Federal Court  Cour fédérale

Date: 20160229

Docket: IMM-2812-15

Citation: 2016 FC 250

Ottawa, Ontario, February 29, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

SYED MOHSIN RAZA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated May 15, 2015, in which the Applicant's appeal from a decision of the Refugee Protection Division [RPD] was dismissed for lack of perfection.

[2] For the reasons that follow, this application is dismissed.

I. Background

[3] The Applicant is a citizen of Pakistan who claimed refugee protection on October 16, 2014. His claim was refused by the RPD, and the parties agree that the RPD's decision was received or deemed to be received by the Applicant on March 9, 2015.

[4] The Applicant submitted a notice of appeal to the RAD on March 24, 2015 and states that he then submitted the required appellant's record to the RAD on April 8, 2015 by fax. On April 10, 2015, the RAD sent a letter by fax to the Applicant's counsel, advising that there were deficiencies in the appellant's record and requesting an application for an extension of time to perfect the appeal. The Applicant states that his counsel did not receive this fax.

[5] On May 15, 2015, the Applicant's appeal was dismissed by the RAD for lack of perfection. This is the decision that is challenged in this judicial review application. While not the subject of this judicial review, the Applicant subsequently applied to the RAD to re-open his appeal, which was denied on July 24, 2015 on the basis that the RAD had no jurisdiction to re-open the appeal in the absence of a denial of natural justice or breach of procedural fairness.

II. RAD Decision

[6] The RAD's decision dismissing the Applicant's appeal referred to section 159.91(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations], which provides that the time limit for a person to perfect an appeal is 30 days after the day on which the person or the Minister receives written reasons for the decision. It concluded that the Applicant's

record was due to be received by the RAD on or before April 8, 2015 and perfected in accordance with Rule 3 of the *Refugee Appeal Division Rules*, SOR/2012-257 [the RAD Rules].

[7] The RAD then referred to a memorandum submitted on April 10, 2015 and to advising the Applicant's counsel by fax dated April 10, 2015 of the deficiencies in the record and to submit an application for an extension of time to perfect an appeal. As it had received neither the perfected record nor an application for an extension of time to perfect an appeal from the Applicant, the RAD dismissed the appeal for lack of perfection on May 15, 2015.

III. Issues and Standard of Review

[8] The Applicant submits the following issues for the Court's consideration:

A. What was the ground of refusal of the Applicant's appeal and did the Applicant receive a fair hearing of his appeal?

B. Did the RAD ignore the Applicant's affidavit regarding perfection of the appeal?

C. Did the RAD err in refusing the appeal purely on procedural grounds, without giving any consideration to the substantive side of the appeal?

[9] The Respondent argues that the issues to be decided are the applicable standard of review and whether the RAD breached the rules of procedural fairness in dismissing the Applicant's appeal due to his failure to perfect.

[10] The Applicant takes the position that, as the issues raised in this application surround procedural fairness, the applicable standard of review is correctness. The Respondent agrees that a standard of correctness is the presumption when issues of procedural fairness are involved, although noting that there is some evolving jurisprudential support for the application of a reasonableness standard even when issues of procedural fairness or natural justice are engaged. The Respondent's position is that the RAD's decision in this case should withstand review regardless of which standard is applied.

[11] I note that the uncertainty surrounding standard of review is evident in some of the case law relied upon by the Applicant in support of his position that considerations of natural justice or procedural fairness require a more flexible application of the RAD Rules than was afforded by the RAD in the present case (see *Garduno v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1306 [*Garduno*] and *Huseen v Canada (Minister of Citizenship and Immigration)*, 2015 FC 845 [*Huseen*]). While these authorities involved decisions of the RPD whether to re-open claims that had been declared abandoned, the Applicant argues that the principles derived from those cases apply to the RAD's decision to dismiss the Applicant's appeal in the present case. At paragraph 21 of *Garduno*, Justice de Montigny decided that it was not necessary to take a position on the divergence in authority on the standard of review, as it was his conclusion that the RAD had committed an error regardless of the standard chosen. Similarly, in the present case, my conclusion as explained below is that the RAD did not err, regardless of whether its decision is reviewed on a correctness or reasonableness standard.

IV. Submissions of the Parties

A. *The Applicant's Position*

[12] The Applicant argues that RAD's grounds for dismissing the appeal were its late submission, being due on April 8, 2015 but received on April 10, 2015. He submits that this was an error, as he submitted his record on time by fax transmission on April 8, 2015.

[13] In referring to the RAD's Perfection Review Checklist [the Checklist] contained in the Certified Tribunal Record, the Applicant submits that a one day grace period was initially allowed and then removed. He also states that he included the documents that were required to be included in his record and the Checklist was filled out incorrectly by the RAD case management office. This error caused confusion which impacted the decision to dismiss his appeal.

[14] The Applicant also argues that the RAD did not consider the affidavit submitted by the Applicant, in support of his application to re-open the appeal, which explained that he did not receive the RAD's fax of April 10, 2015.

[15] Finally, as noted above, the Applicant submits that the Court has ruled against inflexible application of procedural rules, as natural justice encompasses the overarching right to be heard, which should not be unreasonably denied.

B. *The Respondent's Position*

[16] The Respondent argues that there was no breach of natural justice, as the appellant's record was not accepted because it was incomplete, failing to comply with RAD Rules 3(3)(a) and 3(3)(d), not because it was late. The Applicant was provided an opportunity to correct the deficiencies in his record but did not do so.

[17] The Respondent explains that the RAD's statement that the appeal record was received on April 10 as opposed to April 8 appears to be a typographical error. In its decision on the Applicant's request to re-open, the RAD acknowledged that the record was received on time and that this was not the issue. Rather, the Applicant was required to correct the deficiencies in the record and resubmit it.

[18] Referring to the Applicant's submissions on the Checklist, the Respondent's position is that this has no bearing on the judicial review of the RAD's decision. The Checklist correctly captures that the items referenced by the Applicant were not included in his record. He did not include in his record the RPD Notice of Decision and Reasons, which is a necessary pre-condition to perfecting his appeal. Not having included this material, it is unclear what type of flexibility the Applicant could reasonably have expected from the RAD.

V. Analysis

[19] Section 3 of the RAD Rules, which is referenced in the impugned decision, provides as follows:

3. (1) To perfect an appeal, the person who is the subject of the appeal must provide to the Division two copies of the appellant's record.

3. (1) Pour mettre en état un appel, la personne en cause transmet à la Section deux copies du dossier de l'appelant.

(2) The Division must provide a copy of the appellant's record to the Minister without delay.

(2) La Section transmet sans délai au ministre une copie du dossier de l'appelant.

(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

(3) Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

(a) the notice of decision and written reasons for the Refugee Protection Division's decision that the appellant is appealing;

a) l'avis de décision et les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel;

(b) all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript in the appeal, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;

b) la transcription complète ou partielle de l'audience de la Section de la protection des réfugiés, si l'appelant veut l'invoquer dans l'appel, accompagnée d'une déclaration signée par le transcripteur dans laquelle celui-ci indique son nom et atteste que la transcription est fidèle;

(c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if

c) tout document que la Section de la protection des réfugiés a refusé d'admettre en preuve pendant ou après

the appellant wants to rely on the documents in the appeal;

l'audience, si l'appelant veut l'invoquer dans l'appel;

(d) a written statement indicating

d) une déclaration écrite indiquant :

(i) whether the appellant is relying on any evidence referred to in subsection 110(4) of the Act,

(i) si l'appelant invoque des éléments de preuve visés au paragraphe 110(4) de la Loi,

(ii) whether the appellant is requesting that a hearing be held under subsection 110(6) of the Act, and if they are requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing, and

(ii) si l'appelant demande la tenue de l'audience visée au paragraphe 110(6) de la Loi et, le cas échéant, s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66,

(iii) the language and dialect, if any, to be interpreted, if the Division decides that a hearing is necessary and the appellant needs an interpreter;

(iii) la langue et, le cas échéant, le dialecte à interpréter, si la Section décide qu'une audience est nécessaire et que l'appelant a besoin d'un interprète;

(e) any documentary evidence that the appellant wants to rely on in the appeal;

e) tout élément de preuve documentaire que l'appelant veut invoquer dans l'appel;

(f) any law, case law or

f) toute loi, jurisprudence

other legal authority that the appellant wants to rely on in the appeal; and

ou autre autorité légale que l'appelant veut invoquer dans l'appel;

(g) a memorandum that includes full and detailed submissions regarding

g) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) the errors that are the grounds of the appeal,

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,

(iii) how any documentary evidence referred to in paragraph (*e*) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant,

(iii) la façon dont les éléments de preuve documentaire visés à l'alinéa e) sont conformes aux exigences du paragraphe 110(4) de la Loi et la façon dont ils sont liés à l'appelant,

(iv) the decision the

(iv) la décision

appellant wants the Division to make, and	recherchée,
(v) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held.	(v) les motifs pour lesquels la Section devrait tenir l'audience visée au paragraphe 110(6) de la Loi, si l'appelant en fait la demande.
(4) The memorandum referred to in paragraph (3)(*g*) must not be more than 30 pages long if typewritten on one side or 15 pages if typewritten on both sides.	(4) Le mémoire prévu à l'alinéa (3)g) ne peut comporter plus de trente pages dactylographiées au recto seulement ou quinze pages dactylographiées aux recto et verso.
(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.	(5) Le dossier de l'appelant transmis en application de la présente règle doit être reçu par la Section dans le délai prévu par le Règlement pour mettre en état un appel.

[20] It is clear to the Court that the RAD's decision to dismiss the Applicant's appeal was based on failure to perfect the appeal in accordance with Section 3 of the RAD Rules, not based on a misunderstanding of the timing of the Applicant's filing of his memorandum. Both the RAD's Reasons for Decision and its Notice of Decision state that the appeal is dismissed for lack of perfection. While the decision notes the filing of the memorandum and mistakenly records the date as April 10, it was not the failure to file the memorandum by the April 8 deadline that resulted in the dismissal. The RAD's decision is dated May 15, 2015 and notes that, to that date (which was more than 5 weeks after the April 8 deadline), the Applicant still had not filed the perfected appeal record or an application for an extension of time to perfect the appeal. The only

possible interpretation of these reasons is that it was deficiencies in the record that still existed on May 15, 2015, and not a mistaken belief that the memorandum had been filed two days late in April, that resulted in the dismissal.

[21] This interpretation of the decision is supported both by the language of the decision and by reference to the April 10, 2015 fax that was sent to the Applicant's counsel. The decision refers to that fax as advising counsel of the deficiencies in the record. The deficiencies identified in the fax were the failure to provide the notice of decision, reasons for the RPD's decision and the written statement, required respectively by Sections 3(3)(a) and (d) of the RAD Rules. There is no mention in the fax of the Applicant's memorandum having been filed late.

[22] I do not consider the RAD's Checklist to assist the Applicant with his arguments. While he correctly points out that there were changes made to the Checklist, which appears originally to have reflected the record being filed on time, these changes do not present as a result of a misunderstanding of when the Applicant's memorandum was filed but rather as a recognition that there were deficiencies on the record. The Checklist records that the memorandum had been filed but that other documents, including those identified in the April 10, 2015 letter to the Applicant's counsel, had not been provided, and concludes with a note that appears to be a reference to the intention to send that letter.

[23] I therefore find no basis to conclude that the RAD erred, as argued by the Applicant, in dismissing the appeal based on an erroneous understanding that the memorandum had been filed on April 10, 2015.

[24] I must also reject the Applicant's argument that the RAD ignored the Applicant's affidavit regarding perfection of the appeal. That affidavit was sworn by the Applicant's former counsel on June 17, 2015 and submitted to the RAD in support of the application to re-open the appeal. In one of the paragraphs of the affidavit, the Applicant's former counsel states that he did not receive the April 10, 2015 letter. This affidavit was included in the Respondent's Record in this judicial review application, which the Respondent explains was for purposes of providing the Court with a full factual background including documentation related to the application to re-open the appeal. However, the Respondent submits that, as the affidavit post-dates the RAD's decision to dismiss the appeal, it cannot be argued that it should have been taken into account by the RAD in reaching that decision.

[25] The Respondent's position on this issue is of course correct. I do consider the affidavit to be properly before the Court in this judicial review application. This is both because the subsequent application to re-open forms part of the overall factual context of this matter and because, when an issue of procedural fairness is raised as it is in this case, it is permissible to introduce evidence that was not before the maker of the impugned decision to demonstrate the alleged unfairness (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22). I will consider the impact of this affidavit when I analyze below the Applicant's arguments based on natural justice and procedural fairness. However, the fact that the affidavit can be considered for this purpose does not mean that, as argued by the Applicant, the RAD can be faulted for failing to consider this affidavit in reaching its decision. If the Applicant was challenging the RAD's decision not to re-open the appeal, he could of course argue that the affidavit was not considered. However, this

argument is illogical when applied to the decision that is the subject of the present judicial review, as the affidavit did not exist when that decision by the RAD was made.

[26] Turning to the argument that the RAD should have applied its rules more flexibly, the Applicant refers the Court to paragraph 16 of Justice Diner's recent decision in *Huseen*:

> [16] In my view, the door should not slam shut on all those who fail to meet ordinary procedural requirements. Such a restrictive reading would undermine Canada's commitment to its refugee system and underlying international obligations (section 3(2) of the Act). Indeed, one of the purposes of the *Refugee Convention*, to which Canada is a signatory, is to allow refugees the widest possible exercise of fundamental rights and freedoms (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, at para 27).

[27] *Huseen* involved a judicial review of a decision of the RPD denying an application to re-open a refugee claim, which had been declared abandoned after the claimants failed to submit certain forms on time and to appear at an abandonment hearing. In declining to re-open the claim, the RPD stated that "ignorance of the law is no excuse" and concluded that no violation of natural justice had occurred. The Court disagreed with that conclusion on the basis that the RPD had failed to take into account the claimants' personal circumstances surrounding the missed deadline, including their request for a change of venue. It relied on various decisions of this Court that had found breaches of natural justice, even when an applicant had missed a deadline or hearing, where the decision maker did not consider all the evidence before it, including reasons that could have justified the delay or conduct.

[28] The Applicant also relies on *Garduno*, in which a refugee claim had been declared abandoned and the claimant applied to re-open on the basis that the notice of their hearing, which

they failed to attend, had been sent to an outdated address. Justice de Montigny found that the RPD had erred in refusing to re-open the refugee claim, because it had ignored the claimant's affidavit evidence that he had informed the RPD of his new address.

[29] Finally, the Applicant cites *Anjum v Canada (Minister of Citizenship and Immigration)*, 2004 FC 496, in which an abandonment decision by the RPD was quashed because it had not applied the correct test and therefore had not considered factors relevant to the application of that test.

[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. In the authorities relied upon by the Applicant, the Court's decisions were all based on an error by the administrative decision-maker, in failing to observe and apply the correct test or failing to take into account evidence that was before it explaining why particular procedural requirements had not been met. There were no such failures on the part of the RAD in the present case.

[31] It was clear that the Applicant's appeal record had not been perfected, as it was missing the documents required by Sections 3(3)(a) and (d) of the RAD Rules. Before dismissing the appeal for lack of perfection, the RAD wrote to the Applicant's counsel to identify the deficiencies in the record and afford an opportunity to seek an extension of time for perfection. It also had the benefit of the Transmission Verification Report, contained in the Certified Tribunal

Record, which confirms that this letter was successfully transmitted by fax to the Applicant's former counsel's fax number on April 10, 2015.

[32] The Applicant refers to his former counsel's affidavit, stating that he did not receive this letter. However, he has provided no explanation for this in the context of the Respondent's evidence that the letter was successfully transmitted by fax. He has also referred the Court to no authority that, if unbeknownst to the RAD the fax somehow did not come to his counsel's attention, this would undermine the procedural fairness of the RAD's decision.

[33] Rather, the Applicant argued that, not having received the letter, he did not have the benefit of a reminder of what was required in order to perfect his record and did not know what was missing when he filed his subsequent application to re-open the appeal. However, the RAD's decision on the application to re-open is not the subject of this judicial review. I also note that, pursuant to Section 49(6) of the RAD Rules, the basis for the RAD to re-open an appeal is a failure to observe a principle of natural justice. As such, the Applicant had the opportunity to raise alleged denials of natural justice in that application. The affidavit of his former counsel filed in support of the application to re-open includes the statement that he did not receive the April 10, 2015 letter, which clearly demonstrates that he was aware of that issue at that time. However, his submissions on that application did not argue that issue as a basis for relief. I also note that the Applicant was represented by counsel throughout these events.

[34] Having considered the arguments and authorities on which the Applicant relies, whether applying a standard of reasonableness or correctness, I can identify no error on the part of the RAD in the present case in dismissing the appeal for lack of perfection.

[35] Neither party proposed a question of general importance for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2812-15
STYLE OF CAUSE:	SYED MOHSIN RAZA V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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