Federal Court  Cour fédérale

Date: 20191106

Docket: IMM-2749-18
IMM-3194-18

Citation: 2019 FC 953

Ottawa, Ontario, November 6, 2019

PRESENT: Mr. Justice Annis

BETWEEN:

JURGITA BERNATAVICIUTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

[1] This was originally an application for judicial review of two decisions of the Refugee Protection Division [RPD] regarding Jurgita Bernataviciute's [Applicant] claim for refugee protection by different RPD members. The first decision (file number IMM-2749-18), is dated June 11, 2018 where by the member refused to waive the Applicant's hearing due to the unreasonable delay so as to conclude that she was a person in need of protection pursuant to section 170.1(f) of the *Immigration and Refugee Protection Act*, LC 2001, c 27 [IRPA], which

permits the Board to allow a claim for refugee protection without a hearing [First Decision by the first RPD member]. The second (file number IMM-3194-18) is a decision dated June 20, 2018 determining that the Applicant's claim was abandoned, as the Applicant's counsel appeared at the hearing but failed to proceed with the claim [Second Decision by the second RPD member].

[2] The parties have agreed that the Applicant will discontinue the second application, but the issue regarding whether the declaration that the second matter had been abandoned will be considered in these reasons.

I. Background

[3] The Applicant is a citizen of Lithuania who came to Canada on July 8, 2011 and submitted a claim for refugee protection in March 2012. Due to the introduction of new legislation that imposed more stringent time requirements on the processing of new refugee claims, the Applicant's claim, described as a legacy claim, was processed in secondary priority.

[4] The Applicant's hearing was eventually scheduled for June 13, 2018.

[5] Prior to that date, however, on June 1, 2018, the Applicant submitted an application seeking to have her hearing waived and a decision favourable to her made by the RPD pursuant to section 170~~.1~~(f) of the IRPA, which permits the Board to allow a claim for refugee protection without a hearing.

[6] The Applicant submitted that the RPD had delayed in scheduling the hearing giving priority to other refugee claims, and that, as such the Applicant had waited over six years for her

claim to be heard after it was initiated. The Applicant alleges that the delay caused her prejudice in that she lived in legal limbo with stress and anxiety during the entire period.

[7] On June 11, 2018 the panel Member [First Member] issued a decision advising that the application to have the hearing waived was denied. On June 12, 2018, the Applicant filed her application for leave for judicial review of the First Member's decision.

[8] The Applicant's claim was heard on June 13, 2018. At the outset of the hearing, counsel for the Applicant requested that the hearing be adjourned until there was a decision from the Federal Court regarding the application for leave and judicial review of the First Decision that the Applicant filed the previous day. The panel Member [Second Member] indicated that he was not prepared to grant the adjournment and that he wanted to proceed because he had already prepared for it. The Second Member indicated that the Applicant could always appeal the decision afterwards if she was not satisfied with the result. Since the Applicant refused to proceed with the claim, the Second Member declared that the Applicant had abandoned her claim, having advised ~~him~~ her that this would be the consequence of not proceeding with the hearing.

II. Impugned decision

A. *The First Decision*

[9] The First Member noted that while the Applicant admitted that in refugee determination the Board has no such jurisdiction, counsel for the Applicant nevertheless maintained that in

addition to the Board and the Minister, the Applicant could implement such a process. The Member rejected this submission stating that the Board can act only within the parameters of its governing statute and therefore it does not have the jurisdiction to provide the remedy sought.

[10] The RPD also noted that section 11(b) 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 [*Charter*], which protects the right to be tried within a reasonable time only applies to the criminal context and does not address issues relating to administrative law. The First Member also underlined that in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], the Supreme Court of Canada clearly addressed the question of whether an applicant is entitled to a remedy pursuant to administrative law for a delay in having their claim heard. In *Blencoe*, the Supreme Court also established that the onus is on the person making the argument to demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. The First Member also noted that the Federal Court of Appeal made it clear in *Hernandez v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 345 at paras 3-5 that the unreasonable delay argument will rarely if ever be successful in the context of an RPD decision.

[11] The First Member recognized that the delay in hearing the Applicant's claim was extensive, and that the delay arose following the implementation of amended legislation that brought in a new regime with respect to the processing of refugee claims. However, the First Member concluded that the Applicant failed to demonstrate any specific circumstance that could show how the delay had prejudiced the Applicant's ability to make her claim or to address the

forward-facing aspects of the claim. The First Member did not agree with the Applicant's position that the passage of time alone can have an adverse effect on a claimant's ability to address the forward-looking aspects of their claim, and noted that in fact, in some cases, a delay could assist claimants in making their claim such as where country conditions have worsened since the claim was made.

[12] The First Member also noted that although the Applicant claimed that the delay was having a profound impact on her, little evidence sustained the allegation and she did not lodge a complaint with the RPD or consider approaching the Court with a *mandamus* application.

[13] The First Member then cited *Rana v Canada (Minister of Citizenship and Immigration),* 2005 FC 974 at paras 18-20 as standing for the proposition that a mere delay does not automatically mean that a Tribunal cannot fulfil its mandate. Indeed, a refugee claimant is not in the same legal position as an accused person because refugee claimants are ascertaining claims against the State and bear the burden of showing that their claim has a credible basis (*Akthar v Canada (Minister of Employment and Immigration),* [1991] 3 FC 32 [*Akthar*]).

[14] The First Member concluded that as the Applicant did not raise any specific circumstance that could show how the delay had infringed her ability to address the forward-looking aspects of the claim, no breach of section 11(b) of the *Charter* had occurred, and consequently dismissed the application.

B. *The Second Decision*

[15] The Second Member's reasons were brief. He noted that the Applicant's claim was referred to the RPD on March 9, 2012 and that in the Notice to Appear dated May 3, 2018, the Applicant was advised that the hearing of her claim would take place on July 13, 2018. The Second Member noted that the Applicant and her counsel appeared at the hearing but failed to proceed with their claim and that they failed to provide a reason for which the RPD should not determine that the claim had been abandoned, demanding only that the hearing be delayed until the judicial review of the First Decision was completed. Accordingly, the Second Member deemed the claim abandoned.

[16] The Applicant now seeks judicial review of both decisions.

III. Issues

[17] The Applicant submits the following issues:

a) Did the First Member err by fettering his discretion by concluding it did not have the jurisdiction because failing to acknowledge that the *Immigration and Refugee Protection Act*, LC 2001, c 27 at sections 168 and 170 allow the RPD to grant refugee status to a claimant in the absence of holding a hearing and by indicating that no such discretion existed?

b) Was the First Member's decision unreasonable by concluding that the Applicant had not satisfied the relevant test for granting relief on the basis of a delay in processing her claim?

c) Did the Second Member err by finding that the Applicant abandoned her claim for refugee protection?

A. *Statutory framework*

Immigration and Refugee Protection Act, SC 2001, c 27, sections 168 and 170

Abandonment of proceeding	**Désistement**
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.
Abuse of process	**Abus de procédure**
(2) A Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules.	**(2)** Chacune des sections peut refuser le retrait de l'affaire dont elle est saisie si elle constate qu'il y a abus de procédure, au sens des règles, de la part de l'intéressé.
…	[…]
Proceedings	**Fonctionnement**
170 The Refugee Protection Division, in any proceeding before it,	**170** Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :
(a) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;	**a)** procède à tous les actes qu'elle juge utiles à la manifestation du bien-fondé de la demande;

(b) must hold a hearing;	**b)** dispose de celle-ci par la tenue d'une audience;
(c) must notify the person who is the subject of the proceeding and the Minister of the hearing;	**c)** convoque la personne en cause et le ministre;
(d) must provide the Minister, on request, with the documents and information referred to in subsection 100(4);	**d)** transmet au ministre, sur demande, les renseignements et documents fournis au titre du paragraphe 100(4);
(d.1) may question the witnesses, including the person who is the subject of the proceeding;	**d.1)** peut interroger les témoins, notamment la personne en cause;
(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;	**e)** donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;
(f) may, despite paragraph (b), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;	**f)** peut accueillir la demande d'asile sans qu'une audience soit tenue si le ministre ne lui a pas, dans le délai prévu par les règles, donné avis de son intention d'intervenir;
(g) is not bound by any legal or technical rules of evidence;	**g)** n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and	**h)** peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;
(i) may take notice of any	**i)** peut admettre d'office les

facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.	faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation.

Refugee Protection Division Rules, SOR/2012-256, Rules 23, 65 (1), 65(4)

Claim allowed without hearing	**Demande d'asile accueillie sans audience**
23 For the purpose of paragraph 170(f) of the Act, the period during which the Minister must notify the Division of the Minister's intention to intervene is no later than 10 days after the day on which the Minister receives the Basis of Claim Form.	**23** Pour l'application de l'alinéa 170f) de la Loi, le délai dont dispose le ministre pour donner à la Section un avis de son intention d'intervenir est d'au plus dix jours après la date à laquelle il a reçu le Formulaire de fondement de la demande d'asile.
…	[…]
Opportunity to explain	**Possibilité de s'expliquer**
65 (1) In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned,	**65 (1)** Lorsqu'elle détermine si elle prononce ou non le désistement d'une demande d'asile aux termes du paragraphe 168(1) de la Loi, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé:
(a) immediately, if the claimant is present at the proceeding and the Division considers that it is fair to do so; or	**a)** sur-le-champ, dans le cas où le demandeur d'asile est présent à la procédure et où la Section juge qu'il est équitable de le faire;
(b) in any other case, by way of a special hearing.	**b)** au cours d'une audience spéciale, dans tout autre cas.

Factors to consider	Éléments à considérer
(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.	**(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.

IV. Standard of review

[18] With respect to the appropriate standard of review regarding the issue of fettering discretion in denying jurisdiction to entertain a request from a refugee claimant that refugee status be granted without a hearing, the question is subject to review on the standard of reasonableness (*B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at paras 69-70, applying *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61), i.e.: "In other words, since *Dunsmuir*, for the correctness standard to apply, the question has to not only be one of central *importance to the legal system* but also outside the *adjudicator's specialized area* of expertise", and this with respect, despite the decisions of *Gordon v Canada (Attorney General)*, 2016 FC 643 and *Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at para 33. See similarly *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at para 5.

[19] However, even when the question at issue is the interpretation of a tribunal's home statute, the range of possible, acceptable outcomes can be narrow, as aptly illustrated by the

Supreme Court's textual, contextual and purposive analysis in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53.

[20] The issues of not satisfying the relevant test for granting relief on the basis of a delay in processing her claim or regarding abandonment of the claim is governed by the standard of reasonableness, as mixed questions of fact and law.

V. Analysis

A. *The RPD does not have jurisdiction to entertain a request from a refugee claimant that refugee status be granted without a hearing*

[21] The Applicant submits that the RPD fettered its decision by its conclusion that it did not have the jurisdiction to entertain a request from a refugee claimant that refugee status be granted without a hearing. I ~~agree~~ disagree.

[22] Parliament never intended section 170(f) of the IRPA to provide a mechanism by which refugee claimants could claim the right to obtain refugee status without a hearing. Section 170(f) was intended to facilitate the Board's processing of refugee claims. The provision reflects the fact that the RPD must deal with a large number of refugee claims. In such circumstances, and in reliance upon its expertise in these matters, the Board should be given a wide discretion in the administration of its legislation to determine cases where it is plain to see that the refugee claimant will be granted refugee status without the necessity of a hearing.

[23] Conversely, it would never have been Parliament's intention to allow a refugee claimant to proclaim a right pursuant to section 170(f) to require the RPD to exercise its discretion in their favour without a hearing. Forcing the RPD to provide a decision pursuant to section 170(f), would result in yet another decision, with yet another judicial review application for its review, and yet more delay in processing the refugee application.

[24] That is not to say that the RPD's decision is unreviewable. The Minister may always challenge the granting of refugee status without a hearing, even if it has not indicated its intention to participate in one. The Minister, as the guardian of the rule of law and "the losing party" from an uncontested granting of permanent residency without a hearing, has the right to demand his day in court, so to speak, to determine whether the claimant is legitimately in need of protection in accordance with the dictates of the IRPA.

[25] As recognized by Justice O'Reilly in *Canada (Citizenship and Immigration) v Mukasi*, 2008 FC 347 at para 4:

> [4] … the Board may allow a claim without a hearing if the Minister has not given notice of an intention to intervene (s. 170(f)). In addition, if a refugee protection officer recommends that the Board allow a claim without a hearing, the Board may do so only if the case does not disclose any issues that should be brought to the Minister's attention, the claimant's identity has been sufficiently established, there are no serious issues of credibility involved, the claimant's account of events is consistent with information on conditions in the country of origin, and the claimant has established that he or she meets the definition of a Convention refugee or a person in need of protection (*Refugee Protection Division Rules*, SOR/2002-228 (RPD Rules), s. 19(4)(*a*)-(*d*)).
>
> [My emphasis.]

[26] Accordingly, there is no issue of the RPD fettering its decision. It never possessed the jurisdiction in so far as being required to exercise its discretion as a mandatory requirement to consider a request from a refugee claimant pursuant to section 170(f) of the IRPA to grant refugee status without a hearing.

B. *Did the First Member err by concluding that the Applicant had not satisfied the relevant test for granting relief on the basis of a delay in processing her claim?*

[27] The Applicant argues that the First Decision itself is unreasonable, as the First Member erred in assessing the impact of the delay. The Applicant argued that a remedy was warranted on account of the delay, as delay tends to bring the administration of justice into disrepute. I agree with the Respondent that the applicable jurisprudence establishes that the Applicant failed to show any breach of her rights under section 7 or section 11 of the *Charter*, and that she failed to meet the high threshold to establish an abuse of process in terms of delay.

[28] First, the Applicant, as a refugee claimant is not a "person charged with an offence". Section 11 of the *Charter*, which expressly applies only to a person charged with an offence, can have no application in this case. The section 11(b) right to be tried within a reasonable time "has no application in civil or administrative proceedings" (*Blencoe* at para 88). I agree

[29] Second, while section 7 of the *Charter* could be applicable in this context, the Applicant failed to particularize or support her arguments in any meaningful way. In addition, I agree with the Respondent that *Charter* decisions should not and must not be made in a factual vacuum (*Mackay v Manitoba*, [1989] 2 SCR 357). Vague claims of living in "legal limbo" and "the delay

having a profound impact" do not approach the factual requirements to found a section 7 *Charter* claim.

[30] Finally, with respect to refugee claims specifically, the Federal Court of Appeal warned in *Akthar* that unreasonable delay will "rarely, if ever, be successfully accepted as a ground of review". It has also explained that a claim that delay has resulted in a *Charter* breach must "be supported either by evidence or at the very least by some inference from the surrounding circumstances that the claimant has in fact suffered prejudice or unfairness because of the delay." A claimant must produce actual proof, and not simply rely on assertions (*Hernandez v Canada (Minister of Employment and Immigration),* (1993), 154 NR 231 at para 4).

[31] Abuse of process is a common law principle typically invoked to stay proceedings. As the Supreme Court in *Blencoe* noted, an abuse of process has been characterized as "a process tainted to such a degree that it amounts to one of the clearest of cases" and cases of this nature will be "extremely rare". The Court further found that there must be more than merely a lengthy delay to establish an abuse of process; "the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" *(Blencoe* at paras 120, 122 and 133).

[32] In *Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 [*Ching*] Justice Diner summarized the principles applicable to delay amounting to abuse of process at paras 81-83:

> [81] As the parties have recognized,the starting point when analyzing abuse of process for delay is *Blencoe*, which instructs

> that delay does not, on its own, give rise to an abuse of process — otherwise, this would create a judicially-imposed limitation period for administrative proceedings. Rather, an applicant must prove that a "significant prejudice"resulted from the delay (*Blencoe* at para 101).
>
> [82] Prejudice may exist in the form of compromised hearing fairness, such as where memories have faded, or essential witnesses have died (see *Blencoe* at para 102; *Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73 at para 45 [*Chabanov*]). However, where the fairness of the hearing has not been impacted by the delay, an applicant may also prove other forms of prejudice. In *Blencoe*, the Supreme Court held that such other forms prejudice can include, for instance, significant psychological or reputational harm. Either way, "few lengthy delays" will meet the abuse of process threshold; rather, the delay must be unacceptable to the point of being so oppressive as to taint the proceedings (*Blencoe* at paras 115, 121).
>
> [83] On whether the delay meets the high threshold, the Supreme Court held in *Blencoe*:
>
> > 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[33] In the case at bar to support her claim, the Applicant had the onus of demonstrating with persuasive evidence that the delay resulted in a *Charter* breach, or at the very least by some inference from the surrounding circumstances that she in fact suffered prejudice or unfairness because of the delay (*Hernandez v Canada (Minister of Employment and Immigration)*, (1993), 154 NR 231 at para 4; *Canada (Public Safety and Emergency Preparedness) v Prue*, 2012 FCA

108 at para 14). The Applicant has not provided any evidence of prejudice caused to her by the delay.

[34] While a six-year delay may appear significant, I have no evidence that the delay in this case is "inordinate" in the sense of offending the community's sense of fairness (*Ching* at para 78). Indeed, this Court has deemed much more significant delays, including a delay of eleven years as not reaching the threshold of abuse of process because the applicant failed to provide sufficient proof of significant prejudice resulting directly from the delay (*Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73 at para 65). The Applicant having failed to demonstrate that she has suffered a prejudice from this delay, it is not for the Court to speculate on the prejudice to the Applicant (*Montoya v Canada (Attorney General),* 2016 FC 827 at para 44).

C. *Did the Second Member err by finding that the Applicant abandoned her claim for refugee protection?*

[35] The Applicant argues that the Second Decision is unreasonable because the Second Member failed to take into consideration the factors which are normally relevant to an abandonment decision and because the Applicant had given a clear intention to proceed with her claim.

[36] In *Ahamad v Canada (Minister of Citizenship and Immigration,* [2000] 3 FC 109 (QL), Justice Lemieux discussed the applicable test to review a Member's decision to declare a refugee claim abandoned. The analysis focuses on whether the applicant demonstrated a continuing

intention to pursue the refugee claim with diligence. Justice Lemieux discusses some factors which are relevant in determining whether a claimant has shown an interest to pursue the claim with diligence, including, the length of time for which the adjournment is sought, the effect on the immigration system, whether the adjournment would needlessly delay or impede the inquiry, and whether fault is to be placed on the applicant for not being ready.

[37] The Applicant argues that an abandonment decision is unreasonable since such factors were not taken into account by the Second Member. She submits that it is apparent that the only factor which the Second Member considered was the fact that the Applicant refused to proceed with her claim on the scheduled day, and insisted on proceeding at a later date. They did not consider that the Applicant had had filed her Personal Information Form in a timely manner, that the Applicant had retained counsel in a timely manner, that there had been no previous absences, that there was ongoing contact with the Applicant and her counsel, and that both were present at the hearing.

[38] The Applicant further submits that she was not seeking a lengthy adjournment and that it is impossible to state that the RPD's decision is reasonable where the RPD did not even consider the length of time for which the adjournment was sought.

[39] The Applicant further submits that she had expressed a clear intention to pursue her claim and that her refusal to proceed on the scheduled hearing date was completely reasonable. It is important to note in that respect that the Applicant was only refusing to proceed on that day and that she was very prepared to proceed after the Federal Court had rendered a decision on her

pending application for leave and judicial review. The entire basis of the Applicant's application to allow her claim without an oral hearing was in furtherance of her desire to pursue her claim for refugee protection. Furthermore, the Applicant attended the RPD with her counsel on the scheduled date.

[40] Finally, the Applicant argues that her refusal to proceed was reasonable because proceeding could have frustrated the purpose of the pending application for leave and judicial review. For example, in the event that the hearing proceeded and the RPD rejected the claim, and then the Federal Court granted the judicial review, the Applicant would have likely been left with little in the way of a remedy. At the very least, the outcome would be that the refugee hearing would have served no purpose and would have been a waste of the Immigration and Refugee Board of Canada's precious resources.

[41] I agree with the Respondent that by the very wording of section 168(1) of the IRPA, the power to declare the abandonment of a proceeding is a discretionary power. The RPD is entitled to make such a declaration "if it is of the opinion" that the refugee protection claimant is in default in the proceedings. The notion of "default in the proceedings" is not defined in the IRPA but section 168(1) describes three instances where such a default may occur: a failure to appear for a hearing, a failure to provide information required by the RPD or a failure to communicate with the RPD on being required to do so. However, section 168(1) is drafted in such a way that this list of potential defaults is not exhaustive.

[42] Much of the jurisprudence on abandonment findings deal with relatively sympathetic explanations for failing to proceed with a hearing: illness, family problems, counsel failing to attend, etc. No such circumstances are present here. The Applicant and her representative were at the hearing, and were on notice as to the consequences of refusing to proceed, but the Applicant nevertheless refused to have her claim heard. The Applicant admits that she made her choice with full awareness of the potential consequences.

[43] The basis for the Second Member's decision is readily apparent. After having waited for the hearing of her claim on the merits, the Applicant refused to proceed with it. Despite being warned that refusing to proceed with the hearing could result in an abandonment finding, she declined to present her case. This refusal was an ample basis to declare the claim abandoned (*Koky v Canada (Citizenship and Immigration)*, 2015 FC 562 at paras 44-45).

[44] It is not open to the Applicant to complain about the delay in scheduling her hearing, but then refuse to proceed when the day finally arrives. The Applicant's position is internally inconsistent, and cannot give rise to a serious issue. While the Second Member's reasons on the abandonment finding are relatively brief, the endorsement sets out the basis for the decision in a justified, transparent and intelligible way. Though other decision-makers might have approached the matter differently, the Second Member was entitled to decide as he did.

[45] In *Zhang v Canada (Citizenship and Immigration*), 2014 FC 882, Justice Leblanc wrote the following regarding the application of section 168 of the IRPA:

> [36] This Court, in interpreting s 168(1) of the Act, has consistently held that the key consideration with respect to

> abandonment proceedings is whether the claimant's conduct amounts to an expression of his or her intention to diligently prosecute his or her claim (*Csikos v Canada (Minister of Citizenship and Immigration*, 2013 FC 632 (CanLII), at para 25).

[46] In determining whether a claim has been abandoned, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned. It also must consider the explanation given by the claimant and any other relevant factors, including whether the claimant is ready to start or continue the proceedings *(Refugee Protection Division Rules*, SOR/2012-256, Rule 65).

[47] In the case at bar, the Applicant refused to proceed with the hearing and was provided with an opportunity to explain why the claim should not be declared to be abandoned, given this refusal. The Applicant's counsel argued that her refusal to proceed was reasonable because proceeding could have frustrated the purpose of the pending application for leave and judicial review. For example, in the event that the hearing proceeded and the RPD rejected the claim, and then the Federal Court granted the judicial review, the Applicant would have likely been left with little remedy.

[48] The Second Member found this to be insufficient and gave his reasons for that finding. The Applicant persisted with her refusal to proceed with the hearing even though she was advised of the risk of a finding of abandonment. The Applicant, by continuing to refuse to proceed when faced with the very real risk of an abandonment finding, failed to demonstrate her intent to continue with the proceedings. The Second Member's decision was therefore reasonable.

[49] I think that allegations of prejudice caused by delay in determining refugee status to obtain permanent Canadian residency status are somewhat hypocritical. It is generally recognized that the longer a failed refugee claimant can reside in Canada, the better the chances for successful recourse to some collateral means to obtain permanent residency, particularly based on a humanitarian and compassionate application.

VI. Conclusion

[50] The application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT in IMM-2729-18 and IMM-3194-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2749-18 AND IMM-3194-18
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