Federal Court  Cour fédérale

Date: 20171013

Dockets: IMM-5374-16
IMM-5376-16

Citation: 2017 FC 911

Ottawa, Ontario, October 13, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ZINNIA GUADALUPE HERNANDEZ OSUNA
FRANCISCO FRANCO GARCIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This matter consists of two applications for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of decisions by a Member of the Immigration Appeal Division [the IAD], dated December 7, 2016. In these decisions, the Member determined that the Residency Obligation Appeal by the Applicants was abandoned

[Abandonment decision] after refusing the Applicants' request to postpone the ROA [Postponement decision].

[2] In my view, the determinative issue is the lack of procedural fairness in relation to the Member's Postponement decision. Briefly, the Applicant and her family came to Canada from Mexico in 2005 and obtained permanent residence status in 2006. They have not returned to Canada since leaving in 2006. Because the Applicants lacked 365 days residence in Canada, their application for retention of status was rejected. They instituted an appeal to the IAD.

[3] The Applicants required an adjournment to obtain documentation. The IAD granted the adjournment request and the hearing was rescheduled for a later date, on a peremptory basis.

[4] Unfortunately, on the day set for the hearing of their appeal, their former counsel was ill as a result of sleep apnea. New counsel filed former counsel's affidavit, which was not disputed and which deposed:

> [5] I suffer from Sleep Apnea and the last two weeks prior to the hearing and I had only been able to sleep 3-5 hours a day. During the two weeks prior to November 29, 2016, whenever I managed to sleep I would get a suffocating attack and would wake up gasping for air, and when I finally controlled my breathing, after vomiting, I would be fully awake and unable to find sleep again. The latter caused me to sleep only 3-5 hours a day and to spend my time working through files overnight. It is my belief in hindsight that my Sleep Apnea worsen because I gained over 25 pounds in weight and my condition led me to lose track of time.
>
> [6] In my twenty years of practice, I have never missed a court date.
>
> …

> [9] Upon realizing the above, I immediately called the Appeal Division and requested a postponement and directions as I have never missed a court date in my twenty years of practice and had not been in this situation before. When I called the Registrar, the hearing of the appeal had not yet started, and after relating my situation to the Registrar, the Registrar informed me that she would speak to the Board member assigned to the hearing and would call me back.
>
> [10] I waited for the telephone call from the Registrar, and then I received a call from the Registrar who informed me that the Board member understood my situation but that he wanted me to put it in writing and send it to him. At the time, I felt great relief that the Board member understood my situation as it would have also been very unsafe for me to drive from Richmond Hill to downtown Toronto in my condition.

[5] It is apparent that former counsel's message to the IAD was received, because in refusing the request for postponement, the Member did, "not take exception to the counsel's illness". However, the Member dismissed the request for postponement because, "there was no reason given why the appellants did not call in to appear for the appeal hearing via teleconference."

[6] In my view, this raises an issue of procedural fairness, *i.e.*, the right to representation discussed in *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51 at para 34 and see para 28. Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 43 and *Mission Institution v Khela*, 2014 SCC 24 at para 79. In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination

> of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[7] In my respectful view, the Postponement decision was not fair in all the circumstances. There is no doubt that former counsel suffered from an illness, which fact the Member accepted. The evidence that former counsel called the Member's staff before the hearing is not disputed. The evidence that former counsel was waiting for directions back from the Member, and was told to put the postponement request in writing, is consistent with former counsel's sending not only a letter, but also a physician's letter and a copy of a prescription for hypnotic medication, to the IAD. I should add that the physician's letter categorically stated that former counsel was "not fit" for work, and further advised former counsel to abstain from work for two weeks.

[8] Again with respect, in the circumstances, former counsel had every reason to expect that there would be a postponement, and had complied with the IAD's request. As counsel for the Minister confirmed, this is not a case of professional incompetence. In my view, it does not stem from misconduct or disregard for the best interests of the clients. Instead, this is a case of genuine documented and accepted medical illness, which differs qualitatively from incompetence. I note this incident was without precedent in former counsel's twenty-year career at the bar. What happened here is not an appropriate candidate for a complaint to the Law Society of Upper Canada, no complaint was lodged and no one suggested otherwise.

[9] The postponement was refused not because former counsel was not present – that was not possible – but because the Applicants personally did not call in. However, I am not satisfied the Applicants' appeal would have proceeded without their legal representative.

[10] Originally, the Respondent also opposed judicial review on the ground that section 71 of *IRPA* might be relied upon by the Applicants as a separate basis to challenge the Postponement decision. However, the Respondent withdrew this position at the hearing.

[11] In the result the Postponement decision must be set aside for redetermination. Logically then, the Abandonment decision must also be set aside.

[12] While the Applicants requested the certification of a question of general importance relating to section 71, I decline to do so because that issue is no longer before the Court and therefore is not dispositive: see generally *Liyanagamage v Canada (Secretary of State)* (1994), 176 NR 4 at paras 4-6; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 paras 7 to 10, and *Zazai v Canada (Citizenship and Immigration)*, 2004 FCA 89 at paras 11-12.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is granted in both Court files, the Postponement decision is set aside, the Abandonment decision is also set aside, the request for a postponement is remitted to the IAD for redetermination by a different decision maker, no question is certified, there is no order as to costs, and a copy of this decision shall be placed on both Court files IMM-5374-16 and IMM-5376-16.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-5374-16 IMM-5376-16
STYLE OF CAUSE:	ZINNIA GUADALUPE HERNANDEZ OSUNA, FRANCISCO FRANCO GARCIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 12, 2017
JUDGMENT AND REASONS:	BROWN J.
DATED:	OCTOBER 13, 2017

APPEARANCES:

Tanya N. Howell	FOR THE APPLICANTS
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Tanya N. Howell Barrister and Solicitor Markham, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT