

Federal Court



Cour fédérale

Date: 20150424

Docket: IMM-1251-14

Citation: 2015 FC 533

Ottawa, Ontario, April 24, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

QINBIN GUO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada determining that the applicant's refugee claim was abandoned. For the reasons set out below, I have concluded that this application should be granted and the RPD's decision set aside.

II. Facts

[2] The applicant's hearing before the RPD was scheduled to take place on January 27, 2014. On January 23, 2014, applicant's counsel requested that the hearing be postponed because the applicant was sick. In support of this request, counsel filed a letter from the applicant's doctor dated January 23, 2014, indicating that the applicant: (i) had bronchitis and possibly hypertension, (ii) was prescribed antibiotics and cough syrup, and (iii) told his doctor that he had a fever on the night on January 22, 2014. Applicant's counsel appeared before the RPD on January 27, 2014, but the applicant was not present. During this brief hearing, the presiding member stated that he did not find the medical note to be sufficient evidence that the applicant had not abandoned his claim. The RPD scheduled a special hearing on February 17, 2014 to give the applicant an opportunity to explain why his claim should not be considered abandoned.

[3] On February 17th, 2014, the applicant and his counsel appeared before the same RPD member who had previously heard applicant's counsel on January 27, 2014. For a second time, the presiding member expressed that the medical letter dated January 23, 2014, was insufficient to establish that the applicant was in a condition that prevented him from appearing before the RPD on January 27, 2014. The applicant later received a letter dated February 18, 2014, stating that he had failed to show reason why the RPD should determine that his claim was not abandoned. This letter is the impugned decision under review.

III. Analysis

[4] This matter raises one issue:

1. Did the RPD err in determining that the applicant's refugee claim has been abandoned?

[5] The reasonableness standard applies to this issue: *Ndomba v Canada (Citizenship and Immigration)*, 2014 FC 189 at para 9, *Uandara v Canada (Citizenship and Immigration)*, 2015 FC 254 at para 26.

[6] Subrules 65(4) to 65(7) of the *Refugee Protection Division Rules (SOR/2012-256) (RPDR)* provide the factors that are to be considered in deciding if a refugee claim should be declared abandoned:

Factors to consider

(4) The Division must consider, in deciding if the claim should be declared abandoned, the explanation given by the claimant and any other relevant factors, including the fact that the claimant is ready to start or continue the proceedings.

Medical reasons

(5) If the claimant's explanation includes medical reasons, other than those related to their counsel, they must provide, together with the explanation, the original of a legible, recently dated medical certificate signed by a qualified medical practitioner

Éléments à considérer

(4) Pour décider si elle prononce le désistement de la demande d'asile, la Section prend en considération l'explication donnée par le demandeur d'asile et tout autre élément pertinent, notamment le fait qu'il est prêt à commencer ou à poursuivre les procédures.

Raisons médicales

(5) Si l'explication du demandeur d'asile comporte des raisons médicales, à l'exception de celles ayant trait à son conseil, le demandeur d'asile transmet avec l'explication un certificat médical original, récent, daté et lisible, signé par un médecin

whose name and address are printed or stamped on the certificate.

Content of certificate

(6) The medical certificate must set out

- (a) the particulars of the medical condition, without specifying the diagnosis, that prevented the claimant from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim, or otherwise pursuing their claim, as the case may be; and

- (b) the date on which the claimant is expected to be able to pursue their claim.

Failure to provide medical certificate

(7) If a claimant fails to provide a medical certificate in accordance with subrules (5) and (6), the claimant must include in their explanation

- (a) particulars of any efforts they made to obtain the required medical certificate, supported by corroborating evidence;
- (b) particulars of the medical reasons included in the explanation, supported by corroborating evidence; and
- (c) an explanation of how the medical condition prevented them from providing the completed Basis of Claim Form on the due date, appearing for the hearing of the claim or otherwise pursuing their claim, as the case may be.

qualifié, et sur lequel sont imprimés ou estampillés les nom et adresse de ce dernier.

Contenu du certificat

(6) Le certificat médical indique, à la fois :

- a) sans mentionner de diagnostic, les particularités de la situation médicale qui ont empêché le demandeur d'asile de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à laquelle il devait être transmis ou de se présenter à l'audience relative à la demande d'asile,
- b) la date à laquelle il devrait être en mesure de poursuivre l'affaire.

Défaut de transmettre un certificat médical

(7) À défaut de transmettre un certificat médical, conformément aux paragraphes (5) et (6), le demandeur d'asile inclut dans son explication :

- a) des précisions quant aux efforts qu'il a faits pour obtenir le certificat médical requis ainsi que des éléments de preuve à l'appui;
- b) des précisions quant aux raisons médicales incluses dans l'explication ainsi que des éléments de preuve à l'appui;
- c) une explication de la raison pour laquelle la situation médicale l'a empêché de poursuivre l'affaire, notamment par défaut de transmettre le Formulaire de fondement de la demande d'asile rempli à la date à laquelle il devait être transmis

ou de se présenter à l'audience
relative à la demande d'asile.

[7] In reviewing an abandonment of claim decision, this Court must determine “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”: *Ahamad v Canada (Citizenship and Immigration)*, [2000] 3 FCR 109 (FC) at para 32, *Csikos v Canada (Citizenship and Immigration)*, 2013 FC 632 at para 25.

[8] The respondent argues that the RPD made a reasonable assessment of the medical letter and reasonably considered whether the applicant was ready to start or continue the proceedings. The respondent also underlines that the presiding member gave the applicant an opportunity to explain why he was not present on January 27, 2014. In my opinion, the RPD made an unreasonable analysis of the situation.

[9] The central aspect of the RPD's reasoning is the assessment of the medical letter dated January 23, 2014, which was considered insufficient evidence.

[10] First, the RPD acted unreasonably in concluding that the applicant's symptoms were insufficient to postpone the hearing. The applicant's doctor had diagnosed acute bronchitis and had recommended that he stay home for a week. The respondent argues that the RPD reasonably considered that the applicant's medical condition does not indicate that he would have been unable to participate in the hearing. I am not satisfied that the situation required that the applicant go against his doctor's recommendation. The respondent notes that the medical letter refers to a

likely diagnosis. I am not satisfied that the word “likely” changes anything. Any diagnosis is merely a statement of a likely cause of a problem.

[11] Second, the RPD acted unreasonably in concluding that the applicant’s medical letter was deficient by failing to indicate the date on which the applicant was expected to be able to pursue the claim. The applicant’s absence from the original hearing was clearly based on the doctor’s recommendation to stay home for one week. It follows that the end of that week indicates the date on which the applicant could be expected to be available. To ask for more seems pedantic.

[12] Third, the RPD erred in assessing the factor expressed under subrule 65(4) of the *RPDR* that the applicant should be “ready to start or continue the proceedings.” The record of the hearing of February 17, 2014, indicates that the RPD asked the applicant whether he was ready to proceed right away. The applicant answered: “I was not feeling very well this morning, but right now I’m feeling okay. I think so. I think I’m ok.” While this answer may not be as firm and unequivocal as the RPD member would like, it nevertheless indicates that the applicant was ready to proceed. Moreover, applicant’s counsel mentioned during the hearing: “today’s date we are both here because we are ready to proceed.” The only reasonable conclusion is that the applicant was ready to proceed. The record of the hearing suggests that the RPD ignored these statements.

[13] I cannot conclude this decision without expressing my surprise that the respondent chose to oppose the present application. The evidence is perfectly clear, in my view, that it was unreasonable to expect the applicant to appear on the day of the original hearing. The applicant’s

medical letter appears to be as clear as a doctor could be at that time. To deprive a person of a potentially life-saving refugee claim by quibbling over whether prescribing a week at home constitutes providing “the date on which the claimant is expected to be able to pursue their claim” smacks of trying to save RPD resources on the backs of the very people the RPD exists to protect, diligent refugee claimants.

[14] The respondent’s continued insistence that the applicant did not clearly state, at his abandonment hearing, that he was ready to proceed, is even more difficult to understand. Though counsel did not press the point in oral submissions, the respondent’s written argument does so, relying on the incorrect and misleading statement by the RPD that, with respect to whether the applicant was ready to proceed with his claim, he said “only he thought so, as he had not been feeling well earlier.”

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is granted.
2. The RPD's decision is set aside and the matter is remitted for consideration by a differently constituted panel.
3. No serious question of general importance is certified.

“George R. Locke”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1251-14

STYLE OF CAUSE: QINBIN GUO v THE MINISTER OF CITIZENSHIP
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JUDGMENT AND REASONS: LOCKE J.

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