Federal Court  Cour fédérale

Date: 20100413

Docket: IMM-2903-09

Citation: 2010 FC 390

Ottawa, Ontario, April 13, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALELI CABRERA PEREDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada dated May 22, 2009 wherein it was determined that the applicant had abandoned her refugee claim. These are my reasons for determining that the application will be allowed.

Background

[2] Ms. Aleli Cabrera Peredo, the applicant, is a citizen of Mexico. She claims to have fled her country to seek protection in Canada to escape from the violence of her ex-partner.

[3] The applicant filed a refugee claim and retained for counsel, Mr. Hamza Kisaka. The applicant alleges that she routinely communicated with her counsel through the interpreter Carlos Morales. Through this process, the applicant filed her Personal Information Form ("PIF").

[4] The applicant says she became dissatisfied with the services of her counsel, Mr. Kisaka, as she had never met him, everything was done through the interpreter Carlos Morales and she found errors in her PIF.

[5] The applicant moved and says she called the interpreter Morales to advise of the change of address and telephone number. Through the interpreter, the applicant says that she understood that Mr. Kisaka's office would advise the Board of her new information. The applicant claims to have relied on that.

[6] Seeking to change counsel, the applicant then approached the office of Lina Anani and asked her to represent her in this process. The applicant submitted an application to change counsel with Legal Aid Ontario.

[7] Correspondence, dated March 25, 2009 and entitled “Claimant’s Confirmation of Readiness – Hearing of Claim Scheduled”, was forwarded to the applicant by the Board. The correspondence advised the applicant that a hearing had been scheduled in her refugee claim for May 22, 2009. The correspondence further directed the applicant to respond by means of the attached Claimant’s Reply Form, failing which her refugee hearing would be converted to an abandonment hearing.

[8] Although a copy of this correspondence was returned by Canada Post, it was re-mailed to the applicant on April 28, 2009. The applicant attended the May 22, 2009 hearing with a copy of the letter and the Board’s envelope attached.

[9] When the applicant received the Board’s letter, it is alleged that she could not understand the English content of the letter. The applicant says she tried to have someone explain the letter to her but the persons she approached or assistance wanted cash payments of $50 to explain the content in the Spanish language.

[10] The applicant alleges that she did not realize the importance of the letter and believed that her previous counsel, Mr. Kisaka, would have the letter as well and that he would contact her if the letter was found to be of importance.

[11] Nine days before the hearing, the applicant received additional correspondence from the Board containing the disclosure for the hearing. On that letter was a post-it note telling the applicant that her counsel had withdrawn. Also, she says that this was the first time that the applicant was informed of the hearing date.

[12] At that time, Legal Aid had not made a decision regarding the change of counsel and new counsel Anani advised that she was unavailable on the hearing date of May 22, 2009, as she was scheduled to speak at a legal conference on refugee law. Other counsel she approached to appear as agents were unavailable for the same reason.

[13] The applicant attended the May 22, 2009 hearing date with an agent of Ms. Anani, Mr. Pedro Jauregui. The agent for Ms. Anani was not a licensed member of the Law Society of Upper Canada or a member of the Canadian Society of Immigration Consultants.

[14] The applicant indicated at the hearing that she was not prepared to proceed.

Decision Under Review

[15] The panel determined that the applicant had received the Confirmation of Readiness letter as she produced a copy of it with the Board's envelope attached. The panel found that the letter stated quite clearly that if the applicant failed to confirm her readiness to proceed on May 22, 2009, the hearing would convert to a Show Cause hearing to give the applicant an opportunity to show cause as to why her claim should not be declared abandoned for failing to communicate with the RPD on being requested to do so. The member found that the applicant failed to return the document and failed to confirm her readiness.

[16] While the member allowed the agent of counsel Anani to speak as a friend of the Board, it was noted that the agent was not a licensed lawyer or an immigration consultant. The member also

noted that the agent of counsel did not have a file or any other personal documents pertaining to the application. Further, while the letter dated May 21, 2009, from Ms. Lina Anani did provide potential dates for a hearing; counsel Anani specifically stated that “she was not retained” and was just providing potential dates should that happen.

[17] The member found that there are many people in Toronto who can read English and understand Spanish as well. It was determined that the applicant took no steps to understand the significance of the letter that the Board had sent to her and failed to confirm her readiness as she was required to do.

[18] The panel noted that the person who would be most likely to help the applicant in this situation would be her first counsel. Mr. Kisaka, a member of the Law Society of Upper Canada, had written to the Board twice; on May 1, and faxed the same letter of May 14, 2009, stating that despite numerous efforts to contact her he had no idea where the applicant was.

[19] The member did not find any reason why the applicant could not have declared her readiness and returned the Confirmation of Readiness document as she was required to do within the timeframe that the Board required. The panel found that after considering all the evidence on the file that the applicant was indeed in default of the proceedings for failing to communicate with the RPD on being requested to do so.

[20] The panel therefore determined that pursuant to subsection 168(1) of the IRPA that the claim was abandoned.

[21] In the alternative, the member considered that if his analysis with respect to the Confirmation of Readiness document was incorrect, the applicant was not ready to proceed at the hearing pursuant to rule 58(2)(a) of the *Refugee Protection Division Rules*, SOR/2002-228, as am. S.C. 2002, c. 8.

[22] The Board attempted to contact the applicant only to have letters returned by Canada Post. When the Board was finally notified of the applicant's current address, the applicant took no steps to deal with the correspondence that the Board sent her.

[23] The panel found that the applicant had over a year to prepare for the hearing and was not ready to proceed on May 22, 2009.

Issues

[24] The sole issue is whether the panel erred in finding that the applicant had abandoned her refugee claim.

Analysis

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada abandoned the patent unreasonableness standard leaving only two standards of review, correctness and reasonableness. The Supreme Court also held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular

question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review.

[26] Accordingly, I am of the view that abandonment decisions are questions of mixed law and fact and as such they attract the reasonableness standard of review: *Ahamad v. Canada (Minister of Citizenship and Immigration)* (T.D.), [2000] 3 F.C. 109, [2000] F.C.J. No. 289, at paras. 23-30; *Kastrati v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1141, [2008] F.C.J. No. 1424, at para. 12; *Gonzalez c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2009 CF 1248, [2009] A.C.F. no 1600, au para. 15.

[27] The panel's analysis is central to its role as a trier of fact. As such, the panel's findings are to be given significant deference by the reviewing Court. The panel's findings should stand unless its reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[28] In a case such as this one, there might be more than one reasonable outcome. However, as long as the process adopted by the panel and its outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 59.

[29] In the case of Ms. Peredo, I am not satisfied that in all of the circumstances and taking into account all relevant facts, the applicant's behaviour evidenced, in clear terms, a wish or intention not to proceed with her claim: *Ahamad*, above, at para. 37.

[30] As in *Emani v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 520, [2009] F.C.J. No. 684, I am of the view that the panel erred in seeing only part of the picture and neglected the central consideration of whether the applicant's conduct amounted to an expression of her intention to diligently prosecute her claim:

> **20** The jurisprudence appears to be clear that the central consideration in regard to abandonment proceedings is whether the applicant's conduct amounts to an expression of his intention to diligently prosecute his claim (*Ahamad v. Canada (M.C.I.)* (T.D.), [2000] 3 F.C. 109, [2000] F.C.J. no. 289, at para. 32). When presented with the application to have the claim re-opened, the Board was furnished for the first time with information explaining the applicant's failure to appear, and demonstrating that it was due solely to administrative errors on the part of his counsel. In rejecting the application to reopen his claim, the Board failed to consider evidence before it of the applicant's conduct demonstrating his intention to earnestly pursue his claim. I am satisfied that the Board erred in seeing only part of the picture and neglecting this central consideration (*Albarracin v. Canada (M.C.I.)*, [2008] F.C.J. No. 1425, at para. 4).

[31] In evaluating the circumstances of this case, I note that the applicant applied for and obtained Legal Aid, she retained counsel (Hamza Kisaka), she filed her PIF, she communicated on numerous occasions with Mr. Kisaka's office through the interpreter, Carlos Morales, and provided them with her change of address. The applicant depended on that office to relay this information to the Board. I find that the situation in which the applicant finds herself was due to inadvertent miscommunication between herself, her former counsel's office and the Board.

[32] When the applicant lost confidence in her first counsel, the applicant initiated a change of solicitor application with Legal Aid Ontario. Although she was provided with nine days notice of the hearing date, the applicant attended with an agent of new/current counsel, who could not attend as she was speaking at a continuing legal education session.

[33] Taking into consideration that the applicant is a vulnerable party in this case, dependent on the translation services of her interpreter, I find that the benefit of the doubt should have been given to the applicant regarding her intention to proceed with her claim. Finding that Ms. Peredo is the author of her own misfortune would amount to punishing her for carelessness in the communications between third parties (the interpreter and the previous counsel). This would not only be unfair as a matter of basic equity, but also disregard the purpose of the Act: *Andreoli v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1111, [2004] F.C.J. No. 1349, at para. 17.

[34] While I agree with the respondent, to a certain extent, that the applicant chose to remain ignorant of the content of the letter she received from the Board, I am not convinced that in all of the circumstances and taking into account all relevant facts, the applicant's behaviour evidenced, in clear terms, a wish or intention not to proceed with her claim: *Ahamad*, above, at para. 37.

[35] As Justice Harrington indicated in *Andreoli*, above, at para. 20, there is abundant case law from this Court to the effect that the applicant is responsible for her file and cannot use her own wrongdoing as a means to justify fatal omissions, procedural though they may be. However, in this case, I do not find on the totality of the evidence that the applicant was negligent. She merely trusted

her interpreter and previous counsel, on whom I attribute a significant portion of the responsibility for this procedural error.

[36] I find that the reason that the Board did not have the applicant's updated contact information was not entirely her fault but the consequence of an error or oversight that occurred at her former counsel's office through a lack of communication with the interpreter: *Emani*, above, at para. 20.

[37] Again, I am also of the view that the applicant is a vulnerable party who did appear for her scheduled hearing, with an agent of the counsel she was attempting to retain through a Legal Aid change of solicitor application. As it was the previous counsel who scheduled the hearing date, unfortunately for the applicant, the second counsel she was attempting to retain was unavailable for that date.

[38] I see no prejudice that could possibly be caused to the respondent if a hearing on the merits of the claim, with the applicant's counsel, was to take place.

[39] I share the view of Justice Harrington in *Andreoli*, above, at para. 22, keeping in mind the words of Lord Denning in *Doyle v. Olby (Ironmongers) Ltd*., (1969), 2 All E.R. 119, who at page 121 stated:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can at best order a new trial.

[40] The panel's finding that the applicant abandoned her refugee claim should not stand as I am of the view that its reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[41] I find that the process adopted by the panel and its outcome does not fit comfortably with the principles of justification, transparency and intelligibility. Accordingly, it is open to this Court to intervene: *Khosa*, above, at para. 59.

[42] In light of the above, this application must be allowed.

JUDGMENT

IT IS THE JUDGEMENT OF THIS COURT that the application is allowed. The decision of the panel finding the applicant's refugee claim to have been abandoned is quashed. The applicant's refugee claim is remitted to the Board for a redetermination by a different panel. There are no questions to certify.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2903-09
STYLE OF CAUSE:	ALELI CABRERA PEREDO and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 30, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	April 13, 2010

APPEARANCES:

Lina Anani	FOR THE APPLICANT
Adrienne Rice	FOR THE RESPONDENT

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