Federal Court  Cour fédérale

Date: 20190620

Docket: IMM-5643-18

Citation: 2019 FC 834

Ottawa, Ontario, June 20, 2019

PRESENT: Mr. Justice Manson

BETWEEN:

MARIN CRUDU
FECIOARA MARIA NACU
ALEXANDRA CRUDU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [the RPD] dated October 30, 2018, which dismissed the Applicants' application to have the RPD reopen their claims for refugee protection.

II. Background

[2] The Applicants are Marin Crudu [the Principal Applicant], his wife Fecioara Maria Nacu, and their infant daughter Alexandra Crudu. They are citizens of Romania and are of Roma ethnicity.

[3] The Applicants arrived in Canada on September 14, 2018 and claimed refugee protection.

[4] On September 18, 2018, the Applicants were interviewed by an immigration officer, with the assistance of a Romanian interpreter [the Interview]. At this time, their claims were referred to the RPD. The Applicants were provided with a number of forms, including Basis of Claim [BOC] forms, which they were to complete. Additionally, each of the Applicants was provided with a "Confirmation of Referral and Notice to Appear" form [the Notice to Appear forms]. All of the forms were written in English.

[5] The Notice to Appear forms stated that the Applicants must submit their BOC forms within 15 days. The forms also indicated that if they did not meet this deadline, the Applicants should appear before the RPD on the morning of October 11, 2018, and that failure to appear may result in their claims being declared abandoned.

[6] The Applicants did not submit their BOC forms within 15 days, and failed to appear for their hearing on the morning of October 11 [the Hearing]. As a result, the RPD rendered an oral decision declaring their refugee claims to be abandoned.

[7] On October 17, 2018, having retained counsel, the Applicants submitted an application to reopen their refugee claims, accompanied by their completed BOC forms [the Application to Reopen].

[8] In an affidavit accompanying the Application to Reopen, sworn jointly by the adult Applicants but written in the voice of the Principal Applicant, the Applicants detail the circumstances of their first days in Canada:

> (i) The Principal Applicant and his wife do not speak English. They arrived in Canada with very little money;
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> (ii) The Principal Applicant had difficulty understanding the interpreter at the September 18 Interview, as he only completed grade 8 and the interpreter spoke in very formal Romanian;
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> (iii) At the Interview, the Principal Applicant did not understand the need to submit forms within 15 days, and thought the Applicants had 30 days to submit their BOC forms;
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> (iv) The Applicants were residing in a hotel, and the Principal Applicant's first priority was to get adequate shelter for his family. He was not aware of the potential for Legal Aid, and did not have the money to retain a lawyer;
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> (v) On September 24, 2018, the Principal Applicant became aware of Legal Aid, and called to apply. The Applicants received a Legal Aid certificate on October 4, 2018;
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> (vi) Between October 4 and October 10, the Principal Applicant made numerous calls to lawyers, but was unable to retain a lawyer. Eventually, the Principal Applicant found a lawyer, who agreed to a meeting on the afternoon of October 11;
>
> (vii)The Principal Applicant received a phone call on October 10 to inform him of the October 11 hearing, but he could not understand the caller's English instructions. The Principal Applicant passed the phone to an acquaintance to translate. However, while the acquaintance did communicate that there was a hearing scheduled the next day, he did not communicate the purpose of the hearing or that there would be consequences for failing to appear. The Principal Applicant was afraid to attend this hearing without a lawyer, and thought that once he met with his lawyer the lawyer could resolve things;
>
> (viii) On the afternoon of October 11, the Principal Applicant met the lawyer, who informed him that his claim would likely be declared abandoned because he had missed his hearing that morning; and

(ix) Principal Applicant and the lawyer contacted the RPD and asked for an extension. The RPD replied that the Applicants' claims had been abandoned, and suggested that the Applicants apply to have their claims reopened.

[9] On October 25, 2018, a Notice of Decision was sent to the Applicants, informing them of the result of the October 11 Hearing - that their refugee claims had been abandoned.

III. Decision Under Review

[10] In a decision dated October 30, 2018, the RPD dismissed the Applicants' Application to Reopen [the Decision].

[11] The RPD rejected the Applicants' evidence that they had not been informed of the relevant deadlines. The RPD noted the Applicants' inability to communicate in English, but also considered that an interpreter had been provided at the Interview, and the Applicants had indicated at the start of the Interview that they understood the interpreter. On this basis, the RPD found that the relevant deadlines had been explained to the Applicants at the Interview.

[12] The RPD also considered that the Principal Applicant had received a phone call on October 10, 2018, advising him of the hearing the following day, and that the Principal Applicant confirmed in his affidavit that he understood there was a hearing the next day.

[13] The RPD concluded that there had been no breach of the principles of natural justice, and therefore dismissed the application.

[14] The Applicants now seek judicial review.

IV. Issues and Standard of Review

[15] The only substantive issue before this Court is whether the RPD was unreasonable in declining to reopen the Applicants' claim for refugee protection. The issue of whether to reopen a refugee claim is a question of mixed fact and law reviewable on the standard of reasonableness (*Gurgus v Canada (Citizenship and Immigration)*, 2014 FC 9 at para 19; *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at paras 12-13 [*Huseen*]).

V. Relevant Provisions

[16] Section 62 of the *Refugee Protection Division Rules*, SOR/2012-256 [the RPD Rules] governs applications to reopen refugee protection claims. Subsection 62(1) states that a claimant may apply to the RPD to reopen their claim.

[17] Subsection 62(6) outlines that the RPD must not allow an application to reopen unless there has been a failure to observe a principle of natural justice:

> (6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

[18] Subsection 62(7) outlines that in deciding an application to reopen, the RPD must consider any relevant factors, including whether the application was made in a timely manner and the justification for any delay:

> (7) In deciding the application, the Division must consider any relevant factors, including
>
> > (a) whether the application was made in a timely manner and the justification for any delay; and
> >
> > (b) the reasons why
> >
> > > (i) a party who had the right of appeal to the Refugee Appeal Division did not appeal, or
> > >
> > > (ii) a party did not make an application for leave to apply for judicial review or an application for judicial review.

[19] Past jurisprudence of this Court has found that any distinction between the terms "procedural fairness" and "principles of natural justice" has been swept aside, and therefore that these provisions should be read as permitting the RPD to reopen a claim where that has been a denial of natural justice or procedural fairness (*Huseen* at paras 18-20).

VI. Preliminary Issues

A. *Charter Rights*

[20] The Applicants represent that their rights under section 14 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK),* 1982, c 11 [the Charter] were infringed. Section 14 of the Charter guarantees that "a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter".

[21] The Applicants allege that their Charter rights were violated because (1) the Notice to Appear forms were not translated for them, and (2) they had no access to an interpreter when the Principal Applicant received the telephone call reminder on October 10, 2018.

[22] The Applicants had access to an interpreter at the Interview on September 18, 2018. While the interpreter may not have adequately communicated the content of the Notice to Appear forms, this does not constitute a denial of section 14 rights.

[23] Moreover, while the Principal Applicant did not have access to a licensed interpreter when he received the telephone call reminder on October 10, 2018, a telephone call reminder is not a "proceeding", and the lack of an interpreter for a telephone call reminder does not infringe the Applicants' Charter rights.

B. *Lack of Affidavit*

[24] The Respondent takes some issue with the Applicants' failure to submit a personal affidavit; the Applicants filed before this Court an affidavit by a colleague of the Applicants' counsel, which exhibited the contents of their Application to Reopen and correspondence with the RPD [the Ahmadi Affidavit].

[25] The Applicants submit that given the procedural nature of this matter, the Ahmadi Affidavit is sufficient and should be accepted.

[26] While a personal affidavit of the applicant is generally preferred in immigration proceedings, it is not required in all cases. Affidavits from third parties may be used so long as they are limited to the deponent's personal knowledge (*Li v Canada (Citizenship and Immigration)*, 2015 FC 927 at paras 25-26). The Ahmadi Affidavit is limited to the deponent's personal knowledge.

[27] The issue before this Court is whether the RPD reasonably exercised its discretion under section 62 of the RPD Rules. The Ahmadi Affidavit has effectively placed the relevant evidence that was before the RPD, including the affidavit sworn by the Applicants as part of their Application to Reopen, before this Court. The Respondent has not taken issue with the evidence that was before the RPD, and has not alleged any denial of the right to cross examine.

[28] The Ahmadi Affidavit is admitted as evidence.

VII. Analysis

A. *Was the RPD unreasonable in declining to reopen the Applicant's claim for refugee protection?*

[29] The Respondent argues that the RPD's conclusion was reasonable, because:

> (i) The RPD did not fail to consider the Applicants' personal circumstances. The RPD considered the Applicants' explanation that the Notice to Appear forms were not explained to them, and rejected this explanation because they had access to a Romanian interpreter, and did not indicate that they had difficulty understanding the interpreter;
>
> (ii) In a declaration form, both the interpreter and the Principal Applicant indicated that the verbal exchanges and the content of the forms provided at the interview were "faithfully and accurately" interpreted; and

> (iii) At the Interview, the Applicants were directly asked if they understood the interpreter, and responded that they did understand the interpreter.

[30] The Respondent also argues that by not raising the translation issue at the first opportunity, the Applicants waived any right to argue that deficiencies in translation constitute a breach of procedural fairness.

[31] Addressing first the waiver argument, the Respondent cites three decisions in support: *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191; *Jovinda v Canada (Citizenship and Immigration)*, 2016 FC 1297; and *Abegaz v Canada (Citizenship and Immigration)*, 2017 FC 306. In each matter, the Court was reviewing proceedings before the RPD or the Refugee Appeal Division, where the applicants had been represented by counsel and had made no objection to the adequacy of translation.

[32] In contrast, in this matter the Applicants were without counsel until the afternoon of October 11. While they may have indicated at the Interview that they understood the interpreter, as outlined below, it is unclear whether the pertinent deadlines were accurately communicated to them. I find that the Applicants did effectively raise the adequacy of translation at the first possible opportunity - when they were able to retain and instruct counsel on the afternoon of October 11, 2018.

[33] Turning to the reasonableness of the RPD's Decision, I recognize that the Applicants are not blameless in this matter. They received a phone the day before the Hearing, and, through the translation efforts of an acquaintance, understood that there was a hearing the next day. They

should have attended at the RPD on October 11, 2018. I do, however, find it problematic that the need for an interpreter was recognized at the Interview, yet this reminder telephone call was made in English with no attempt at translation.

[34] Notwithstanding the Applicants' failures, the door to Canada, through the availability of refugee protection, "should not slam shut on all those who fail to meet ordinary procedural requirements" (*Huseen*, above at para 16). A strict adherence to procedural requirements may, in some circumstances, undermine Canada's commitment to its refugee system and underlying international obligations (*Huseen* at para 16, citing subsection 3(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27). "The opportunity to free a family from the scourge of persecution … should not rest on an overly rigid application of procedural requirements" (*Huseen* at para 17).

[35] The Respondent correctly asserts that the RPD considered the Applicants' arguments regarding the adequacy of translation. However, I question the reasonableness of the RPD's dismissal of the Applicants' sworn evidence that they did not understand the Notice to Appear forms. This dismissal was solely based on (1) the Applicants statement at the Interview that they understood the interpreter, and (2) the Principal Applicant's signature on a form, written in English, which indicated that the contents of Notice to Appear forms had been communicated to him. Without any way to verify that the verbal information from the immigration officer and the contents of the forms had in fact been accurately communicated, and in the face of sworn evidence to the contrary, these statements and signature should not, at least in some cases, be determinative.

[36] More importantly, the RPD failed to consider whether the Application to Reopen was made in a timely manner, the justification for the delay, and "any relevant factors", each of which is required by subsection 62(7) of the RPD Rules. In particular, the RPD failed to meaningfully consider that:

> (i) The Applicants were alone in a foreign country where they did not speak the language;
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> (ii) They had limited funds and were unaware of the possibility for Legal Aid;
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> (iii) They diligently pursued legal representation in a timely manner – repeatedly calling Legal Aid once they became aware of it, and, having received a Legal Aid certificate, repeatedly attempting to retain a lawyer;
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> (iv) Their lawyer called the RPD on October 11, 2018, the same afternoon that their claims were declared abandoned; and
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> (v) The Applicants submitted their Application to Reopen on October 17, 2018, within 6 days of retaining a lawyer and well before the Decision was communicated to them on October 25.

[37] This failure resulted in a lack of any reasonable contextual approach by the RPD to deciding the Application to Reopen. Natural justice encompasses the overarching right to be heard (*Canada v Garber,* 2008 FCA 53 at para 40), and this right should not be denied unreasonably.

[38] In these circumstances, particularly given the Applicants' diligent attempts to retain counsel and their timely submission of their Application to Reopen, I find the RPD's denial of the Application to Reopen unreasonably denied the Applicants procedural fairness. The Decision is set aside, the Applicants' Application to Reopen is sent back for redetermination by a different panel of the RPD in accordance with these reasons.

JUDGMENT in IMM-5643-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed, and the matter remitted back for redetermination by a different panel of the RPD; and

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Khesrau Ahmadi	FOR THE APPLICANTS
Nicole Paduraru	FOR THE RESPONDENT

SOLICITORS OF RECORD:

NK Lawyers Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT