

Federal Court



Cour fédérale

**Date: 20091204**

**Docket: IMM-663-09**

**Citation: 2009 FC 1248**

**Ottawa, Ontario, December 4, 2009**

**PRESENT: The Honourable Mr. Justice Mainville**

**BETWEEN:**

**OSCAR DAMIAN GONZALEZ GONZALEZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review submitted by Oscar Damian Gonzalez Gonzalez (the applicant) of a decision dated January 30, 2009, by the Refugee Protection Division of the Immigration and Refugee Board (the Board), declaring the abandonment of his refugee claim in Canada.

## Background

[2] The applicant is a citizen of Mexico, born on August 19, 1989, who temporarily entered Canada as a visitor on or around September 20, 2008. He then filed a refugee claim and this claim was submitted to the Board on November 21, 2008.

[3] By means of a notice given to the applicant in person on November 21, 2008, he was informed that he had to submit his duly completed personal information form in the following 28 days and he was called to a hearing before the Board scheduled for December 2, 2008. In particular, the notice contained the following:

[TRANSLATION]

If you do not submit your PIF [personal information form] in the twenty-eight days following the date on which this was given to you, the RPD [Refugee Protection Division] may, after giving you the opportunity to be heard, declare that your refugee claim has been abandoned. You will be called to a hearing to explain why the RPD should not declare that your refugee claim has been abandoned. If necessary, the date that appears on this notice will be annulled.

[4] The applicant did not appear before the Board on December 2, 2008, and did not submit his personal information form before the prescribed deadline.

[5] On January 13, 2009, his counsel wrote to the Board to inform it of the following:

[TRANSLATION]

Mr. Gonzalez had an appointment with you at the beginning of December 2008, but because he had problems with legal aid he cancelled his appointment at our office. He phoned to make another appointment, but our offices were closed for the holiday season. He finally had an appointment today and we discovered that he had

understood that he had to produce his PIF as soon as possible but had not understood that he had only 28 days. We are to see Mr. Gonzalez again this Friday, January 16 in the afternoon. We would kindly ask you to grant us two weeks to produce our client's PIF.

[6] This request for an extension was refused and, on January 19, 2009, the Board called the applicant to a hearing to allow him to explain why he failed to send the Board his duly completed personal information form by the prescribed deadline. The notice to appear made no mention of the applicant's failure to appear before the Board on December 2. The hearing was scheduled for January 28, 2009, at 8:30 a.m.

[7] The day before this hearing, on January 27, 2009, counsel for the applicant submitted the duly completed personal information form dated January 16, 2009.

[8] The hearing on January 28, 2009, took place as scheduled at 8:30 a.m. and the applicant was present. However, his counsel was not present. The hearing was not recorded. The applicant submitted an affidavit, which was not challenged by the respondent, in which he explains the circumstances that prevented him from filing his personal information form before the deadline. In particular, he mentions a) that he was in a crisis situation during the month of December 2008 because he was not receiving social assistance and had nothing to eat and no money to take the bus to get to his counsel's office; and b) that his counsel was on vacation during the period of Christmas 2008 and New Year's Day 2009 and that he was not able to make an appointment before January. The applicant also relates in his affidavit that his counsel requested an extension on January 13, 2009.

[9] The applicant also claims that he asked at the hearing that everyone wait for the arrival of his counsel [TRANSLATION] “who was on his way to the hearing” (at paragraph 16 of his affidavit), but the Board refused. He also states that he told the Board that he wanted to pursue his refugee claim. Finally, the applicant notes that the hearing was brief.

### **Relevant statutory and regulatory provisions**

[10] Subsections 167(1) and 168(1) of the *Immigration and Refugee Protection Act* (the Act) provide the following:

167. (1) Both a person who is the subject of Board proceedings and the Minister may, at their own expense, be represented by a barrister or solicitor or other counsel.

167. (1) L'intéressé peut en tout cas se faire représenter devant la Commission, à ses frais, par un avocat ou un autre conseil.

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.

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.

[11] Section 58 of the *Refugee Protection Division Rules* provides the following:

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

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

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

(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

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

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

(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

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

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

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.

(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.

(4) If the Division decides not to declare the claim abandoned, it must start or continue the proceedings without delay.	(4) Si la Section décide de ne pas prononcer le désistement, elle commence ou poursuit l'affaire sans délai.
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### **Arguments raised**

[12] The applicant is raising three main arguments to which the respondent has replied: a) the Board allegedly breached his right to counsel, guaranteed by section 10(b) of the *Canadian Charter of Rights and Freedoms*, and the principles of procedural fairness; b) the Board erred in finding that the claim had been abandoned when the applicant's manifest intention was to proceed with his refugee claim; and c) the Board erred in law by not assessing, in the context of the abandonment hearing, the applicant's possible fear of persecution if he were to return to Mexico.

[13] It is to be noted that the third argument is clearly erroneous and does not have any bearing on the issue that was before the Board. Therefore, there is no reason for examining it. A hearing on an abandonment pursuant to subsection 168(1) of the Act should not be confused with a pre-removal risk assessment. Furthermore, given this Court's finding on the abandonment issue, there is no basis for ruling on the alleged breach of the right to counsel.

### **Analysis of the abandonment issue**

[14] Before *Dunsmuir*, this Court consistently held that the standard of review of reasonableness *simpliciter* applied to the judicial review of a decision of the Board declaring a claim to be abandoned: *Ahamad v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 109, at paragraph 27; *Anjun v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 496 at

paragraph 17; *Markadu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1596 at paragraph 9; *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 328 at paragraph 15.

[15] In accordance with *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of review of reasonableness *simpliciter* is now merged with the reasonableness standard. Given that in *Dunsmuir*, at paragraph 62, there is no basis for carrying out an exhaustive review to determine the proper standard of review when it has already been determined in a satisfactory manner by the case law, I will therefore proceed with the judicial review of the Board's decision declaring the abandonment by applying the reasonableness standard.

[16] The issue in this case is therefore whether the Board reached a reasonable finding in deciding that the applicant had abandoned his refugee claim. In *Ahamad v. Canada (Minister of Citizenship and Immigration)*, above, at paragraph 32, Justice Lemieux said the following:

The decided cases of the Court on a review of abandonment claim decisions by the CRDD indicate the test or question to be asked is whether the refugee claimant's conduct amounts to an expression of intention by that person, he or she did not wish or had shown no interest to pursue the refugee claim with diligence; this assessment is to be made in the context of the obligation of a claimant who breaches one of the elements of subsection 69.1(6) to provide a reasonable excuse (*Perez v. Canada (Solicitor General)* (1994), 93 F.T.R. 256 (F.C.T.D.), Joyal J.; *Izauierdo v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1669 (T.D.) (QL), Rouleau J.; *Ressam v. Canada (Minister of Citizenship and Immigration)* (1996), 110 F.T.R. 50 (F.C.T.D.), Pinard J.; *Alegria-Ramos v. Canada (Minister of Citizenship and Immigration)* (1999), 164 F.T.R. 150 (F.C.T.D.), Dubé J.).

[17] In the case at bar, given the lack of a recording of the hearing before the Board and the cursory nature of the Board's decision, which contains practically no explanation of the reasons for the abandonment decision, it is difficult to understand what led the Board to declare the abandonment. Under such circumstances, we must act with caution and avoid attributing reasons to a decision that does not contain any reasons.

[18] In his affidavit, the applicant provides explanations for his delay in submitting his personal information form.

[19] Indeed, the applicant argues that he was in a crisis situation during December 2008 since he was not receiving social assistance and did not have anything to eat or even money to take the bus to get to his counsel's office. The applicant also claims that he informed the Board during the abandonment hearing that he was continuing his claim and wished to pursue it. The applicant also submitted his personal information form, albeit a few weeks late. Furthermore, his counsel had written to the Board to explain the delay, to request an extension for submitting the form and to indicate the applicant's intention of pursuing his claim.

[20] In the absence of reasons why the Board did not accept the applicant's explanations, I cannot but conclude that this decision is unreasonable. Indeed, reasonableness is mostly concerned with the existence of justification, transparency and intelligibility within the decision-making process, and also whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47).



[21] The purpose of a special hearing under subsection 52(2) of the *Refugee Protection Division Rules* is to determine, given all of the circumstances and taking into account all relevant facts, whether the applicant's behaviour evidences, in clear terms, a wish or intention not to proceed with his or her claim (*Ahamad*, above, at paragraph 37). In light of the applicant's uncontradicted evidence and the lack of reasons for not accepting this evidence, the application for judicial review is allowed, the Board's decision that the applicant abandoned his claim is set aside and the applicant's file is referred back to the Board to be dealt with in accordance with the Act.

[22] This matter does not raise any serious question of general importance and, consequently, no question will be certified in accordance with paragraph 74(d) of the Act.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review be allowed, that the Board's decision that the applicant had abandoned his claim be set aside and that the applicant's file be referred back to the Board to be dealt with in accordance with the Act.

“Robert M. Mainville”

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Judge

Certified true translation  
Susan Deichert, Reviser

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-663-09

**STYLE OF CAUSE:** OSCAR DAMIAN GONZALEZ GONZALEZ v.  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 23, 2009

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

**DATED:** December 4, 2009

**APPEARANCES:**

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