

Federal Court



Cour fédérale

Date: 20200303

Docket: IMM-2398-19

Citation: 2020 FC 329

Ottawa, Ontario, March 2, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

ABDUL RAHMAN ABDUL SATAR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Abdul Rahman Abdul Satar, a citizen of Afghanistan, seeks judicial review of the March 13, 2019 decision of the Refugee Appeal Division (RAD) denying his application to reopen his appeal (March Decision). His appeal to the RAD was dismissed on December 4, 2018 for lack of perfection (December Decision). The RAD noted that Applicant's appeal record was filed six weeks late and that the RAD had received no indication that the Applicant intended to proceed.

[2] The Applicant argues that the delay in filing his appeal was because he was in the process of changing lawyers, and because he suffers from psychological issues. He says that the RAD's March Decision to deny his request to reopen his appeal is unreasonable.

[3] For the reasons that follow, this application for judicial review is dismissed as the RAD's decision to refuse to reopen the Applicant's appeal is reasonable.

Background

[4] The Applicant's claim for refugee status was denied by the RPD in 2013. Due to problems with interpretation, a *de novo* hearing was ordered by the RAD in 2014. After the *de novo* hearing in June 2018, the RPD denied the Applicant's refugee claim, again. The Applicant's then lawyer filed a Notice of Appeal to the RAD. Upon receipt of the Appeal, the RAD advised the Applicant's lawyer that the deadline to perfect his appeal was October 22, 2018.

[5] On November 29, 2018, the Applicant authorized his previous lawyer to provide his new lawyer with a copy of his file. The file was provided on December 10, 2018.

[6] On December 10, 2018, the Applicant's new lawyer sent a letter to the RAD by fax stating that the Applicant was waiting for funding from legal aid, and that he intended to perfect his appeal and file an extension of time (EOT) application "as soon as possible."

[7] However, by this time, the RAD had already dismissed his appeal for lack of perfection on December 4, 2018, as no appeal submissions had been filed by the October 22, 2018 deadline. This decision of the RAD (December Decision) was sent to the Applicant by mail on December 12, 2018.

[8] On December 14, 2018, the Applicant's new lawyer faxed a letter to the RAD requesting a recording of the RPD proceedings on CD. However, as the RAD had not received a Use of Representative form, it advised that the form was required before it could send the CD.

[9] On December 28, 2018, the Applicant's lawyer attempted to file the EOT application with the RAD, but the Use of Representative form was not included. The RAD eventually received the EOT application on January 7, 2019.

[10] On January 9, 2019, the RAD informed the Applicant's counsel that his appeal had been dismissed on December 4, 2018 (December Decision).

[11] On February 7, 2019, an application to re-open the appeal was filed with the RAD. Following which, on February 13, 2019, the Applicant's lawyer sent a psychologist report to the RAD. In this report, the psychologist notes that the Applicant had "difficulty with attention, concentration, short-term and long-term memory", as well dissociations and other symptoms, which overall were consistent with post-traumatic stress disorder. The psychological assessment of the Applicant was completed on February 5, 2019.

RAD Decision Under Review

[12] On March 13, 2019, the RAD refused the application to reopen the appeal. The RAD found there had been no failure to observe a principle of natural justice, which is a precondition to reopening an appeal under subrule 49(6) of the *Refugee Appeal Division Rules*, SOR 2012-257 (the RAD Rules).

[13] The RAD noted that the appeal record was six weeks overdue at the time of the dismissal of the appeal in December. The RAD also noted that the Applicant had not provided a reasonable explanation for the delay in perfecting his appeal, or for the additional delay between the filing of the extension of time application and the filing of the application to reopen.

[14] The RAD noted that the Applicant relied upon his memory problems identified in the psychological assessment report as a justification for the delays. However, the RAD noted that during that time, the Applicant was represented by legal counsel and had taken various steps to advance his claim. The RAD, therefore, found that the memory problems were not a reasonable explanation for the delays. The RAD concluded that there was no breach of natural justice when the appeal was originally dismissed, and denied the application to reopen the appeal.

[15] The issue of natural justice in the December Decision was dispositive of the case, because the RAD Rules only allow an appeal to be re-opened when a principle of natural justice was not observed. The RAD also found that, due to the additional delay after the EOT application, the Applicant had not demonstrated a continuing intent to pursue his appeal.

Relevant Legislation

[16] *Immigration and Refugee Protection Regulations*, SOR/2002-227:

<p>Appeal to Refugee Appeal Division</p> <p>Time limit for appeal</p> <p>159.91 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act,</p> <p>(a) the time limit for a person or the Minister to file an appeal to the Refugee Appeal Division against a decision of the Refugee Protection Division is 15 days after the day on which the person or the Minister receives written reasons for the decision; and</p> <p>(b) the time limit for a person or the Minister to perfect such an appeal is 30 days after the day on which the person or the Minister receives written reasons for the decision.</p>	<p>Audition devant la Section de la protection des réfugiés</p> <p>Délais — audition</p> <p>159.9 (1) Pour l'application du paragraphe 100(4.1) de la Loi et sous réserve des paragraphes (2) et (3), la date de l'audition devant la Section de la protection des réfugiés ne peut être postérieure à l'expiration :</p> <p>a) dans le cas d'un demandeur visé au paragraphe 111.1(2) de la Loi :</p> <p>(i) d'un délai de trente jours suivant la date à laquelle la demande est déférée à la Section, si le demandeur se trouve au Canada et demande l'asile ailleurs qu'à un point d'entrée,</p> <p>(ii) d'un délai de quarante-cinq jours suivant la date à laquelle la demande est déférée à la Section, si le demandeur se trouve au Canada et demande l'asile à un point d'entrée;</p> <p>b) dans le cas de tout autre demandeur — que la demande ait été faite à un point d'entrée ou ailleurs au Canada —, d'un délai de soixante jours suivant la date à laquelle la demande est déférée à la Section.</p>
--	---

Extension

(2) If the appeal cannot be filed within the time limit set out in paragraph 1)(a) or perfected within the time limit set out in paragraph 1)(b), the Refugee Appeal Division may, for reasons of fairness and natural justice, extend each of those time limits by the number of days that is necessary in the circumstances.

Exclusion

(2) Si le délai visé au sous-alinéa (1)a)(i) ou (ii) ou à l'alinéa (1)b) expire un samedi, il est prolongé jusqu'au prochain jour ouvrable.

[17] *Refugee Appeal Division Rules, (SOR/2012-257)*

Reopening an Appeal

49 ...

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

Réouverture d'un Appel

49 ...

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'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

made.

l'a pas fait.

Issues

[18] The Applicant raises a number of issues, however the only issue for determination is if the RAD decision is reasonable. This will be considered with reference to the RAD's consideration of the reasons for the delay and natural justice principles.

Standard of Review

[19] The parties agree that the standard of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 31 and 17).

[20] To determine whether a decision is reasonable, the Court must "ask whether the decision bears the hallmarks of reasonableness - justification, transparency and intelligibility - and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The decision must also be internally coherent and have a clear chain of analysis that supports the justification given (*Vavilov* at para 85).

Analysis

Delay in perfecting RAD appeal

[21] The Applicant argues that the RAD erred in failing to properly consider the impact of his memory problems on his ability to instruct legal counsel regarding his appeal. He argues that the RAD engaged in unreasonable speculation when it assessed the evidence regarding his memory

problems by contrasting the Applicant's ability to complete individual tasks associated with this appeal with his apparent inability to meet the requisite deadlines. The Applicant argues that his actions demonstrate a clear continuing intent to pursue the appeal.

[22] The RAD considered the psychological assessment but found that when considered against the Applicant's other actions, the reported symptoms were not adequately connected to the Applicant's inability to perfect his appeal.

[23] The treatment of this evidence is consistent with *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896, where the Court instructed that expert reports based on a single consultation need to be approached with caution, particularly in an administrative tribunal setting where evidence is often less rigorously tested.

[24] The delay between the filing of the EOT application and the filing of the application to reopen were: (i) the delay of two weeks in submitting a Use of Representative form, and (ii) waiting for the psychological assessment.

[25] The Applicant did not submit the Use of Representative form until 77 days after the first meeting with his present counsel, and 21 days after the RAD first requested it.

[26] There is no explanation as to why the Applicant did not file his application and submit the psychologist assessment report later. These delays were within the Applicant's control and were unexplained.

[27] In my view, the RAD's conclusion that the Applicant's psychological symptoms, as noted in the report, did not provide an explanation for the delay is a reasonable finding.

[28] Delay is identified in subrule 49(7) as a relevant consideration in whether to reopen an appeal. It was reasonable for the RAD to conclude that Applicant had not provided a reasonable explanation for the delay.

Natural Justice

[29] The Applicant asserts the RAD misconstrued the evidence, thereby violating principles of natural justice. However, the main focus of the Applicant's argument relates to the reasonableness of the decision, rather than a breach of natural justice. Natural justice matters are typically associated with the procedure used to arrive at a decision rather than with the substance of the decision.

[30] In deciding that the Applicant had not identified a failure of natural justice in the December Decision, the RAD had already disposed of the matter. Rule 49 is clear that a failure to observe a principle of natural justice is a prerequisite for reopening a dismissed RAD appeal. The dispositive issue, then, is whether the RAD was reasonable in concluding that there was no failure to observe a principle of natural justice in the December Decision.

[31] The RAD properly considered the Applicant's chronology as a whole. The RAD made note of the long delays in the record. There was a six-week delay between when the Applicant's record was due and the December Decision. There was another delay between the Applicant's

application for the EOT and his application to reopen his appeal on February 7. That delay was well over a month.

[32] The RAD contrasted the second delay against the Applicant's promptness when it came to answering his lawyer's questions or attending meetings, noting that he was able to follow instructions from his lawyer, obtain documents, and attend meetings at his lawyers' office.

[33] In my view, the RAD considered and engaged with the Applicant's arguments. At its core, the Applicant's arguments relate to how the RAD assessed the evidence. Given that the conclusion reached by the RAD was open to it based on the relevant facts and law, and that a clear chain of analysis is apparent in the decision, there are no grounds upon which to find the decision unreasonable.

Conclusion

[34] The Applicant has not demonstrated that the RAD decision is unreasonable. The RAD considered the issues raised by the Applicant, but concluded that the Application did not raise any failure in the process leading to the RAD's December Decision to observe a principle of natural justice which was an essential element to reopen an appeal under subrule 49(6).

[35] Therefore, the RAD properly denied the application to reopen. This application for judicial review is dismissed. There is no question for certification.

JUDGMENT IN IMM 2398-19

THIS COURT'S JUDGMENT is that this judicial review is dismissed. There is no question for certification.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2398-19

STYLE OF CAUSE: ABDUL RAHMAN ABDUL SATAR v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 3, 2019

JUDGMENT AND REASONS: MCDONALD J.

DATED: MARCH 3, 2020

APPEARANCES:

Deanna Karbasion FOR THE APPLICANT

Nicholas Dodokin FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Loebach FOR THE APPLICANT
Barrister and Solicitor
London, Ontario

Attorney General of Canada FOR THE RESPONDENT
Department of Justice
Toronto, Ontario