Federal Court  Cour fédérale

Date: 20140821

Docket: IMM-7173-13

Citation: 2014 FC 812

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 21, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

SAMATAR HARBI DJILAL
SAMALEH HARBI DJILAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, of the decision dated October 23, 2013, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada

(Board or IRB), dismissing the application filed by the applicants, Samatar Harbi Djilal and Samaleh Harbi Djilal, to have their refugee claims reopened.

[2] The applicants' refugee claims were declared abandoned based on their failure to submit their Basis of Claim Forms (BOC Forms). According to Rule 62(6) of the *Refugee Protection Division Rules*, SOR/2012-256 (Rules), applications to reopen must not be allowed "unless it is established that there was a failure to observe a principle of natural justice".

[3] For the following reasons, the application for judicial review must be allowed.

I. Issues and standard of review

[4] The issue is whether the RPD erred by dismissing the applicants' application to reopen their refugee claims.

[5] The applicants argue that, because this application concerns a question of natural justice, the applicable standard of review is correctness. The applicants rely on *Emani v Canada (Citizenship and Immigration)*, 2009 FC 520 at paragraph 14.

[6] However, the respondent maintains that, in an application for judicial review of a decision by the RPD on an application to reopen a refugee claim, the applicable standard of review is reasonableness because it is a question of mixed fact and law. That is the case even though the application for judicial review concerns a question of natural justice. The respondent refers to the following decisions: *Orozco v Canada (Citizenship and Immigration)*, 2008 FC 270

at paragraphs 24 to 26; and *Gurgus v Canada (Citizenship and Immigration)*, 2014 FC 9 at paragraph 19.

[7] I am of the opinion that the respondent is correct. Several other decisions on this subject are consistent with the respondent's position. I will therefore apply the reasonableness standard.

II. Facts

[8] The applicants are brothers and citizens of Djibouti. They arrived in Canada on September 9, 2013, and claimed refugee protection at the Lacolle border. Their mother has lived in Canada since she was recognized as a refugee in 2004.

[9] The applicants' refugee claims were referred to the Board on September 10, 2013. According to the notice to appear provided to the applicants on entry into Canada, they had to submit their BOC Forms to the Board within 15 days of that date. The notice to appear also stated that the applicants had to appear for a special hearing on October 1, 2013, in the event that the BOC Forms were not received within the prescribed time frames.

[10] On September 17, 2013, the applicants contacted the Bureau d'aide juridique en droit de l'immigration [legal aid office, immigration law] to make an appointment with a lawyer. That appointment was scheduled for September 30, 2013. The receptionist at the office noted the date on which the applicants filed their refugee claims, and was therefore able to determine the time limit for submitting the BOC Forms, but she was so busy that she did not realize that that time limit was before September 30.

[11] It was at the meeting on September 30, 2013, that the legal aid lawyer realized that the applicants had failed to submit their completed BOC Forms within the prescribed time frame. The lawyer then asked the applicants to complete their BOC Forms and to meet with him again the next day, that is, on October 1, 2013. However, on September 30, 2013, the lawyer did not notice that the special hearing scheduled in the event that their BOC Forms had not been received was the next day.

[12] It was only on the morning of October 1, 2013, that the lawyer realized that the special hearing was scheduled for that day. He immediately went to the Board's Registry to submit the BOC Forms (at 11:31 a.m.), but the special hearing had already taken place earlier that day (at 8:58 a.m.), and the panel had already declared the applicants' refugee claims abandoned by reason of their failure to submit their BOC Forms and their absence at the hearing.

[13] On October 3, 2013, the notice of decision was served on the applicants and their lawyer. That same day, counsel for the applicants filed an application to reopen to the Board's Registry.

III. RPD's decision

[14] The RPD dismissed the applicants' application to reopen their refugee claims. It considered the applicants' arguments, which can be summarized as follows:

(a) Even though they only recently reached the age of majority, they grew up in a cultural context controlled by their father that left no room for autonomy;

(b) They relied on the good faith of their mother, who obtained her refugee status in 2004, to guide them through the claim process. However, their mother was

wrongly convinced that all of the documents required for her sons' refugee claims had been completed with the immigration officer. That said, she nevertheless acted diligently by going to the Board on September 12, 2013, to ask that her sons' hearings be scheduled for the same time. She also communicated with the legal aid office on September 17, 2013, to retain the services of a lawyer;

(c) They disregarded the forms that were to be completed because, according to them, the hearings had already been scheduled;

(d) The immigration officer at the border did not verbally inform them that the forms had to be completed and submitted to the Board within a specific time frame;

(e) The receptionist at the Bureau d'aide juridique en droit de l'immigration did not realize that their appointment with the lawyer, which was scheduled for September 30, 2013, was after the time limit for submitting the BOC Forms; she should have referred them to a lawyer in private practice who would have been available to complete the BOC Forms and submit them in a timely fashion, thus within the prescribed 15-day time frame;

(f) During the meeting with the legal aid lawyer on September 30, 2013, the lawyer neglected to tell them about the special hearing on October 1, 2013;

(g) They were not familiar with the Rules;

(h) They took the necessary measures to correct the situation as soon as they were made aware of the mistake.

[15] The RPD's decision specifies that, in order to decide whether to allow an application to reopen, the RPD must assess whether there has been a breach of a principle of natural justice.

The decision also states that the RPD has limited jurisdiction with respect to reopening and that it would only be able to exercise its function a second time in the same case where there has been a violation of the rules of natural justice.

[16] In its decision, the RPD analyzed the elements raised by the applicants and was of the opinion that none of them was sufficient to conclude that there had been a breach of a principle of natural justice.

[17] For example, regarding the lawyer's negligence, the RPD's decision states that, in *Kilave v Canada (Minister of Citizenship and Immigration),* 2005 FC 564 (*Kilave*), Justice Kelen found that the omission by the lawyer to submit the Personal Information Form on time, to obtain an extension, or to attend the abandonment hearing was not basis for setting aside a decision not to reopen a claim for refugee protection. Justice Kelen summarized the case law applicable to issues with respect to reopening claims that have been declared abandoned as follows:

> (a) Applications to reopen may be allowed only where there has been a breach of natural justice by the Board at the abandonment hearing; and
>
> (b) Negligence or lack of diligence on the part of the lawyer is relevant at the abandonment hearing or on judicial review of the abandonment decision. It is not relevant to whether the Board should reopen the claim.

[18] The applicants also claim that they relied on their mother and their lawyer and that those persons made mistakes that led to the abandonment of their refugee claims. However, in its

decision, the RPD specified that in *Taher v Canada* (*Minister of Citizenship and Immigration)*, 2002 FCT 991 (*Taher*), the applicant, who did not speak either of our official languages, retained the services of a lawyer, who failed to tell him to submit his Personal Information Form and to appear at the special hearing on the abandonment. The Court concluded that the applicant was not negligent, that he should benefit from the rules of natural justice and that he had been deprived, through no fault of his own, of the opportunity to be heard before the Board declared the claim abandoned.

[19] Furthermore, in *Khan v Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 833 (*Khan*), the Court found that the applicants, who relied entirely on their lawyer because he had promised to take care of their case, were not accountable for their counsel's failures. In *Khan*, the Court found that the Board erred in not finding that the applicants had been denied the opportunity to present their case at the abandonment hearing.

[20] The RPD found, in light of this case law, that counsel's negligence can, in exceptional cases, be sufficient to conclude that there has been a breach of a principle of natural justice, but only in cases where there was no contributory negligence or fault by the applicant.

[21] The RPD stated that, in this case, the applicants disregarded the documentation given to them by the immigration officer, which contained important information on their obligation to complete the BOC Forms and appear at a special hearing. The RPD also stated that the document entitled *Claimant's Important Instructions*, which was provided to the applicants, is also available in Somali.

[22] The RPD found that the applicants' negligence cannot justify the reopening of the claim; the applicants were of age, educated, could read and understand French and Somali, and never alleged that they were unable to understand the nature of the proceedings before the RPD. The RPD was not convinced that the applicants were disadvantaged to the point of being unable to manage their affairs or that they were completely dependent on their mother or their lawyer. The RPD found that the applicants had travelled alone and stayed in the United States for three days. The RPD concluded that the fact that they relied entirely on their mother demonstrates negligent and wrongful behaviour. According to the RPD, that behaviour had a significant impact on the abandonment of the applicants' refugee claims. The mother's errors do not invalidate the error of the applicants, who were negligent by not consulting the documentation provided by the immigration officer.

[23] The RPD also found that the immigration officer was not required to verbally advise the applicants of their obligations regarding the BOC Forms and of the fact that a special hearing was scheduled. Subrule 3(4) of the Rules states that the officer must transmit the information in writing, which he did in this case.

[24] The RPD acknowledged that the deadline for submitting the BOC Forms is not expressly mentioned on the forms themselves; however, the date for the special hearing in the event that the RPD does not receive the BOC Forms within the prescribed time frame was noted. The RPD found that, generally speaking, failure to explicitly set out the date for submitting a BOC Form does not constitute a breach of a principle of natural justice; in this case, given that the applicants

failed to familiarize themselves with the documents provided by the immigration officer, that failure is even more inconsequential.

[25] The RPD also noted that the statement made at the abandonment hearing that the applicants had also been notified by telephone, was not confirmed. However, the RPD stated that even if the member who declared the claim abandoned had known that the applicants had likely not been notified, given the evidence in the record, that member would have still declared the claim abandoned.

[26] The RPD found that the right to be heard was respected in this case and that there was no breach of a principle of natural justice. As a result, the application to reopen was dismissed.

[27] In my opinion, the following findings by the RPD are unreasonable:

i. that it was not relevant to consider the negligence by the applicants' lawyer; and
ii. that the contributory negligence by the applicants prevented the RPD from finding that there was a breach of a principle of natural justice.

I set out my reasoning in support of that opinion in the next section.

IV. Analysis

A. *Legal issues*

[28] Rule 62(6) of the Rules provides for a reopening of a refugee claim only if the applicant establishes a breach of a principle of natural justice. The burden of proof is on the applicant.

[29] A breach of a principle of natural justice may be present even if the RPD did not commit an error: *Osagie v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368.

[30] The respondent notes that an application for judicial review of the dismissal of an application to reopen a refugee claim is distinct from an application for judicial review of the abandonment of a refugee claim: *Lin v Canada (Minister of Citizenship and Immigration)*, 2005 FC 512 at paragraph 12. The respondent notes that this application falls under the first situation and informs me that many decisions in this matter confuse the principles that apply to the two separate proceedings. For example, the respondent submits that the intention to proceed with a refugee claim is relevant to the abandonment of a refugee claim, but not to the reopening of a refugee claim.

[31] The Court stated the following in *Emani*, which involved an application to reopen, in paragraph 20:

> The jurisprudence appears to be clear that the central consideration in regard to abandonment proceedings is whether the applicant's conduct amounts to an expression of his intention to diligently prosecute his claim.

The Court thus relied on *Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 109, which involved an abandonment.

[32] The respondent is correct in that the intention to proceed with a refugee claim is not directly relevant to this application, and that this application must be determined only on the issue of natural justice. However, it must be noted that the applicants' argument that there was a

breach of a principle of natural justice is based on the absence of the applicants (or their counsel) at the abandonment hearing. We can assume that, if they had been present for the hearing, they would have relied on their intention to proceed with the refugee claims. Thus, the intention to proceed with the claims is not entirely irrelevant.

[33] Another way in which the abandonment of a refugee claim and an application to reopen a refugee claim are different is with respect to negligence or absence of diligence on the part of the counsel. Although negligence is normally considered in an abandonment proceeding, it is relevant in an application to reopen, but only in exceptional cases: *Drummond v Canada (Minister of Citizenship and Immigration),* 112 FTR 33 at paragraphs 5 and 6, [1996] FCJ No 477 (QL), *Osagie*, above, at paragraphs 17 and 18.

[34] The respondent also argues that the applicants' failure to submit their BOC Forms and to appear at the special hearing on the abandonment of their claims was because of their negligence, and that their arguments of a breach of a principle of natural justice therefore cannot succeed. It is true that several decisions involving the reopening of a refugee claim refer to absence of fault on the part of the applicant, but the decision in *Khan* recognizes the principle that there can be a sufficient breach of a principle of natural justice to allow an application to reopen, even if the applicant is partly to blame (at paragraphs 28 to 30). In *Khan*, the applicant was negligent in that he relied entirely on his lawyer and did not make reasonable follow-up efforts.

[35] I also note the decision in *Karagoz v Canada (Citizenship and Immigration)*, 2011 FC 1479, in which Justice Rennie allowed an application for judicial review of a dismissal of an

application to reopen. In that decision, the applicant erred by sending a change of address notice to the Canada Border Services Agency instead of to the RPD.

[36] Another important principle here is found in *Emani* at paragraph 21, which cites *Andreoli v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1111, [2004] FCJ No 1349 at paragraph 16:

> In order to assess a case such as this, it is absolutely paramount to opt for a contextual approach and to avoid the mire of procedural dogma. I refer to the words of the Honourable Mr. Justice Pigeon in Hamel v. Brunette, [1977] 1 S.C.R. 147, 156, where he very aptly wrote that "procedure [should] be the servant of justice and not its mistress".

B. *Application of the legal issues to the facts*

[37] I am of the opinion that, in this case, there was no negligence on the part of the RPD or the IRB. The time period for submitting the BOC Forms as well as the date for the special hearing was communicated to the applicants in a reasonable manner: *Samuels v Canada (Citizenship and Immigration)*, 2009 FC 272. In my view, the IRB is not required to state the specific deadline for submitting a BOC Form, as long as the applicants are reasonably able to calculate it, which is the case. Also, the IRB is not required to verbally inform refugee claimants of subsequent steps and critical dates, or to remind them of the date for the special hearing at a later date. Providing the documents that were provided to the applicants was sufficient.

[38] That said, it is clear that certain problems like the ones in this case could have been avoided if a more robust process was used to ensure that refugee claimants are better informed of the requirements.

[39] From the applicants' perspective, I am of the opinion that, even if they did not carefully review all of the documents that were provided to them by the IRB, they acted in a reasonably diligent manner to meet the requirements of the IRB. They arranged, on September 17, 2013, to meet with a lawyer. That call with the lawyer's office was comfortably in advance of the time limit for submitting the BOC Forms, even if the applicants were not aware of that. During that call, the applicants communicated the necessary information to enable the lawyer's office to determine the relevant time limit. The applicants had reason to be confident that, having communicated that information to their lawyer's office, any critical deadline in their record was in order. The applicants did not act perfectly, but they took reasonable measures in the circumstances. The fact that it was their mother who arranged the meeting with the lawyer does not change that reasonableness.

[40] Even though the meeting with the lawyer took place after the deadline to submit the BOC Forms, the abandonment of the applicants' refugee claims had not yet been declared. If the lawyer had realized at that meeting on September 30, 2013, that a special hearing was scheduled for the next day, he could have taken the necessary steps to ensure that the BOC Forms were submitted before the special hearing and argue against the abandonment. He could have noted that the applicants still intended to proceed with their refugee claims, which seems to be the case. It is reasonable to find that the abandonment would never have been declared.

[41] Therefore, I am of the opinion that the errors by the lawyer and his office are the most proximate and significant causes of the abandonment of the refugee claims.

[42] Furthermore, I am of the view that these circumstances are exceptional enough to make the negligence on the part of counsel and his office relevant to the application to reopen. First, the applicants missed the special hearing by only two and a half hours. Second, once they realized the problem, they reacted with impressive speed.

[43] Any fault that could be attributed to the applicants is not any more serious than the fault involved in *Khan* and *Karagoz*, which was forgiven.

[44] It would be unfair and unreasonable to permit the abandonment of the applicants' refugee claims in these circumstances. It seems fairly clear that the applicants always intended to proceed with their refugee claims, and that those claims are very important to them. The applicants are entitled to a consideration of the merits of their refugee claims. I refer to the statement that procedure should be the servant of justice and not its mistress.

[45] For these reasons, I am of the opinion that the RPD's decision to dismiss the application to reopen the applicants' refugee claims is unreasonable.

[46] No serious questions of general importance were proposed by counsel and none will be certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.

2. The RPD's decision dated October 23, 2013, is set aside and the matter is referred back to the RPD for redetermination by a differently constituted panel.

3. There is no question of general importance to be certified.

"George R. Locke"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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