

Date: 20090317

Docket: IMM-368-08

Citation: 2009 FC 272

Ottawa, Ontario, March 17, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ANLA RHODEEN SAMUELS

Applicant

and

**THE MINISTER OF CITIZENSHIP
& IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Anla Rhodeen Samuels (the “Applicant”) seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated January 3, 2008. In that decision, the Board rejected the Applicant’s application to reopen her claim for refugee protection.

[2] The Applicant, a citizen of Jamaica, came to Canada on July 14, 2005. She claimed protection on September 11, 2007, on the basis of persecution in Jamaica because of her sexual orientation towards women.

[3] The Applicant received her Personal Information Form (“PIF”) on September 11, 2007. By letter dated September 12, 2007, she was advised that the completed PIF was due no later than 28 days after she received it.

[4] The September 12, 2007 letter also contained the following advice:

Enclosed with this letter you will find a *Notice to Appear for an Abandonment Hearing* to be held on October 24, 2007. If the IRB does not receive your completed PIF within the 28 days, you must appear at this hearing to explain why you did not provide your PIF on time. If you do not appear at that hearing or if you appear but you cannot give a valid reason for not providing your PIF on time, the IRB may declare your claim abandoned. This means that you would lose your right to have your claim heard by the IRB.

If the IRB receives your completed PIF within the 28 days, the hearing scheduled for October 24, 2007 will be cancelled and you will not have to appear on that date.

[5] The enclosed notice provided as follows:

If you fail to provide the IRB with your completed PIF within 28 days, you must appear at a hearing to explain why you did not provide your PIF on time. If you do not appear at that hearing or if you appear but can not give a valid reason for not providing your PIF on time, the IRB may declare your claim to have been abandoned and you may lose the right to have your claim heard by the IRB. This hearing will take place at the:

IMMIGRATION AND REFUGEE BOARD
74 Victoria St, Suite 400,
Toronto, Ontario, M5C 3C7
Telephone: 954-1000 Facsimile: 954-1165

on October 24, 2007, Room PABA, at 9:30.

[6] By Notice of Abandonment Decision dated November 5, 2007, the Applicant was informed that her claim had been found to be abandoned. This Notice advised as follows:

On September 11, 2007 your claim was referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board.

You were provided with your Personal Information Form (PIF) on September 11, 2007. You failed to provide the RPD with your completed PIF on time.

By Notice dated September 12, 2007, the RPD advised you that a hearing would take place on October 24, 2007, to give you an opportunity to explain why the RPD should not determine that your claim has been abandoned. Neither you nor a representative appeared at that hearing.

[7] On December 14, 2007, the Applicant submitted an application to reopen her claim. She filed an affidavit in support of that application. In that affidavit, she deposed that she mailed her completed PIF to the Board on October 5, 2007 and that the PIF was due on October 9, 2007. She deposed that she did not personally receive any correspondence or telephone contact from the Board until she received the Abandonment Decision.

[8] The Applicant further deposed that she did not change her address from the time that she made her refugee claim. She said that she believes there was a breach of natural justice since she “did not get an opportunity to have a hearing of my claim and my show cause or abandonment hearing”.

I did not receive any notice to appear for a hearing nor did I receive any notice to appear for an abandonment hearing from the Immigration and Refugee Board. I only received the decision that my case was declared abandoned.

...

I believe that there was a breach of the principles of natural justice in the fact that I did not get an opportunity to have a hearing of my claim and my show cause or abandonment hearing.

[9] The Board did not give reasons for its decision of January 3, 2008 when the reopening application was dismissed.

[10] The Applicant filed an affidavit in support of this application for judicial review. The Minister of Citizenship and Immigration (the "Respondent") also filed affidavits, that is the affidavits of Josephine Mayanja and of Angela Marinos.

[11] In her affidavit, the Applicant stated the basis for her claim for refugee protection in Canada. She repeated that she had mailed her PIF on October 5, 2007, "unaware that I could have submitted it by hand delivery". At paragraph 16 of this affidavit, she deposed as follows:

After filing my PIF, I had no written or verbal correspondence with the Immigration and Refugee Board, until early November 2007, when I received a letter stating that my claim had been declared abandoned because I did not provide my PIF on time and that a notice dated September 12, 2007, had been sent to me advising me of a hearing on October 24th, 2007. However, I never received such a notice. Such a notice if dated September 12, 2007, as stated on the abandonment decision, would have been sent out one day after I received by PIF that was due 27 days later. I therefore could not attend an abandonment hearing that I had no knowledge of.

[12] Ms. Mayanja is a Case Officer with the Board and was responsible for the Applicant's file. She deposed that she spoke with the Applicant by telephone on October 17, 2007, to remind her of the preliminary abandonment hearing that was scheduled for October 24, 2007. She further deposed

that she made notes about this telephone call and that she recorded that the Applicant's PIF was both late and incomplete.

[13] Ms. Marinos, a solicitor employed with the Department of Justice, Immigration Division, deposed that she had knowledge of the documents from the Board's file concerning the Applicant's refugee claim. Copies of various documents, including the notes regarding the telephone call by Ms. Mayanja on October 17, 2007, were attached as exhibits to her affidavit.

[14] The test to be applied by the Board upon an application to reopen a refugee claim that has been declared abandoned is set out in the *Refugee Protection Division Rules*, SOR/2002-228 (the "Rules") at Rule 55(4) as follows:

(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.

(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[15] The test is whether a breach of natural justice has occurred relative to the abandonment proceedings before the Board.

[16] Rule 58 deals with abandonment of a claim, as follows:

58.(1) A claim may be declared abandoned, without giving the claimant an opportunity to explain why the claim should not be declared

58.(1) La Section peut prononcer le désistement d'une demande d'asile sans donner au demandeur d'asile la possibilité d'expliquer

abandoned, if

(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

(b) the Minister and the claimant's counsel, if any, do not have the claimant's contact information.

Opportunity to explain

(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

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

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

Factors to consider

pourquoi le désistement ne devrait pas être prononcé si, à la fois :

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) ni le ministre, ni le conseil du demandeur d'asile, le cas échéant, ne connaissent ces coordonnées.

Possibilité de s'expliquer

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

(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.

Éléments à considérer

(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

(4) If the Division decides not to declare the claim abandoned, it must start or continue the proceedings without delay.

Poursuite de l'affaire

(4) Si la Section décide de ne pas prononcer le désistement, elle commence ou poursuit l'affaire sans délai.

[17] The crux of the Applicant's argument here is that she did not receive notice of the abandonment hearing that proceeded on October 24, 2007. She argued that the letter of September 12, 2007 and the enclosed Notice to Appear cannot be regarded as proper notice since the purported notice was sent only one day after she had received her PIF. As of September 12, the PIF was not late and when she mailed it on October 5, 2007, she had no way of knowing that it was not received by the Board before the deadline, that is October 9, 2007.

[18] Rule 22 provides that the Board must give written notice of a hearing to a party to proceedings before the Board, as follows:

22. The Division must notify a party in writing of the date,

22. La Section avise les parties par écrit des date, heure et lieu

time and location of a proceeding.

d'une procédure.

[19] Rule 35(2) addresses the delivery of documents by the Board, as follows:

(2) A document provided by regular mail to a party is considered to be received seven days after the day it was mailed. If the seventh day is a Saturday, Sunday or other statutory holiday, the document is considered to be received on the next working day.

(2) Tout document envoyé par courrier ordinaire à une partie est considéré comme ayant été reçu sept jours après sa mise à la poste. Si le septième jour est un samedi, un dimanche ou un autre jour férié, le document est alors considéré comme ayant été reçu le premier jour ouvrable suivant.

[20] Does the notice that was provided under cover of the letter of September 12, 2007 meet the requirements of the Rules as to notice of the hearing scheduled for October 24, 2007?

[21] According to the decision in *Canada (Ministre de la Citoyenneté & de l'Immigration) c. Deffo*, CF 1589, Rule 22 imposes a non-discretionary duty upon the Board to provide written notice of a proceeding.

[22] In my opinion, the Board complied with the notice requirement when it sent out the notice on September 12, 2007, about the abandonment hearing that was scheduled for October 24, 2007. It is clear from the notice that the hearing was conditional, that is if the completed PIF was received within 28 days after receipt by the Applicant, then the hearing would be cancelled.

[23] The Applicant's PIF was not received by its due date. The Applicant was aware, or should have been, that failure to submit the completed PIF on time could lead to an abandonment hearing. The letter of September 12, 2007 provided that notice. According to Rule 35(2), that notice is deemed to have been received by a party, once it has been mailed by regular mail. There is nothing in the Tribunal Record to show that the document was returned to the Board or that the Applicant notified the Board of any change in her mailing address.

[24] In these circumstances, the telephone call of October 17, 2007 by Ms. Mayanja is a neutral factor. Rule 22 addresses written notice, not notice by way of a telephone call.

[25] In the result, I see no basis for judicial intervention. The decision of the Board dismissing the Applicant's reopening application meets the applicable standard of review, that is the standard of reasonableness, pursuant to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. This application for judicial review will be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-368-08

STYLE OF CAUSE: ANLA RHODEEN SAMUELS v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: February 3, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN J.

DATED: March 17, 2009

APPEARANCES:

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