Federal Court  Cour fédérale

Date: 20111215

Docket: IMM-3811-11

Citation: 2011 FC 1479

Toronto, Ontario, December 15, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

NIZAMETTIN KARAGOZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This decision arises from an application for judicial review of a May 11, 2011 decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (the Board) which refused to reopen the applicant's claim for refugee protection. For the reasons that follow, the application is allowed.

[2] Mr. Karagoz, the applicant, is originally from Turkey. His claim for refugee protection, made on January 7, 2009, was based on his political activities and his status as an Alevi Kurd in Turkey. On December 8, 2010 the Board found that the applicant had abandoned his claim by failing to attend his refugee claim hearings. On April 26, 2011, the applicant filed a motion with the Board to have his claim reopened. The Board refused his motion on May 11, 2011.

[3] The applicant contends that it is was not his intention to abandon his refugee claim, but he erred by sending his change of address form to the Canada Border Service Agency and not to the Board. When notices of the upcoming hearings were sent out to the applicant, they did not reach him at his new address. As he did not receive the notices regarding the hearings, he did not appear; because he did not appear, the Board determined that he had abandoned his refugee claim. The applicant argues that the Board acted in a capricious manner by refusing to reopen his claim.

[4] Section 18.1(4)(d) of the *Federal Courts Act* provides this Court the jurisdiction to grant relief if the Court determines that a federal board, commission or other tribunal:

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it…	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose…

[5] Section 55 of the *Refugee Protection Division Rules* (SOR/2002-228) (Rules) provides the conditions under which a refugee claim may be re-opened:

55. (1) A claimant or the Minister may make an	55. (1) Le demandeur d'asile ou le ministre peut demander

application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
Form of application	Forme de la demande
(2) The application must be made under rule 44.	(2) La demande est faite selon la règle 44.
Claimant's application	Contenu de la demande faite par le demandeur d'asile
(3) A claimant who makes an application must include the claimant's contact information in the application and provide a copy of the application to the Minister.	(3) Si la demande est faite par le demandeur d'asile, celui-ci y indique ses coordonnées et en transmet une copie au ministre.
Factor	Élément à considérer
(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.
[Emphasis added]	[Nous soulignons]

[6] The jurisdiction of the Board to re-open is narrowly prescribed. In *Nazifpour v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 35 at para 82, the Court of Appeal observed:

> The Federal Court has rejected the argument that, while Rule 55 expressly obliges the Division to reopen for breach of natural justice, since this is not stated to be the only ground for reopening, it does not preclude the Division from reopening decisions on other grounds, including the existence of new evidence. The Court has held that Rule 55 does not expand the jurisdiction to reopen refugee and protection determinations. The Division may reopen only for breach of a principle of natural justice…

[7] None of the critical facts are in issue. The record before the Board demonstrated a continuing and bona fide intention to appeal. The applicant notified what he thought was the Board of a change of address as required and followed up four months later, re-communicating his change of address, when he had not heard of a hearing date. There is no suggestion that he sought to avoid or delay the refugee determination process. He communicated his change of address openly to Revenue Canada, the Ontario Ministry of Transportation, his bank, and Toronto Social Services. His sole mistake was that he faxed his change of address to CBSA and not the Board. He moved immediately to re-open his case when CBSA contacted him for removal purposes.

[8] In *Matondo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416, Justice Sean Harrington stated that "[t]o be 'capricious' is to be so irregular as to appear to be ungoverned by law." I find, given the uncontroverted record before it, the decision of the Board falls within the scope of s. 18.1(4) (d), particularly given the absence of reasons as to how it reached the conclusion that the claimant had abandoned his claim.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter is remitted to the Board for re-consideration in accordance with these reasons. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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