Federal Court Cour fédérale

Date: 20190823

Docket: IMM-3412-18

Citation: 2019 FC 1099

Ottawa, Ontario, August 23, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

YING LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Ying Li, is a citizen of China. On December 9, 2012, he submitted a claim for refugee protection. After a number of delays, his case was scheduled to be heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on June 26, 2018. Shortly before the hearing date, the applicant's lawyer, who had only recently been retained, wrote to the RPD to request that the hearing be adjourned and re-scheduled. The

applicant's lawyer explained that he had not been able to obtain the materials he required to prepare for the hearing and, further, he was not available to proceed with the hearing on the scheduled date because of a conflicting commitment later the same morning. The request was refused by a coordinating member of the RPD.

[2] The applicant's lawyer renewed his request in person at the commencement of the hearing on June 26, 2018. Once again, the request was refused.

[3] Since his lawyer was not able to proceed with the hearing, the applicant was asked by the RPD member if he wished to go ahead unrepresented. The applicant said he did not. The RPD member then declared the applicant's claim abandoned.

[4] The applicant now applies for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Among other things, he submits that the decision to declare his refugee claim abandoned is unreasonable.

[5] For the reasons that follow, I agree with the applicant.

II. BACKGROUND

[6] The applicant arrived in Canada on November 26, 2012. He initiated his claim for refugee protection on December 9, 2012. The applicant was assisted by a paralegal in the early stages of preparing his claim.

[7] In or about January 2013, the applicant retained a lawyer to represent him before the RPD.

[8] The applicant's hearing before the RPD was first scheduled to take place on January 9, 2014. For reasons that are not apparent on the record, it was rescheduled to March 6, 2014. However, it did not proceed on that date because the applicant's lawyer was ill. The matter was re-scheduled for April 24, 2014.

[9] The hearing went ahead on April 24, 2014, but it could not be completed in the time available.

[10] The matter was scheduled to continue on May 6, 2014. However, the applicant's lawyer did not attend, apparently because he was unwell again. The matter was adjourned to June 24, 2014. On that date, however, the RPD member seized with the applicant's case was not available. The member was expected to be available in September so the matter was to be re-scheduled for some time after that. For reasons that are not disclosed in the record, this did not happen for nearly four years.

[11] While the applicant was waiting for his hearing before the RPD to continue, his lawyer retired from practice. Apparently unbeknownst to the applicant, the lawyer simply transferred all his files, including the applicant's, to another lawyer.

[12] This second lawyer went on the record for the applicant before the RPD on January 9, 2018.

[13] On April 25, 2018, the RPD sent the applicant's second lawyer a letter stating that, "for administrative reasons," the RPD had decided to re-hear the applicant's claim.

[14] On May 22, 2018, the RPD mailed the applicant a Notice to Appear for a Hearing (dated May 18, 2018) which stated that his refugee claim would be heard on June 26, 2018, at 8:45 a.m. The applicant states in his affidavit in support of this application for judicial review that he received the notice in the mail "sometime toward the end of May of 2018."

[15] The applicant was unable to maintain the retainer of the lawyer to whom his file had been transferred because he could not afford the latter's fees.

[16] The applicant retained a new lawyer. The record does not reveal when this retainer was completed. However, the applicant and his new lawyer appear to have signed a Use of Representative Form on May 30, 2018 (although the date is difficult to read). The file the applicant's new lawyer received from former counsel was incomplete. It did not contain any documents from the applicant's original lawyer's file, including the applicant's Personal Information Form.

[17] The applicant's new lawyer wrote to the RPD on June 21, 2018, requesting an adjournment of the June 26, 2018, hearing date. He offered two reasons for the request. First, he

had not yet been able to obtain a complete copy of the applicant's file from the applicant's former lawyers. Second, he already had another matter scheduled before the RPD later the same morning (a hearing by videoconference for a matter being heard in Vancouver). The applicant's lawyer offered several potential alternative dates for the hearing in late July and early August.

[18] The next day (June 22, 2018), the application for an adjournment was dismissed by a coordinating member of the RPD. The applicant's lawyer was informed of the decision by a telephone call from the RPD. (The written reasons for the decision are dated June 22, 2018, but the applicant's lawyer did not receive them until June 28, 2018.)

[19] In his reasons, the coordinating member explained that he considered that the determinative issue was counsel's unavailability. The member judged the concern about the incompleteness of counsel's file to be "moot" because, even if the file was complete, this would not change the fact that counsel was not available. In the member's view, the applicant should not have chosen a lawyer who was not available on the scheduled hearing date (citing paragraphs 3.6.1 and 3.6.2 of *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding* as well as information the applicant would have been provided with when he launched his claim). The member also found that the lawyer should not have accepted the retainer knowing that he was not available. The member noted that Rule 54(4) of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], states that the RPD must not allow an application for the adjournment of a hearing date "unless there are exceptional circumstances." In the member's view, counsel's unavailability was not an "exceptional circumstance." As a result, the request was denied.

[20] On June 25, 2018, the applicant's lawyer wrote to advise the RPD that he intended to renew his request for an adjournment at the hearing the following day. In response, a Case Management Officer with the RPD advised him as follows by fax: "Unless there is some additional evidence not now apprent [*sic*] in the file, if counsel does not proceed with the hearing and if the claimant refuse [*sic*] to proceed without counsel it is the member's intention to abandon the claim."

III. DECISION UNDER REVIEW

[21] At the commencement of the hearing on June 26, 2018, the applicant's lawyer renewed his request for the adjournment, relying on the same two grounds stated in his letter of June 21, 2018.

[22] The presiding RPD member (who was not the same member as had dismissed the written application for an adjournment) offered to give the applicant's lawyer some time to review the Board's file before proceeding in order to make up for any deficiencies in the file as it had been transferred to him. The lawyer declined this offer.

[23] The member refused to adjourn the hearing.

[24] With counsel being unavailable for the balance of the hearing because of his Vancouver commitment, the applicant was asked if he was prepared to proceed without counsel. The applicant said that he was not. The claim was then declared abandoned.

[25] The member gave brief oral reasons at the time. Written reasons were provided subsequently. In substance, the member simply adopts the reasons of the coordinating member for refusing the first adjournment request. The member's reasons also demonstrate that the decision to declare the claim abandoned was based simply on the fact that the applicant refused to proceed without counsel despite being warned that doing so would result in his claim being abandoned.

IV. STANDARD OF REVIEW

[26] The decision immediately under review is the decision to declare the applicant's refugee claim abandoned. However, that decision is inextricably linked to the refusal to allow the request for an adjournment. The applicant challenges the refusal to allow the request for an adjournment on the basis that the member fettered his discretion. He also challenges the reasonableness of the decision to declare the applicant's refugee claim abandoned.

[27] There is no dispute that a decision by the RPD to declare a refugee claim abandoned is reviewed on a reasonableness standard (*Csikos v Canada (Citizenship and Immigration)*, 2013 FC 632 at para 23 [*Csikos*]; *Zhang v Canada (Citizenship and Immigration)*, 2014 FC 882 at para 19).

[28] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process"

and determines “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 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if “the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[29] The introduction of fettering of discretion as a ground of review has the potential to complicate the choice of standard of review: see the discussion of this question by Justice Boswell in *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112 at paras 16-18. However, it is not necessary to resolve this question here because, as I will now explain, I have found the decision to declare the refugee claim abandoned to be unreasonable irrespective of any alleged fettering of discretion.

V. ANALYSIS

[30] Section 168(1) of the *IRPA* provides that a Division of the IRB “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.” Rule 65(1) of the *RPD Rules* states that 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." Under Rule 65(4), the Division must consider any explanation offered by the claimant and "any other relevant factor" in deciding if the claim should be declared abandoned.

[31] This Court has consistently held that "the central 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* at para 25; *Octave v Canada (Citizenship and Immigration)*, 2015 FC 597 at para 18, quoting *Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 109, at para 32).

[32] Until the morning of June 26, 2018, the applicant had never been in default in the proceeding. While there had been a lengthy delay in his case, this was not his fault. The only "default" the applicant could be said to have demonstrated was retaining a lawyer who was not available on the scheduled date of his hearing and then refusing to proceed without counsel when invited to do so after an adjournment was refused. In my view, neither consideration reasonably supports a finding that the applicant had abandoned his refugee claim.

[33] It may very well have been unwise for the applicant's new lawyer to accept the retainer given that he was not available on the hearing date. That being said, it may not have been unreasonable for the lawyer to expect that the matter could be re-scheduled given its history, given that it was a legacy case (cf. paragraph 7.9 of *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding*), given the applicant's diligence in retaining new

counsel when he had to, given the incompleteness of the file the lawyer had received from former counsel, and given that the date had been set before he was retained.

[34] It is true that the applicant was taking a risk when he retained a lawyer who was not available on the scheduled hearing date. However, given the state of the file as it had been transferred from the applicant's previous lawyers, it is far from clear that the matter could have proceeded on June 26, 2018, even if the applicant had retained a lawyer who was available. In the circumstances of this case, the applicant's choice of counsel does not reasonably support the conclusion that he was not pursuing his claim diligently.

[35] As for the applicant's unwillingness to proceed without counsel after the adjournment was refused, the member put the applicant in an untenable position. In the circumstances of this case, the applicant's unwillingness to proceed without counsel was simply not probative of whether he was diligently pursuing his claim. It was unreasonable of the member to conclude otherwise.

[36] Taking a step back, I recognize that if the claim was not declared abandoned then the applicant would effectively achieve indirectly what he could not secure directly – namely, an adjournment of his refugee hearing. However, it was unreasonable for the member to put the applicant to the election that he did because it was unreasonable to refuse the adjournment in the first place.

[37] The adjournment request based on counsel's unavailability effectively presented the RPD with a *fait accompli*, something that ought to be avoided if at all possible. Still, the significance of this is mitigated by the fact that the counsel could not reasonably have proceeded in any event given the state of the file he received from former counsel. Most importantly, even before he heard the renewed request for an adjournment, the member was clearly aware of the potential consequence of the claim being declared abandoned if the adjournment was refused. He himself had raised this, warning the applicant's lawyer that he was ready to declare the claim abandoned if the applicant did not proceed without counsel. By refusing the adjournment, the member effectively painted himself and the applicant into a corner. In the circumstances of this case, this was unreasonable.

[38] Even if the applicant's lawyer should have declined the retainer, and even if the applicant should have attempted to retain another lawyer in the limited time available, the consequence of declaring the refugee claim abandoned is disproportionate to the applicant's "default" in the proceeding. The decision to declare the claim abandoned does not fall within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). The loss of the opportunity to have his refugee claim determined on its merits is not an acceptable outcome on the facts of this case, particularly when those facts are considered against the backdrop of the objectives of the *IRPA* with respect to refugees (see *IRPA*, s 3(2); see also *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at para 16). The decision of the RPD therefore must be set aside.

VI. CONCLUSION

[39] For these reasons, the application for judicial review is allowed, the decision of the RPD dated June 26, 2018, is set aside, and the matter is remitted for redetermination.

[40] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

[41] Finally, the original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(1). Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-3412-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.
2. The application for judicial review is allowed.
3. The decision of the Refugee Protection Division dated June 26, 2018, is set aside and the matter is remitted for reconsideration by a different decision-maker.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3412-18
STYLE OF CAUSE:	YING LI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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