Federal Court  Cour fédérale

Date: 20130731

Docket: IMM-4277-12

Citation: 2013 FC 837

Ottawa, Ontario, July 31, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NANDOR DROBINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated February 27, 2012, wherein the applicant was determined to have abandoned his claim.

[2] The applicant requests that the Board's decision be set aside and the matter be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a citizen of Hungary, born in 1986. He is an ethnic Hungarian who arrived in Canada on May 19, 2009 and seeks refugee status based on persecution by Hungarian Roma and by his government based on his anti-European Union political views.

[4] His claim was first scheduled to be heard on June 27, 2011. It was postponed as the applicant did not appear due to illness.

[5] At a show cause hearing on July 15, 2011, the applicant appeared but his counsel, Mr. Artem Djukic, was absent. The Board accepted the applicant's medical note for the June 27, 2011, hearing and determined the next date would be set administratively.

[6] The next hearing was on January 16, 2012. The applicant's counsel appeared but the applicant did not appear due to car problems.

[7] At a show cause hearing on February 6, 2012, the applicant attended but his counsel did not. The Board accepted his explanation of car troubles for the previous hearing, but set a new hearing date for February 27, 2012, as peremptory and advised the applicant it would proceed with or without counsel.

[8] In a letter dated February 8, 2012, the applicant's counsel advised the Board he had a scheduling conflict and requested a different date, with suggested alternatives of five dates in April

and May 2012. The request was refused and communicated to the applicant's counsel on February 14, 2012 and he was told he should arrange for other counsel to take over the file if he could not attend.

[9] On February 27, 2012, the Board proceeded with the hearing with the applicant present and his counsel absent. After giving the applicant a chance to be heard, the Board reserved on its decision.

Board's Decision

[10] In a decision made on the same date, the Board determined the applicant's claim had been abandoned. Its written reasons begin with describing the chronology of the file as laid out above.

[11] The Board indicated that in refusing the applicant's request during the hearing for postponement, he had been cognizant of the balancing act between avoiding a miscarriage of justice and expeditiously processing claims and alluded to subsection 162(2) of the Act.

[12] The Board applied *Refugee Protection Division* Rule 48(4), which lays out the factors to consider in deciding whether to change the date or time of a proceeding. He noted the date and time had been fixed with the applicant's knowledge after he was afforded several previous adjournments and that counsel had been duly informed of the peremptory date but chose not to attend or secure new counsel. Counsel made the written adjournment request two days after the date had been set, and should have anticipated the ruling would not be in his favour and made alternative plans. The

Board indicated it considered the time the applicant had to prepare for the proceedings and the efforts made. The applicant's counsel is very experienced. This was not a complicated matter and the applicant and his counsel never attended a hearing simultaneously.

[13] The Board indicated Rule 48(4) required the Board to consider whether allowing an application for adjournment would likely cause an injustice, not whether refusing such an application would cause an injustice. The applicant was given the opportunity to participate in the February 27th hearing, but refused to answer questions. When told that leaving the hearing might result in his claim being declared abandoned, the applicant said "Whatever you decide to do." and left.

[14] The Board determined it had adhered to *Refugee Protection Division* Rule 58(2) by giving the applicant an opportunity to explain why the claim should not be declared abandoned. The Board determined the claim to be abandoned.

Issues

[15] The applicant submits the following points at issue:

1. Did the Board err in law by making a decision that was patently unreasonable?
2. Did the Board err in law by ignoring relevant evidence, misinterpreting evidence, making erroneous findings of fact and placing reliance on irrelevant evidence?

[16] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in refusing the adjournment and determining the claim to be abandoned?

Applicant's Written Submissions

[17] The applicant argues the Board had agreed as of 2004 to make special accommodations for his counsel due to his illness, such as not scheduling more than two hearings per week, only scheduling half day hearings in the afternoon and scheduling full day hearings to commence at 9:30 a.m. In his letter of February 8, 2012, counsel indicated the February 27, 2012 date had been set in violation of this agreement. The Board refused this requested adjournment.

[18] The Board unfairly denied the applicant his right to counsel by setting a hearing at 8:30 a.m., when it knew his counsel's physical frailty made it impossible to attend at this time. It was a half day hearing scheduled in the morning, another violation of this agreement. The Board's reasons fail to mention this agreement. A failure to take into account contradictory evidence is a reviewable error. The Board breached almost every aspect of an agreement that had been in place for almost a decade without acknowledging its existence.

Respondent's Written Submissions

[19] The respondent argues the standard of review for procedural fairness is correctness. The applicant's counsel never provided any explanation for failing to appear on July 15, 2011, or

February 6, 2012. The applicant was specifically told the February 27, 2012, hearing would proceed with or without counsel. There was nothing to suggest key documents were unavailable or that the applicant was unable to proceed with his complaint.

[20] The respondent argues the right to counsel at the Board is not absolute. This Court has repeatedly held that the onus is on an applicant to retain counsel that is competent and available. It is not a breach of natural justice to proceed without counsel when counsel was unprepared or unavailable. The applicant was aware the hearing would proceed and was specifically told to retain other counsel if necessary. The applicant knew the hearing would proceed and chose not to retain new counsel or proceed without counsel.

[21] The respondent argues the Board adhered to its agreement with the applicant's counsel. His letter of February 8, 2012, cited no health concerns and simply cited a scheduling conflict. The agreement was alluded to, but no copy was provided with the letter. In suggesting alternate dates, the applicant's counsel made no reference to the start time. Regardless, the agreement stipulates that accommodations would be provided only so far as they do not negatively affect the Board's decision making ability. Counsel has still provided no explanation for the two previous absences. The Board considered the relevant factors outlined in Rule 48(4). There was no need to consult counsel on the setting of the February 27, 2012 date as it was set with the applicant's knowledge, who was specifically told to find counsel who could attend on that date. At the February 27, 2012 hearing, the applicant was not denied the opportunity to make new submissions.

Analysis and Decision

[22] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[23] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798 at paragraph 13, [2008] FCJ No 995 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[24] **Issue 2**

Did the Board err in refusing the adjournment and determining the claim to be abandoned?

The applicant is correct that the Board should take into account its agreement with his counsel when making scheduling decisions. In this case, however, I agree with the respondent that counsel's request for an adjournment was unrelated to those accommodations. His letter mentions the agreement, but his complaint is clearly due to a scheduling conflict:

> It is further my understanding that at this [February 6, 2012] hearing it was established that his claim would not be abandoned and a Peremptory Hearing has been scheduled for February 27, 2012 at 8:30 AM. I am to attend this hearing with my client, however, there is an unfortunate scheduling conflict on that date, as I am already booked for a hearing before the RPD on another matter.

Therefore, the agreement is irrelevant to the Board's adjournment decision and the Board need not have mentioned it.

[25] I would also note that the transcript indicates that the Board nearly determined the applicant's claim to be abandoned at the very first hearing on June 27, 2011, but decided not to after hearing submissions from counsel. The applicant and his counsel were therefore on notice more than six months before the February 27, 2012, hearing as to the consequences of failing to attend board hearings or attending without being ready to proceed.

[26] The Board's decision in applying Rule 48(4) was correct. To consider the enumerated factors:

- Rule 48(4)(a): The applicant and his counsel were aware of the adjournment to February 27, 2012.
- Rule 48(4)(b): Counsel made the request two days after being informed of the February 27, 2012 date.
- Rule 48(4)(c): The applicant had eight months to prepare after his first hearing and three weeks after being informed of the peremptory date.
- Rule 48(4)(d): There was no indication the applicant had made any effort to start the hearing beyond retaining counsel.
- Rule 48(4)(e): There was no mention of a need for more time to gather information.
- Rule 48(4)(f)/(g): The applicant had experienced counsel.
- Rule 48(4)(h): There had been four previous hearings, none of which had been attended by both the applicant and his counsel.

- Rule 48(4)(i): The February 27, 2012 date was peremptory and clearly communicated to the applicant as such.
- Rule 48(4)(j): Allowing the adjournment would unreasonably delay the proceedings.
- Rule 48(4)(k): It was not a particularly complex matter.

[27] The applicant can be faulted for not being ready to proceed, given the long delay and clear instructions that his hearing was peremptory and there is no indication of efforts to secure other counsel available for the peremptory day.

[28] I also do not think the Board failed to consider positive factors as the decision acknowledges such positive factors as the valid reasons for previous adjournments and the fact that counsel requested the adjournment shortly after receiving notice of the February 27, 2012 date.

[29] The applicant submitted that he was not given an opportunity to make submissions relating to the adjournment request and that this constituted a denial of natural justice or a breach of the duty of procedural fairness. I do not agree. The applicant's counsel made a written submission by way of letter requesting the adjournment and the applicant himself submitted the letter at the hearing on February 27, 2012.

[30] The applicant's right to a fair hearing was not compromised. He had multiple opportunities to present his case and when the peremptory hearing proceeded without counsel, as he had been told it would, he left the hearing.

[31] The application is therefore dismissed.

[32] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

***Refugee Protection Division Rules*, SOR/2002-228**

48. (4) In deciding the application, the Division must consider any relevant factors, including	48. (4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;	a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
(b) when the party made the application;	b) le moment auquel la demande a été faite;
(c) the time the party has had to prepare for the proceeding;	c) le temps dont la partie a disposé pour se préparer;
(d) the efforts made by the party to be ready to start or continue the proceeding;	d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
(e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;

(f) whether the party has counsel;

f) si la partie est représentée;

(g) the knowledge and experience of any counsel who represents the party;

g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

(h) any previous delays and the reasons for them;

h) tout report antérieur et sa justification;

(i) whether the date and time fixed were peremptory;

i) si la date et l'heure qui avaient été fixées étaient péremptoires;

(j) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and

j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;

(k) the nature and complexity of the matter to be heard.

k) la nature et la complexité de l'affaire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4277-12
STYLE OF CAUSE:	NANDOR DROBINA - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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