

Federal Court



Cour fédérale

Date: 20130207

Docket: IMM-846-12

Citation: 2013 FC 136

BETWEEN:

THADCHANAMOORTHY MAYILVAHANAM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] These are a brief set of reasons for an oral decision issued from the Bench granting this judicial review. The matter turns entirely on procedural fairness – or the lack thereof in this case.

II. FACTS

[2] The Applicant is a Sri Lankan of Tamil ethnicity. He applied for refugee protection on July 14, 2010.

[3] The original hearing was scheduled for October 14, 2011 but, at the Immigration and Refugee Board's [IRB] request, it was rescheduled to November 18, 2011. It was rescheduled again at the request of the Applicant's lawyer due to his vacation time to December 18, 2011.

[4] When the Applicant arrived at his counsel's office prior to the scheduled hearing, counsel informed him that he was not available due to a scheduling conflict and that the Applicant would have to go to the IRB hearing alone and request an adjournment. This latest adjournment requested on December 18, 2011 was not granted.

[5] The Member concluded that he did not consider his excuse for adjournment reasonable as the case had been ongoing for 1.5 years and that there had been ample time to prepare.

[6] The following excerpt is indicative of the tone of the hearing and the openness of the Member to the Applicant's plight:

Member: I am denying your request as I mentioned a while ago, I am not going to repeat myself. Since you are not prepared to proceed I am going to abandon your claim, which means your claim is finished. What do you say sir?

Applicant: You may what?

Member: If I abandon your claim finished, no more. What is your final answer? No more postponements.

Applicant: Okay, will it be possible to get another date?

Member: Sorry?

Applicant: Will it be possible to get another date?

Member: No. Give me your final answer sir. Proceed or not proceed?

Applicant: I cannot proceed on my own, no.

Member: Okay, so as of now as it has been put on record that the claimant does not [wish] to proceed I am abandoning this claim.

Applicant: Excuse me I am getting letters...

(CTR at 151-152)

III. ANALYSIS

[7] This is an issue of procedural fairness subject to the correctness standard of review (*Vasquez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 385, 407 FTR 167). Even if the issue were the reasonableness of the Member's decision, the result would be the same.

[8] Abandonment proceedings are governed by Rule 58 (now Rule 65 of the *Refugee Protection Division Rules*, SOR/2012-256).

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.

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.

(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 in writing.

(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.

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

(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;

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

(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.

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

[9] As held in *Ahamad v Canada (Minister of Citizenship and Immigration) (T.D.)*, [2000] 3 FC 109, 184 FTR 283, the test for abandonment is showing that an applicant has no interest in proceeding with his claim. The evidence here is that the Applicant wished to proceed but was left on his own by counsel.

[10] The Member did not take into account all the relevant facts but merely focused on the length of time that the application had been in the IRB system.

[11] The evidence clearly establishes that the Applicant wished to proceed. The only evidence of abandonment is abandonment by counsel of his client. The unfortunate irony of the case is that if that counsel had told the Applicant not to go to the hearing, the Applicant would have had a show cause hearing and potentially a better opportunity to address the issue of abandonment.

[12] The IRB's decision was unfair and unreasonable, narrow in its reasoning and devoid of fairness. The only abandonment was by counsel.

IV. CONCLUSION

[13] For these reasons, the judicial review was granted, the decision quashed and the matter remitted back to be determined (if the abandonment is still a live issue) by a different Member.

[14] There is no question for certification.

“Michael L. Phelan”

Judge

Ottawa, Ontario
February 7, 2013

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-846-12

STYLE OF CAUSE: THADCHANAMOORTHY MAYILVAHANAM
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

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