Date: 20090227

Docket: IMM-2377-08

Citation: 2009 FC 211

Ottawa, Ontario, February 27, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

DILIM VANESSA CHUKWUDEBE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The way it normally works is this. An applicant who claims to be a refugee or otherwise in need of international protection in accordance with sections 96 and 97 of the *Immigration and Refugee Protection Act* is not to be removed from Canada before a determination is made. If the determination is negative the applicant is then entitled to apply for a pre-removal risk assessment (PRRA). This PRRA application results in a further automatic stay of removal from Canada for

most applicants. In Ms. Chukwudebe's case, had she filed in time she would have been entitled to a further stay until the PRRA decision was rendered. No such decision has been rendered as yet.

[2] However she filed late. Section 160 and following of the *Immigration and Refugee Protection Regulations* provide that in a case of late filing one is still entitled to a PRRA, but the application no longer results in an automatic stay of removal.

[3] Section 48 of the Act requires a foreign national, such as Ms. Chukwudebe, against whom a removal order is made and is enforceable to leave Canada immediately. Furthermore, it must be enforced "as soon as is reasonably practicable", by an Enforcement Officer.

[4] Ms. Chukwudebe requested, through counsel, that her removal be deferred until a decision was rendered on her PRRA application. Her plea fell on deaf ears. Her request was denied. This is a judicial review of that decision.

[5] Ms. Chukwudebe was required to file her application form by 12 February 2008 and written submissions to support that application were due before 27 February 2008.

[6] She completed the form at her lawyer's office on 11 February 2008. His office mailed it out that day, rather than hand-deliver it. According to documents in the Tribunal Record the application was only received 17 February 2008. Furthermore, the subsequent written submissions were only received 3 March 2008.

[7] She was informed that her application was received late and then was given a date to present herself at the airport in Toronto for removal.

[8] The former lawyer for Ms. Chukwudebe explained that his client had been pregnant and sick, which is why the application was only mailed out on 11 February 2008. The lawyer incorrectly said "the due date was 14 February 2008". This is a clear error. No real explanation was then given as to why the written submissions due 27 February were late. The lawyer submitted that there was a *bona fide* intention to comply with the time period and referred to a number of cases in that regard.

[9] The Enforcement Officer was not swayed. In his notes to file he set out the history of the matter, including various submissions by counsel, and simply concluded there was no justification for late filing.

[10] The Enforcement Officer focused on Ms. Chukwudebe's pregnancy and was not satisfied that that prevented her from completing the PRRA application and submitting it on time. He is correct. She did all that was within her power. The delays are administrative delays attributable to her counsel. This distinction was not grasped by the Enforcement Officer who did not take into account jurisprudence of this Court.

[11] Ms. Chukwudebe's counsel referred to four cases of this Court granting judicial review of negative decisions in which claims were dismissed because of tardy filing or failure to appear. Particular reference was made to the decision of *Januzi v. Canada (Minister of Citizenship and*

Immigration), 2004 FC 1386, 267 F.T.R. 161, [2004] F.C.J. No. 2189 (QL). That was a case in which a Personal Information Form was filed late causing the Immigration and Refugee Board to hold that the refugee claim had been abandoned. Even after a miscommunication was explained the Board refused to reopen the claim.

[12] Ms. Chukwudebe's counsel quoted paragraph 8 thereof:

> I would have thought it went without saying that the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and its Regulations are to be interpreted with its objectives always in mind. Section 3 states the Act is all about saving lives and offering protection to the displaced and persecuted, and to give fair consideration to those who come to Canada claiming persecution. This decision was not a fundamental expression of Canada's humanitarian ideals.

[13] Furthermore there is a distinction between the error of a lawyer as a lawyer and an administrative error within his office. As I said in *Medawatte v. Canada (Minister for Public Safety and Emergency Preparedness)*, 2005 FC 1374, 52 Imm. L.R. (3d) 109, [2005] F.C.J. No. 1672 (QL):

> [10] There is a great deal of jurisprudence in these matters to the effect that a party must suffer the consequences of his or her own counsel. I subscribe to that view. If a case has been poorly prepared; if relevant jurisprudence was not brought to the attention of the Court in a civil case; if there was a bad choice in witness selection, the consequences fall on that party. Is there a difference, however, between malfeasance and non-feasance? In this case, it is not a question of a lawyer doing something poorly. He did not do something he should have done. *In Andreoli v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1111; 2004 F.C.J. 1349 (QL), the applicants' refugee claim was ordered abandoned because the interpreter in their lawyer's office failed to provide the authorities with a change of address. I found in that case the board in deciding that the applicants were the authors of their own misfortune was punishing them for the carelessness of a third

> party. I found that to dismiss that application would be to disregard the principles of natural justice. I said:
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> > I issue this order keeping in mind the words of Lord Denning in Doyle v. Olby (Ironmongers) Ltd. (1969) 2 All E.R. 119, who at page 121 stated:
> >
> > We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can at best order a new trial.
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> This is not a case where counsel poorly pleaded their case on the merits. Rather, it involved a matter that had never been heard because of an administrative error which occurred at counsel's office.

[14] The Enforcement Officer gave no indication in his notes that he had considered the jurisprudence. Nor did he give any consideration as to why the normal rule is that an applicant is not to be removed pending a PRRA determination. The reason is that until a determination is made it may well be that the applicant is in need of international protection.

[15] No one can ignore the law, not even an Enforcement Officer. The decision was unreasonable and so judicial review shall be granted.

[16] Although Ms. Chukwudebe did not obey the removal order, the submission that her judicial review should not be granted because of lack of “clean hands” is somewhat ironic and not relevant in this case. She never went into hiding and for some time represented herself. In the documents she

served and filed, she gave her address and telephone number! Furthermore, she was present in court for her hearing.

[17] Another point of concern is that for reasons counsel for the respondent was unable to explain, no decision has been made as yet on her PRRA application, notwithstanding that in the normal course such a decision should have been rendered long ago.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted.

2. The matter is referred back to another decision maker for a fresh determination.

3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2377-08
STYLE OF CAUSE:	Chukwudebe v. MCI
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