Federal Court  Cour fédérale

Date: 20200124

Docket: IMM-2907-19

Citation: 2020 FC 121

Ottawa, Ontario, January 24, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

YUSSUF MUXUMED MAXAMUD

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the decision of the Refugee Appeal Division ("RAD") dismissing an application to re-open the Applicant's RAD appeal, which was dismissed for lack of perfection ("RAD Decision"). The Applicant's refugee claim was dismissed by the Refugee Protection Division ("RPD") on July 10, 2018. The Applicant received the reasons on July 17, 2018. A Notice of Appeal of the RPD decision was filed on July 17, 2018, by the

Applicant's former counsel. However, the Application Record for the RAD appeal was dismissed for lack of perfection on September 10, 2018. On March 20, 2019, the RAD received an application to re-open the appeal submitted by the Applicant's current counsel. By decision dated April 15, 2019, the RAD dismissed the application to re-open the appeal.

[2] The Applicant is a 24-year-old citizen of Ethiopia, of Somali ethnicity. The Applicant's refugee claim was based on fear of persecution by the Ethiopian police, the LIYU, who allegedly killed his family members. The Applicant also claimed that the LIYU arrested him without charge, repeatedly beat and tortured him during a two-month imprisonment.

[3] On this application for judicial review, the Applicant submits that the RAD erred in finding there was no breach of natural justice and that the RAD Decision is unreasonable. Specifically, the Applicant submits that the RAD erred in concluding the application to re-open the appeal was not timely, and that the RAD made a factual error on assessing Rule 49(7)(b) of the *Refugee Appeal Division Rules*, SOR/2012-257 ("*RADR*"). The Applicant also submits that he was not provided with a reasonable opportunity to have his appeal considered by the RAD. Furthermore, the Applicant submits that the RAD erred in finding that only an allegation of incompetent counsel could rise to a breach of natural justice.

[4] The RAD's decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicant*

[5] Mr. Yussuf Muxumed Maxamud (the "Applicant") is a 24-year-old citizen of Ethiopia. The Applicant fled Ethiopia in 2015 fearing persecution from the Ethiopian police, and submitted his refugee claim when he came to Manitoba, Canada.

[6] The Applicant's refugee claim was dismissed by the RPD on July 10, 2018. A Notice of Appeal of the RPD decision was filed on July 17, 2018, by the Applicant's former counsel. The Application Record was due on August 16, 2018. The former counsel had brought an application to extend the deadline to perfect the Applicant's appeal. However, the Applicant's former counsel never perfected the appeal record. Given that there was no further communication from former counsel or the Applicant with the RAD regarding the matter, the appeal was dismissed for lack of perfection on September 10, 2018.

[7] The Applicant stated that he was "shocked" to learn that his appeal had been dismissed for lack of perfection, and attested to having been under the impression that his former counsel would be submitting an application to re-open the appeal, as the Applicant even attended the former counsel's office in October 2018 to sign an affidavit. After speaking with his friends and community members who encouraged the Applicant to move to Toronto where there were a great number of refugee lawyers, the Applicant decided to move to Toronto. The Applicant also explained that he "lost confidence" in his former counsel.

[8] In Toronto, the Applicant sought out help from a community agency, and was referred to a new lawyer. In January 2019, the Applicant met this new lawyer, and asked him to submit an

application to re-open the RAD appeal. The new lawyer contacted the Applicant's former counsel, and obtained an affidavit from him. The Applicant later learned that his case had been referred from this new lawyer to his current counsel.

[9] On March 20, 2019, the RAD received an application to re-open the appeal submitted by the Applicant's current counsel.

B. *The RAD Decision*

[10] On application to re-open the appeal, the RAD noted the Applicant's submissions that the dismissal of the initial RAD appeal was in breach of natural justice for the following reasons:

- Former counsel was overwhelmed with a transfer of files from another lawyer;
- Former counsel was diligent in trying to obtain extensions of time, his being overwhelmed can be characterized as an error, thereby resulting in a breach of natural justice;
- The Applicant is entitled to make submissions with regard to his appeal and is entitled to be heard;
- The continuing intention of the Applicant to appeal the decision of the RPD denying his refugee claim; and
- The fact that there would be no prejudice to the Immigration Refugee Board ("IRB") or the Minister.

[11] The RAD noted that the Applicant "made no argument that this application was submitted in a timely matter," and found that the Applicant did not make the application in a timely manner given that the appeal had been dismissed more than six months prior to the re-opening application. The RAD further found that in the re-opening application, counsel did not make statements as to whether the Applicant had filed an application for judicial review on the initial dismissal.

[12] The RAD noted evidence from a student affiant from the former counsel's office, who described the circumstances leading to a failure to perfect the appeal, and stated that the Applicant was advised to seek other counsel. The Applicant, however, stated in his affidavit that he was never told by anyone from his former counsel's office to find new counsel. The RAD noted that although the Applicant stated having lost confidence in his former counsel, he did not raise any allegations on the inadequacy of counsel. The RAD thus concluded that "there is no other ground for finding a possible breach of natural justice due to serious inadequate representation."

[13] The RAD found that denying the re-opening of the application would not constitute a breach of natural justice because the Applicant's arguments were based on the lack of legal counsel to prepare the record within the required timelines, and "appellants at the RAD are not required to have legal counsel represent them in their appeal". The RAD stated that it is the appellant's responsibility for finding available counsel. The RAD also noted that natural justice, in this particular case, requires the Applicant to be given the opportunity to explain why his appeal was not perfected within the required time, but concluded the Applicant did not adduce persuasive evidence of the RAD's failure to observe natural justice.

[14] By decision dated April 15, 2019, the RAD dismissed the application to re-open the appeal. This is the underlying decision for this judicial review.

III. **Relevant Provisions**

[15] Rules 49(4), 49(6), 49(7) and 49(8) of the *RADR* read as follows:

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.

[…]

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

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.

[…]

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

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.

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 l'a pas fait.

Demande subséquente

(8) Si l'appelant 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.

IV. **Issue and Standard of Review**

[16] The issue on this application for judicial review is whether the RAD Decision to deny the application to re-open the RAD appeal is reasonable.

[17] Prior to the recent decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], this Court had consistently held that the standard of review applicable to the RAD's decision to deny an application to re-open an appeal is that of reasonableness (See *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 (CanLII) [*Brown*] at paras 24-25, citing *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 (CanLII) at paras 19-21; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996 (CanLII) at para 12; and *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 (CanLII) at para 31). However, there is no need to depart from the

standard of review followed in previous case law, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[18] Under the *Vavilov* framework, there is a presumption of reasonableness. This presumption can be rebutted in two types of situations: first, where the legislature has indicated that it intends a different standard to apply, i.e. where it has explicitly prescribed the applicable standard of review, or where it has provided a statutory appeal mechanism from the administrative decision maker to a court; and second, where the rule of law requires that the standard of correctness be applied, for example in certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17). However, in the case at bar, neither exception to the presumption of reasonableness applies. Thus, the reasonableness standard applies.

V. **Analysis**

[19] The Applicant submits that the RAD's Decision is unreasonable because it erred in finding there was no breach of natural justice. The Applicant had outlined the detailed circumstances surrounding the timeline on his appeal, and submits that the RAD should have considered "any relevant factors" under Rule 49(7) of the *RADR*, rather than limiting itself to: a) the consideration of the timeliness of the application; and b) the reasons for why an application for judicial review had not been made on the initial appeal dismissal. The Applicant submits that the RAD erred by failing to consider the reasons and justification for the delay in perfecting the appeal record, and in submitting the application to re-open the appeal. The Applicant relies on this Court's decision in *Brown* for the proposition that the reasons why an appeal was not

perfected within time is just as important on an application to re-open the appeal (See *Brown* at para 38, citing *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 (CanLII) [*Huseen*] at paras 31-33 and *Andreoli v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1111 (CanLII) [*Andreoli*] at paras 16-20).

[20] The Respondent submits that the RAD reasonably determined there was no breach of natural justice that would justify re-opening the appeal. The Respondent argues that there is "no clear evidence" that the failure to perfect the application was "solely" due to an error of the Applicant's former counsel as there was conflicting evidence before the RAD on whether the Applicant was advised to seek other counsel.

[21] The Respondent also submits that the RAD did not err in finding that the application to re-open was not made in a timely manner, and argues that the Applicant's evidence before the RAD on what happened between September 2018 and March 2019 was "scant and lacking in detail". The Respondent submits that the Applicant would have been aware that his appeal record deadline had been missed in September 2018 upon receiving the decision, but after attending the former counsel's office in October 2018, the Applicant took no further steps to re-open his application until he moved to Toronto. The Respondent takes issue with the Applicant's failure to provide details on the expected amount of time for his former counsel to bring an application to re-open the appeal, and on when his retainer with the former counsel ended.

[22] The Respondent argues that the Applicant's submission on the right to be heard is misplaced because the Applicant participated in his RPD hearing, and made submissions to re-

open his RAD appeal. The Respondent submits that the RAD did consider the circumstances of the Applicant, but the key problem was the timeliness of the application.

[23] In my view, this Court's decision in *Brown* and the reference to *Huseen* is particularly helpful (although I recognize that *Huseen* deals with the re-opening of an RPD decision, the same principle of upholding natural justice, specifically in the context of the timeliness of an application and any justification to support the lack thereof, is instructive). In *Brown*, this Court stated (*Brown* at para 38):

> In a case where an extension of time is sought to perfect an appeal, the timeliness of the application and the justification for any delay have a direct bearing on whether an extension should be granted (see Rule 6(7)). The reasons why an appeal that has been dismissed for lack of perfection was not perfected within time are just as important on an application to re-open the appeal (cf. Justice Diner's helpful discussion of the rules governing applications to re-open refugee claims in *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 (CanLII), especially paras 31-33 and the cases cited therein).

[24] I find that the RAD's Decision is unreasonable as the RAD failed to consider the evidence before it, and in particular, the reasons that may have justified the delay of bringing the application to re-open the appeal pursuant to Rule 49(7) of the *RADR*.

[25] First, the RAD erred in finding that "current counsel has made no argument that this application was submitted in a timely matter [sic]" (emphasis added). However, to the contrary, the Applicant's counsel made submissions as to the timeliness of the application by explaining the circumstances surrounding the Applicant's former counsel's failure to perfect the appeal, and the Applicant's search of new counsel in order to bring the application to re-open the appeal. It

was unreasonable for the RAD to conclude that the Applicant had made bare assertions on the timeliness of his application.

[26] The Applicant had met with his former counsel following the dismissal due to lack of perfection, and attested to having believed the former counsel would re-open the case. The Applicant also sought the advice of his community and friends, and made a move to a new city, where he looked for lawyers to take his case. Since the appeal record had not been complete, it took time for his new counsel to put the applications together, and the Applicant submitted that his new counsel submitted the files as soon as she could. As the Applicant correctly points out, the RAD failed to consider the fact that the Applicant inadvertently fell between "an overwhelmed counsel, who had accepted the extra cases of the other counsel, and the RAD, who refused to accommodate him," in what is described as "an institutional capacity dispute". Given that the Applicant did not have the chance to have an appeal heard for his refugee claim, where one's most vulnerable interests are at stake, the RAD unreasonably found that there was no breach in natural justice by simply focusing on the passage of time, without a view to the circumstances that resulted in the six-month gap.

[27] Second, the RAD erred in finding that "current counsel did not make any statement as to whether or not the Applicant had filed an Application for Leave and Judicial Review" in the application to re-open the appeal. Again, contrary to the RAD's own conclusions, the Applicant's counsel made submissions as to the reasons why the Applicant had not previously filed an application for judicial review. The Applicant explained that since his appeal record was not perfected, and filed late, it would be highly unlikely he would have been granted leave by this Court without a record *per se*. Furthermore, the Applicant aptly pointed out that appellants

are expected to exhaust all legal avenues before commencing a judicial review, i.e. first submitting an application to re-open the RAD appeal.

[28] I note that the Respondent appears to be speculating and adding onto the RAD's reasons via its submissions. The RAD did not require the Applicant to provide details on the concluding date of the retainer, or the timeline of the re-open application with his former counsel. Furthermore, it is inappropriate for the Respondent to seek answers to questions—such as why the Applicant's former counsel could not have arranged to secure other immigrations lawyers across the country, or why the Applicant could not have made an appointment before leaving Winnipeg—that were not asked by the RAD itself.

[29] Furthermore, contrary to the Respondent's submissions that the record before the RAD lacks evidence of the Applicant's former counsel remaining on the record or working on the Applicant's file, I note the application to re-open the appeal contains the Applicant's submissions that "former counsel never filed a letter with the RAD indicating he was getting off the record", and also notes that the Applicant attended his former counsel's office to sign an affidavit in October 2018.

VI. **Certified Question**

[30] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[31] The RAD failed to consider the evidence submitted before it, in assessing whether there was a failure to observe natural justice. Thus, the RAD Decision is unreasonable. This application for judicial review is allowed.

JUDGMENT in IMM-2907-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2907-19
STYLE OF CAUSE:	YUSSUF MUXUMED MAXAMUD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 9, 2020
JUDGMENT AND REASONS:	AHMED J.
DATED:	JANUARY 24, 2020

APPEARANCES:

Lina Anani	FOR THE APPLICANT
Nadine Silverman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lina Anani Law Office Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT