

Federal Court



Cour fédérale

Date: 20150227

Docket: IMM-5225-13

Citation: 2015 FC 254

Ottawa, Ontario, February 27, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**CECILIE VEHAMIS UANDARA
OPERI MUATIJE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [Board], dated July 24, 2013 [Decision], which declared the Applicants' claim for refugee protection abandoned under s. 168 of the Act.

II. BACKGROUND

[2] The Applicants are common-law spouses and citizens of Namibia. They arrived in Canada on November 20, 2010 and made a claim for refugee protection the same day. Their claim for protection was based on their fear of the female Applicant's [Ms. Uandara] parents.

[3] The Applicants claim that Ms. Uandara's parents did not approve of their relationship. They say her parents locked the male Applicant [Mr. Muatije] in a room, beat him, and cut his neck. Ms. Uandara says that she was also beaten for trying to free Mr. Muatije.

[4] The Applicants claim that Mr. Muatije escaped, and they continued their relationship in secret. They say that, nearly one year later, Ms. Uandara's parents saw the couple together and Ms. Uandara's father shot Mr. Muatije in the leg.

[5] The Applicants left Namibia and arrived in Canada on November 20, 2010. Their claim was referred to the Board on November 22, 2010.

[6] On October 19, 2012, the Applicants were notified that their hearing was scheduled for November 19, 2012 in Toronto. On November 2, 2012, the Applicants requested that the hearing be postponed because their child was ill and would be unable to fly to Toronto. The Applicants also asked that their file be transferred because they were living in Edmonton. The Board granted their request: the hearing was postponed, and the Applicants' file was transferred to the Western region.

[7] On December 24, 2012, the Applicants requested that their file be transferred back to Toronto. The Applicants said that they had nobody to stay with in Vancouver (the location of the Western region's office) and that they could not afford to fly their counsel to Vancouver. The Board denied the request. It said that the Applicants could appear by videoconference.

[8] On February 15, 2013, the Applicants were notified that their hearing was scheduled for April 26, 2013 in Toronto to be heard by videoconference.

[9] The Applicants did not appear at the April 26, 2013 hearing. Their counsel appeared and said that the Applicants would not be attending because they were ill.

[10] On May 9, 2013, the Applicants were notified that a special hearing was scheduled for July 18, 2013 to allow the Applicants to explain their failure to attend the April hearing. The letter stated that the Applicants were required to provide documentation if their failure to appear was due to medical reasons. The letter also stated that if the Board decided not to declare the claim abandoned, the Applicants should be prepared to proceed with the hearing of their claim.

[11] On June 11, 2013, the Applicants requested that the hearing be postponed. They claimed that their employer would not give them a day off for the rest of the year because they had already been given a day off for the April hearing. The Board denied the request because the Applicants had been granted two previous postponements. The Board also noted that the claim had been outstanding since November 2010 and needed to be heard.

[12] On July 10, 2013, Ms. Uandara requested that the hearing be postponed. She claimed that she was eight months pregnant and feeling unwell. She said that her due date was soon and asked that the hearing be postponed until after she gave birth. She said that she would send a doctor's note later. The Board denied the request. The Board, again, noted that the hearing had been postponed in the past and that there was no medical documentation to support Ms. Uandara's request.

[13] Neither the Applicants nor their counsel appeared at the July 18, 2013 hearing.

III. DECISION UNDER REVIEW

[14] The Applicants' claim was declared abandoned on July 18, 2013. The Applicants were notified in a letter sent July 24, 2013. The letter states (Certified Tribunal Record [CTR] at 2):

On November 22, 2010, your claims were referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board.

In the Notice to Appear Notice dated February 15, 2013, you were advised that the hearing of your claims would take place on April 26, 2013. You did not appear at that hearing.

In the Notice to Appear dated May 09, 2013, you were advised that a special hearing would take place on July 18, 2013, to give you an opportunity to explain why the RPD should not determine that your claims have been abandoned. You did not appear at that hearing.

ACCORDINGLY, THE REFUGEE PROTECTION DIVISION DETERMINES THAT YOUR CLAIMS HAVE BEEN ABANDONED.

[emphasis in original]

[15] The transcript of the July 18, 2013 hearing provides further reasons for the Decision.

[16] The Board said that it had received three requests to postpone the July 18, 2013 hearing. The Board said that the June 11 request was implausible because the Applicants' employers would be in contravention of the Canada Labour Code and provincial labour codes if the Applicants were permitted only one day off a year. There was also no documentary evidence to support their claim that their employers would not give them the day off. The Board also said that a refugee hearing should take precedence over a day of work.

[17] Regarding the July 10 request, the Board noted the lack of medical documentation to support Ms. Uandara's claim. The Board also noted that there were credibility concerns given that the request one month earlier had only mentioned that the Applicants were unable to get the day off work.

[18] The Board also said that it had received a doctor's note on July 17, 2013. The note indicated that Ms. Uandara was pregnant and expected to deliver her baby on October 19, 2013. The note indicated that Ms. Uandara had "back pain and nausea related to her pregnancy, and probably should not be flying on an airplane to Toronto at this time. Is it possible to reschedule her hearing till after October 19, 2013, after her baby delivers [sic]" (CTR at 222).

[19] The Board gave the doctor's note very little weight. The Board said that the note merely provided that Ms. Uandara probably should not fly. The Board also noted that previous correspondence had suggested that Ms. Uandara was working full-time which led to a conclusion that Ms. Uandara was more than likely able to fly as well. There was also a credibility issue in that Ms. Uandara claimed to be eight months pregnant but the doctor's note indicated that she

was six months pregnant. Further, the Board noted that there was no need for the Applicants to travel to Toronto for the hearing. The Board said that the hearing could have been held by videoconference in Edmonton, or the Applicants could have had an in-person hearing in Calgary with counsel attending in Toronto by videoconference.

[20] The Board concluded that the Applicants' claim was declared abandoned because: their claim had been outstanding for three years; they had failed to appear twice for refugee hearings; there were credibility issues with their postponement requests; and, they had failed to appear for the special hearing to decide whether their claim should be declared abandoned.

[21] The transcript indicates that shortly after the Decision was rendered, the Board received a couriered letter from counsel that indicated that counsel and the Applicants were sick and unable to attend the hearing. The Board said that it was *functus* because it had already rendered the Decision but would consider the letter "in an abundance of caution." The Board said that counsel's failure to appear was immaterial because the Applicants had already indicated that they would not attend the hearing. The Board confirmed the Decision to declare the claim abandoned.

IV. ISSUES

[22] The Applicants raise the following issues in this application:

1. Whether the Decision is a violation of the fundamental principles of natural justice, in particular the Applicants' right to a fair hearing;
2. Whether the Board erred in principle;
3. Whether the Decision is unreasonable.

V. STANDARD OF REVIEW

[23] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[24] The Applicants submit that the standard of review of an abandonment decision is reasonableness. The Respondent submits that the standard of review applicable to the Board's findings of fact or mixed fact and law is reasonableness: *Dunsmuir*, above, at para 53.

[25] The first issue raises a question of procedural fairness and will be reviewed on a standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 31.

[26] The second and third issues require the review of the Decision to declare a claim abandoned. These decisions involve questions of mixed fact and law and so are reviewed on a standard of reasonableness: *Gonzalez Gonzalez v Canada (Citizenship and Immigration)*, 2009

FC 1248 at paras 14-15; *Singh v Canada (Citizenship and Immigration)*, 2012 FC 224 at para 22; *Csikos v Canada (Citizenship and Immigration)*, 2013 FC 632 at para 23; *Cabrera Peredo v Canada (Citizenship and Immigration)*, 2010 FC 390 at para 26.

[27] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[28] The following provision of the Act is applicable in this proceeding:

Abandonment of proceeding

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.

Désistement

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.

[29] The following provisions of the *Refugee Protection Division Rules*, SOR/2012-256

[*Refugee Protection Division Rules*] are applicable in this proceeding:

ABANDONMENT

Opportunity to explain

65. (1) In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned,

(a) immediately, if the claimant is present at the proceeding and the Division considers that it is fair to do so; or

(b) in any other case, by way of a special hearing.

Special hearing — Basis of Claim Form

(2) The special hearing on the abandonment of the claim for the failure to provide a completed Basis of Claim Form in accordance with paragraph 7(5)(a) must be held no later than five working days after the day on which the completed Basis of Claim Form was due. At the special hearing, the claimant must provide their completed Basis of Claim Form, unless the form has already been

DÉSISTEMENT

Possibilité de s'expliquer

65. (1) Lorsqu'elle détermine si elle prononce ou non le désistement d'une demande d'asile aux termes du paragraphe 168(1) de la Loi, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé :

a) sur-le-champ, dans le cas où le demandeur d'asile est présent à la procédure et où la Section juge qu'il est équitable de le faire;

b) au cours d'une audience spéciale, dans tout autre cas.

Audience spéciale — Formulaire de fondement de la demande d'asile

(2) L'audience spéciale sur le désistement de la demande d'asile pour défaut de transmettre en vertu de l'alinéa 7(5)a) un Formulaire de fondement de la demande d'asile rempli, est tenue au plus tard cinq jours ouvrables après la date à laquelle le formulaire devait être transmis. À l'audience spéciale, le demandeur d'asile transmet son Formulaire de fondement de la demande d'asile rempli, à moins qu'il ne l'ait déjà

provided to the Division.

transmis à la Section.

Special hearing — failure to appear

Audience spéciale — omission de se présenter

(3) The special hearing on the abandonment of the claim for the failure to appear for the hearing of the claim must be held no later than five working days after the day originally fixed for the hearing of the claim.

(3) L'audience spéciale sur le désistement de la demande d'asile pour défaut de se présenter à l'audience relative à la demande d'asile est tenue au plus tard cinq jours ouvrables après la date initialement fixée pour l'audience relative à la demande d'asile.

Factors to consider

Éléments à considérer

(4) The Division must consider, in deciding if the claim should be declared abandoned, the explanation given by the claimant and any other relevant factors, including the fact that the claimant is ready to start or continue the proceedings.

(4) Pour décider si elle prononce le désistement de la demande d'asile, la Section prend en considération l'explication donnée par le demandeur d'asile et tout autre élément pertinent, notamment le fait qu'il est prêt à commencer ou à poursuivre les procédures.

Medical reasons

Raisons médicales

(5) If the claimant's explanation includes medical reasons, other than those related to their counsel, they must provide, together with the explanation, the original of a legible, recently dated medical certificate signed by a qualified medical practitioner whose name and address are printed or stamped on the certificate.

(5) Si l'explication du demandeur d'asile comporte des raisons médicales, à l'exception de celles ayant trait à son conseil, le demandeur d'asile transmet avec l'explication un certificat médical original, récent, daté et lisible, signé par un médecin qualifié, et sur lequel sont imprimés ou estampillés les nom et adresse de ce dernier.

Content of certificate

Contenu du certificat

(6) The medical certificate

(6) Le certificat médical

must set out

(a) the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim, or otherwise pursuing their claim, as the case may be; and

(b) the date on which the claimant is expected to be able to pursue their claim.

Failure to provide medical certificate

(7) If a claimant fails to provide a medical certificate in accordance with subrules (5) and (6), the claimant must include in their explanation

(a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;

(b) particulars of the medical reasons included in the explanation, supported by corroborating evidence; and

(c) an explanation of how the medical condition prevented them from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim or otherwise pursuing their claim, as the

indique, à la fois :

a) sans mentionner de diagnostic, les particularités de la situation médicale qui ont empêché le demandeur d'asile de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à laquelle il devait être transmis ou de se présenter à l'audience relative à la demande d'asile;

b) la date à laquelle il devrait être en mesure de poursuivre l'affaire.

Défaut de transmettre un certificat médical

(7) À défaut de transmettre un certificat médical, conformément aux paragraphes (5) et (6), le demandeur d'asile inclut dans son explication :

a) des précisions quant aux efforts qu'il a faits pour obtenir le certificat médical requis ainsi que des éléments de preuve à l'appui;

b) des précisions quant aux raisons médicales incluses dans l'explication ainsi que des éléments de preuve à l'appui;

c) une explication de la raison pour laquelle la situation médicale l'a empêché de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à

case may be.

laquelle il devait être transmis ou de se présenter à l'audience relative à la demande d'asile.

Start or continue proceedings

Commencer ou poursuivre les procédures

(8) If the Division decides not to declare the claim abandoned, other than under subrule (2), it must start or continue the proceedings on the day the decision is made or as soon as possible after that day.

(8) Si la Section décide de ne pas prononcer le désistement, sauf dans le cas prévu au paragraphe (2), elle commence ou poursuit les procédures le jour même de cette décision ou, dès que possible après cette date.

VII. ARGUMENT

A. *Applicants*

[30] The Applicants submit that the *Refugee Protection Division Rules*' abandonment provisions act to prevent claimants from abusing the process and ensure that only those claimants who are willing, able and prepared to pursue their claims may do so. The Applicants submit that the *Refugee Protection Division Rules* cannot be interpreted to authorize the abandonment of a claim where the claimant has shown or indicates a continued willingness to proceed with his or her claim. The Applicants submit that they have demonstrated this requisite willingness in pursuing their claim.

[31] The Applicants also submit that the Board erred in describing the July 18, 2013 hearing as a "show cause" hearing.

[32] Finally, the Applicants submit that the Board erred in failing to consider their explanations which they say were legitimate and unforeseeable. The failure to consider their explanations constitutes the denial of a fair hearing and is a violation of the fundamental principles of natural justice: see *Uysal v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1310; *Espinoza Pineda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 328.

B. *Respondent*

[33] The Respondent submits that in determining whether to declare a claim abandoned, the Board must consider the explanation provided by the claimant and any other relevant factors: *Refugee Protection Division Rules*, s. 65(4); *Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 109, 184 FTR 283; *Markandu v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1596. The *Refugee Protection Division Rules* are clear regarding the documentation that a claimant is required to provide when he or she fails to appear due to a medical reason.

[34] The Respondent submits that the Applicants have not provided any evidence, before either the Board or the Court, to demonstrate that the Board erred in declaring the Applicants' claim abandoned. The Respondent also highlights the number of accommodations that the Applicants received, including two hearing postponements, the transferring of their file, and the scheduling of a videoconference. Further, the Board provided a number of reasons for declaring the claim abandoned.

[35] The Respondent also submits that, contrary to the Applicants' submissions, the Applicants were notified that their July 18, 2013 hearing date was a special hearing and an opportunity for them to explain why their claim should not be declared abandoned. The Respondent says that the Board considered the Applicants' explanations but found them not credible due to the inconsistencies in the documentary evidence.

VIII. ANALYSIS

[36] For people who claim to fear returning to Namibia, the Applicants appear to have made little effort to establish their claim for refugee protection in Canada. The record suggests repeated accommodation by the Board and failures to appear by the Applicants that are more consistent with an attitude of avoidance than an attempt to assert a claim.

[37] In any event, as far as the Decision under review is concerned there is clearly no legal error. The Applicants were made fully aware of the consequences for non-attendance at the July 18, 2013 hearing and of what they needed to provide in order to avoid an abandonment decision. Yet, once again, they failed to appear and did not provide the Board with convincing evidence of their inability to attend. The Board's Decision was reasonable and the Court cannot interfere simply because the Applicants want it to be set aside.

[38] The Applicants are critical of the Board's consideration of the doctor's note of July 17, 2013, but they have really told the Court nothing that would allow me to question the Board's alternative finding (CTR at 136):

In any event, the claimant has chose [*sic*], for reasons unknown to the Board, to have counsel in Toronto represent her. The claimant is living in Edmonton. The Board has videoconferencing in Edmonton. Indeed, the videoconferencing can be set up between Toronto and Calgary and Edmonton, or the claimant could travel down to Calgary to have an in-person hearing and have counsel present. All of these locations are publicly know [*sic*], or all of these locations are made available to the public and it is up to the claimant to determine the closest place to come to the Board for a refugee hearing. There's no reason why she would have to fly to Toronto. She could have a videoconference in Edmonton.

[39] The Applicants have been advised that they do not need to travel to Toronto for the hearing and that they can participate from Edmonton by videoconference. In fact, their own counsel was participating by videoconference. The doctor's note says that the female Applicant "probably should not be flying on an airplane to Toronto at this time." There is no explanation from the Applicants, or anyone else, as to why they did not ask to attend by videoconference. They simply informed the Board that they would not be attending the hearing and the doctor's note they eventually provided only speaks to air travel. The Decision clearly states this as one of the reasons for finding the claim abandoned, and yet the Applicants have chosen not to address it in their materials. The Court can only assume that they have no reason for their failure to attend the hearing in this way, even though they were told that it was always an option for them.

[40] With no real refutatory evidence on point, it is not possible for the Court to say that the Decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Applicants were given a full and fair opportunity to make their case for non-abandonment before the Board. For reasons that are not clear from the record, they chose not to avail themselves of that opportunity even though they were fully aware of the consequences.

[41] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5225-13

STYLE OF CAUSE: CECILIE VEHAMIS UANDARA, OPERI MUATIJE v
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 16, 2014

JUDGMENT AND REASONS: RUSSELL J.

DATED: FEBRUARY 27, 2015

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