

Federal Court



Cour fédérale

Date: 20211221

Docket: IMM-2585-20

Citation: 2021 FC 1453

Ottawa, Ontario, December 21, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**FERDYNAND GLOWACKI
ZANETA LACKO
KONRAD LACKO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ferdynand Glowacki, his wife Zaneta Lacko and their young son [collectively the Applicants] are Polish citizens of Roma ethnicity. They seek judicial review of a refusal by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] to reopen their

refugee claim after they failed to appear for the hearing of their claim and a subsequent abandonment show cause hearing.

[2] The RPD unreasonably found there was no failure to observe a principle of natural justice that would justify reopening the Applicants' refugee claim. The application for judicial review is allowed.

II. Background

[3] The Applicants arrived in Canada on April 1, 2019. They spent the first two weeks at a shelter and then moved into a basement apartment in Brampton, Ontario. They obtained a Legal Aid certificate and hired Howard C. Gilbert as their lawyer.

[4] The adult Applicants do not speak English and are otherwise illiterate. They completed their Basis of Claim [BOC] and other forms at their lawyer's office. An interpreter was present, but he was Czech Roma. The Applicants say they could not understand the interpreter clearly because they speak a dialect of Polish Roma. According to the Applicants, they assumed their lawyer would handle all communications with the IRB.

[5] The Applicants' BOC was submitted to the IRB on or about April 24, 2019. The form indicated that they were represented by counsel, who had helped them to complete the BOC. Mr. Gilbert added the following handwritten note: "I am not retained to represent the claimant at

their hearing at this time, but anticipate that I will be shortly. Please copy me on all correspondence to claimant.”

[6] Ms. Lacko became pregnant, and the family moved to new accommodations on September 1, 2019. They did not inform the IRB of their changed address. They did, however, inform the Government of Ontario, their social services provider, and assumed the information would be shared with the IRB and all other government agencies.

[7] On December 21, 2019, the RPD sent the Applicants a Notice to Appear [NTA] at the address on file. The hearing was scheduled for February 11, 2020, with an abandonment show cause hearing set for February 18, 2020. The NTA was returned to the RPD on or about January 20, 2020 with the annotation “moved / unknown”.

[8] On January 24, 2020, the RPD sent Mr. Gilbert a facsimile transmission informing him that the NTA had been returned by the post office, and asked him to provide an updated address for the Applicants. Mr. Gilbert responded to the IRB by letter dated January 27, 2020, in which he wrote the following:

Please be informed that I am no longer retained to represent the Claimants in relation to the above captioned matter. Their Legal Aid Certificate has been canceled. I have asked the interpreter to contact the Claimant to attempt to rectify this matter as soon as is possible. If it is rectified in a timely matter, I may be in a position to represent the Claimant at the scheduled Hearing of Feb. 11, 2010 [*sic*], or on a later date. I will provide the Claimants a copy of their file should they wish to proceed without my services.

In accordance with Rule 15 of the RPD Rules, please remove me as counsel of record for the above referenced claim.

I am copying the Claimant on this letter. I trust that the foregoing is to your satisfaction.

[9] It appears that Mr. Gilbert copied the Applicants at the same address the IRB had informed him was no longer current.

[10] The IRB granted Mr. Gilbert's request to be removed from the record. Neither the Applicants nor Mr. Gilbert attended the hearing of the refugee claim or the abandonment show cause hearing. The Applicants' claim was declared abandoned on February 19, 2020.

[11] The Applicants say they became aware of a possible issue when they attended their immigration medical examination on February 21, 2020. They were informed that their interim medical coverage had been denied. Ms. Lacko was told the same thing when she arrived for an appointment at her gynaecologist's office. The Applicants returned to their former address on February 24, 2020 and discovered the correspondence from the IRB and Mr. Gilbert.

[12] The Applicants contacted Mr. Gilbert on February 25, 2020 and provided the RPD with their updated contact information the same day. Mr. Gilbert applied to reopen their refugee claim on March 13, 2020. However, the RPD's offices were closed due to the COVID-19 pandemic.

[13] The RPD became aware of the application to reopen the Applicants' claim on May 8, 2020, and rejected it on May 15, 2020.

III. Issue

[14] The sole issue raised by this application for judicial review is whether the RPD's refusal to reopen the Applicants' refugee claim was reasonable.

IV. Analysis

[15] The RPD's decision is subject to review by this Court against the standard of reasonableness. The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 100).

[16] The Applicants say that the RPD should not have permitted Mr. Gilbert to remove himself from the record without first ensuring he had provided the IRB with their updated contact information, and without confirming they were in fact aware of the upcoming hearings. They therefore argue that the RPD unreasonably found there was no failure to observe a principle of natural justice that would justify reopening their refugee claim.

[17] The Respondent says that the Applicants did not raise the argument respecting the manner in which Mr. Gilbert removed himself from the record, or the failure of both Mr. Gilbert and the RPD to ensure they had notice of the hearings, when they applied to reopen their refugee claim. The Respondent notes that the Applicants have not complied with the protocol respecting

Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court dated March 7, 2014 [*Protocol*], and they therefore cannot rely upon any alleged negligence or incompetence on the part of Mr. Gilbert.

[18] The Applicants say there is insufficient information in the certified tribunal record to support an allegation of negligence or incompetence against Mr. Gilbert. Instead, they say that the RPD unreasonably found there had been no failure to observe a principle of natural justice, despite the uncontroverted evidence that they did not in fact have notice of the hearing of their claim or the abandonment show cause hearing. The Applicants attribute this to a series of unfortunate events for which they, the RPD and Mr. Gilbert all bear some responsibility.

[19] The Applicants argue the RPD was required to demonstrate that it had “knowledge of the full picture of the course of conduct leading to the making of [the] abandonment decision”, and that it failed to do so (citing *Clavijo Albarracin v Canada (Citizenship and Immigration)*, 2008 FC 1143 at para 4). Furthermore, the Refugee Protection Division Rules, SOR/2012-256 provide in s 62(7) that the RPD must consider whether the application to reopen was made in a timely manner, and the justification for any delay. Here, the Applicants informed the RPD of their new address on the same day they became aware of the issue, which was just six days after their claim had been declared abandoned.

[20] Mr. Gilbert asked to be removed from the record on January 27, 2020 without providing updated contact information for the Applicants. This was just 15 days before the scheduled hearing. Mr. Gilbert’s letter of January 27, 2020 may have given the RPD the false impression

that both he and the interpreter were in touch with the Applicants and would apprise them of the upcoming hearing dates. Mr. Gilbert inexplicably copied the Applicants at an address he had just been informed was no longer current. The RPD never reiterated its request that Mr. Gilbert provide the Applicants' new address.

[21] It would have been preferable for the Applicants' current counsel to give Mr. Gilbert notice under the *Protocol* to ensure the Court had the benefit of his perspective on the events that preceded the dismissal of the Applicants' refugee claim as abandoned. It would also have been useful to hear from Mr. Gilbert regarding his approach to the application to reopen the Applicants' refugee claim, which does not appear to have acknowledged any shortcomings on his part.

[22] Courts should refrain from criticizing counsel without adequate notice or providing an opportunity to respond. Equally, no slip or mistake of counsel should be permitted to bring about a miscarriage of justice (*R v B (FF)*, [1993] 1 SCR 697 at p 714, citing *R v Guenot, Kocsis and Lukacs* (1979), 51 CCC (2d) 315 at p 320).

[23] As Justice Diner held in *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at paragraph 16:

In my view, the door should not slam shut on all those who fail to meet ordinary procedural requirements. Such a restrictive reading would undermine Canada's commitment to its refugee system and underlying international obligations (section 3(2) of the Act). Indeed, one of the purposes of the *Refugee Convention*, to which Canada is a signatory, is to allow refugees the widest possible exercise of

fundamental rights and freedoms (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, at para 27).

[24] In the unusual and unfortunate circumstances of this case, the RPD's finding that there was no failure to observe a principle of natural justice that would justify reopening the Applicants' refugee claim was unreasonable. The matter must be returned to the RPD for redetermination.

V. Conclusion

[25] The application for judicial review is allowed, and the matter is remitted to a different member of the RPD for redetermination. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed,
and the matter is remitted to a different member of the RPD for redetermination.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2585-20

STYLE OF CAUSE: FERDYNAND GLOWACKI, ZANETA LACKO, AND
KONRAD LACKO v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN
MISSISSAUGA, TORONTO AND OTTAWA,
ONTARIO

DATE OF HEARING: DECEMBER 1, 2021

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: DECEMBER 21, 2021

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