Federal Court  Cour fédérale

Date: 20190531

Docket: IMM-2332-18

Citation: 2019 FC 771

Ottawa, Ontario, May 31, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

EMAN MANSOUR MAHMOUD ATTALLA
MOHAB ELSAYED MOHAMED AHMED
MALAK ELSAYED MOHAMED AHMED
MOHAMED ELSAYED AHMED
YARA ELSAYED MOHAMED AHMED
YASMEEN ELSAYED AHMED

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] On November 13, 2017, Eman Mansour Mahmoud Attalla and five of her children arrived at Pearson International Airport in Toronto on a direct flight from Cairo. Ms. Attalla and her children are all citizens of Egypt. At the time, the five children travelling with Ms. Attalla

ranged from eight to eighteen years of age. No one understood English. They had no family or friends in Canada.

[2] Despite everyone having valid visitor visas for Canada, Ms. Attalla immediately communicated to the Canada Borders Services Agency [CBSA] that she wanted to seek refugee protection for herself and her children. In brief, Ms. Attalla claimed to fear persecution in Egypt because of her opposition to the government of the day. Ms. Attalla also claimed on behalf of her adult daughter, Yasmeen, that she was at risk in Egypt because of her gender.

[3] CBSA officers processed Ms. Attalla and her children over the next few days. Not wanting to miss her appointments with the CBSA, and having nowhere else to stay, Ms. Attalla and her children slept at the airport.

[4] The CBSA completed its processing on November 15, 2017. The applicants' refugee claims were referred to the Immigration and Refugee Board of Canada [IRB] that day. This meant that their Basis of Claim [BOC] forms had to be submitted by November 30, 2017. (Under section 159.8(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, the forms must be submitted within fifteen days of referral of the claim to the IRB.) A special hearing before the Refugee Protection Division [RPD] was set for December 7, 2017, in the event that the BOC forms were not provided by November 30, 2017. The hearing of the refugee claims was set for March 15, 2018.

[5] The applicants did not provide their BOC forms by November 30, 2017. They did not attend the special hearing on December 7, 2017.

[6] For reasons stated on the record at the special hearing on December 7, 2017, the RPD member declared that the applicants' refugee claims were abandoned.

[7] Meanwhile, Ms. Attalla was trying to retain a lawyer to help with the refugee claims. This was difficult because she did not know any lawyers in Toronto and she did not speak English. She was also trying to find shelter for herself and her family. Eventually Ms. Attalla met with a lawyer on December 9, 2017. He could not assist her but he referred her to another lawyer who could. This second lawyer assisted the applicants with their BOC forms, which were all signed on December 17, 2017. The BOC forms as well as an application to reopen the refugee claims were submitted to the RPD on December 22, 2017.

[8] For reasons dated May 1, 2018, the RPD dismissed the application to reopen the refugee claims.

[9] The applicants now apply for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[10] For the reasons that follow, I am allowing the application and remitting the matter to the RPD for redetermination.

[11] Applications to reopen refugee claims are governed by Rule 62 of the *Refugee Protection Division Rules*, SOR/2012-256. For present purposes, the pertinent parts of this rule are subsections (6) and (7), which provide as follows:

(6) Factor – The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.
(7) Factors – In deciding the application, the Division must consider any relevant factors, including	(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :
(a) whether the application was made in a timely manner and the justification for any delay; and	a) la question de savoir si la demande a été faite en temps opportun et, le cas échéant, la justification du retard;
(b) the reasons why	b) les raisons pour lesquelles :
(i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or	(i) soit une partie qui en avait le droit n'a pas interjeté appel auprès de la Section d'appel des réfugiés,
(ii) a party did not make any application for leave to apply for judicial review or an application for judicial review.	(ii) soit une partie n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire.

[12] In other words, a finding that there was a failure to observe a principle of natural justice is a necessary condition for allowing an application to reopen but, depending on other relevant factors (e.g. an unexplained delay in bringing the application to reopen) it may not be sufficient.

[13] The parties submit, and I agree, that the merits of the RPD's decision on an application to reopen a refugee claim are reviewed on a reasonableness standard (*Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at para 13 [*Huseen*]; *Anni v Canada (Citizenship and Immigration)*, 2017 FC 134 at paras 13-14; *Hegedus v Canada (Citizenship and Immigration)*, 2019 FC 428 at para 16). Under this standard, the reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[14] The RPD member does not address subsection (7) of Rule 62 in her reasons but there could be no suggestion that there was an unexplained delay on the applicants' part in applying to reopen their refugee claims or that any other factor weighed against granting the application even if a failure to observe the principles of natural justice was established. The application to reopen thus turned on whether the principles of natural justice were observed when the refugee claims were declared abandoned. The member concluded that they were. This application for judicial review turns on whether that conclusion is reasonable.

[15] Counsel acting on behalf of the applicants at the time (not Ms. Ashamalla) argued in the application to reopen that the principles of natural justice were not observed when the refugee claims were declared abandoned because Ms. Attalla had not been told the deadline for submitting the BOC forms or the date of the special hearing; she was only told the date of the refugee hearing. As well, Ms. Attalla's ability to participate fully in the early days of pursuing

her refugee claim was compromised by mental health concerns, including post-traumatic stress disorder, which could lead to impaired concentration and memory. The latter submission was supported by a report from a registered psychotherapist who had assessed Ms. Attalla on December 19, 2017.

[16] The member rejected both submissions. The member found that Ms. Attalla had been told the relevant dates in Arabic when she met with CBSA officers and that she had not raised any concerns at the time about understanding the interpreters who were assisting her. As well, the member did not accept that Ms. Attalla's "mental incapacity was such that she could not appreciate the nature of the proceedings during the initiation of her claim."

[17] In my view, the member's conclusion that the principles of natural justice were observed is unreasonable.

[18] The member appears to have approached the central question of whether Ms. Attalla was aware of the deadline for providing the BOC forms or the date of the special hearing as simply a matter of whether she was told these dates or not. Certainly if Ms. Attalla had not been told the dates, she could not be expected to have been aware of them or to comply with them. The member concluded that Ms. Attalla had been told the dates in Arabic (on November 15, 2017, to be precise) and this finding was reasonably open to her on the evidence. However, this is not the end of the story. It does not follow from the fact that Ms. Attalla was told the dates on November 15, 2017 that she would remember them during the relevant time period (i.e. until December 7, 2017). The fact that the dates were on documents provided to her would not help

because those documents were all in English. Moreover, if Ms. Attalla had forgotten that she was told these dates, and never recalled later on that she had been told them, it was not unreasonable for her to take the position on the application to reopen that she was never told these dates but only the date of the refugee hearing. After all, that is what she remembered.

[19] Ms. Attalla's conduct after she arrived in Canada demonstrates that she had every intention of pursuing the refugee claims. Apart from missing the BOC deadline and not attending the special hearing, there is no suggestion of dilatoriness on her part. That she could forget something as important as the date the BOC forms were due and the date of the special hearing is not out of the question given her specific circumstances at the time. If this is what happened, it would be relevant to whether the principles of natural justice were observed when the refugee claims were dismissed as abandoned after none of the applicants appeared at the special hearing. In such circumstances, the loss of the right to be heard on the question of whether the claims should be declared abandoned could well mean that the principles of natural justice were not observed. However, the member never addresses the possibility that Ms. Attalla had been told the relevant dates but, in the stress and confusion of her first days and weeks in Canada, she had simply forgotten them. As a result, the member's reasons lack justification, transparency and intelligibility. Moreover, that stress and confusion could cause Ms. Attalla not to retain these dates without having to rise to the level of making her "unable to appreciate the nature of the proceedings," a threshold which the member appears to suggest (erroneously in my view) is necessary to meet to establish a failure to observe the principles of natural justice.

[20] In addition to these flaws in the member's reasoning, in my view the decision itself does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The loss of the opportunity to have the refugee claims determined on their merits is not an acceptable outcome on the facts of this case, particularly when those facts are considered against the backdrop of the objectives of the *IRPA* with respect to refugees (see *IRPA*, s 3(2); see also *Huseen* at para 16).

[21] For these reasons, the decision of the RPD dated May 1, 2018 must be set aside and the matter redetermined by another decision-maker.

[22] Neither party suggested a serious question of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

[23] Finally, the original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(1). Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-2332-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.
2. The application for judicial review is allowed.
3. The decision of the Refugee Protection Division dated May 1, 2018, is set aside and the matter is remitted for redetermination by a different decision-maker.
4. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2332-18
STYLE OF CAUSE:	EMAN MANSOUR MAHMOUD ATTALLA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 27, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	MAY 31, 2019

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