Federal Court  Cour fédérale

Date: 20160108

Docket: IMM-1049-15

Citation: 2016 FC 25

Québec, Québec, January 8, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

SHAHLA KHAKPOUR

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 [IRPA] of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB], rejecting the applicant's request to reopen her appeal from the Refugee Protection Division [RPD] of the IRB which had been previously dismissed by the RAD for lack of perfection.

[2] For the reasons that follow I am of the view that the application should be dismissed.

I. Background

[3] The applicant claims to be a citizen and national of Iran. The applicant alleges that she was hassled and detained by Iranian security forces due to her religious beliefs and that in June, 2013 she was detained, assaulted and told to denounce her faith. The applicant further claims that she left Iran in July, 2013 travelling on fraudulent documents and making a claim for protection on arrival in Canada.

A. *RPD Decision*

[4] The RPD found that the applicant was neither a Convention refugee nor person in need of protection with the determinative issues being identity and credibility. The applicant was found to be so lacking in credibility that the entirety of her evidence was tainted and thus the RPD rejected her claim for having no credible basis. The RPD found that the applicant may have at one point been a national Iran but the various identity documents she presented were either fraudulent or obtained in a fraudulent fashion. The RPD concluded that the applicant had not been in Iran in the recent past including the period of time when the alleged persecution occurred although it did accept that the applicant may be the mother of two witnesses that appeared before the RPD on the basis of DNA evidence.

[5] The RPD notes, relying on the decision of Justice Michel Shore in *Diarra v Canada (Minister of Citizenship and Immigration)*, 2014 FC 123 at para 32, that where an applicant has

not established identity a negative conclusion as to credibility will almost inevitably be drawn and can be dispositive of the claim. The RPD then undertook a lengthy credibility analysis, concluding at paragraph 33 that:

> [33] The credibility concerns with the claimant's evidence are so overwhelming that the panel cannot believe anything she says. The documents she has produced from Iran have photos of the claimant on them from almost 20 years ago. There has been no reasonable explanation as to why all her Iranian identity documents have such old photos. The panel does not need to know or to speculate about the reason for this major irregularity. The claimant's credibility has been destroyed by her testimony about these documents. She is not a reliable witness. She has obtained and used three fraudulent passports in the course of coming to Canada. She has shown herself to be someone with access to fraudulent documents. This fact, coupled with her incredible testimony, leads the panel to the conclusion that her story about being persecuted in 2013 in Iran has been fabricated for the purpose of establishing a refugee claim. The panel finds that she did not suffer the persecution in Iran as she alleged and when she alleged.

B. *RAD Dismissal of Appeal*

[6] The applicant submitted a Notice of Appeal to the RAD on July 14, 2014 which stated she received the RPD's decision on June 30, 2014. On July 21, 2014 the RAD sent the applicant a letter advising that the appellant record was due 30 days after the date the applicant received the RPD reasons. The applicant did not submit an appellant record.

[7] On September 10, 2014, the RAD dismissed the applicant's appeal from the RPD for lack of perfection. The RAD noted that the RPD decision was dated June 17, 2014 and was deemed to be received by the applicant on June 24, 2014. The RAD further noted that paragraph 159.91(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 provides

that the time limit for a person to perfect an appeal is 30 days after the day on which the person or Minister receives reasons for the decision. However, the RAD did not receive an appeal record or an application for an extension of time to perfect an appeal.

C. *Application to Reopen*

[8] On November 6, 2014 the applicant submitted an application to the RAD to reopen the dismissed appeal. That application contained an affidavit from the applicant dated September 28, 2014 which included the following explanation:

> This affidavit is being filed late due to reasons outside my control. I required additional evidence to prove my identity and residency in Iran because the documents available in Canada were insufficient. It took time to contact people in Iran, obtain documents, have them translated into English and then delivered to Canada. The delay is also due to the difficulties I have encountered in trying to convince people to help me as they fear consequences of acting against Iranian government.

D. *RAD Decision under Review*

[9] In dismissing the applicant's application to reopen the appeal, the RAD notes that the applicant has not established, as required by sub-rule 49(6) of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], that there had been a failure to observe a principle of natural justice in the dismissal of the appeal. The RAD decision notes that the RAD waited 48 days beyond the perfection due date arising from the applicant's deemed receipt of the RPD's reasons on June 24, 2014, and further noted that if it accepted the date the applicant advised in her Notice of Appeal as the date of receipt, June 30, 2014, then the RAD waited 42 days after the due date

to perfect before dismissing the appeal. The RAD further found that the circumstances to perfect the appeal were not beyond the applicant's control.

II. Position of the Parties

A. *Applicant's Position*

[10] The applicant makes minimal submissions in relation to the actual decision under review in this case, focusing instead on the RPD decision dismissing the refugee claim on the sole basis that the applicant was not a resident of Iran during the material time period.

[11] The applicant argues that the RPD erred by basing its credibility findings on what the applicant characterizes as the implausibility of the evidence, not inconsistencies in the testimony before it. The applicant argues that implausibility findings must be made in only the clearest of cases, but in this case the findings were based on perception, not evidence.

[12] The applicant further submits that the RPD erred in dismissing her claim without proceeding to an assessment of the substantive merits of the claim, and this constitutes a denial of basic fairness. The applicant argues that despite the residency and identity concerns of the RPD there was a finding of nationality. The finding that the applicant was an Iranian national is, in the applicant's submissions, sufficient to trigger an obligation on the part of the RPD to undertake a substantive review of the applicant's claim, which the RPD did not do. As a result the applicant is facing deportation to Iran without having had her risk assessed.

[13] Finally the applicant argues a breach of the duty of fairness owed the applicant in that she was not advised that the RPD concern was one of residency, not nationality. The applicant also argues that the RPD improperly failed to extend the applicant the time required to allow the Canadian Border Services Agency to investigate concerns relating to residency.

B. *Respondent's Position*

[14] The respondent submits that the decision under review in this application is the decision of the RAD not to reopen the applicant's appeal, rather than the RPD's decision. The respondent further submits that the RAD's discretion when considering an application to reopen is limited to circumstances where there has been a breach of natural justice at the RAD level. In this case the applicant failed to establish a breach of natural justice in the RAD's process and therefore, on either a reasonableness or correctness standard of review, the RAD did not err in refusing to reopen the applicant's appeal.

III. Issues

[15] I have identified the following issues:

1) What is the applicable standard of review when considering a decision of the RAD not to reopen an appeal under RAD Rule 49?;
2) Did the RAD err in dismissing the applicant's request to reopen the appeal?; and
3) Were the RPD's findings relevant to the RAD's decision?

IV. Analysis

A. *What is the Standard of Review?*

[16] The applicant made no written submissions on standard of review. However, in oral argument the applicant submitted the correctness rather than the reasonableness standard of review applies to the RAD's decision because the RAD's failure to consider the circumstances at the RPD in the RAD's determination of whether a breach of natural justice occurred under sub-rule 49(6) of the RAD Rules constitutes a fettering of discretion.

[17] The respondent, noting that there is no jurisprudence from this Court establishing the appropriate standard of review in the case of a decision by the RAD on an application to reopen an appeal, submits that the reasonableness standard should be adopted.

[18] The RAD Rules addressing an application to reopen an appeal state the following:

49. (1) At any time before the Federal Court has made a final determination in respect of an appeal that has been decided or declared abandoned, the appellant may make an application to the Division to reopen the appeal.	49. (1) À tout moment avant que la Cour fédérale rende une décision en dernier ressort à l'égard de l'appel qui a fait l'objet d'une décision ou dont le désistement a été prononcé, l'appelant peut demander à la Section de rouvrir cet appel.
(2) The application must be made in accordance with rule 37. If a person who is the subject of an appeal makes the application, they must provide to the Division the original and a copy of the application and include in the application their contact information and, if	(2) La demande est faite conformément à la règle 37. Si la demande est faite par la personne en cause, celle-ci transmet à la Section l'original et une copie de la demande et indique dans sa demande ses coordonnées et, si elle est représentée par un conseil, les

represented by counsel, their counsel's contact information and any limitations on counsel's retainer

coordonnées de celui-ci et toute restriction à son mandat.

(3) The Division must provide to the Minister, without delay, a copy of an application made by a person who is the subject of an appeal.

(3) La Section transmet sans délai au ministre une copie de la demande faite par la personne en cause.

(4) If it is alleged in the application that the person who is the subject of the appeal's counsel in the proceedings that are the subject of the application provided inadequate representation,

(4) S'il est allégué dans sa demande que son conseil, dans les procédures faisant l'objet de la demande, l'a représentée inadéquatement :

(a) the person must first provide a copy of the application to the counsel and then provide the original and a copy of the application to the Division, and

a) la personne en cause transmet une copie de la demande au conseil, puis l'original et une copie à la Section;

(b) the application provided to the Division must be accompanied by proof that a copy was provided to the counsel.

b) la demande transmise à la Section est accompagnée d'une preuve de la transmission d'une copie au conseil.

(5) The application must be accompanied by a copy of any pending application for leave to apply for judicial review or any pending application for judicial review.

(5) La demande est accompagnée d'une copie de toute demande d'autorisation de présenter une demande de contrôle judiciaire en instance ou de toute demande de contrôle judiciaire en instance.

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

(7) In deciding the application, the Division must consider any

(7) Pour statuer sur la demande, la Section prend en

relevant factors, including	considération tout élément pertinent, notamment :
(a) whether the application was made in a timely manner and the justification for any delay; and	a) la question de savoir si la demande a été faite en temps opportun et la justification de tout retard;
(b) if the appellant did not make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made.	b) si l'appelant n'a pas présenté une demande d'autorisation de présenter une demande de contrôle judiciaire ou une demande de contrôle judiciaire, les raisons pour lesquelles il ne l'a pas fait.
(8) If the appellant made a previous application to reopen an appeal that was denied, the Division must consider the reasons for the denial and must not allow the subsequent application unless there are exceptional circumstances supported by new evidence.	(8) Si l'appelant a déjà présenté une demande de réouverture d'un appel qui a été refusée, la Section prend en considération les motifs du refus et ne peut accueillir la demande subséquente, sauf en cas de circonstances exceptionnelles fondées sur l'existence de nouveaux éléments de preuve.
(9) If there is a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of appeals, or dismiss the application.	(9) Si une demande d'autorisation de présenter une demande de contrôle judiciaire en instance ou une demande de contrôle judiciaire en instance est fondée sur des motifs identiques ou similaires, la Section, dès que possible, soit accueille la demande de réouverture si cela est nécessaire pour traiter avec célérité et efficacité les appels, soit rejette la demande.

[19] I agree with the respondent that while there is no jurisprudence on the standard of review to be adopted when reviewing a decision under RAD Rule 49, there is jurisprudence that

addresses the question where the Court is reviewing a reopening decision of the RPD made under Rule 62 of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules]. Sub-rule 62(6) of the RPD Rules contains an identical provision to sub-rule 49(6) of the RAD Rules.

[20] Justice George Locke, in *Djilal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 812 at paragraphs 5 through 7 addresses the standard of review to be applied under sub-rule 62(6) of the RPD Rules. I am of the view that his analysis is relevant in determining the standard of review that I adopt in considering the RAD's decision in this case:

> [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.

[21] Further, the jurisprudence establishes that a presumption of deference applies to questions pertaining to the interpretation of a decision-maker's home statute or statutes that are closely connected to its function (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654 at para 30; *Smith v Alliance Pipeline Ltd*, [2011] 1 SCR 160 at paragraph 26). The RAD Rules fall squarely within the functions of the RAD and

neither party suggested that the interpretation of sub-rule 49(6) of the RAD Rules constitutes a question of general importance to the legal system (*Singh v Canada (Citizenship and Immigration*, 2014 FC 1022 at paras 41-42 [*Singh*]). I therefore share Justice Locke's view from *Djilal* that notwithstanding the fact that the RAD Rules engage a question of natural justice the reasonableness standard of review applies.

B. *Did the RAD err in dismissing the applicant's request to reopen the appeal?*

[22] I am of the view that the RAD did not err in dismissing the applicant's request to reopen the RAD's decision.

[23] Sub-rule 49(6) of the RAD Rules does not allow the RAD to consider the reopening of an appeal except where a failure to observe a principle of natural justice has been established. In this case the applicant did not advance any argument that the RAD, in the conduct of its procedures in relation to the applicant's appeal, committed a breach of natural justice. The RAD provided notice to the applicant of the RAD Rules relating to the time for perfection of the appeal, the RAD did not proceed in a hasty fashion to dismiss the application upon the expiry of the time to perfect the appeal. The applicant acknowledges that she received the RPD's reasons on June 30, 2014 and the RAD waited an additional 42 days after the expiry of the 30 day deadline on July 30, 2014 before dismissing the appeal on September 10, 2014.

[24] Moreover, Rule 6 of the RAD Rules provides a mechanism by which the applicant can seek an extension of time to perfect an appeal, and Rule 29 provides that an applicant can bring an application to submit further documents after an appeal has been perfected. As the RAD noted

in dismissing the appeal for a lack of perfection, the applicant never attempted to seek an extension of time to perfect the appeal. Furthermore, in dismissing the application to reopen it was reasonable for the RAD to reject the applicant's explanation set out in the above-referenced affidavit that she was waiting for further evidence before filing an appeal record when she could have perfected her appeal and subsequently make an application under Rule 29 to submit further documents.

[25] The applicant failed to demonstrate a breach of natural justice arising out of the RAD appeal process.

[26] Instead the applicant relies on an alleged breach of natural justice in the proceedings before the RPD to establish the condition precedent for the exercise of the RAD's discretion to reopen the appeal. The breach alleged is substantive in nature in that it alleges the RPD erred by dismissing the application on the basis of identity without considering the merits of the applicant's refugee claim. The applicant argued the RAD needed to take a broader view of natural justice by looking beyond its own process and assess the fairness or lack thereof in the RPD's process. In oral submissions, the applicant was not able to identify any jurisprudence to support the position that the RAD must consider natural justice breaches arising outside its process when assessing whether or not a breach of natural justice has occurred for the purposes of sub-rule 49(6) of the RAD Rules.

[27] Although the respondent persuasively argued that RAD Rule 49 only pertains to the RAD's prior decision since that decision is the subject of the application to reopen, I am not

prepared to conclude that there might not be a circumstance where a breach of natural justice in a prior process or proceeding might be relevant in the context of RAD Rule 49 in light of the RAD's role as an appellate body in reviewing first level decisions (*Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 at paras 54-55, 30 Imm LR (4th) 115; *Singh* at paras 55, 57). However, this is not such a circumstance. In this case the applicant is relying on a substantive argument to be advanced on appeal not a breach of natural justice. As noted by Justice Luc Martineau at paragraphs 6 through 8 of *Ikuzwe v Canada (Minister of Citizenship and Immigration)*, 2014 FC 875 in considering RPD Rule 62:

> [6] Under subsection 62(6) of the Rules and according to recognized case law, an application to reopen will only be allowed if the original decision-maker breached a principle of natural justice, i.e. in very limited circumstances (*Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 488 at para 24). Since December 2012, the new subsection 62(7) of the Rules requires the Board to consider any relevant factors, including the reasons why a party has not presented an application for leave and judicial review.
>
> [7] In his application to reopen, the applicant complained of a breach of a principle of natural justice flowing from a misapplication of law by the original decision-maker […] The applicant also alleged that he suffered from paranoid schizophrenia that was not diagnosed at the time of the original hearing and that the Board was not able to consider this particular medical condition during the assessment of his credibility.
>
> [8] No reviewable error was committed by the Board. **Must it be repeated that natural justice relates to the procedural protections and do not cover the errors of law that could have been committed by the original decision-maker** [emphasis added].

[28] Similarly in *Brahim v Canada (Minister of Citizenship and Immigration)*, 2014 FC 735 at paras 7-8, Justice Shore held:

> [7] [T]he applicants filed an application for judicial review. They also submitted an application to reopen to the RPD, which was refused on January 28, 2014. The applicants are now asking the Court to intervene in the latter decision on the following grounds:
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> a) The RPD violated their right to a hearing in the official language of their choice;
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> b) The RPD failed to consider all of the evidence in the record;
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> c) The RPD erred in the manner in which it assessed the prospective risk faced by the applicants.
>
> IV. Analysis
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> [8] In the respondent's view, the last two questions are not relevant to this case, as they bear no relation to any breach of the principles of natural justice. The Court shares this view. These allegations have nothing to do with natural justice; rather, they relate to the reasonableness of the decision. The applicants are essentially attempting to make the same arguments as those submitted in IMM-7118-13 (2014 FC 734) before this Court. In short, the applicants disagree with the manner in which the RPD considered the evidence and the way it reviewed their refugee protection claim. The Court cannot intervene on either of these grounds in this case. Section 62 of the Refugee Protection Division Rules, SOR/2012-256, clearly states that the RPD cannot reopen a refugee claim unless it has been established 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).

[29] The same reasoning applies here; the applicant takes issue with the reasonableness of the RPD's decision in dismissing her claim on the basis of her failure to establish her identity, not a breach of natural justice.

[30] I am therefore satisfied that the RAD did not err in dismissing the applicant's request.

C. *Were the RPD's findings relevant to the RAD's decision?*

[31] For the reasons set out above I am of the view, on the facts before me in this case, that the RPD's substantive findings were of no relevance to the RAD's dismissal of the application to reopen the appeal.

V. Conclusion

[32] The application for judicial review is dismissed. The parties did not identify a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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