Federal Court Cour fédérale

Date: 20091222

Docket: IMM-2185-09

Citation: 2009 FC 1306

Ottawa, Ontario, December 22, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

DOMINGO MARTINEZ GARDUNO
ARACELI BADILLO BRAVO
ANDRES MARTINEZ BADILLO
SILVANA MARTINEZ BADILLO

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated April 14, 2009, rejecting the application for the RPD to reopen the applicants' claim. The RPD had previously declared the claim abandoned and closed the applicants' file when they failed to appear.

[2] After carefully considering the case submitted by the applicants, I have concluded that the RPD erred in law by refusing to reopen the applicants' claim, and intervention by this Court is therefore warranted.

a. Facts

[3] The principal applicant, Domingo Martinez Garduno, his wife, Araceli Badillo Bravo, and their two children, Andres and Silvana Martinez Badillo, are Mexican citizens and claimed refugee protection on October 25, 2006.

[4] In early December 2006, the applicants moved. They allege that they informed the RPD and Citizenship and Immigration Canada (CIC) of their change of address within a few days after the move.

[5] On November 2, 2007, a notice of a hearing of their refugee protection claim before the RPD in December 2007 was sent to the applicants' former address.

[6] On December 18, 2007, the applicants did not appear for their hearing. Also on that date, the lawyer who had represented them up to that point withdrew from the case, and had no further contact with the applicants.

[7] On January 7, 2008, a second notice was sent, again to the applicants' former address, for them to appear at a hearing for the purpose of explaining their failure to appear the first time.

[8] On January 23, 2008, the applicants again failed to appear at the hearing.

[9] On January 24, 2008, the first notice, which had been sent on November 2, was returned to the RPD by the post office, with the notation addressee "moved/unknown".

[10] On January 25, 2008, the RPD concluded that the applicants' refugee protection claim had been abandoned and closed their file.

[11] According to the affidavit by Louise Brazeau, an administrative assistant at the RPD, she had contacted CIC on January 28, 2008, to obtain the applicants' address. She stated that a CIC official told her that the applicants had moved in December 2006 and had informed CIC of this. Ms. Brazeau then entered the change of address in the computer system. Ms. Brazeau stated that before January 28, 2008, there was no indication of a notice of change of address in the applicants' file.

[12] The applicants stated that they were not aware that their file had been closed at the RPD until February 2009, when they inquired about progress in their case through their new lawyer.

[13] On March 20, 2009, the RPD received an application to reopen the applicants' claim based on the failure to give proper notice of the hearings. In support of their application, the applicants submitted an affidavit by the principal applicant alleging that a written notice of change of address

was sent in December 2006 to both the RPD and CIC; a copy of the lease for their new apartment; and correspondence sent by CIC to their new address between January 2007 and February 2009. The rejection of that application to the RPD is the subject of this application for judicial review.

II. Impugned Decision

[14] The impugned decision consists of a short letter dated April 14, 2009, stating:

> [TRANSLATION]
>
> On March 20, 2009, the Refugee Protection Division (RPD) received your application to reopen your claim for refugee protection.
>
> **YOUR APPLICATION IS REJECTED.**

[15] Initially, that letter was the only thing sent to the applicants. However, under rule 9(2) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, an internal RPD request record dated April 8, 2009, was subsequently sent to them with the certified record of the tribunal, for the purposes of this application for judicial review.

[16] On the internal request record, a coordinating member of the RPD, Mr. Hamelin, had written brief reasons stating that no failure to observe a principle of natural justice that would justify reopening the claim, under rule 55(4) of the *Refugee Protection Division Rules*, SOR/2002-227, had been established. Mr. Hamelin stated that there was no evidence in the applicants’ file to confirm that they had sent their change of address to the RPD. Accordingly, the notices of hearing had been sent to the appropriate address.

III. Issue

[17] After hearing arguments from the parties, one issue remains: whether the RPD erred by refusing to reopen the applicants' refugee protection claim.

IV. Relevant Legislation

[18] The following provisions are relevant to this application for judicial review.

Section 168 of the *Immigration and Refugee Protection Act*, S. C. 2001, c. 27

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.

Rules 4, 22 and 55 of the *Refugee Protection Division Rules*, SOR/2002-227

4. (1) The claimant must provide the claimant's contact information in writing to the Division and the Minister.	**4.** (1) Le demandeur d'asile transmet ses coordonnées par écrit à la Section et au ministre.
…	…
(3) If the claimant's contact information changes, the claimant must without delay provide the changes in writing to the Division and the Minister.	(3) Dès que ses coordonnées changent, le demandeur d'asile transmet ses nouvelles coordonnées par écrit à la Section et au ministre.
22. The Division must notify a	**22.** La Section avise les parties

party in writing of the date, time and location of a proceeding.	par écrit des date, heure et lieu d'une procédure.
55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	**55.** (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
…	…
(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.

V. Analysis

[19] There is no unanimity in the case law regarding the standard of review that applies to a refusal to reopen a refugee protection claim that the RPD has declared abandoned. There are two trends in this regard. In some judgments, the Court has deferred to the administrative decision-maker, notwithstanding the natural justice component of a decision of this nature. In *Enahoro v. Canada (Minister of Citizenship and Immigration)*¸ 2006 FC 430, [2006] F.C.J. No. 531, at paragraphs 12-13, for example, the issue was analyzed entirely from the standpoint of the assessment of the facts, thus leading to application of the former patent unreasonableness standard. In other judgments, however, the emphasis has been placed instead on the RPD's expertise in applying its own rules of procedure to a fact situation, and accordingly the former reasonableness standard was applied: see, for example, *Hurtado v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 270, [2008] F.C.J. No. 345, at paragraph 25. Since the decision in *Dunsmuir*

v. New Brunswick, 2008 SCC 9, [2008] S.C.J. No. 9 and the resulting unification of the two standards of reasonableness, decisions where emphasis is placed on either of these two analyses have applied the reasonableness standard: see, *inter alia*, *Samuels v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 272, [2009] F.C.J. No. 336, at paragraph 25.

[20] However, there is a second trend in the case law, characterized by the weight placed on the procedural fairness that must surround the decision as to whether to reopen a refugee protection claim. From that standpoint, the standard of review will be correctness, in so far as the emphasis is placed on the impact of the decision. By that reasoning, the essential issue is no longer the assessment of the facts or the application of internal rules of procedure, but rather the fact that the applicant is being deprived of an opportunity to have his or her case heard.

[21] In this case, it is not necessary to take a position on the difference of opinion in the case law, since the RPD has committed a major error in law that justifies setting the decision aside regardless of the standard chosen.

[22] The notes written by RPD member Hamelin on the applicants' internal request record constitute the reasons for the decision under review: *Vranici v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1417, [2004] F.C.J. No. 1718, at paragraph 29; see also *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153, [2004] F.C.J. No. 1394, at paragraph 20. The RPD's conclusion, as set out in its reasons and argued by the respondent, is that there was no

denial of procedural fairness when the first panel of the RPD declared the claim abandoned, since there is no evidence of a change of address reported by the applicants.

[23] The principal applicant submitted an affidavit in support of his assertion that he informed the RPD of his change of address. Completely ignoring that affidavit is an error in law, since an affidavit is a sworn written statement and constitutes evidence that is acceptable before the RPD: *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2006] F.C.J. No. 631, at paragraph 25; *Khan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 833, [2005] F.C.J. No. 1067, at paragraph 9.

[24] The RPD did not question the applicant's credibility and could have questioned him at a hearing to verify the sincerity of his account, if it had any doubts in that regard. It did nothing, however. It is important to note the unique aspects of this case. Unlike many others where applicants admit that they failed to give notice of their change of address (*Abuali v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 221, [2009] F.C.J. No. 293, at paragraph 3; *Serrahina v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 477, [2003] F.C.J. No. 622, at paragraph 3), the applicants in this case have always maintained that they informed the RPD of their change of address. In both their affidavit before the RPD and the affidavit they presented in support of their application for judicial review, they stated that they had given notice of their change of address to both CIC and the RPD.

[25] The respondent submits that there is a slight contradiction between the principal applicant's two affidavits in that he states in the first affidavit that he gave notice of his change of address in writing to the IRB and CIC, while in his second affidavit he states that he went in person to give notice of his change of address. I do not believe this is necessarily an actual contradiction in this case. It is possible that the applicants went to the IRB and CIC offices to give written notice of their change of address. The applicants were in fact able to establish that they had informed CIC of their new address shortly after moving, as the affidavit of Louise Brazeau presented by the respondent, *inter alia*, confirms.

[26] The respondent submitted that there was no evidence to establish that the applicants had informed the RPD of their change of address. The respondent contends that in the absence of any indication in the record that the applicants gave such notice, it follows that they in fact failed to do so. I am not persuaded by that argument. The applicants' credibility was not questioned, and so they were entitled to the benefit of the doubt, particularly since they had reported their change of address to CIC. When the Federal Court of Appeal was faced with a similar case, it wrote:

> **10** On September 19, 1995, in the absence of the applicant, the Refugee Division rejected the motion to re-open the claim on the grounds that there had been no breach of the rules of natural justice since the claimant had changed his address and had failed to notify the Board. A notice of decision was issued on October 13, 1995. It is this decision not to re-open the refugee claim which the applicant seeks to have reviewed.
>
> **11** As I have stated above, the applicant is entitled, in the absence of any circumstances tending to cast doubt on it, to the benefit of his uncontradicted evidence that he submitted the correct change of address to the Board. It follows from this that the Notice of the abandonment hearing was sent to the wrong address and that the applicant was therefore denied a fair hearing in accordance with the

> rules of natural justice to determine whether he had abandoned his claim for refugee status.
>
> **12** The Refugee Division was in error in basing its decision not to re-open the claim on the finding that the applicant had not proven that he had taken the proper steps to advise the Board of his address. There is no evidence that the error was not the Board's own; there is no reason to doubt the credibility of the applicant or of this piece of evidence; therefore, there is no reason not to re-open the applicant's refugee claim.
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> *Zaouch v. Canada (Minister of Citizenship and Immigration)* (1996), 64 A.C.W.S. (3d) 844, at paragraphs 10-12

[27] I believe that this reasoning can be transposed to this case, at least with respect to the RPD’s conclusion as to the absence of evidence in spite of the applicant’s affidavit.

[28] For all of the foregoing reasons, this application for judicial review must be allowed. The parties proposed no question for certification, and no question is raised by this case.

ORDER

THE COURT ORDERS that the application for judicial review be allowed. No question is certified.

"Yves de Montigny"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2185-09
STYLE OF CAUSE:	Domingo Martinez Badillo et al. v. MCI
PLACE OF HEARING:	Montréal, Quebec
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REASON FOR ORDER AND ORDER:	de MONTIGNY J.
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APPEARANCES:

William Sloan	FOR THE APPLICANTS
Alain Langlois	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William Sloan 400 McGill, 2nd floor Montréal, Quebec H2Y 2G1	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT