

Federal Court



Cour fédérale

**Date : 20211213**

**Docket : IMM-1353-20**

**Citation : 2021 FC 1299**

**Ottawa (Ontario), December 13, 2021**

**PRESENT: The Honourable Madam Justice Rochester**

**BETWEEN :**

**MARTHA KALAW WASHA  
DENZEL ALAIN KALAW**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The present matter is a judicial review of a decision by the Immigration and Refugee Board of Canada (IRBC), Refugee Protection Division (RPD), dismissing a request to re-open the Applicant's claim for refugee protection.

I. Background

[2] The Applicant, Martha Kalaw Washa, is a citizen of the Democratic Republic of the Congo. She left the Democratic Republic of the Congo as a minor and has spent most of her life in the United States. Her immediate family members reside in the United States and her son was born there. The Applicants, Ms. Washa and her son Denzel Alain Kalaw, arrived in Canada on September 27, 2019 and claimed asylum on October 4, 2019.

[3] Upon claiming asylum, the Applicant, Ms. Washa, was given a document entitled Confirmation of Referral and Notice to Appear which required her and her minor son to submit their Basis of Claim [BOC] forms within 15 days (i.e. by October 19, 2019), failing which they must appear at a special hearing on October 28, 2019. It was common ground that both the Applicant Ms. Washa and her counsel were aware of this document.

[4] The Applicants allege that the BOC forms were faxed to the IRBC on October 13, 2019, being within the 15-day timeframe. The Applicants rely upon a photograph of a fax cover sheet with a copy of the first page of the Ms. Washa's BOC form [October 13 Fax Cover Sheet] indicating a fax to the number 514-283-0164 at 5:28pm on October 13, 2019. That number is the fax number listed for the Eastern Region (Montréal) on the IRBC website as the contact for the RPD division. At the bottom of the photo of the fax cover sheet is the line item that the fax was sent with "Résultat OK" and the time and date stamp.

[5] The Respondent alleges that the October 13 Fax Cover Sheet was not received by the IRBC, nor was any fax received that had the BOC forms attached. The October 13 Fax Cover Sheet is not in the certified tribunal record.

[6] It was common ground at the hearing that if the BOC forms has been submitted on time, then the Applicants or their counsel were not required to present themselves at the special hearing on October 28, 2019. It is the Applicants and their counsel's position that they were operating under the assumption that the BOC had been duly submitted and therefore did not attend the special hearing.

[7] On October 28, 2019, the RPD pronounced that the claim had been abandoned. On October 30, 2019, the RPD sent the Applicants a Notice of Decision – Abandonment of a claim for refugee protection. At that time, Ms. Washa's address on record was the YMCA in downtown Montréal. On November 25, 2019, the Notice was returned to the IRBC by the Post Office with the note "Moved/ Unknown."

[8] The Applicant, Ms. Washa, submitted a Notification of Client Contact Information to the RPD, signed on November 1, 2019, advising them of her new address. The Notification was stamped as received by the RPD on November 4, 2019. The RPD forwarded the Notice of Decision to the Applicant Ms. Washa at her new address on November 27, 2019. It is common ground that the Applicants received the Notice when it was forwarded to Ms. Washa.

[9] On December 13, 2019, the Applicants' counsel delivered an application to re-open the claim, which was stamped received by the IRBC on the same date. It contained a cover letter dated December 3, 2019, alleging that "due to an administrative mistake, this file was close (sic)." The letter further states that the BOC form "was submitted within the timeframe it was expected to be file (sic) (2019-10-13) as it appears from a copy of the fax attached." The copy of the fax cover sheet attached to the letter was dated December 12, 2019, did not show the BOC form, and was addressed to the Ministère de la sécurité publique du Canada and evidenced a different fax number from that of the IRBC and the RPD [December 12 Fax Cover Sheet]. As will be discussed further below, during the hearing, counsel for the Applicant confirmed that the October 13 Fax Cover Sheet had not been included with the documentation submitted to the IRBC on December 13, 2019. The December 12 Fax Cover Sheet referred to a fax of 26 pages, while the October 13 Fax Cover Sheet referred to a fax of 22 pages.

[10] The copies of the BOC forms of the Applicants were also included in the package provided to the IRBC on December 13, 2019. While the copies submitted were executed on October 13, 2019, they did not have a date stamp or a fax stamp. The BOC forms were thus stamped when submitted and the copies of the BOC forms in the certified tribunal record are stamped as received on December 13, 2019. The BOC forms were processed in the IRBC's case management system on December 19, 2019.

[11] On December 23, 2019, the Registry provided a note to the RPD that the request was to re-open the file, counsel had provided two completed BOC forms, and that counsel stated that the BOC was submitted on time but that the RPD has no records of receiving the BOC forms. On

January 13, 2020, the RPD requested that counsel be asked to provide to the application to the Minister's representative as per Rule 62(2) of the *Refugee Protection Division Rules*, SOR 2012-256. Note that the "Minister" in the *Refugee Protection Division Rules* is the Minister of Citizenship and Immigration, now known as the Minister of Immigration, Refugees and Citizenship. On January 15, 2020, the Registry wrote to counsel for the Applicant with the RPD's request, namely proof of service to the Minister's representative. On January 23, 2020, the Applicant submitted the same December 12 Fax Cover Sheet, being the fax cover sheet addressed to the Ministère de la sécurité publique du Canada.

## II. The Decision

[12] In a decision dated February 4, 2020, the RPD denied the Application to reopen the claim [The Decision]. Rule 62(6) of the *Refugee Protection Division Rules* provides that the RPD must not allow an application unless it is established that there was a failure to observe a principle of natural justice. The RPD found that the Applicants had not established a breach of natural justice.

[13] The RPD noted that the Applicants had been provided with notice of the BOC form deadline and the date of the hearing, should the BOC forms not be provided on time. The RPD stated that the Applicants had been represented by the counsel of record since at least October 13, 2019. The RPD further noted that in the application to re-open the claim, the cover letter from counsel referred to a fax dated October 13, 2019 as "attached", but it in fact attached the December 12 Fax Cover Sheet to the Ministère de la sécurité publique du Canada. The RPD highlighted the fact that the BOC forms are stamped December 13, 2019, and were only entered

into the case management system on December 19, 2019. The RPD found that there was no evidence that the BOC forms were received by the RPD on October 13, 2019, either in the attachments provided by counsel for the Applicants or in the RPD records.

[14] The RPD stated that it had requested that the Applicants provide proof that the application had been forwarded to the Minister in accordance with Rule 62(2) of the *Refugee Protection Division Rules*. The RPD noted that in response to this request the Applicants provided the same December 12, 2019 Fax Cover sheet indicating that a fax was sent to the Ministère de la sécurité publique du Canada. The RPD found that that Rule 62(2) was not complied with and that the re-submission of this same fax cover sheet could be interpreted as an attempt to mislead the RPD.

### III. The Position of the Parties and the Hearing

[15] The parties agree that the standard of review is one of reasonableness. The Applicants submit that the RPD committed a reviewable error by violating the principles of natural justice in failing to consider the consequences that a decision that the BOC forms were not received in time could have on the life of the Applicants. A simple question of procedure should not be fatal to the Applicants' claim. The Applicants submits that they have a right to be heard and have a continuing intention to pursue the claim.

[16] The Applicants further submit that the BOC forms were submitted by way of fax on October 13, 2019, and that, being a Sunday, automatic updates in the IRBC's system could have prevented the fax from being received. In addition, the Applicants submit that a bed bug

infestation that resulted in the closure of the IRBC from October 17, 2019 onwards, would have resulted in service disruptions. The Applicants rely on the October 13 Fax Cover Sheet as evidence that the BOC forms were duly submitted in time.

[17] The Respondent submits that the RPD's power to reopen a refugee claim is very limited. The Respondent submits that the authorities relied on by the Applicants address instances where tribunals did not take evidence into account as to why applicants failed to meet procedural requirements. In the matter at hand, the RPD did not fail to consider evidence and there were no attenuating circumstances adduced before the decision maker. The Respondent objects to the arguments relating to the alleged fax being sent on a Sunday or the bed bug infestation that followed several days later, as they were not raised before the RPD. In the Respondent's written submissions, the Respondent claimed to not understand the Applicant's insistence that the BOC forms were submitted on October 13, 2019, given that there was no evidence to that effect.

[18] Over the course of the hearing, and as a result of questions from the Court, it became clear that the photograph of the fax cover page dated October 13, 2019, was not before the RPD, nor was it contained in the certified tribunal record. Counsel for the Applicants explained that while he had (a) faxed a copy of the BOC forms to the Ministère de la sécurité publique du Canada on December 12, 2019, and (b) hand-delivered his cover letter referring to an October 13 fax, a copy of the December 12 Fax Cover Page, and the two BOC forms to the IRBC, on December 13, 2019, he had not actually included the October 13 Fax Cover Page in the documentation. Thus, the photograph of the October 13 Fax Cover Page was submitted for the first time when it was attached to the affidavit of the Applicant Ms. Washa in the Applicants'

Record in the context of this judicial review. Only the photo of the cover page is appended to the Applicant's affidavit, not the 22 pages said to follow the October 13 Fax Cover Page. Counsel for the Applicant explained that the rest of the document as faxed was not included with the Affidavit submitted on judicial review as only the cover page was kept in his file and/or provided to the Applicants.

IV. Issue

[19] Was the RPD's decision to reject the application to re-open the Applicants' refugee claim reasonable?

V. Analysis

[20] While I am sympathetic to the situation in which the Applicants find themselves, there is simply no reviewable error on the part of the RPD. The Decision was reasonable based on the evidentiary record before it. The RPD had no evidence that the BOC forms were received on time, nor any explanation as to why they were not. The RPD was simply provided with a bald allegation that the BOC forms were submitted on October 13, 2019, when the record reflected that they were submitted on December 13, 2019.

[21] The photo of the October 13 Fax Cover Page was not before the RPD, nor were the theories as to why the fax was not received by the IRBC (weekend system updates and/or bed bug infestations). I agree with the Respondent that these materials were not before the RPD and are therefore inadmissible in an application for judicial review. The general rule is that the



evidentiary record before this Court on judicial review of an administrative decision is restricted to the evidentiary record that was before the administrative decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]). While there are exceptions to the general rule (*Access Copyright* at para 20), they do not apply to the matter at hand.

[22] Given that the above-mentioned materials were not before the RPD, I find they should not be considered in assessing the reasonableness of the Decision on judicial review. I am mindful of the guidance by the Federal Court of Appeal: “[c]onsideration of facts that were not before the decision-maker would turn this Court's attention away from the decision under review and towards a *de novo* consideration of the merits. That is never the role of a judicial review, and would be entirely incoherent with review on a standard of reasonableness” (*Henri v Canada (Attorney General)*, 2016 FCA 38 at para 41).

[23] The Applicants plead that a simple question of procedure should not determine the outcome of the Applicants’ claim and they rely on a number of authorities where it was found that a lack of flexibility could constitute a breach of natural justice. Given that the material relied upon by the Applicants was not before the RPD, being the October 13 Fax Cover Sheet, the theories on why the fax was received, or the admission that the October 13 Fax Cover Sheet was inadvertently not included in the application to re-open, there was no lack of flexibility or failure on the part of the SDR.

[24] For the foregoing reasons, this judicial review is dismissed. Neither party proposes a question to certify, and in my view, no such question arises in this case.

**JUDGMENT in IMM-1353-20**

**THIS COURT'S JUDGMENT is that:**

1. The Applicants' application for judicial review is dismissed;
2. There is no question for certification.

“Vanessa Rochester”

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Judge

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

**DOCKET :** IMM-1353-20

**STYLE OF CAUSE :** MARTHA KALAW WASHA ET DENZEL ALAIN  
KALAW v THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING :** MONTRÉAL (QUÉBEC) BY VIDÉOCONFÉRENCE

**DATE OF HEARING :** NOVEMBRE 22, 2021

**JUDGMENT AND REASONS :** ROCHESTER J.

**DATED :** DECEMBER 13, 2021

**APPEARANCES :**

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