Date: 20080728

Docket: IMM-245-08

Citation: 2008 FC 915

Ottawa, Ontario, July 28, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JORGE ANDRES DAVILA RUIZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), following an application to reopen made to the Refugee Protection Division (the panel). On December 20, 2007, the panel dismissed the application to reopen. In his initial decision, the panel declared the refugee claim abandoned.

ISSUE

[2] This application raises only one issue: did the panel err by refusing to reopen the decision declaring the refugee claim abandoned?

BACKGROUND

[3] The applicant is a Mexican citizen, born on May 19, 1967. He arrived in Canada on March 27, 2007, and claimed refugee status. On September 13, 2007, he was advised that a hearing would take place on November 5, 2007.

[4] A month and a half later, on October 31, 2007, the panel received a power of attorney from the applicant's new counsel (Mr. Centurion), designating him as counsel to the case. The panel also received an application to join the applicant's file with that of his son who, in turn, had just filed a refugee claim. This application was accompanied by another application to adjourn the hearing.

[5] On November 1, 2007, both applications were dismissed, and the applicant and his counsel were so advised.

[6] At the hearing on November 5, the applicant presented his two applications again, and the panel dismissed them again. Counsel for the applicant indicated to the panel that he was not ready to proceed and removed himself from the record.

[7] The panel asked the applicant if he was ready to proceed. He replied that he would be ready to proceed if he had legal representation. At the hearing, the panel declared the claim abandoned.

[8] On November 30, 2007, the applicant, represented by Mr. Centurion, filed an application with the panel to reopen, alleging a breach of his right to counsel. No application for judicial review of the abandonment decision was brought.

IMPUGNED DECISION

[9] The application to reopen was dismissed. The panel stated that his jurisdiction over applications to reopen was limited to cases where the applicant claimed that there had been a breach of the rules of natural justice.

[10] The panel stated that he listened to the tapes of the hearing and reviewed the entire record. He determined that that there was no basis for finding that the rules of natural justice had been breached, since the applicant had had the opportunity to seek counsel. It was the solicitor-client relationship that generated the declaration of abandonment.

RELEVANT LEGISLATION

[11] *Refugee Protection Division Rules*, SOR/2002-228.

55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	**55.** (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
(2) The application must be made under rule 44.	(2) La demande est faite selon la règle 44.
(3) A claimant who makes an application must include the claimant's contact information	(3) Si la demande est faite par le demandeur d'asile, celui-ci y indique ses coordonnées et en

in the application and provide a copy of the application to the Minister.	transmet une copie au ministre.
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

ANALYSIS

Standard of review

[12] The issue is whether there was a breach of natural justice. The Court has no obligation to show deference in such matters (*Diraviam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1470, at paragraph 30, [2004] F.C.J. No. 1772).

Did the panel err by refusing to reopen the decision declaring the refugee claim abandoned?

[13] The applicant submits that the panel made a reviewable error by declaring the claim abandoned, in violation of the right to counsel. He relies on the statements of Madam Justice Layden-Stevenson in *Ramadani v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 211, at paragraphs 10 and 11, [2005] F.C.J. No. 251:

> [10] However, the RPD did not consider any of the other factors identified by the Federal Court of Appeal in *Siloch v. Canada (Minister of Employment and Immigration)* (1993), 151 N.R. 76 (F.C.A.) - whether the applicants had done everything in their power to be represented by counsel at the hearing; the number of previous adjournments granted (none in this case); the fault or blame to be placed on the applicants for not being ready; whether any previous adjournments were granted on a peremptory basis. The decision not to adjourn affected the applicants' ability to be represented by counsel at the show cause hearing. The consequences of an

> abandonment decision are not insignificant. It terminates a claim without consideration of its merits; a conditional removal order becomes effective; and, a claimant is barred from seeking refugee protection in the future.
>
> [11] In my view, the RPD must, at a minimum, indicate that it has had regard to the relevant factors enumerated in *Siloch, supra*, before arriving at a negative decision. Its failure to do so constitutes a reviewable error. I note that my colleagues Madam Justice Heneghan and Mr. Justice O'Keefe arrived at a similar conclusion in *Dias v. Canada (Minister of Citizenship and Immigration)* 2003 FC 84 and *Sandy v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1468.

[14] The facts in this case are distinguishable from *Ramadani.* Here, the applicant and his counsel were advised that the application to adjourn was dismissed a number of days before the date fixed for the hearing. This is an excerpt from the transcript of the hearing:

> [TRANSLATION]
>
> Member: Considering the foregoing, you knew we were going to proceed this morning because the refugee claim, the application for an adjournment was dismissed. So you knew full well that you might be heard this morning.
>
> Counsel for the applicant: Yes, yes, sir.
>
> . . .
>
> Member: Then you knew full well that this morning, your decision for an adjournment, your application for an adjournment had been denied and that you had to be ready to proceed. Are you ready to proceed this morning?
>
> Counsel for the applicant: No, sir.

[15] The applicant was able to fully exercise his right to be represented by counsel. It was his responsibility to choose counsel who was available to proceed on the day of the hearing. Since they

were informed that the application for an adjournment had been refused, the applicant and his counsel must have expected that the panel would insist on proceeding with the case on the date fixed for the hearing. I adopt Madam Justice Tremblay-Lamer's remarks in *Gapchenko v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 427, at paragraphs 7, 8 and 15, [2004] F.C.J. No. 518:

> [7] The applicants requested a postponement, but were refused. The Board stated that it was the applicants' responsibility to ensure that Mr. Popov be present at the hearing. The applicants did not want to proceed without counsel. As a result, the Board declared the applicants' claim abandoned.
>
> [8] The applicants submit that the Board's decision was manifestly unfair and abusive and was made contrary to the principles of natural justice because the Board insisted on proceeding without applicants' counsel even though they wanted to postpone the hearing and proceed only if he was there to represent them.
>
> . . .
>
> [15] It was the duty of the applicants, before changing counsel at the last minute, to verify if the new one was available (*Natchev v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1601 (Q.L.)). The applicants could not request a postponement because the counsel of their choice was not available at the date of the hearing (*Pierre v. Minister of Manpower and Immigration*, [1978] 2 F.C. 849 (C.A.)). [My emphasis.]

[16] No question was submitted for certification, and there is none in the record.

JUDGMENT

THE COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-245-08
STYLE OF CAUSE:	**JORGE ANDRES DAVILA RUIZ AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA**
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