*sic*), it was (inaudible).

**MEMBER:** Mr. Tajinder Singh, anything further?

...

**INTERPRETER:** He says that "I felt sick and I just couldn't contact him".

(Tribunal file, pp 301, 303)

[23] The tribunal rejected this explanation given by the applicant because the medical note only made reference to one day—July 20, 2012—whereas more than a month had passed between the first hearing before the tribunal and the second. The tribunal also noted that he had 34 days to attend to his incomplete PIF starting on July 20, 2012. In these circumstances, the Court feels that the behaviour can reasonably be considered as a lack of intention to pursue his refugee claim with diligence. It is therefore reasonable to reject the applicant's explanation.

[24] Rule 58(3) clearly states the elements to take into consideration when declaring an abandonment: (1) the explanations given by the claimant at the hearing, and (2) any other relevant

element, in particular whether the claimant is ready to start or continue the proceedings. In this case, the tribunal considered these elements. The applicant provided no acceptable explanation, no justification as to why the PIF was still incomplete aside from the fact that he simply did not go to his representative's office when he was asked to. Moreover, despite his claims at the hearing before the tribunal, the applicant was not ready to continue because he did not have a completed PIF. In these circumstances, it was reasonable for the tribunal to declare an abandonment in this case.

[25] That being said, although the PIF was incomplete, the tribunal's representative still attempted to remedy the applicant's situation, of his own initiative, asking if the PIF could be translated at the hearing, with a 30 minute break. The applicant's representative's assistant, Mr. Mohamed, stated he could not interpret the PIF:

**MEMBER:** How long do you think you'll need to translate this document?  
Can Mr. Kereshi do it?  
Can you translate this to the Claimant? If I give you 30 minutes?

**MR. MOHAMED:** No, sir, because (inaudible).

(Tribunal file, p 303)

[26] During the hearing before this Court, the applicant claims that following the refusal of the applicant's representative's assistant (Mr. Mohamed) to translate the applicant's PIF, the tribunal should not have dropped the subject and should have asked the interpreter present in the courtroom to translate the applicant's PIF. The applicant feels that this failure constitutes an error.

[27] The Court cannot agree with the applicant's argument for the following reasons. First, the burden of being ready to proceed at a hearing is on the applicant, not the tribunal. Placing an obligation on the tribunal to ensure that the applicant's PIF is complete is similar to transferring the

applicant's burden to the tribunal. The Court feels that the tribunal did not have an obligation to ask the interpreter present in the courtroom to translate the applicant's PIF to correct his deficiencies, as the applicant had suggested. It is the applicant's responsibility to prepare his claim file, and it is not up to the tribunal to fix his deficiencies.

[28] For all these reasons, the intervention of the Court in this case is not justified. The tribunal's decision to declare an abandonment is clearly a possible outcome considering the facts and the requirements of the Rules, making it a reasonable decision.

[29] At the hearing before this Court, counsel for the applicant indicated that she would submit a question for certification. However, on July 18, 2013, counsel for the applicant informed this Court that no question would be certified. In response, on July 19, 2013, counsel for the respondent confirmed the position that there was no question for certification.

**JUDGMENT**

**THE COURT ORDERS** that this application for judicial review is dismissed. There is no matter for certification.

"Richard Boivin"

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Judge

Elizabeth Tan, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-9193-12

**STYLE OF CAUSE:** Tajinder Singh v MCI

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** July 17, 2013

**REASONS FOR JUDGMENT:** BOIVIN J.

**DATE OF REASONS:** July 25, 2013

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