

Date: 20090303

Docket: IMM-3223-08

Citation: 2009 FC 221

Toronto, Ontario, March 3, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

HUSSEIN ABUALI

Applicant

and

**THE MINISTER OF CITIZENSHIP
& IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Hussein Abuali (the “Applicant”) seeks judicial review of the decision of the Refugee Protection Division, Immigration and Refugee Board (the “Board”), made on June 27, 2008. In that decision, the Board refused the Applicant’s motion to reopen his claim for refugee protection after it had been declared abandoned.

Background

[2] The Applicant is a forty year old stateless national of the West Bank of Palestine. He fled the West Bank in 1989 and went to the United States where he eventually obtained permanent

residence. However, after being convicted of conspiracy to commit theft, he was returned to the West Bank in July 2005. On June 16, 2006, he fled the West Bank again and arrived in Canada on June 17, 2006. He applied for refugee protection on July 5, 2006.

[3] When he completed his Personal Information Form, he was living with a friend, Mohammad Saleh, in Mississauga. He later moved, but he did not notify the Refugee Protection Division of his change of address. He continued to have his mail delivered to his friend's home. He could be notified by his friend of any mail and he would then collect it. On April 17, 2008 the Applicant filed a change of address form with Canada Post.

[4] The Applicant alleges that he recently learned that in August 2007, his former counsel removed himself from the record at the Board, without informing the Applicant.

[5] In March 2008, the Applicant received a notice from the Canada Border Services Agency (the "CBSA") directing him to report to the Greater Toronto Enforcement Centre for an interview. At that interview, the Applicant was told that his refugee claim had been dismissed and that he would be deported. He was also told of his right to make a Pre-Removal Risk Assessment Application ("PRRA") before his removal.

[6] The Applicant retained new counsel to assist in preparing his PRRA and to make an application to reopen his refugee claim. According to the *Refugee Protection Division Rules*,

SOR/2002-228 (the “RPD Rules”), the test upon a motion to reopen a claim that has been found to be abandoned is whether a breach of natural justice occurred.

[7] In rejecting the reopening motion, the Board identified the issue as being whether the Board had met its onus in mailing the NTA to the Applicant’s last known address. The Board referred to the fact that the NTA letter for a hearing set for October 30, 2007 had been returned, bearing a notice from Canada Post that the Applicant was no longer living at his listed address. The Board noted that the NTA is deemed to have been delivered after it has been deposited in the mail.

[8] The Applicant submitted two affidavits with his reopening motion, his own and that of his friend whose address he had provided to the Board. The Board did not question the Applicant’s credibility but rejected his argument that he, the Applicant, had satisfied his onus to keep the Board informed about his address by arranging to have his mail redirected, rather than notifying the Board of his new mailing address.

[9] Likewise, the Board did not make adverse credibility findings relative to the friend’s affidavit but gave it little weight, saying the issue was not whether a resident in the friend’s house had inadvertently caused the second NTA to be returned, rather than advising the Applicant of its receipt. The Board found that the main issue was whether deemed delivery had occurred. The Board found that such deemed delivery had in fact taken place.

Submissions

[10] The Applicant argues that the Board erred in failing to find that no breach of natural justice had occurred as a result of the lack of notice to him that an abandonment hearing had been scheduled.

[11] The Minister of Citizenship and Immigration (the “Respondent”), for his part, submits that no breach of natural justice resulted from the actions of the Board in finding that the mailing of the NTA, in accordance with RPD Rules, satisfied the Notice requirement. The Respondent acknowledges that in determining whether a breach of natural justice has occurred, regard must be given to any explanation provided as to why notice was not received, relying in this regard on the decision in *Gutierrez v. Canada (Minister of Citizenship and Immigration)* (2005), 47 Imm L.R. (3d) 238.

[12] The Respondent also argues that the actions of the Applicant are also a relevant factor. He was responsible for advising the Board of any change in contact details and he did not do so. The fact that he did not receive the NTA is not *per se* a breach of natural justice.

[13] In his Reply, the Applicant acknowledges that the lack of notice alone will automatically lead to a reopening of a claim. He submits, however, that he was not at fault for the lack of notice.

Discussion and Disposition

[14] The only question arising in this application for judicial review is whether the Board committed a reviewable error in finding that no breach of natural justice was committed by the Abandonment Panel. Since this is essentially a matter of procedural fairness, the standard of correctness will apply. In this regard, I refer to the decision in *Ha v. Canada (Minister of Citizenship and Immigration)*, (2004), 34 Imm. L.R. (3d) 157.

[15] Subsection 161(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 authorizes the Chairperson of the Board to make rules of practice and procedure of each Division of the Board and provides as follows:

161. (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting

(a) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;

(b) the conduct of persons in proceedings before the Board, as well as the consequences of, and

161. (1) Sous réserve de l'agrément du gouverneur en conseil et en consultation avec les vice-présidents et le directeur général de la Section de l'immigration, le président peut prendre des règles visant :

a) les travaux, la procédure et la pratique des sections, et notamment les délais pour interjeter appel de leurs décisions, l'ordre de priorité pour l'étude des affaires et les préavis à donner, ainsi que les délais afférents;

b) la conduite des personnes dans les affaires devant la Commission, ainsi que les conséquences et sanctions applicables aux

sanctions for, the breach of those rules;	manquements aux règles de conduite;
(c) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and	c) la teneur, la forme, le délai de présentation et les modalités d'examen des renseignements à fournir dans le cadre d'une affaire dont la Commission est saisie;
(d) any other matter considered by the Chairperson to require rules.	d) toute autre mesure nécessitant, selon lui, la prise de règles.

[16] The RPD Rules also address the obligation of a claimant, such as the Applicant, to provide the contact information and any changes in that information to the Board. Rule 4 provides as follows:

Claimant's contact information 4.(1) The claimant must provide the claimant's contact information in writing to the Division and the Minister.	Coordonnées du demandeur d'asile 4.(1) Le demandeur d'asile transmet ses coordonnées par écrit à la Section et au ministre.
Time limit (2) The claimant's contact information must be received no later than 10 days after the claimant received the Personal Information Form.	Délai (2) Les coordonnées doivent être reçues par leurs destinataires au plus tard dix jours suivant la réception, par le demandeur d'asile, du formulaire sur les renseignements personnels.
Change to contact information (3) If the claimant's contact information changes, the	Changement des coordonnées (3) Dès que ses coordonnées

claimant must without delay provide the changes in writing to the Division and the Minister.

changent, le demandeur d'asile transmet ses nouvelles coordonnées par écrit à la Section et au ministre.

Claimant's counsel

(4) A claimant who is represented by counsel must, on obtaining counsel, provide the counsel's contact information in writing to the Division and the Minister. If that information changes, the claimant must without delay provide the changes in writing to the Division and the Minister.

Coordonnées du conseil

(4) Dès qu'il retient les services d'un conseil, le demandeur d'asile transmet les coordonnées de celui-ci par écrit à la Section et au ministre. Dès que ces coordonnées changent, le demandeur d'asile transmet les nouvelles coordonnées par écrit à la Section et au ministre.

[17] Rule 22 provides that a claimant be given notice of a proceeding, as follows:

22. The Division must notify a party in writing of the date, time and location of a proceeding.

22. La Section avise les parties par écrit des date, heure et lieu d'une procédure.

[18] Rule 55(4) sets out the test to be applied when a motion is made to reopen a claim that has been found to be abandoned, as follows:

Factor

55.(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.

Élément à considérer

55.(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[19] Rule 58 governs abandonment hearings and provides as follows:

Abandonment without hearing the claimant

58.(1) A claim may be declared abandoned, without giving the claimant an opportunity to explain why the claim should not be declared abandoned, if

(a) the Division has not received the claimant's contact information and their Personal Information Form within 28 days after the claimant received the form; and

(b) the Minister and the claimant's counsel, if any, do not have the claimant's contact information.

Opportunity to explain

(2) In every other case, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned. The Division must give this opportunity

(a) immediately, if the claimant is present at the hearing and the Division considers that it is fair to do so; or

(b) in any other case, by way of a special hearing after notifying the claimant

Désistement sans audition du demandeur d'asile

58.(1) La Section peut prononcer le désistement d'une demande d'asile sans donner au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé si, à la fois :

a) elle n'a reçu ni les coordonnées, ni le formulaire sur les renseignements personnels du demandeur d'asile dans les vingt-huit jours suivant la date à laquelle ce dernier a reçu le formulaire;

b) ni le ministre, ni le conseil du demandeur d'asile, le cas échéant, ne connaissent ces coordonnées.

Possibilité de s'expliquer

(2) Dans tout autre cas, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé. Elle lui donne cette possibilité :

a) sur-le-champ, dans le cas où il est présent à l'audience et où la Section juge qu'il est équitable de le faire;

in writing.

Factors to consider

(3) The Division must consider, in deciding if the claim should be declared abandoned, the explanations given by the claimant at the hearing and any other relevant information, including the fact that the claimant is ready to start or continue the proceedings.

Decision to start or continue the proceedings

(4) If the Division decides not to declare the claim abandoned, it must start or continue the proceedings without delay.

b) dans le cas contraire, au cours d'une audience spéciale dont la Section l'a avisé par écrit.

Éléments à considérer

(3) Pour décider si elle prononce le désistement, la Section prend en considération les explications données par le demandeur d'asile à l'audience et tout autre élément pertinent, notamment le fait que le demandeur d'asile est prêt à commencer ou à poursuivre l'affaire.

Poursuite de l'affaire

(4) Si la Section décide de ne pas prononcer le désistement, elle commence ou poursuit l'affaire sans délai.

[20] Rules 31 to 35 deal with the manner of providing a document. Rule 35 is relevant to the within matter and provides as follows:

35. (1) A document provided to the Division is considered to be received by the Division on the day the document is date stamped by the Division.

When a document provided by regular mail is considered received by a party

(2) A document provided by regular mail to a party is

35.(1) Tout document transmis à la Section est considéré comme ayant été reçu le jour où la Section y appose la date de réception au moyen d'un timbre dateur.

Date de réception d'un document envoyé par courrier ordinaire à une partie

(2) Tout document envoyé par

considered to be received seven days after the day it was mailed. If the seventh day is a Saturday, Sunday or other statutory holiday, the document is considered to be received on the next working day.

courrier ordinaire à une partie est considéré comme ayant été reçu sept jours après sa mise à la poste. Si le septième jour est un samedi, un dimanche ou un autre jour férié, le document est alors considéré comme

ayant été reçu le premier jour ouvrable suivant.

[21] The Applicant's principal argument is that he did not receive notice of the abandonment hearing and this circumstance denied him the right to a hearing prior to the decision that his claim had been abandoned. He submits that denial of a hearing is a fundamental breach of natural justice, relying in that regard upon the decision in *Matondo v. Canada (Minister of Citizenship and Immigration)* (2005), 44 Imm. L.R. (3d) 225.

[22] The sole issue arising here is whether the Board committed a reviewable error in dismissing the Applicant's motion to reopen his refugee protection claim. It is clear from the RPD Rules that the test upon a motion to reopen a claim that has been declared abandoned is whether a breach of natural justice occurred. That test is set out in Rule 55 (4).

[23] I agree with the position of the Applicant that the non-receipt of the notice is insufficient, by itself, to justify an abandonment finding. However, I do not agree that his demonstrated non-receipt of the notice gives rise to a finding that he was denied a hearing.

[24] The relevant fact is that the Applicant did not notify the Board of his change of address. That is the root of the problem, a problem created by the Applicant. The error made by the Abandonment Panel concerning his representation by counsel is not under review in the current proceeding and is not relevant to the Board's decision to reject his re-opening motion.

[25] Upon the facts and the evidence and having regard to the RPD Rules and the Act, the Board's decision is correct. There is no basis for judicial intervention and this application for judicial review is dismissed. There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3223-08

STYLE OF CAUSE: HUSSEIN ABUALI v.
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AND IMMIGRATION

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: February 3, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN J.

DATED: March 3, 2009

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