

Federal Court



Cour fédérale

Date: 20140107

Docket: IMM-2849-13

Citation: 2014 FC 9

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 7, 2014

Present: The Honourable Mr. Justice Shore

BETWEEN:

HEKMAT GURGUS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The power of the Refugee Protection Division (RPD) of the Immigration and Refugee Board to reopen a refugee claim is very limited. It may not exercise its duty a second time in the same case without a situation or circumstance of breach of natural justice (*Longia v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 288 (CA)).

II. Introduction

[2] This is an application for judicial review by the applicant under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of an RPD decision dated April 5, 2013, by which the application to reopen the applicant's file was dismissed.

III. Facts

[3] The applicant, Hekmat Gurgus, is a citizen of Egypt. She came to Canada on April 14, 2011, with a visitor's visa. Ms. Gurgus has been a widow since 2004 and she has a daughter and son that still live in Egypt and no problems were noted in relation to them.

[4] When she arrived, the applicant went to live with her daughter in Laval, Quebec.

[5] On April 18, 2011, with the help of her counsel, Anthony Karkar, the applicant filed a refugee claim in Canada.

[6] On July 19, 2012, the applicant apparently had an altercation with her daughter and son-in-law and was forced to leave their residence.

[7] On September 4, 2012, a notice of change of address was sent to Citizenship and Immigration Canada (CIC); but the RPD was not informed of this change of address.

[8] On September 21, 2012, the RPD sent a notice to appear to the applicant at her daughter's address and to her counsel, informing them that the refugee claim hearing would be held on November 15, 2012.

[9] On November 15, 2012, the applicant failed to attend the hearing. Counsel for the applicant informed the RPD at that time that he was not able to contact the applicant and that her family had asked him to close her file because she was returning to Egypt.

[10] The same day, the RPD sent a notice to appear – refugee claim declared abandoned to the applicant at her daughter's address and to her counsel, informing them that a new hearing would be held on November 30, 2012, so as to allow the applicant to explain her absence before the RPD declared her claim abandoned.

[11] On November 30, 2012, the applicant failed to attend the hearing.

[12] On December 4, 2012, the RPD sent a notice of decision – refugee claim declared abandoned to the applicant at her daughter's address and to her counsel.

[13] On December 10, 2012, an application to reopen the claim was submitted to the RPD.

[14] On April 5, 2013, the RPD rejected the request to reopen the claim.

IV. Decision under review

[15] In its decision, the RPD found that there was no breach of the principles of natural justice and that the applicant was the only one responsible for the result of her application to reopen the claim. It specified that “the applicant provided the Minister with her change of address on September 4, 2012, but failed to provide her change of address in writing to the RPD, as required under rule 4” (at para 14).

[16] The RPD emphasized that its power to reopen a refugee claim is very limited. The RPD may not exercise its duty a second time in the same case without a situation or circumstance of breach of natural justice (*Longia v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 288 (CA)).

IV. Issue

[17] Was the decision not to reopen the refugee claim reasonable?

V. Relevant legislative provisions

[18] Section 55 of the *Refugee Protection Division Rules* SOR/2002-228 [Repealed, SOR/2012-256, section 62] (Rules) applies in this matter:

Application to reopen a claim	Demande de réouverture d'une demande d'asile
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.

Form of application	Forme de la demande
(2) The application must be made under rule 44.	(2) La demande est faite selon la règle 44.
Claimant's application	Contenu de la demande faite par le demandeur d'asile
(3) A claimant who makes an application must include the claimant's contact information in the application and provide a copy of the application to the Minister.	(3) Si la demande est faite par le demandeur d'asile, celui-ci y indique ses coordonnées et en transmet une copie au ministre.
Factor	Élément à considérer
(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.

VI. Standard of review

[19] The issue of whether to reopen a refugee claim is a question of mixed fact and law reviewable on a standard of reasonableness (*Yan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1270, at para 20; *Hurtado v Canada (Minister of Citizenship and Immigration)*, 2008 FC 270, 324 FTR 192, at para 24-25).

VII. Analysis

[20] Under section 55 of the Rules, the RPD cannot reopen a claim for refugee protection unless an applicant shows that there was a failure to observe a principle of natural justice (*Lakhani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 612; *Ali v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153, 228 FTR 226). Therefore, when the RPD finds that

an applicant has been afforded a fair hearing, there are no grounds for reopening a refugee protection claim.

[21] In this case, counsel for the applicant submitted on her behalf that [TRANSLATION] “the deficiencies that led the RPD to determine the abandonment and to dismiss the application to reopen” are not [TRANSLATION] “the result of her own turpitude” and that the decision made against his client breached the rules of natural justice and procedural fairness. However, counsel for the applicant did not specify how the RPD had breached such principles.

[22] Furthermore, the evidence in the record clearly shows that the RPD gave enough chances to justify the inability to attend the hearings scheduled for November 15 and 30, 2012.

[23] The Court does not see any breach of the principles of natural justice in this case. In fact, the Court agrees with the respondent with respect to the RPD’s decision. No attention was given to the refugee protection claim after the move. As Justice Sean Harrington stated in *Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 924, natural justice requires that every stakeholder is given the opportunity to argue the case in question (at para 14) (see also *Matondo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416).

[24] In this case, the RPD was not informed of the change of address, despite the clear indication of the obligation to do so on form IMM-5292 on filing the refugee claim. However, a change of address was communicated to CIC less than one month after the alleged move.

[25] The Court finds it difficult to see how the new address was communicated to CIC but was not also sent to the RPD. By carefully reading the facts on the record regarding the events since counsel for the applicant has been working with the applicant, i.e. since April 2011, the Court had noticed that the applicant successfully, one way or another, obtained the notice of decision sent by the RPD, on December 4, 2012, even if this notice was sent to her daughter's address, where she alleges that she received no correspondence from the RPD after her move. The Court, as the RPD (itself) did, finds that this fact remains ambiguous; the actions in this regard leaves the Court with significant questions with respect to what information counsel may have received, given the whole of the events that may have taken place at the home of the applicant's daughter in Canada and, also, that may have taken place entirely outside of her daughter's home in Canada.

[26] Thus, the Court finds that it was entirely reasonable for the RPD to determine that there was no breach of natural justice. This finding falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

[27] The Court considers that the RPD analyzed the applicant's application to reopen a claim in accordance with the new rule on reopening a claim at section 62 of the *Refugee Protection Division Rules*, SOR/2012-256, and the previous rule at section 55 of the *Refugee Protection Division Rules*, SOR/2002-228. Although the RPD only noted the rule at section 62 of the *Refugee Protection Division Rules*, SOR/2012-256, in its decision, the rule at section 55 is identical to it. Thus, the Court is satisfied that the application was dealt with in the same way as it would have been if the analysis had been done only in accordance with the previous rule.

VII. Conclusion

[28] For all of the above reasons, the applicant's application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the applicant's application for judicial review be dismissed without any question of general importance to certify.

"Michel M.J. Shore"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2849-13

STYLE OF CAUSE: HEKMAT GURGUS v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: DECEMBER 19, 2013

REASONS FOR JUDGMENT AND JUDGMENT: SHORE J.

DATED: JANUARY 7, 2014

APPEARANCES:

Anthony Karkar FOR THE APPLICANT

Margarita Tzavelakos FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anthony Karkar FOR THE APPLICANT
Counsel
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec