Federal Court  Cour fédérale

Date: 20160901

Docket: IMM-892-16

Citation: 2016 FC 996

Ottawa, Ontario, September 1, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MAYRA ELIZABETH AGUIRRE RENTERIA
and ARINSON AGUIRRE RENTERIA

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mayra Elizabeth Aguirre Renteria [the Principal Applicant] and her minor brother, Arinson Aguirre Renteria, seek judicial review of a decision rendered by the Refugee Appeal Division [RAD], whereby it dismissed their application to reopen their appeal. The appeal to the RAD was dismissed, without being assessed on its merits, for failure to perfect the appeal within

the time prescribed by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*].

II. Background

[2] The Applicants are citizens of Colombia. They claimed refugee status in Canada in June 2015, alleging that they faced persecution and risks under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], from the Revolutionary Armed Forces of Colombia (FARC) rebel group. The Refugee Protection Division [RPD] rejected their claims on September 11, 2015, finding that the Principal Applicant lacked credibility.

[3] The Applicants received the decision on September 21, 2015, and filed a notice of appeal with the RAD Registry on October 2, 2015. The deadline for perfecting their appeal was October 21, 2015. However, the Applicants, through their counsel, only delivered an Appellants' Record to the RAD on November 27, 2015. The Appellants' Record was accompanied by an application to extend the time within which the appeal could be perfected.

[4] Unbeknownst to the Applicants at the time, the RAD dismissed their appeal for lack of perfection on November 25, 2015. On December 2, 2015, the RAD Registry advised counsel that there would be no appeal before the RAD. The Applicants filed an application to reopen the appeal on December 10, 2015. In their submissions, they argued several points, including:

- Their counsel did not attend the RPD hearing due to the denial of his request for a change of hearing date, thus he did not know what had happened at the hearing;

- They were awaiting legal aid assistance in pursuing the appeal;
- The transcript of the RPD hearing was only received on November 6, 2015, more than 30 days from the time they received the RPD's decision;
- After their counsel read the transcript, he realized that the Applicants' passports were important to the appeal, and the passports only arrived on November 20, 2015;
- The Appellants' Record was sent out for filing at the RAD Registry on November 25, 2015, but due to a delay in the delivery service, it only arrived on November 27, 2015.
- It would be a breach of natural justice to deny the reopening of the appeal because there may be substantial issues to be determined on appeal.

III. Impugned Decision

[5] The RAD began by outlining the legislative provisions relevant to the analysis of the merits of the application to reopen:

IRPA:

> **110(2.1)** The appeal must be filed and perfected within the time limits set out in the regulations.

Refugee Appeal Division Rules, SOR/2012-257 [RAD Rules]:

> **3(5)** The appellant's record provided under this rule must be received by the Division within the time limit for perfecting an appeal set out in the Regulations.
>
> **49(6)** The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

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

Regulations:

> **159.91(1)** Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act,
>
> > **(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
> >
> > **(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.
>
> **(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.

[6] The RAD dismissed the application to reopen the appeal, finding that doing so would not result in a breach of natural justice.

[7] First, the RAD rejected the Applicants' argument that their counsel had no idea what occurred at the RPD hearing and needed to order the transcript, which only arrived on November 6, 2015. The RAD noted that a compact disc [CD] of the RPD hearing is provided to an unsuccessful claimant, by the RPD, with the written copy of the negative decision. The RAD found there was no reason why the Applicants' counsel could not have listened to the CD to

prepare his memorandum, as many counsel do. The Applicants' counsel had not adduced evidence to the effect that a CD was not provided to the Applicants.

[8] Second, the RAD rejected the argument that the Applicants' counsel only knew that passports were an issue after reading the transcript, and had to then request and wait for their passports to arrive. The RPD decision at paragraphs 18 and 19 clearly indicated that the absence of the passports contributed to the finding that the Principal Applicant lacked candour; thus, on the basis of the RPD decision alone, the Applicants' counsel could have initiated the request for the passports. Alternatively, the Applicants could have perfected their appeal by filing their Appellants' Record on time, and sought to supplement it with passports upon receipt of them, pursuant to Rule 29 of the RAD Rules.

[9] Third, the RAD found that the Applicants' explanation that the delivery service was two days late was inconsequential. The RAD noted that the Member's decision dismissing the appeal was effective when he signed and dated it on November 25, 2015. Even if the request for an extension of time had been received by the RAD on November 25, there was no guarantee it would come to the RAD Member's attention before he signed the dismissal order. In any event, the Applicants' materials arrived two days after that decision was effective.

[10] Fourth, the RAD considered the factors in Rule 49(7)(a) and (b) of the RAD Rules (in the RAD decision at paragraphs 30 and 31, the RAD says it is considering Rule 49(1)(a) and 49(1)(b), but those provisions do not exist – I believe the RAD meant to say Rule 49(7)(a) and 49(7)(b)). Regarding Rule 49(7)(a), the RAD found that the application for reopening the appeal

was not meaningfully untimely. As for Rule 49(7)(b), the RAD noted that the Applicants had not provided information with respect to an application for judicial review before this Court. However, the RAD found that it would be unnecessary for the Applicants to seek the intervention of this Court as opposed to following the course they had taken by applying to the RAD. This was especially so given that paragraph 72(2)(*a*) of the IRPA provides that an application for judicial review cannot be made until the right of appeal is exhausted.

[11] Finally, the RAD considered whether "there was a failure to observe a principle of natural justice" as per Rule 49(6) of the RAD Rules. The RAD opined that this provision acts retrospectively to historical failures, as evidenced by the specific language used in the provision itself. Thus, the prospective failure alleged by the Applicants – that it would be a breach of natural justice to deny their application – was not determined to fall within the scope of this provision.

IV. Issue and Standard of Review

[12] The determinative issue is whether the RAD breached the rules of natural justice by failing to allow the Applicants' reopening application. However, while this case raises a question of natural justice, the RAD's interpretation of its home statute and the application of that law to the facts are questions of mixed fact and law reviewable on a standard of reasonableness (*Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at paras 20-21). Accordingly, I am of the view that the determinative issue is whether the RAD's decision to deny the application to reopen the appeal is reasonable.

V. Analysis

[13] Counsel for the Respondent conceded at the hearing that the RAD may have erred when it found that Rule 49(6) of the RAD Rules applied retrospectively to historical failures and not to the prospective failure like that which was alleged by the Applicants – namely, that it would be a breach of natural justice to deny their application. If such a restrictive interpretation was chosen, the RAD could never reopen an appeal when, in cases like the present one, it dismisses an appeal for a simple matter of delay without assessing its merits. Rather, I am of the view that the RAD should only grant a motion to reopen an appeal when, considering all the circumstances of a case, it finds that not reopening it would result in a breach of procedural fairness.

[14] However, and for the reasons discussed below, I am of the view that the RAD's misinterpretation of Rule 49(6) of the RAD Rules is not material as it did consider all the facts before it, including those that were not before the decision-maker who dismissed the appeal, and as such its decision is reasonable.

[15] First, it was reasonable for the RAD to reject the Applicants' counsel's argument that he needed to order the transcript of the RPD hearing before preparing his submissions for the appeal. The RAD explained that all unsuccessful claimants receive a CD of the RPD hearing, and that it is common practice for counsel to listen to these CDs. By virtue of subsection 171(b) of the IRPA, "the [RAD] may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge". The common practice regarding CDs was clearly a fact of which the

RAD could take judicial notice, and which was within its specialized knowledge. Thus, it was reasonable for the RAD to find that absent evidence that the CD was unavailable to the Applicants, there was no reason why their counsel could not have listened to the CD immediately after receiving the negative decision on September 21, 2015, in order to prepare his memorandum. In her affidavit, the Principal Applicant states that they had to wait for the Legal Services Society to fund their appeal before ordering the transcript of the hearing and that they had to have the transcript before taking steps to obtain their passports. She states that the passports were obtained on November 20, 2015, but she is silent as to when the different steps in the process were taken. All that is revealed by the evidence is that it took nine weeks from the receipt of the RPD decision before they had all the necessary materials to perfect their appeal and that it took an additional week to file those materials with the RAD.

[16] Second, I find that the Applicants' argument that they could not request the passports until receiving the RPD hearing transcript is without merit. The Applicants' counsel could have determined that the absence of the passports was an issue from listening to the CD of the hearing or simply from reading paragraphs 18 and 19 of the RPD decision, which leave no doubt as to the impact of the missing documents on the Applicants' credibility:

> [18] To begin with, the claimants chose not to provide their passports for examination. The principal claimant testified that they left their Colombian passports with a person named Elizabeth in the United States, so that they could not be lost or stolen while crossing into Canada. Asked how they were able to provide their passport numbers, she explained that Elizabeth was contacted and provided that information.
>
> [19] From this evidence, I find that the claimants could have obtained their passports from Elizabeth. While the claimants have established their identity through alternative documentation, passports might contain other relevant information. The choice not to submit passports is not suggestive of full candour.

[17] Counsel could have then requested the passports and, as the RAD pointed out, even if they did not arrive on time, counsel could have filed the Appellants' Record on time, and submitted the passports when they became available, pursuant to Rule 29 of the RAD Rules.

[18] Finally, I agree with the Respondent that *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 is distinguishable from the present case. The applicant in *Huseen* was not represented by counsel when she failed to meet the procedural requirement, and when she did retain counsel, her counsel contacted the IRB immediately to remedy the situation. In this case, the Applicants were represented by counsel throughout the process. Counsel was even contacted by the RAD Registry, two days after the expiration of the delay to perfect the appeal, and was advised that he needed to ask for an extension of time. It was reasonable for the RAD to dismiss the Applicants' appeal a little over a month later, as no such request was yet received.

[19] Alternatively, as pointed out by the RAD, counsel could have submitted the Appellants' Record on time and submitted the passports later, as per Rule 29 of the RAD Rules. As held by this Court in *Raza v Canada (Citizenship and Immigration)*, 2016 FC 250 at para 30:

> [30] While I accept as a general principle that procedural rules should be applied flexibly in the administration of Canada's refugee system, I do not consider the facts of this case to demonstrate a lack of flexibility that would constitute breach of the principles of procedural fairness or natural justice on the part of the RAD. …

[20] I therefore find that the RAD's refusal to reopen the Applicants' appeal is reasonable in the circumstances of this case.

VI. Conclusion

[21] This application for judicial review is dismissed. The parties did not propose any question of general importance for certification and none arises from this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. No question of general importance is certified;
3. No costs are granted.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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