Federal Court Cour fédérale

Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

TO / DESTINATAIRE(S) :

1. Name / Nom : Mr Richard Odeleye
   Facsimile / Télécopieur : 416-603-9190 Telephone/ Téléphone : 416-603-9191
   Address / Adresse :
   ☐ As requested / tel que demandé
   ☒ Left voice message / suite au message vocal

2. Name / Nom : Ms. Teresa Ramnarine
   Facsimile / Télécopieur : 416-954-8982 Telephone / Téléphone : 416-952-7665
   ☐ As requested / tel que demandé File # / # de dossier :
   ☐ Left voice message / suite au message vocal

3. Name / Nom : IRB-RPD
   Facsimile / Télécopieur : 416-954-6705 Telephone / Téléphone :
   ☐ As requested / tel que demandé File # / # de dossier : TB0-16181
   ☐ Left voice message / suite au message vocal

FROM / EXPÉDITEUR : J-F Rochon	DATE : October 10, 2012
Telephone / Téléphone : 613-943-4040	TIME / HEURE : 1:30 pm
Facsimile / Télécopieur : 613-947-2141	Total number of pages (including this page) / Nombre de pages (incluant cette page) : 7

SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour: Imm-6920-11

Between / entre: MORGAN v. MCI

Enclosed is a copy of the Direction / Order / Judgment / Reasons of : // Vous trouverez ci-joint une copie de la directive / l'ordonnance / jugement / motifs de: Scott, J. dated / daté du OCT/10/2012

COMMENTS / REMARQUES

Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.

Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise sur demande, dès qu'elle sera disponible.

N.B.: If you do not receive all pages being transmitted, please call the sender at the above telephone number. Si vous ne recevez pas toutes les pages transmises, prière de communiquer avec l'expéditeur au numéro de téléphone ci-haut.

Federal Court  Cour fédérale

Date: 20121010

Docket: IMM-6920-11

Ottawa, Ontario, October 10, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

CELITA DAGGLIN MORGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER

UPON application for judicial review to set aside a decision of the Immigration and Refugee Board (the Board), dated July 11, 2011, whereby the Refugee Protection Division [RPD] declared Ms. Celita Dagglin Morgan's (Ms. Morgan) claim abandoned under subsection 168(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and section 58 of the *Refugee Protection Division Rules,* SOR/2002-228 [*RPDR*];

AND UPON reading the written submissions and hearing the oral representations of counsel for the parties in Toronto;

AND UPON reviewing the Certified Tribunal Record [CTR];

AND UPON determining that this application for judicial review should be allowed for the following reasons:

1. The Court "in *Ahamad v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 109 analysed the function of the Convention Refugee Determination Division (the IRB's predecessors) and the nature of the decision to be made on an abandonment case. [It] held that the standard of review is reasonableness because the decision is one of mixed law and fact. That conclusion remains [valid] despite the changes in legislation" (see *Anjum v Canada (Minister of Citizenship and Immigration)*, 2004 FC 496 at para 17 [*Anjum*]). Additionally, credibility findings are reviewable on the standard of reasonableness (see *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA)). Therefore, the Court must determine whether the RPD's decision 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 [*Dunsmuir*]).

2. In its decision, the RPD made the following findings at paras 11 to 17:

> [11] My reasons as follows:
>
> - The claimant did not claim protection for three years after entering Canada.
>
> - The claimant failed to provide her PIF within the 28 days as required.

- The claimant failed to return her confirmation of readiness as required which is a default of the proceedings in and of itself which default has not been cured.

- The claimant failed to attend her hearing on the 11th of April, 2011. The claimant's reasons for not attending are not credible.

[12] Firstly, when claimant's counsel wrote on 7 April that the claimant would not attend because her son had been stabbed, counsel had then (or shortly after) the note from the doctor in Saint Vincent faxed to him on the 7th of April, yet that note was not disclosed to the Board until the 4th of July, 2011.

[13] Secondly, the medical note dated 11 April, 2011 provided is totally inadequate on its face. Clearly the doctor did not put his or her mind to the nature of the proceedings when he or she signed the note disclosed. The note does not disclose when the claimant went to the doctor or why the claimant would be off work or school indefinitely.

[14] I find that the doctor did not reveal his or her name, so it's not even possible to confirm if the signer is a medical practitioner.

[15] The claimant and her counsel have not explained why the confirmation of readiness was returned to the Board when asked by the Board by telephone in April.

[16] Finally, the claimant has now filed materials, including a psychiatric report and report regarding her son, in breach of Rule 29.

[17] For all the above reasons, I declare the claim abandoned as it has not been pursued with due diligence as required by Rule 58.

3. The Court finds that the RPD's decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* cited above at para 47).

4. Subsection 58(1) of the *RPDR* provides that:

58. (1) A claim may be declared abandoned, without giving the claimant an	**58.** (1) La Section peut prononcer le désistement d'une demande d'asile sans

opportunity to explain why the claim should not be declared abandoned, if	donner au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé si, à la fois :
(*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	*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*) the Minister and the claimant's counsel, if any, do not have the claimant's contact information.	*b*) ni le ministre, ni le conseil du demandeur d'asile, le cas échéant, ne connaissent ces coordonnées.

5. Ms. Morgan's Personal Information Form [PIF] was not received on its due date. On November 26, 2010, Ms. Morgan's claim was referred to the RPD. The RPD sent the required documents including a blank PIF to Ms. Morgan on November 26, 2010 as well as a provisional notice to appear for abandonment should she fail to file her PIF within 28 days as required by subsection 6(1) of the *RPDR*. Ms. Morgan filed her PIF on December 29, 2010, with her contact information and address.

6. Ms. Morgan's counsel argues that:

> "[T]he panel erred in declaring the applicant's claim as abandoned because the applicant did not provide a PIF within 28 days as required. The applicant received her PIF on November 26, 2010. The PIF would have been due on December 24, 2010. However, the PIF was not provided until the 29th of December, 2010. The court should take judicial notice of the fact that December 25 to 28 were public holidays (Christmas an Boxing Day- 25th and 26th being Saturday

> and Sunday respectively). So the applicant's PIF was one day late as she could not file it on any of those public holidays. It is submitted that the Board must be deemed to have waived the requirements of the Rules in this case by one day by not declaring the applicant's claim as abandoned by virtue of paragraph 58(1) of the RPD Rules which empowers the RPD to declare a claimant's claim as abandoned without a hearing if PIF was not provided within 28 days of the receipt of the PIF by the applicant. In this case, the applicant's claim was not declared abandoned in accordance with that provision or scheduled for a show cause hearing to explain why the PIF was late, but scheduled for a hearing on the merit on April 11, 2011 as evidenced by the RPD's notice dated February 21, 2011" (see Applicant's Record at pages 131-132).

7. Section 26 of the *Interpretation Act*, RSC, 1985, c I-21, provides that "[w]here the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday". However, in the present case, the Court cannot take judicial notice of the fact that December 25 to December 28 was a holiday period because Ms. Morgan's PIF was due on December 24, 2010, which is not a holiday. Furthermore, Ms. Morgan failed to "apply to the Division for more time to provide the Personal Information Form" as per subsection 6(2) of the *RPDR*.

8. Ms. Morgan also claims that the RPD waived the requirements of the *RPDR* by providing her with a hearing to show cause. The fact that the RPD afforded Ms. Morgan with an additional opportunity to explain why her claim should not be declared abandoned does not preclude it from declaring a claim abandoned.

9. The Court finds that the RPD's credibility findings are unreasonable as Ms. Morgan adduced sufficient probative evidence to demonstrate that she was unable to attend her hearing before the Board.

10. With respect to the fact that she failed to provide her PIF and personal information on time and to request an extension of time, these failures cannot be determinative in the present case as the authorities of this Court have consistently held that all the circumstances must be considered in an abandonment hearing. In the present case, the Applicant should have been afforded the opportunity to explain why the PIF was sent one day late. The Court acknowledges that claimants must abide by the regulations and meet the prescribed deadlines to ensure the timely disposition of their claims. But these obligations must be construed in light of the proper test. The test has held by the Court is twofold; the Claimant must be afforded the opportunity to explain why it should not be declared abandoned and to state if the claimant is ready to continue with the proceedings. As the Court reviews the transcript of the July 11, 2011 hearing, Ms. Morgan clearly stated that she was ready to proceed (see Certified Tribunal Record, page 158, line 44). The Board failed to direct its attention to the question of whether Ms Morgan was ready to proceed just as in *Anjum* cited above, at para 31. For this reason, the decision must be quashed.

For the above mentioned reasons, **THIS COURT ORDERS that** this application for judicial review is allowed and finds that there is no question of general importance to certify.

"André F.J. Scott"

Judge