

Federal Court



Cour fédérale

Date: 20180928

Docket: IMM-4063-17

Citation: 2018 FC 970

St. John's, Newfoundland, September 28, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

AMINA OGHENERHO OMOKRI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mrs. Amina Oghenerho Omokri (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the “RAD”). In that decision, dated September 1, 2017, the RAD dismissed the Applicant’s application to re-open her appeal before the RAD.

[2] The Applicant is a citizen of Nigeria. She entered Canada on January 3, 2016 and sought protection as a Convention refugee on the basis of risk to her life arising from her status as a bisexual woman. The Refugee Protection Division (the “RPD”) dismissed her claim, finding that the Applicant had failed to establish her sexual orientation as a bisexual woman. The decision of the RPD was delivered on January 24, 2017.

[3] The Applicant filed an appeal on or about February 2, 2017. On March 10, 2017, she submitted an application for an extension of time to perfect her appeal.

[4] The Applicant did not submit her perfected appeal record with the request for an extension of time. Her request for an extension of time was denied and her appeal was dismissed by the RAD in a decision dated June 21, 2017. According to that decision, notice was given to the Applicant, by telephone, on March 22, 2017, that her request for an extension of time would not be considered until there was compliance with the *Refugee Appeal Division Rules*, SOR/2012-257 (the “RAD Rules”).

[5] The decision of June 21, 2017 also says that messages were left for the Applicant’s counsel on June 6 and June 9, 2017. However, the Applicant’s record for her appeal was not perfected.

[6] In the decision dated June 21, 2017, the RAD dismissed the Applicant’s appeal “for lack of perfection”.

[7] Under cover of a letter dated July 26, 2017, the Applicant filed an application to re-open her appeal.

[8] The Applicant requested an extension of time to perfect her appeal. Included with this application were copies of the “Application for extension of time to file or perfect an appeal”, copies of the notice of appeal and two copies of the perfected Appellant’s record. The covering letter referred to the four-part test for an extension of time set out in *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.).

[9] In its decision of September 1, 2017, the RAD referred to Rule 49 of the RAD Rules, which provides as follows:

Application to reopen appeal

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.

Form and content of application

(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

Demande de réouverture d’un appel

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’appellant peut demander à la Section de rouvrir cet appel.

Forme et contenu de la demande

(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.

Documents provided to Minister

Documents transmis au ministre

(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.

Allegations against counsel

Allégations à l'égard d'un conseil

(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.

Copy of pending application

Copie de la demande en instance

(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

(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

judicial review.

contrôle judiciaire en instance.

Factor

Élément à considérer

(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.

Factors

Éléments à considérer

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

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

Subsequent application

Demande subséquente

(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'appellant 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.

Other remedies

Autres recours

(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.

[10] In dismissing the Applicant's application to re-open her appeal, the RAD noted that the Applicant had failed to comply with the RAD Rules since she had not indicated that she had sought judicial review or shown that she had given copies of her application to the former counsel who allegedly provided inadequate representation.

[11] The RAD then said that the application could not be re-opened unless the Applicant established that there had been a breach of natural justice in the initial dismissal of her appeal. It found that the Applicant had not shown such a breach.

[12] In her application for judicial review of the decision of the RAD, the Applicant argues, among other things, that the RAD had failed to discuss the issue of natural justice. She submits that the issue arose in relation to her initial application for an extension of time and her application to re-open her appeal, together with a request for an extension of time to perfect the appeal.

[13] The Minister of Citizenship and Immigration (the “Respondent”) argues that the alleged breach of natural justice relates to the incompetence of her former counsel and submits that such incompetence has not been established.

[14] As well, the Respondent argues that the Applicant is attacking the reasonableness of the decision of the RAD, in the guise of an alleged breach of natural justice.

[15] Questions of procedural fairness, including a breach of natural justice, are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 S.C.R. 339.

[16] Questions of fact or of mixed fact and law are reviewable on the standard of reasonableness; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 53.

[17] According to the decision in *Dunsmuir, supra*, the standard of reasonableness requires that a decision be transparent, justifiable and intelligible, falling within a range of possible, acceptable outcomes that is defensible on the law and the facts.

[18] The crux of the matter here is whether the Applicant has shown that a breach of natural justice occurred when the initial RAD panel dismissed her application for an extension of time and then dismissed her appeal, in the decision dated June 21, 2017. This issue is reviewable on the standard of correctness.

[19] I am not persuaded that any breach of natural justice is apparent from the decision of the first RAD panel.

[20] That panel reviewed the Applicant's submissions for an extension of time and found no basis for granting an extension. Without an extension of time, the Applicant could not perfect her appeal.

[21] In her subsequent application to re-open her appeal, the Applicant made submissions through Counsel that she met the four-part test in *Hennelly, supra*, for an extension of time. The relevant factors are as follows:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists.

[22] The RAD panel who made the decision under review in this application for judicial review commented on the failure of the Applicant to show a continuous intention to pursue her appeal, as well as the failure to account for every day of the delay. I refer to paragraph 14 of the decision which provides as follows:

The RAD finds that the Applicant has not demonstrated continuous intention to pursue her appeal or that each day of the delay has been justified. There was no breach of natural justice when the RAD decided to dismiss this appeal for lack of perfection.

[23] It is unclear to me whether the second RAD panel is commenting on the Applicant's failure to show her continuing intention to appeal and to account for the delay in perfecting her appeal, in her application for an extension before the first RAD panel or before the second panel.

[24] However, I note that similar observations were made by the first RAD panel at paragraph 10 of its decision, as follows:

I find that the Appellant has not demonstrated a continuous intent to appeal the RPD decision nor has she provided a reasonable justification for not doing so.

[25] The second RAD panel appears to conflate the Applicant's failure to meet the *Hennelly* test with a failure to show a breach of natural justice.

[26] I am not satisfied that such conclusion is correct. However, the mistake is not material since I am satisfied that the RAD correctly determined that there had not been a breach of natural justice in the proceedings before the initial RAD panel.

[27] In the original request for an extension of time the Applicant presented, as the basis of her request, the need for extra time to allow receipt of documents to allow her to perfect the record. She did not raise allegations about the inadequacy or competence of counsel at that time.

[28] The Applicant cannot now complain about any failure of the first RAD panel to address competency of counsel when she did not raise the issue.

[29] The RAD Rules are clear that an application to re-open an appeal before the RAD requires a person to show that the dismissal of an appeal was made in breach of natural justice. The alleged breach of natural justice must be established vis à vis the RAD panel that dismissed the Applicant's appeal.

[30] In my opinion, the RAD panel that dismissed the Applicant's request to re-open her appeal correctly decided that there was no breach of natural justice on the part of the RAD panel that dismissed her appeal, that is by the decision of June 21, 2017.

[31] This means that the Applicant has failed to show a reviewable error on the part of the RAD panel that refused the application to re-open her appeal, and there is no basis for judicial intervention.

[32] In the result, this application for judicial review is dismissed. There is no question for certification arising.

JUDGMENT in IMM-4063-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification arising.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4063-17

STYLE OF CAUSE: AMINA OGHENERHO OMOKRI v THE MINISTER OF
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