

Federal Court



Cour fédérale

**Date: 20190124**

**Docket: IMM-2162-18**

**Citation: 2019 FC 103**

**Ottawa, Ontario, January 24, 2019**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**ZAMZAM ALI MASOUD (AKA NATALYA  
MASOUD ALLY) AND NURJANNAH  
MLINDE MABROUK (AKA NURJANNAH  
SALEH)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Proceeding**

[1] This application is for judicial review of a decision of the Refugee Appeal Division [RAD] of April 19, 2018, refusing the Applicants' application to re-open their appeal [the Decision]. This application was brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*].

## **II. Background**

[2] The Applicants are a mother and her three year old daughter, who are citizens of Tanzania. The Mother claimed refugee status on the basis of her sexual orientation. The Refugee Protection Division [RPD] denied the Applicants' claim and the RAD received the Applicants' Notice of Appeal on September 7, 2017 [the Appeal].

[3] By letter dated September 26, 2017, counsel for the Applicants advised the RAD that she needed an extension of time to perfect the Appeal until October 9, 2017 [the Deadline]. The Applicants' counsel failed to perfect by the Deadline and did not seek a further extension of time.

[4] In a decision dated December 4, 2017, almost two months after the Deadline, the RAD dismissed the Appeal for lack of perfection under Rule 3 of the RAD Rules [the Dismissal].

[5] On February 1, 2018, the RAD received an application to reopen the Appeal. The Applicants submitted documentation showing i) that their counsel was ill and only able to work on an intermittent basis from October 1, 2017 to November 16, 2017 and ii) that she was unable to work at all from December 18, 2017 to December 30, 2017. However, counsel was at her office between November 16 and December 18, 2017.

[6] The Applicants also submitted an affidavit from Mohamad Omar sworn on January 18, 2018, which showed that between September and December 2017 the Applicants were engaged in contacting people overseas with a view to assembling more documents for their Appeal.

### **III. The Decision**

[7] The RAD did not accept that her illness explained why the Applicants' counsel was unable to request a further extension of time and perfect the Appeal in November and December 2017 when she was working on a full-time basis.

[8] The RAD noted that the only other explanation provided was that the Applicants had advised their counsel in December that they expected to receive additional documentation in support of the Appeal. However, the RAD held that perfecting an appeal cannot be delayed for the purpose of gathering and translating new evidence because Rule 29 of the *RAD Rules* allows applicants to tender new evidence after an appeal has been perfected.

[9] It is noteworthy that the RAD was not asked to consider whether counsel had made mistakes or errors when she failed to perfect the Appeal or seek an extension. The issue of possible inadequate representation was not raised before the RAD. Accordingly, the RAD had no basis for a finding that there had been a breach of natural justice.

[10] Accordingly, the RAD found that the Applicants did not provide any reasonable explanation for their failure to contact the RAD and advise it of their intention to perfect their Appeal.

[11] The RAD further concluded that the Applicants had not demonstrated a continuous intention to pursue their appeal and had not justified each day of the delay.

**IV. The Relevant Rule**

[12] Motions to reopen are governed by RAD Rule 49 (See attached Appendix). Briefly, Rule 49(6) provides that the RAD cannot re-open an appeal, unless it is established that there was a failure to observe a principle of natural justice. Rule 49(7) sets out the factors to be considered when deciding whether to re-open once a breach of natural justice has been established. These factors include whether the application was made in a timely manner and the justification provided for any delay.

**V. Discussion**

[13] In their memorandum of law and argument for this Judicial Review, the Applicants submit that the Dismissal involved a failure of natural justice by the RAD in that it eliminated their right of appeal when they were not at fault. Rather, the illness of counsel and the delay in obtaining the new evidence led to the Dismissal.

[14] However, in my view, the RAD reasonably concluded that:

- Counsel's illness did not prevent her from perfecting the Appeal by the Deadline or from seeking a further extension before the Dismissal.
- The new evidence was not needed to perfect the Appeal.

[15] In the alternative, the Applicants make a new argument on this judicial review and submit that their counsel's mistakes in failing to perfect the Appeal and in failing to seek a further extension of time give rise to a breach of natural justice in that their appeal rights were lost.

[16] In my view, this submission is not persuasive because RAD Rule 49(4) creates a separate procedure to be followed when Applicants seek to reopen based on inadequate representation.

Since the Applicants did not rely on Rule 49(4), it is not open to them to assert inadequate representation as a breach of natural justice on this judicial review when this submission was not made on the application to re-open before the RAD.

[17] In the absence of a finding that there had been a breach of natural justice, the RAD did not need to consider the other factors, such as the Applicants' continuing intention to appeal.

**VI. Conclusion**

[18] The RAD's conclusion that there had been no breach of natural justice was reasonable and, without more, justified the Decision.

**VII. Certification**

[19] No question was posed for certification for appeal.

**JUDGMENT IN IMM-2162-18**

**THIS COURT'S JUDGMENT is that** this application for judicial review is hereby dismissed.

“Sandra J. Simpson”

---

Judge

## Appendix

*Refugee Appeal Division Rules, SOR/2012-257*      *Règles de la Section d'appel des réfugiés, DORS/2012-257*

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

### **Documents provided to Minister**

(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.

### **Allegations against counsel**

(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,

(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

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

### **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'appelant 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 coordonnées de celui-ci et toute restriction à son mandat.

### **Documents transmis au ministre**

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

### **Allégations à l'égard d'un conseil**

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

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

### **Copy of pending application**

(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.

### **Factor**

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

### **Factors**

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

(a) whether the application was made in a timely manner and the justification for any delay; and

(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.

### **Subsequent application**

(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.

### **Other remedies**

(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.

### **Copie de la demande en instance**

(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.

### **Élément à considérer**

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

### **Éléments à considérer**

(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :

a) la question de savoir si la demande a été faite en temps opportun et la justification de tout retard;

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.

### **Demande subséquente**

(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.

### **Autres recours**

(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.



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2162-18

**STYLE OF CAUSE:** ZAMZAM ALI MASOUD (AKA NATALYA MASOUD ALLY) AND NURJANNAH MLINDE MABROUK (AKA NURJANNAH SALEH) V THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 17, 2019

**JUDGMENT AND REASONS:** SIMPSON J.

**DATED:** JANUARY 24, 2019

**APPEARANCES:**

Lina Anani FOR THE APPLICANTS

Christopher Crighton FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lina Anani Law Office FOR THE APPLICANTS  
Barrister & Solicitor  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario