Federal Court  Cour fédérale

Date: 20200721

Docket: IMM-5756-18

Citation: 2020 FC 776

Ottawa, Ontario, July 21, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

MAHAD ALI AARAB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mahad Ali Aarab, is a Somali national who claimed refugee status in Canada. His claim was denied, and he sought to appeal that decision to the Refugee Appeal Division (RAD). This case concerns his unsuccessful effort to pursue his appeal.

[2] The question at the core of this case is whether the RAD decision, dated October 26, 2018, not to re-open the appeal is unreasonable. It is necessary to examine this in the wider context of the RAD's activities as well as those of the Applicant's various counsel, all of which must be viewed against the backdrop of the significant increase in refugee claimants coming into Manitoba during the relevant period. The facts are unusual, but the consequences for the Applicant are not. In many prior cases, this Court has ruled that an applicant must take responsibility for their choice of counsel, even if that means their claim cannot be pursued because of the action or inaction of that lawyer (see, for example: *Truong v. Canada (Citizenship and Immigration)*, 2017 FC 422 at para 33, citing *Robles v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 374 at para 31). This case raises the same considerations.

[3] For the following reasons, I dismiss this application for judicial review, despite the impact of doing so on the rights and interests of the Applicant. There is simply no basis to find the RAD's decision to be unreasonable.

II. Background

[4] It will be helpful to begin with a summary of the timeline and the principal actors in this case, before tracing in more detail the specific events that underlie this application.

[5] The Applicant is a refugee claimant from Somalia. He fled Somalia and entered Ethiopia in 2006, following which he entered the United States in 2009. He then came to Canada on April 19, 2017, and sought refugee status. His claim was heard by the Refugee Protection Division (RPD) of the Immigration and Refugee Board on February 19 and March 20, 2018. The

Applicant was represented by a lawyer, Alastair Clarke of Winnipeg, Manitoba. On March 27, 2018, the RPD denied his refugee claim.

[6] The Applicant then retained another lawyer, David Matas of Winnipeg, Manitoba, to appeal that decision to the RAD. As will be explained below, Mr. Matas was unable to meet the deadlines for this and other cases, and he says that this was in part because of the upsurge in refugee claimants that arrived at the Emerson point of entry in Manitoba, and also because in early February 2018, he accepted the transfer of many other refugee appeal files from another lawyer, a Mr. Khan from British Columbia. Mr. Khan was never involved in the Applicant's case, but the files he transferred affected Mr. Matas' overall workload, which in turn affected the Applicant.

[7] Finally, during the course of the RAD proceedings, the Applicant moved from Winnipeg to Edmonton, Alberta, and he retained another lawyer, Mr. Yu of Edmonton, Alberta, to try to pursue his RAD appeal. When the RAD refused to re-open the appeal, the Applicant once again retained Mr. Matas to represent him in this application for judicial review.

[8] With this background, we now turn to the specific facts which gave rise to the dispute in issue in this case.

[9] As noted above, the Applicant's refugee claim was denied by the RPD. The Applicant retained Mr. Matas (hereafter referred to as the Applicant's counsel) to appeal that decision to the RAD. A Notice of Appeal was filed with the RAD on April 11, 2018. The deadline to perfect the appeal to the RAD was May 4, 2018, pursuant to paragraph 159.91(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*].

[10] On May 2, 2018, two days before the deadline, the Applicant applied to the RAD for an extension of time to perfect the appeal, pursuant to subsection 159.91(2) of the *Regulations* and Rule 6 of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]. This application was one of many similar applications the Applicant's counsel filed on the same day. These requests for an extension were based on an argument that the Applicant's counsel was unable to meet the deadline for perfecting the appeals because his workload had been affected by the dramatic increase in refugee claims in Manitoba relating to the upsurge in crossings at the Emerson point of entry.

[11] In order to understand the context for the Applicant's arguments on the extension request and the RAD's response – as well as the further request to re-open the appeal – it is necessary to review the background to this request. This includes other RAD appeals involving the Applicant's counsel.

[12] On January 18, 2018, the RAD wrote to a lawyer, Mr. Khan, in British Columbia, to express its concern about his compliance with the *RAD Rules*. In particular, the RAD indicated that the written submissions Mr. Khan had filed on appeals did not comply with the requirement for "full and detailed submissions" set out in Rule 3(3)(g). The RAD requested a meeting with the lawyer to discuss these concerns, which occurred on January 26, 2018, by telephone. Mr. Khan indicated that he intended to transfer a number of files to the Applicant's counsel. Ultimately, he transferred 32 files.

[13] On February 1, 2018, the RAD e-mailed the Applicant's counsel to confirm his willingness and capacity to take on these files, and that he would take steps to communicate with the 32 applicants to finalize his appointment as counsel. The RAD requested that counsel provide

a timeline for "completing any requested submissions to the RAD for each file" and it indicated that such submissions should be completed in accordance with Rules 29 and 37 of the *RAD Rules*. The e-mail concludes: "As you are aware, appeals at the RAD are time sensitive. It will be important to establish timelines so that these files can be finalized by RAD members as soon as possible. Please provide your timelines for any RAD rule 29 & 37 submissions on these files."

[14] That same day, the Applicant's counsel replied to the RAD by e-mail, confirming his willingness and capacity to take on the extra files and indicating that he would take the necessary steps to finalize his appointment as counsel for these applicants. He stated that he would "provide the Division with my timeline for completing any requested submissions to the RAD for each file, file by file in sequence." The Applicant's counsel also indicated that he was "aware that appeals at the RAD are time sensitive and that it [would] be important to establish timelines so that these files can be finalized by RAD members as soon as possible."

[15] The next major step in this sequence is an e-mail from the RAD to the Applicant's counsel dated April 18, 2018, which states, in part:

> My understanding is that notwithstanding periodic contact from RAD registry, you have not submitted RAD rule 29/37 applications nor established a timeline for such applications for many of these appeals.
>
> **In view of the above, I advise you that any RAD rule 29/37 applications for any of the Vancouver appeals transferred to you by former counsel Khan must be received by May 3, 2018**, otherwise the appeals will proceed on the basis of the record.
>
> Any further extension of time if needed would require an application with justification and evidence if applicable…
>
> [Emphasis in original.]

[16] On May 2, 2018, Mr. Matas submitted requests for extensions of time in the files that had been transferred to him, as well as the Applicant's file and several others. The applications were all similar in substance; as noted previously, the basis for the applications for extensions of time was that counsel's workload had prevented him from filing the documents on time. The submissions did not address any particular aspect of each specific case.

[17] On May 31, 2018, the RAD dismissed the requests for an extension of time, because the applications had not been made in a timely manner, the Applicant's counsel had not provided an acceptable justification for the continuing delay, and the applications did not provide evidence relevant to each specific case, but rather cited only the general pressures of an increasing workload due to a surge in the number of refugee claimants in Manitoba. Finally, the RAD found that the Applicant's counsel had not made out an arguable case as to why the applications should be allowed.

[18] This decision is somewhat unusual because, having dismissed the applications for an extension of time that had been requested, the RAD then set June 25, 2018, as the new deadline for filing further material. The decision, in effect, denied the indefinite extension that had been requested and instead granted one until June 25, 2018.

[19] After receiving no further communication from counsel by the new deadline, on July 4, 2018, the RAD dismissed the Applicant's appeal because the record had not been perfected.

[20] Meanwhile, in May 2018 the Applicant had moved from Winnipeg, Manitoba to Edmonton, Alberta. He was in Edmonton when he received the RAD decision denying his extension of time. He retained another lawyer, Mr. Yu, on August 1, 2018. On September 17,

2018, Mr. Yu filed an application to re-open the Applicant's appeal, arguing that the appeal had merit and that the Applicant should not face negative consequences due to Mr. Matas' workload and inability to meet the RAD's deadlines.

[21] On October 26, 2018, the RAD denied the request to re-open the appeal. It is useful to summarize the RAD's decision, because it sets the context for the analysis which follows.

[22] The RAD decision considered "relevant factors" for an application to re-open, as set out in Rule 49(7), before considering the grounds alleged by the Applicant to constitute a breach of natural justice, all of which must be weighed in deciding whether to grant or dismiss an application to re-open (Rule 49(6) of the *RAD Rules*).

[23] On the first factor under Rule 49(7)(a), which concerns whether the application had been brought in a timely way, the RAD noted that the decision dismissing the appeal was mailed to the Applicant on July 4, 2018, and that it received the application to re-open on September 17, 2018. The RAD noted the Applicant's explanation for the delay, including the need to retain new counsel after his move to Edmonton, and his efforts to obtain legal aid funding. The RAD also noted the new counsel's efforts to obtain and review the record. However, the RAD found that the Applicant had been represented by counsel throughout this period, and concluded that the appeal had not been brought in a timely manner, given the two and a half month delay in filing the application to re-open.

[24] On the second factor under Rule 49(7)(b), concerning the reasons why an application for judicial review was not made, the RAD noted the Applicant's explanation, that "there was no reasonable chance of success at the Federal Court since the RAD refusal was on the basis that the

appellant's record was not perfected." The RAD found that this was not a reasonable explanation, since the Applicant continued to make the same assertions that had been advanced in the application for an extension of time, namely the difficulties of meeting the RAD deadlines because of counsel's workload pressures associated with the upsurge in Manitoba refugee cases, despite the different legal tests for an extension of time and an application to re-open. The RAD concluded that these arguments should more appropriately have been made to the Federal Court, since the RAD has no power to reconsider a decision already made on the same facts and arguments.

[25] Turning to the grounds for re-opening the appeal, the RAD noted the argument of counsel that Rule 49(6) should not be interpreted restrictively to apply only to historical failures to observe a principle of natural justice, but rather it should also apply to prospective failures. The RAD rejected this argument, based on the decision in *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996.

[26] The Applicant argued that in dismissing his appeal because it had not been perfected, the RAD denied him his opportunity to be properly represented by counsel and to be heard and that this constituted a breach of natural justice. By extension, denying the application to re-open would also constitute a breach of natural justice. The RAD rejected this argument, noting that it was identical to the argument that had previously been advanced in the application for an extension of time to perfect the record. The RAD noted that the Applicant had been represented by counsel throughout, and he had not made any allegation of inadequate representation by former counsel. The RAD concluded there was no basis to find a breach of natural justice.

[27] The RAD also rejected the argument that the principle of natural justice includes the right to be represented before the RAD. It noted that there is no requirement for an appellant to be represented by counsel in RAD appeals and that whether or not counsel is retained, the appellant is responsible to ensure that the time limits are met. The RAD found that there is not an unqualified right to be represented by legal counsel and that being unable to be represented does not automatically equate to a denial of natural justice, citing *British Columbia (Attorney General) v Christie*, 2007 SCC 21.

[28] The RAD considered the circumstances of the Applicant's case, and noted that he had been provided an opportunity to explain why his appeal was not perfected within the required time. The RAD summarized the history set out above, and concluded (at para 23):

> While the Appellant did make a previous application to extend the deadline to perfect his appeal for an undefined period of time, the appeal was dismissed on July 4, 2018 in the absence of any further communication from the Appellant. The appeal was dismissed two months after the expected perfection date. Under the circumstances outlined above, I find that this does not constitute a premature dismissal [of the] appeal or a breach of natural justice or a failure to adhere to principles of procedural fairness.

On the basis of this reasoning, the RAD dismissed the application to re-open the appeal. The Applicant seeks judicial review of that decision.

III. Issues and Standard of Review

[29] The Applicant raises the following issues:

i. Did the RAD fail to observe a principle of natural justice by denying the Applicant the right to counsel?

ii. Was the RAD unfair to the Applicant by creating a legitimate expectation that they would establish a timeline for all outstanding additional submissions and appeals to be perfected if the Applicant's counsel accepted the transfer of files from Mr. Khan, and then reneging on that expectation once the files had been transferred?

iii. Can the failure to take into account the availability of suitable alternative counsel in denying an extension of time to perfect the appeal record in the RAD amount to a breach of natural justice by reason of the denial of the right to counsel?

[30] The Respondent submits that the only issue in this case is whether the RAD's refusal to re-open the Applicant's appeal was reasonable.

[31] I agree with the Respondent's framing of the issue. The Applicant's claim focuses on the RAD's refusal to re-open his appeal. As will be discussed below, the decision to re-open necessarily involves a consideration by the RAD of whether there had been a breach of natural justice in the handling of the applicant's case. The decision to re-open involves a question of mixed fact and law, which is assessed on the reasonableness standard. This was explained by Justice John Norris in *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 [*Brown*]:

> [25] At first glance, it may appear surprising that the reasonableness standard of review would apply since the question the RAD must address is whether there was a failure to observe a principle of natural justice, an issue that usually engages the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]). However, it is the RAD that is tasked with determining whether there was a failure to observe a principle of natural justice in relation to the appeal whose re-opening was sought, not this Court (*Atim* at para 33). A decision on such a question is typically one of mixed fact and law, something that is generally reviewed on a reasonableness standard (*Dunsmuir* at paras 51 and 53-54).

> [26] On the other hand, if the allegation were that the RAD member who denied an application to re-open an appeal had failed to observe a principle of natural justice, it would be this Court's task to determine whether the process the member followed satisfied the level of fairness required in all of the circumstances (*Khosa* at para 43; *Canadian Pacific Railway Co. v Canada (Attorney General)*, 2018 FCA 69 at para 54). This is an issue with respect to which no deference is owed to the decision-maker; the reviewing court would make its own determination. The same is true if the allegation on judicial review were that counsel who had acted for an applicant on an application to re-open an appeal had provided inadequate assistance in that proceeding: see *Atim* at para 32.

[32] The points raised by the Applicant can be addressed in the context of the reasonableness analysis. Although the Applicant asserts that the refusal to re-open his appeal is tainted by a breach of natural justice, it is evident that he had the opportunity to meaningfully participate in the process, in the sense of knowing the basis for the decision and having an opportunity to argue his case. He was represented by counsel and there was no complaint raised at the time that the procedure was unfair. The core of his claim is that the RAD's assessment of the request to reopen the appeal was unreasonable.

[33] The standard of review of this type of decision was established under the *Dunsmuir* framework (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]). It is not changed by the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[34] In view of paragraph 144 of *Vavilov*, there is no reason to request additional submissions from the parties on either the appropriate standard or the application of that standard. This case is similar to the situation in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, where the Supreme Court stated at paragraph 24 that it was not unfair to decide a case

applying the *Vavilov* framework when it had been argued under the *Dunsmuir* approach, because the standard of review and the results would be the same under both frameworks.

[35] When reviewing for reasonableness, the Court asks "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). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para 85).

[36] Based on this framework, a decision will likely be found to be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision-maker's reasoning on a critical point (*Vavilov* at para 103). The burden is on the applicant to show that the decision is unreasonable (*Vavilov a*t para 100).

[37] Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision is sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

[38] The *Vavilov* framework "affirm[s] the need to develop and strengthen a culture of justification in administrative decision-making" by endorsing an approach to judicial review that is both respectful and robust (*Vavilov* at paras 2, 12-13).

IV. Analysis

[39] The starting point for reasonableness review is the decision that is being challenged. It must be considered in the context of the applicable law, and the key facts. This case involves a request to re-open an appeal before the RAD, and it is necessary to examine the legal framework before considering the Applicant's arguments.

A. *The law concerning an application to re-open a RAD appeal*

[40] Rights to appeal to the RAD are governed by section 110 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The timelines and procedures for appeals are set out in the *Regulations* as well as the *RAD Rules*.

[41] In general, an appeal to the RAD must be commenced within 15 days after the person receives the RPD's written reasons for decision (*Regulations*, paragraph 159.91(1)(a)). The appeal must then be perfected within 30 days of receipt of the written reasons (*Regulations*, paragraph 159.91(1)(b)). The contents of the record to complete an applicant's appeal are set out in subsection 3(3) of the *RAD Rules*, which includes a requirement to provide the portions of the transcript that the person wishes to rely upon in the appeal and any new evidence the person seeks to file pursuant to subsection 110(4) of *IRPA*. The record must also include "a

memorandum that includes full and detailed submissions" setting out the errors that are the grounds of the appeal (*RAD Rules*, paragraph 3(3)(g)).

[42] The time limits for commencing or perfecting an appeal may be extended by the RAD "for reasons of fairness and natural justice" (*Regulations*, subsection 159.91(2)). Rule 6(7) provides that, in deciding an application for an extension of time, the RAD "must consider any relevant factors, including (a) whether the application was made in a timely manner and the justification for any delay; (b) whether there is an arguable case; (c) prejudice to the Minister, if the application is granted; and (d) the nature and complexity of the appeal."

[43] Under Rule 7, the RAD may, without further notice to the person, decide an appeal on the basis of the materials provided if, among other things, the "time limit for perfecting the appeal set out in the Regulations has expired."

[44] Rule 49 provides that an appellant may apply to the RAD to re-open an appeal that has been decided or declared abandoned. Such an application must be made before the Federal Court has made a final determination in respect of the appeal. The grounds to re-open an appeal are quite limited. Rule 49(6) states that the RAD "must not allow the application [to re-open] unless it is established that there was a failure to observe a principle of natural justice." In view of the context for this provision, this must mean a failure to observe a principle of natural justice in relation to the appeal that is the subject of the application to re-open, not in the original proceeding before the RPD (see *Brown* at para 20).

[45] Under Rule 49(7), in deciding an application to re-open an appeal, the RAD, "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."

[46] The combined effect of these rules was summarized in *Brown*:

> [28] As set out above, Rule 49(6) states that the RAD may re-open an appeal that has been dismissed only if it finds that there was a failure to observe a principle of natural justice. In other words, a failure to observe a principle of natural justice is a necessary condition for an appeal to be re-opened. The presence of Rule 49(7) suggests that this alone may not also be a sufficient condition to re-open an appeal; other "relevant factors" may warrant denying an application to re-open, even if a failure to observe a principle of natural justice is established (e.g. an unexplained failure to bring the application to re-open in a timely manner).

[47] This is the legal framework against which the reasonableness of the RAD's denial of the Applicant's request to re-open his appeal must be assessed.

(1) The Applicant's arguments

(a) *The right to counsel*

[48] The Applicant was represented by legal counsel during the entire period that he was pursuing his RAD appeal. He has not made any specific allegations about ineffective representation by the lawyers who have acted for him. In this sense, he cannot complain that he has been denied his right to counsel. Instead, he argues that the RAD's unwillingness to extend the timelines for perfecting his appeal, in the context of the other appeals that his counsel was handling, and against the wider backdrop of the surge in refugee claims in Manitoba, amounted to an effective denial of counsel.

[49] The Applicant's argument on this point is expressed in the following way in his Further Memorandum of Argument: "The position of the applicant is that being unable to be represented by legal counsel before the Refugee Appeal Division does indeed equate to denial of natural justice where that denial is the result of a decision by the Refugee Appeal Division."

[50] The crux of this argument is that the RAD had been instrumental in the transfer of the 32 files from Mr. Khan to the Applicant's counsel, who accepted this transfer on the understanding that timelines for filing further materials in these files would be agreed upon. However, the RAD did not accept counsel's proposed new timelines and instead fixed an impossible new deadline for the completion of the needed work on the other files and on the Applicant's appeal.

[51] The Applicant argues that this decision amounted to an effective denial of his right to counsel: "That was the case here. Counsel, though representing the applicant, was not allowed to act, by reason of having been given a deadline for perfecting the record, in combination with all other pending cases, which it was not practically possible to meet. In this case, there was effective denial of the right to counsel."

[52] I am not persuaded. This argument rests on an interpretation of the history of the Applicant's case in the context of the other RAD appeals in the transferred files that is not supported by the record.

[53] It is important to begin by recalling the sequence of events, beginning with the transfer of 32 files from Mr. Khan to Mr. Matas, which was confirmed on February 1, 2018. At that time, the RAD noted that it expected timelines to be established for these appeals, and it underlined the importance of proceeding without delay. The records in most of these appeals had already been

perfected, and the reference to “timelines” for filing further submissions expressly refers to Rules 29 and 37 – which deal with applications to file further documents, including new evidence.

[54] The e-mail from the RAD to the Applicant’s counsel also notes that Mr. Khan had requested that the RAD delay making any decision on any of these appeals, and that an extension of time be granted to new counsel to file, “a revised memorandum that is compliant with Rule 3 of the RAD Rules.” That was the basis for the transfer of the files. It also appears to have been the basis on which the Applicant’s counsel agreed to take on these new files; in his e-mail confirmation sent the same day, the Applicant’s counsel states, “I will provide the Division with my timeline for completing any requested submissions to the RAD for each file, file by file in sequence.” He also stated, “I am aware that appeals at the RAD are time sensitive and that it will be important to establish timelines so that these files can be finalized by RAD members as soon as possible.”

[55] More than two months later, the Applicant retained Mr. Matas to handle his appeal, and on April 11, 2018, a Notice of Appeal was issued. It was noted that the deadline to perfect the appeal was May 4, 2018.

[56] On April 18, 2018, the RAD followed up on the status of the transferred files in an e-mail to the Applicant’s counsel. In that e-mail, the RAD stated: “notwithstanding periodic contact from RAD registry, you have not submitted RAD rule 29/37 applications nor established a timeline for such applications for many of these appeals.” In view of that, the RAD established a deadline of May 3, 2018, for filing any new materials, and indicated that in the absence of such further submissions, the appeals would be decided on the basis of the record. Finally, the RAD

notes that any further extension of time "would require an application with justification and evidence if applicable."

[57] As noted earlier, on May 2, 2018, the Applicant's counsel filed a number of applications for extensions of time to perfect the appeals, including for the transferred files as well as the Applicant's case. The applications were similar, and they were all based on the argument that counsel could not meet the time limits for these files, and that the extensions should be considered in light of the significant increase in refugee claims in Manitoba. On May 31, 2018, the RAD dismissed all of the requested extensions, but also granted a further period until June 25, 2018, for the filing of further materials in these files, including the Applicant's appeal.

[58] No further submissions or requests were made to the RAD by the new deadline, and on July 4, 2018, it dismissed the Applicant's appeal because it had not been perfected.

[59] In light of this history, it is simply not tenable to claim that the Applicant was denied effective representation of counsel due to decisions made by the RAD. To the contrary, the RAD made two things clear from the outset: (i) it was willing to extend the time for filing further submissions in the 32 transferred files, and expected Applicant's counsel to establish a timeline for doing so; and (ii) these appeals were time sensitive and needed to proceed without undue delay. The Applicant's counsel specifically confirmed his understanding and acceptance of these two points in his reply e-mail accepting the transfer of the files.

[60] The Applicant's appeal became caught up in this only several months later, and there is no evidence in the record of any separate or specific indication from the RAD that it was willing to consider a different deadline for perfecting the appeal record in the Applicant's case.

[61] I agree with the Applicant that subsection 167(1) of *IRPA* expressly recognizes that parties may be represented by legal counsel in RAD appeals. I also agree that this must mean that counsel is allowed to take the necessary steps to provide effective representation, and a RAD decision impairing that might have the effect of denying an appellant that opportunity. Depending on the circumstances, this could amount to a breach of natural justice. So, for example, a RAD decision that significantly limited counsel's opportunity to participate in an appeal could amount to a denial of the right to counsel that would constitute a breach of natural justice. However, that is not what happened here.

[62] Rather, the Applicant's appeal became caught up in a series of unrelated appeals because his counsel agreed to take on the Applicant's appeal several months after agreeing to take on a significant number of other files. During the intervening period, and prior to taking on the Applicant's case, counsel had not proposed any timelines for completing the other files to the RAD nor had he been given any indication that the RAD was no longer concerned with timelines or moving the appeals forward quickly. There is no indication in the record as to why none of the other files had progressed between February 1, 2018, and June 25, 2018, given the limited amount of work that was needed for each of them, nor is there any explanation why the Applicant's record could not be completed at any point between the filing of the Notice of Appeal on April 11, 2018, and the expiry of the RAD's final deadline of June 25, 2018.

[63] In the circumstances, I cannot accept the Applicant's argument that he was, in effect, denied his right to counsel by the decisions made by the RAD. He was represented by counsel throughout. At the time the Applicant's counsel agreed to represent him in his appeal, he had taken on significant other work but had neither advanced those files nor agreed upon a timeline

for doing so with the RAD. Whatever issues may arise from this sequence of events as between the Applicant and his counsel, the problems cannot be blamed on the RAD.

[64] It should be noted that in other cases involving similar facts, extensions of time have been granted, sometimes to avoid prejudicing the innocent applicants: see *Tilahun v Canada (Citizenship and Immigration)*, 2019 FC 815 [*Tilahun*] and the cases cited therein. On the other hand, the Court has also refused extensions of time: see *Kiflom v Canada (Citizenship and Immigration)*, 2020 FC 205 [*Kiflom*].

[65] I agree with the Respondent that the mere fact that the Court granted extensions of time in particular cases, based on its assessment of the facts and context, does not make it unreasonable for the RAD to deny an extension of time or a request to re-open an appeal, based on its consideration of the applicable law in the context of the circumstances of a particular case. In other cases, the Court has refused an extension of time: see *Kiflom*. That is what the RAD did here. Its actions did not amount to an effective denial of the Applicant's right to counsel. Rather, they reflected the RAD's willingness to allow a degree of flexibility in an effort to try to ensure that the Applicant and other appellants had an opportunity for a full presentation of their cases.

[66] On the record, there is simply no basis to conclude that the RAD's refusal to extend the time limit for perfecting the appeal in the Applicant's case, or its subsequent refusal to re-open the appeal, amounted to an effective denial of his right to counsel.

(b) *Legitimate expectation*

[67] The Applicant argues that the RAD had created a legitimate expectation for him and for his counsel that they would provide a timeline for the completion of the additional submissions

for the other files. Based on this expectation, the Applicant retained Mr. Matas to represent him on his appeal, and Mr. Matas agreed to accept the retainer.

[68] The Applicant argues that the RAD went against that legitimate expectation by refusing to accept his application for an extension of time, and then refusing to re-open his appeal. This violated the duty of fairness owed to the Applicant, pursuant to *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

[69] The Applicant points to the convergence of three circumstances to buttress his argument. First, his counsel had taken on the transferred files on the undertaking that he would provide a timeline for completing the records in these appeals, and the indication that those extensions of time would be granted to permit this to be done. However, the RAD rejected his proposed timeline, did not propose another in its place and instead fixed an arbitrary deadline for the completion of all of the files.

[70] Second, the Applicant points to the influx of refugee claimants into Manitoba, which resulted in the Applicant's appeal as well as seven others being added to Applicant's counsel's workload, separate and apart from the transferred files.

[71] Third, the Applicant underlines the RAD's concern that Rule 3(3)(g) needed to be complied with, and therefore detailed written submissions were needed for each appeal.

[72] The Applicant submits that the RAD failed to consider the combined effect of these three elements when it refused to re-open his appeal. The RAD had created a legitimate expectation that further time would be permitted for the various appeals to be perfected in a manner that

complied with the requirements of Rule 3(3)(g), and then it reneged on this promise. This amounted to a denial of natural justice.

[73] I am not persuaded.

[74] The doctrine of legitimate expectations, as it applies in Canadian administrative law, was summarized in *Baker* at para 26:

> This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[75] The Applicant's argument is that the RAD backtracked on its promise to extend timelines for perfecting his and other appeals. This is not consistent with the history of this case.

[76] The RAD did not, directly or indirectly, do anything to create a legitimate expectation on the part of the Applicant as to how or when his appeal would proceed. There is nothing in the record to support such a finding. Rather, the RAD may have created an expectation on the part of Applicant's counsel that it would agree to the filing of further submissions in 32 separate appeals, and that it required him to provide a timeline indicating the dates for the completion of these records. No such agreement or approval for specific dates or timelines for these other appeals had been obtained by counsel before he accepted to represent the Applicant on his appeal. There is some indication in the record that the Applicant may have been aware of the background context when he retained his counsel, but whatever the understanding between them, it cannot be attributed to the RAD.

[77] The record shows that the Applicant's counsel had from February 1, 2018 (when he confirmed his willingness and capacity to take on the files), until June 25, 2018 (the deadline given after the extension requests), to complete memoranda of fact and law for the other appeals, or to establish a timeline for their completion. The record also shows that the Applicant's counsel had from April 11 to June 25 to perfect the Applicant's record in his appeal. The fact that neither was done is not due to any change in course or reneging on any specific undertaking by the RAD.

[78] For these reasons, I do not accept the Applicant's argument that there was a breach of natural justice because the RAD backtracked on any promise that had been made to him or his lawyer about how or when his appeal would proceed.

(c) *Suitable alternative counsel*

[79] The Applicant argues that the RAD breached natural justice by failing to consider the availability of suitable alternative counsel in the context of its decision to refuse to re-open the appeal. He notes that the RAD concluded that his application to re-open was not brought in a timely manner, and the Applicant asserts this is unreasonable on the facts. He submits that he acted as quickly as he could to pursue his appeal in view of the fact that he had changed cities. Under the *RAD Rules*, the Applicant was deemed to have received the decision dismissing his appeal on July 11, 2018. He retained alternate counsel in Edmonton, Alberta on August 1, 2018. He argues that it was unreasonable to justify dismissing his application to re-open based on this short delay.

[80] The Respondent points out that this is only part of the delay, and that the actual period began on July 11, 2018, when the Applicant was deemed to have received the decision, and continued until September 17, 2018, when the application to re-open his appeal was received. This was the period that formed the basis for the RAD's finding, and its conclusion is reasonable in the circumstances.

[81] In light of the facts as to the actual delay, the finding of the RAD is reasonable. The Applicant submits that the RAD failed to deal with this argument in its decision, but that is contradicted by the discussion at paragraph 13 of the decision, where the RAD reviews the Applicant's submissions and concludes that the application to re-open was not filed in a timely manner because of the two and a half month delay between the dismissal of the appeal and the filing of the application.

[82] In addition, I cannot accept the argument advanced by counsel that the RAD was willing to make allowances for its increased workload when it came to its own compliance with the statutory deadlines, but it was unwilling to extend the same flexibility to counsel. The record in this case directly contradicts this assertion. The RAD clearly indicated to the Applicant's counsel that it was willing to accept further submissions in the transferred files, long after the deadline for making such submissions had expired. In the context, this can only be understood as a reflection of the RAD's desire to have further and more complete submissions before it considered these appeals. This was, in essence, a procedural accommodation granted by the RAD in order to ensure a full argument of the cases of these other appellants.

[83] However, the RAD's flexibility obviously had limits, and these were expressed clearly in the original communication to counsel. The importance of moving these files forward as quickly

as possible was also reflected in counsel's reply to the RAD. The fact that this did not happen cannot be attributed to any lack of flexibility on the part of the RAD.

[84] For these reasons, I am not persuaded that the RAD decision is unreasonable because it failed to consider the availability of suitable alternative counsel.

V. Conclusion

[85] For these reasons, I must dismiss this application for judicial review. There is no basis on the record to find that the RAD's refusal to re-open the appeal was unreasonable.

[86] This is a difficult and unfortunate result in view of the impact on the Applicant. He loses his right to pursue his appeal despite his efforts, and without any argument on the merits. However, that is the result that the law requires, and it is a consequence of the Applicant's choices.

[87] The Applicant proposed the following question of general importance for certification pursuant to paragraph 74(d) of *IRPA*:

> Can the failure to take into consideration a large increase in refugee protection claims in denying an extension of time to perfect the appeal record in the Refugee Appeal Division amount to a breach of natural justice by reason of denial of the right to counsel?

[88] The Respondent opposed certification of this question, largely on the basis that the case turned on its own facts, and the question therefore did not meet the requirement of a "serious question of general importance."

[89] In view of my disposition of this application, I do not find that the question proposed meets the requirements for certification set out in the jurisprudence, in particular because deciding whether there has been a breach of natural justice or procedural fairness is in most cases an inherently factual determination (see *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46, citing *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15, 35).

[90] In closing, as noted above, the facts of this case bear a striking similarity to *Tilahun*, and the decisions cited therein (*Ibrahim v The Minister of Citizenship and Immigration*, IMM-2507-18, September 7, 2018 and *Idu v The Minister of Citizenship and Immigration*, IMM-658-18, May 17, 2018), as well as to the situation addressed in *Kiflom*. The Court had occasion in those decisions to comment on the importance of observing deadlines in matters involving Applicant's counsel. Nothing more needs to be said.

[91] I therefore dismiss the application for judicial review, and I find there is no question of general importance for certification.

JUDGMENT in IMM-5756-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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