

Federal Court



Cour fédérale

Date: 20180308

Docket: IMM-3570-17

Citation: 2018 FC 271

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 8, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

JHIMMY NOEL

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] Mr. Jhimmy Noel seeks judicial review of a decision by the Refugee Protection Division [RPD] for refusing to reopen his refugee protection claim. The RPD concluded that its decision

declaring the Applicant's refugee protection claim abandoned was not the result of a breach of a principle of natural justice and that as a result, reopening was not warranted.

[2] For the reasons that follow, the application for judicial review will be dismissed.

II. Facts

[3] Mr. Noel is a citizen of Haiti. On April 3, 2017, he arrived in Canada from the United States at the Fort Erie border crossing. He applied for refugee protection on the same day, and the Immigration and Refugee Board [IRB] received a notice of referral the next day.

[4] Several documents were provided to the Applicant upon his arrival, including a notice to appear stating that he had fifteen days to file his Basis of Claim Form [BOC Form] and that a special hearing for failure to do so, if applicable, was set for April 25, 2017.

[5] The Applicant did not provide his BOC Form within the 15 days, and a few days before the date of his special hearing, an employee from the RPD registry attempted to contact him by telephone to remind him that he had to appear on April 25, 2017, with his BOC Form duly completed.

[6] Since the Applicant did not appear, the RPD declared his refugee claim abandoned for failure to provide his BOC Form within the prescribed time and failure to appear at the special hearing.

[7] In an affidavit filed in support of his application to reopen, the Applicant explained his delay and absence. He stated that he never knew there was a deadline for producing his BOC Form and that if he failed to comply, a special hearing on the abandonment of his refugee claim would be held. He also stated he did not recall if an immigration officer had indicated this to him when he arrived.

[8] He added that the day after his arrival to Canada, his sister, who had been living in Canada since obtaining refugee status in 2009, helped him find an immigration lawyer and that an appointment was made for April 28, 2017. On or around April 15, 2017, she informed him that she had learned from a friend that there would be a fifteen-day period to respect for filing his BOC Form. The Applicant and his sister therefore attempted to contact the retained lawyer without success. Unable to find another available lawyer, they completed the BOC Form themselves.

[9] On April 18, 2017, the Applicant and his sister went to a welfare office to file the BOC Form, mistakenly believing they were in the right place. A representative at the welfare office allegedly informed them that they were not in the right place, but since the Applicant had completed his BOC Form and a court date had already been set, his file seemed complete.

[10] A few days later, the Applicant contacted a new lawyer, who is still representing him. He explained the events of the previous weeks and made an appointment with him for the next day, April 25, 2017, at 2 p.m. During the meeting, the Applicant's lawyer explained to him that he was out of time to submit his BOC Form and that the special hearing on the abandonment had

likely been held that morning. The lawyer tried unsuccessfully to contact the IRB to explain the situation.

[11] On April 26, 2017, the IRB received the Applicant's BOC Form and a representation form.

[12] On May 1, 2017, the IRB provided the Applicant and his counsel with a notice of decision informing the Applicant of the abandonment of his refugee claim, and on May 19, 2017, the Applicant submitted his application to reopen.

[13] On July 7, 2017, the RPD denied the motion to reopen.

III. Impugned Decision

[14] The RPD concluded that since the Applicant had not been the victim of a breach of a principle of natural justice, there was no reason to grant his application to reopen his refugee claim.

[15] The RPD listed the documents provided to the Applicant upon his arrival to Canada, which informed him of his responsibilities as a refugee claimant and the various deadlines to be respected. Moreover, the notice of referral received by the IRB confirms that all documents were served to the Applicant in person, by an immigration officer.

[16] The RPD added that the documents contained in the package provided to the Applicant are translated into around ten languages, including French. The Applicant used the services of an interpreter during his interview by an immigration officer and he signed a form containing the conditions imposed on him, including the various prescribed deadlines.

[17] The RPD acknowledged that the Applicant indicated he had difficulty speaking French. It noted, however, that the affidavit submitted in support of his application to reopen and his BOC Form—in which he says he speaks French (see page 5 of his BOC Form, question 1g)—are written in French. The RPD also noted that the Applicant completed high school and attended a college and a polytechnic school.

[18] In light of those observations, the RPD believed that [TRANSLATION] “the decision on the abandonment of the Applicant’s refugee claim made on April 25, 2017, results from the Applicant’s negligence Applicant, not from a violation of one of the principles of natural justice”. The RPD concluded that the Applicant himself was responsible for his failure to follow the established procedure and that he had been given several opportunities to understand the situation in which he found himself and to try to correct it.

[19] The Applicant could not explain his failure to contact the IRB, even after experiencing uncertainty when he went to the welfare office, where he was advised that he was not in the right place to file his BOC Form. Based on the information received, his inaction and failure to obtain further information and to report to the IRB office amounted to negligence.

[20] As to the fact that the special hearing took place in the absence of the Applicant and his counsel, the RPD replied that this is a normal consequence of his negligence and not a breach of a principle of natural justice, since the Applicant was duly summoned.

[21] The RPD also concluded that, contrary to the Applicant's submission, the latter lacked diligence and his actions tend to suggest that he did not intend to pursue his refugee claim.

[22] The RPD acknowledged that the Applicant ultimately retained the services of a lawyer and submitted his BOC Form the day after his special hearing, thereby [TRANSLATION] "demonstrating due diligence in correcting the situation in which he had placed himself". However, it stated that in the context of an application to reopen, its obligation is limited to determining whether the decision declaring the abandonment of a refugee claim is the result of a violation of one of the principles of natural justice. The RPD concluded that there was no such violation and dismissed the Applicant's application to reopen.

IV. Issue in dispute and standard of review

[23] This application for judicial review raises only one question:

- *Did the RPD err in rejecting the application to reopen the Applicant's claim?*

[24] The standard of review applicable to the analysis of this question is that of reasonableness (*Orozco v Canada (Citizenship and Immigration)*, 2008 FC 270 at paras 24-26, *Djilal v Canada (Citizenship and Immigration)*, 2014 FC 812 at paras 6-7). I must therefore review the RPD's decision and determine whether it meets the criteria set out in *Dunsmuir v New Brunswick*, 2008

SCC 9 at para 47, particularly if it “[fits] comfortably with the principles of justification, transparency and intelligibility” (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[25] The criteria in *Dunsmuir* are met if the RPD’s reasons “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes”, (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

V. Analysis

[26] Subsections 62(1) and 62(6) of the *Refugee Protection Division Rules*, SOR/2012-256, read as follows:

Application to reopen claim

62(1) At any time before the Refugee Appeal Division or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the Division to reopen the claim.

...

Factor

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

[27] The Applicant does not indicate how the RPD’s decision would be unreasonable. In his application for judicial review, as in his application to reopen, he does not really specify what

principle of natural justice was allegedly violated. He simply explained his delay and absence during the special hearing of April 25, 2017. He accused the RPD of having relied on his BOC Form to conclude that his knowledge of French was sufficient and accused it for its lack of “fair play” and its rigidity with respect to deadlines, whereas it had difficulty meeting its own deadlines.

[28] Essentially, the Applicant is asking me to re-analyze the evidence and substitute my opinion for that of the RPD. This is not my role (*Khosa v Canada (Citizenship and Immigration)*, 2010 FC 83 at para 37, see also *Anni v Canada (Citizenship and Immigration)*, 2017 FC 134 at para 19, *Singh v Canada (Citizenship and Immigration)*, 2008 FC 673 at para 10).

[29] I am of the opinion that it was reasonable for the RPD to find that the Applicant was the sole person responsible for his delay and absence and that he had received all the information necessary to complete his refugee claim. The Applicant’s situation Applicant is different from that of the applicants in the *Djilal* case above, and in *Khan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 833; the Applicant was not misled by a lawyer or immigration consultant whose services were retained to assist him.

[30] The Applicant’s negligence alone cannot justify the reopening of his refugee claim. I cite Justice Danièle Tremblay-Lamer: “At a certain point, the applicant must take some responsibility to ensure that he understood the written correspondence he received regarding his refugee claim” (*Sainvry v Canada (Citizenship and Immigration)* 2013 FC 468 at para 16). The Applicant admits, moreover, that he did not read the documents he was given.

[31] Even if he did not know any of the fifteen languages used in the package he was given, it was the Applicant's responsibility to take interest and to seek help. His sister had been living in Canada since 2009 and could have helped him.

[32] But there is more. The RPD was correct in understanding from the Applicant's affidavit and his BOC Form that he understands French. His affidavit indicates that he has difficulty speaking French, but does not indicate that he cannot read or understand French. In his BOC Form, he declares that he speaks Creole and French. He also states that part of his classes were in Creole, suggesting that the rest were in French. The RPD could therefore reasonably conclude that the Applicant understood the documents received and his responsibilities as a refugee claimant.

[33] In support of his application for judicial review, the Applicant submitted the affidavit of an interpreter. However, the interpreter indicated he translated from French into Spanish. Although this was obviously an error, this error has no consequence since the affidavit was not submitted to the RPD, which only had in its possession an affidavit from the Applicant, written in French.

[34] The RPD acknowledged that the Applicant "acted promptly as a result of the decision made during his special hearing". However, it ultimately concluded that the Applicant had not established a breach of one of the principles of natural justice that would justify the reopening of his refugee claim. There is no error that would justify the intervention of the Court in this decision.

VI. Conclusion

[35] It follows that this application for judicial review is dismissed. The parties did not submit any general question for certification and the Court's opinion is that this case does not raise any.

JUDGMENT in docket IMM-3570-17

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question of general importance is certified;
3. No fees are awarded.

“Jocelyne Gagné”

Judge

Translation certified true
on this 3rd day of December 2018.

Elizabeth Tan, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3570-17

SYTLE OF CAUSE: JHIMMY NOEL v MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: FEBRUARY 5, 2018

JUGEMENT AND REASONS: GAGNÉ J.

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