

Federal Court



Cour fédérale

Date: 20130613

Docket: IMM-8765-12

Citation: 2013 FC 632

Ottawa, Ontario, this 13th day of June 2013

Present: The Honourable Mr. Justice Pinard

BETWEEN:

**Zsoltne CSIKOS
Jozsef Daniel OLAH**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the “Act”) for judicial review of the decision of the Refugee Protection Division (the “RPD”) of the Immigration and Refugee Board rendered orally on March 16, 2012 and in writing on July 27, 2012. In the decision, the RPD declared the applicants’ claim for refugee protection abandoned.

[2] The applicants are citizens of Hungary. On August 13, 2009, Zsoltne Csikos (the female applicant), along with her husband, daughter, and son-in-law (the male applicant), filed a refugee claim in Canada.

[3] The applicants requested and obtained two extensions to file their Personal Information Forms ("PIFs"). They filed their PIFs on September 25, 2009.

[4] On April 5, 2011, the applicants' lawyer informed the RPD that the female applicant's husband was deceased.

[5] The applicants' hearing scheduled for July 21, 2011 was postponed to November 7, 2011 due to the applicants' counsel's health issues.

[6] On November 7, 2011, the applicants requested a two-month postponement of their hearing based on a letter from the psychologist of the female applicant and her daughter. The RPD granted the postponement, but advised the applicants' counsel that any future postponement request would need to be made well in advance of the new hearing date and would require medical evidence.

[7] A new hearing date was set for January 30, 2012.

[8] On January 27, 2012, the applicants requested another postponement based on another letter from the same psychologist. The RPD granted the postponement and rescheduled a peremptory

hearing for March 15, 2012 at 1:00 p.m., but required the applicants to submit to the RPD a detailed medical report from their family physician by February 20, 2012.

[9] The RPD also sent the applicants a letter requiring them to complete a Confirmation of Readiness report indicating that they were ready, willing and available to proceed with the hearing of their claim on the date and time indicated on the Notice to Appear. The letter explaining the Confirmation of Readiness report stated, in part, the following:

[...] You must return the form completed, signed and dated to the RPD **no later than 20 days** from the date on which you receive this letter. The requirement for you to provide this form is in accordance with Rule 21 of the RPD Rules.

If the RPD does not **receive** the completed reply form **within the 20 days**, the RPD will commence abandonment proceedings in connection with your claim under section 168 of the *Immigration and Refugee Protection Act*. In that case, **the hearing scheduled on the date indicated above will become a show cause or abandonment hearing**. You will be given an opportunity to explain why your claim should not be declared abandoned at that hearing.

[Emphasis in original]

[10] The applicants claim that on the morning of March 15, 2012, the male applicant experienced severe chest pain and difficulty breathing. An ambulance was called. The female applicant affirms that she chose to accompany the male applicant to the hospital because her husband was murdered in 2011 and she was afraid of losing another family member. She also wanted to be able to advise her daughter as to the medical condition of her husband (the male applicant).

[11] The male applicant was diagnosed at the Burnaby Hospital as having suffered a “panic attack”.

[12] Only the female applicant’s daughter, Ivett Olahne Csikos, appeared at the hearing on March 15, 2012. She was accompanied by counsel. She informed the RPD that her husband had been taken to the hospital by ambulance and that her mother had accompanied him.

[13] The RPD gave the applicants 24 hours to provide the ambulance record and full clinic records from the hospital, at which point it would rule on whether to adjourn or abandon the claim.

[14] The RPD continued the hearing on March 16, 2012. Shortly after the hearing began that day, the RPD received by fax a one-page document from the Burnaby Hospital that the applicants’ counsel had submitted. The RPD telephoned the applicants’ counsel. He informed the RPD that his clients had told him that it would take at least a couple of days to obtain the ambulance record and only if the male applicant’s family physician requested it. Counsel stated that if the male applicant requested the record personally, it would take even longer than that.

* * * * *

[15] The RPD was not satisfied by the document from the Burnaby Hospital. It noted that the document had no entries of tests undertaken or objective findings made by the hospital, nor an actual time the male applicant was admitted to hospital. The RPD acknowledged that the document did state the following:

Loss of consciousness, dyspnea, fluid retention, possible cardiac arrhythmias, decreased cardiac output, further cardiac testing required.

[16] The RPD stated that it understood the explanation for why the paramedic report was not ready, but determined that the applicants' claim was abandoned given the history of the applicants' file and the fact that the applicants had failed to provide more detailed medical notes to justify the previous adjournment of their hearing, despite the RPD requesting on two occasions for more detailed medical information and the applicants' failure to provide a reasonable explanation for not complying with this request.

[17] The RPD found that if the ambulance notes were produced at a later date, they could be the subject of a re-opening application if the information in the ambulance record was useful or outweighed the continued attempts of the family to not comply with the RPD's numerous requests.

[18] The RPD also noted that no explanation was provided for why the female applicant took the liberty of accompanying the male applicant to the hospital instead of attending a hearing that was peremptory given that it had been scheduled for the third time.

[19] The RPD stated that it would give Ivett Olahne Csikos the benefit of the doubt and not find that her claim was abandoned.

* * * * *

[20] Subsection 168(1) of the Act deals with the abandonment of a proceeding before a Division of the Immigration and Refugee Board and reads as follows:

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.

[21] Rule 58 of the *Refugee Protection Division Rules*, SOR/2002-228 (the "Rules") sets out how the RPD may declare a refugee claim abandoned:

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

- (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.

(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.

(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

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) 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.

(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) Pour décider si elle prononce le désistement, la Section prend en considération les explications données par le demandeur

fact that the claimant is ready 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.

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

* * * * *

[22] The issue in this matter is whether it was reasonable for the RPD to declare the applicants’ claim abandoned.

[23] The standard of review applicable to the RPD’s decision to declare a refugee claim abandoned is reasonableness (*Gonzalez v The Minister of Citizenship and Immigration*, 2009 FC 1248 at para 15; *Singh v The Minister of Citizenship and Immigration*, 2012 FC 224 at para 22 [*Singh*]).

[24] Accordingly, the Court will consider “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

* * * * *

[25] This Court has repeatedly held that the central consideration with respect to abandonment proceedings is whether the applicant's conduct amounts to an expression of his or her intention to diligently prosecute his or her claim (*Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 109 at para 32; *Peredo v The Minister of Citizenship and Immigration*, 2010 FC 390 at para 30; *Mayilvahanam v The Minister of Citizenship and Immigration*, 2013 FC 136 at para 9).

[26] The onus is on the refugee claimant to establish why his or her claim should not be abandoned. As explained by Justice James Russell in *Singh, supra*, at paragraph 75:

The Court notes that the consequences of a declaration that a claim has been abandoned may be severe, even fatal to a claimant. This does not, however, absolve claimants of the onus on them to establish why their claims should not be abandoned. It also does not mean that the RPD is always bound to accept claimants' arguments as to why their claims should not be abandoned. The severity of consequences means only that the RPD must ensure that claimants have a full opportunity to present their case and that it fully considers the case presented to it. [...]

[27] Pursuant to subsection 168(1) of the Act, the RPD may determine that a proceeding before it has been abandoned if it is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing or by failing to provide information required by the RPD upon being requested to do so.

[28] In the case at bar, considering the relevant statutory provisions and case-law, in my view it was reasonable for the RPD to find that the applicants were in default in the proceedings and declare their proceedings abandoned. As subsection 58(2) of the Rules required in the circumstances, the applicants were notified by letter in advance of the hearing that they would be given an opportunity

to explain why their claim should not be declared abandoned. I cannot agree with the applicant that the RPD appears to have declared the female applicant's claim abandoned without giving her an opportunity to explain her absence at the March 15, 2012 hearing or considering her explanation for why she was absent. Both applicants were given the opportunity to explain their absence on March 16, 2012, but only their counsel participated in the proceedings on that date. Paragraph 35 of the decision demonstrates that the RPD considered counsel's representations for why the female applicant was also absent at the hearing:

[...] I also note that the first claimant, Zsoltne Csikos, she was not present because she supposedly accompanied her son-in-law to the hospital when ambulance was called. There was no explanation provided as to why she took the liberty of making that decision over the importance of attending a hearing that was scheduled for the third time when she ought to have known that she had not complied with the request of the Board on the previous medical reports that were requested as well and that this was a peremptory hearing, which meant that without a very good reason she has to be present.

[29] Moreover, as required by subsection 58(3) of the Rules, in deciding whether the applicants' claim should be declared abandoned, the RPD considered the applicants' explanations and all other relevant information, including the fact that the applicants had failed to provide more detailed medical information to justify their most recent request for postponement of their hearing. As noted by the applicants, there was sufficient medical documentation submitted to the RPD to postpone the hearing on two previous occasions due to the mental health of the female applicant and her daughter. However, this fact does not negate the reasonableness of the RPD's concern that the applicants had not complied with its request for more detailed medical information.

[30] It was also reasonable for the RPD to take into account the fact that the applicants never submitted a signed Confirmation of Readiness form in advance of their hearing, despite having been mailed the document in a letter dated January 30, 2012. They were warned in this letter that abandonment proceedings would be commenced on their hearing scheduled for March 15, 2012 if they did not submit the report.

[31] At the abandonment hearing, the applicants had not provided any explanation for why they had not complied with the RPD's request for more detailed medical information or why they had not submitted a signed Confirmation of Readiness form as the RPD had requested.

[32] The RPD also noted that if the remaining requested documents were forthcoming at a later date, the applicants could be the subject of a re-opening application. However, there is no indication in the record that those documents have been forthcoming.

[33] As for the applicants' allegation that the RPD misconstrued the document from Burnaby Hospital, upon receipt of this document, the RPD read aloud all the medical information it contained and reasonably analyzed it as lacking the time of admission to the hospital as well as any objective findings. The RPD only once later referred to the information as "complaints" and this was in the context of the following analysis:

[31] As I said yesterday, I had made a request for the paramedic report, as well as – not a detailed medical/legal report, but full clinical notes from the hospital due by one o'clock this afternoon. In the interests of fairness, I allowed the time that counsel requested. However, what he provided to me, which is now on the record, which is a one-page document with a computer printout that does not even contain the time of admission to the hospital or that he was

admitted to the hospital by the ambulance. In the “Complaints” there is no suggestion whether there were objective signs that were ascertained by medical tests or the observations which could or could not have been fabricated. I am not making a finding on that, but I am just saying that what is before me it’s not clear whether objectively anything was done and, in any event, the claimant has failed to comply with the Board’s request, not just on this occasion, but on the previous two occasions as well, without a reasonable explanation.

[34] As noted by the respondent, the fact that the word “complaints” was not written on the form does not mean that the references on the form to loss of consciousness, dyspnea, fluid retention, possible cardiac arrhythmias, and decreased cardiac output could not reasonably be construed as “complaints”. Accordingly, I am not persuaded by the applicants’ argument that the RPD’s reference to the information on the document from the Burnaby Hospital as “complaints” misconstrued the evidence.

[35] In my view, it was therefore reasonable for the RPD to determine based on the evidence before it and the history of the applicants’ file that the applicants’ conduct did not demonstrate an intention to diligently pursue their claim before the RPD.

* * * * *

[36] For the above-mentioned reasons, the application for judicial review is dismissed.

[37] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada, rendered orally on March 16, 2012 and in writing on July 27, 2012, declaring the applicants' claim for refugee protection abandoned, is dismissed.

“Yvon Pinard”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8765-12

STYLE OF CAUSE: ZSOLTNE CSIKOS, JOZSEF DANIEL OLAH v.
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: May 1, 2013

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

DATED: June 13, 2013

APPEARANCES:

Me Roger Bhatti FOR THE APPLICANTS

Me Mary Murray FOR THE RESPONDENT

SOLICITORS OF RECORD:

Roger S. Bhatti FOR THE APPLICANTS
Surrey, British Columbia

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada