Federal Court  Cour fédérale

**Date: 20180705**

**Docket: IMM-1-18**

**Citation: 2018 FC 695**

**Toronto, Ontario, July 5, 2018**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**CANAN ATIM**

**Applicant**

**And**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicant, a citizen of Turkey, seeks judicial review of the December 4, 2017 decision [Decision] of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB], which denied the Applicant's request that the RAD reopen her appeal from a negative refugee determination by the Refugee Protection Division [RPD] of the IRB, such appeal having been dismissed by the RAD for lack of perfection on August 21, 2017. For

the reasons that follow, I have not been persuaded that the RAD's decision was unreasonable. As a result, I am dismissing the judicial review application [Application].

## II. Background

[2] In her affidavit submitted to the RAD, filed in support of her application to reopen, the Applicant deposed that she was encouraged to hire new counsel to assist in her appeal of the negative RPD decision. Thus, although she was represented before the RPD by counsel [First Lawyer], she sought assistance from a different lawyer [Second Lawyer] for the purposes of her proceedings before the RAD.

[3] The Applicant deposed that she met with the Second Lawyer on June 9, 2017. By text messages dated June 13, 2017 (attached as exhibits to the Applicant's affidavit), the Applicant's aunt advised the Second Lawyer that she had attempted to obtain the Applicant's file from the First Lawyer, but was told that she needed the Second Lawyer to send him the Applicant's signed consent. The Applicant's aunt, who sent messages on her behalf, stated that time for the appeal was short, and the Applicant was "nervous". The Second Lawyer responded that the Applicant was to come to his office that day, and that she should file the notice of appeal in her own name, as he would become her lawyer "when legal aid pays or you pay me".

[4] The Applicant deposed that, later that day (June 13, 2017), she provided the Second Lawyer with her file and Legal Aid Certificate number, and he filled out her notice of appeal forms, but did not put his own name on the forms as counsel. The Applicant then submitted her notice of appeal forms to the RAD that same day.

[5] By text messages dated June 21, 2017, the Second Lawyer advised the Applicant's aunt that legal aid funding was denied and that he required a retainer of $2,500 by "Sunday" (presumably, June 25, 2017) in order to perfect the Applicant's appeal "on the June 29, 2017 deadline". He further advised that if the retainer was received late, her appeal would be perfected late, necessitating a late filing motion. The Applicant's aunt paid the retainer by e-mail money transfer the next day (June 22, 2017).

[6] By text messages dated June 23, 2017, the Applicant advised the Second Lawyer that she had received correspondence from the RAD, and he replied that he was aware of it. Although it is not clear from the Certified Tribunal Record, presumably this correspondence was the letter from the RAD dated June 19, 2017 stating that the Applicant's appeal record was due by July 4, 2017.

[7] By text messages dated July 3, 2017, the Second Lawyer asked the Applicant's aunt when the Applicant would be receiving additional evidence from her family, writing, "I need to know because your file is due Tuesday. If we are waiting for evidence to file that is ok but we will have to file late. Can you put it in writing that it is ok to wait and that there is new evidence!" The Applicant's aunt responded, "…do you want me to write a letter to RAD about new evidence? I didn't understand that part". The Second Lawyer replied, "I just needed you to recognize that we would be submitting the new letter from youblate [sic]. This means the appeal is late […] I will submit the appeal a day or two after you get me the family latter [sic]. Just updating you that this is how case will proceed […] I have to be sure about what's happening when we decide to file late."

[8] By messages dated July 10, 2017, the Applicant's aunt advised the Second Lawyer that the additional evidence was ready and would be couriered to his office. The Second Lawyer replied "I can file the appeal within a week of trying that letter [sic]". The Applicant deposed that she provided the Second Lawyer with the additional evidence sent from her mother in Turkey on July 21, 2017.

[9] A month later, on August 21, 2017 (a Monday), the Applicant's aunt text messaged the Second Lawyer, writing: "We haven't heard from you since we see you. You told us " [sic] you will send me a email what kind of letter you will need from me or [the Applicant] . We look forward to hear from you. Thank you". The Second Lawyer responded that he would be working on the Applicant's file "tomorrow and Wednesday". Other text messages attached as exhibits to the Applicant's affidavit show that the Second Lawyer asked, on August 25, 2018, that the Applicant come "Tuesday at 2:00" (which would have been August 29, 2017), presumably to his office. The Applicant's aunt replied, "Of course we will be there".

[10] However, on August 28, 2017, the Applicant received the RAD's decision dismissing her appeal for lack of perfection. She went the next day to see the Second Lawyer, who returned her money. She deposes that she then communicated with a number of other lawyers, including one who delayed fifteen days before advising that she would not take on the Applicant's case. She ultimately retained another lawyer [Third Lawyer], who represented her in her request for the RAD to reopen her appeal.

[11] The Applicant did not file written submissions in support of her application to reopen. The Third Lawyer simply stated, in the application, that the grounds for reopening the Applicant's RAD appeal were "the interests of natural justice". As mentioned, in support of her application to the RAD, the Applicant submitted an affidavit attaching as exhibits the text messages between her aunt and the Second Lawyer. She also submitted an affidavit from her aunt, which corroborated the Applicant's account of her interactions with the Second Lawyer.

[12] The Second Lawyer submitted three sets of materials in support of the Applicant's application to re-open her RAD appeal, stating that his medical condition was at the root of the issue. First, in a letter to the RAD dated October 26, 2017, he stated that the delay in filing the appeal record was not the Applicant's fault, enclosing his family doctor's letter stating that he suffered from "a chronic post-concussion syndrome".

[13] Next, the Second Lawyer submitted another letter on November 6, 2017, attaching a second medical letter. In his covering letter, the Second Lawyer stated:

> Please see medical letter from specialist concerning counsel medical issues which delayed filing of an appeal record for the above-mentioned client.
>
> Counsel is currently on a two week break from work as a result of the medical issues. I hope that the medical noted filed explain the breach of natural justice which has occurred and which should cause the Refugee Appeal Division to re-open the appeal.
>
> I hope to complete an affidavit over the next 5 days to explain hat has occurred in greater detail, however at present I am off work and have had to cancel several RPD hearings. I am arranging for a colleague to assist me in drafting an affidavit concerning the late filing and I hope that this will be complete by Friday November 10, 2017. The delay is a result of the break from work caused by the return f post-concussion symptoms.

[Spelling as in original.]

[14] The accompanying medical letter was dated November 3, 2017 and was authored by the Medical Director of the David L. MacIntosh Sport Medicine Clinic. It stated that "[d]uring the summer of 2017, [the Second Lawyer] was experiencing headaches and double vision associated with prolonged uninterrupted work. This caused him to miss a filing deadline with the Refugee Appeal Division".

[15] Finally, the Second Lawyer submitted his own affidavit, sworn November 10, 2017. He deposed that he suffered from post-concussion syndrome, the symptoms of which flared up "in the late summer of 2017", and caused him to require extra time to complete his work. He deposed that "this set of symptoms [was] responsible for some of the delay in filing the Appeal record" in the Applicant's file. He also confirmed that he had failed to notify the RAD after he was privately retained by the Applicant.

[16] The Second Lawyer went on to describe that the Applicant's aunt had informed him that a letter was coming from Turkey which would assist with the Applicant's appeal. He deposed that: (i) he had told the Applicant that she would have to account for the delay in filing; (ii) there was no guarantee the RAD would accept a late appeal; (iii) he received said letter from Turkey on or about July 24, 2017; (iv) he thereafter had difficulty locating a translator; (v) there were further delays in obtaining official transcripts; (vi) thereafter, his office was responsible for delays due to those contingencies; (vii) although he had begun to work on the file in earnest by that point, he was working slowly and having difficulty drafting strong arguments; (vii) he regretted the delay attributable to his condition after July 24, 2017; (ix) he had not taken any

payment from the Applicant for work rendered and refunded her retainer immediately after learning that the appeal had been dismissed for lack of perfection; and (x) he was still not working full time, as a result of double-vision and headaches.

[17] The RAD considered the various submissions, including from the Second Lawyer. However, on December 4, 2017, it dismissed the Applicant's application to reopen pursuant to Rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 [RAD Rules], finding that the Applicant had not established that there was a failure to observe a principle of natural justice when her appeal was dismissed for lack of perfection.

[18] In its Decision, the RAD noted that the appeal record was nearly two months overdue when the appeal was dismissed. It reviewed the text messages between the Applicant's aunt and the Second Lawyer, and found that he was "aware of the timelines and kept requesting updates on materials that were coming Turkey". The RAD further noted that there had been no communication to the RAD prior to the dismissal of the Applicant's appeal, including with respect to any request for an extension of time for acquiring new materials.

[19] The RAD accepted that the Second Lawyer was suffering from post-concussion syndrome and that this impacted his ability to work. However, the RAD noted that the Second Lawyer and the Applicant (through her aunt) were interacting after the Applicant's notice of appeal was filed. The RAD found that no specific information had been provided about how the Second Lawyer's medical condition impacted his ability to file for an extension of time, or alert the Applicant that he could not represent her effectively.

[20] Finally, the RAD also noted that the Applicant neither made representations as to inadequacy of her counsel with respect to the processing of her appeal, nor sought judicial review (presumably of the RAD's dismissal of her appeal).

## III. Parties' Positions

[21] The Applicant argues that there was evidence before the RAD that the Applicant's failure to perfect her appeal was not her fault, but rather was the fault of the Second Lawyer's post-concussion syndrome. She notes that the RAD expressly found that the Second Lawyer's medical condition impacted his ability to work. The Applicant submits that, as a result, the RAD's decision is unreasonable.

[22] In terms of case law, the Applicant argues that, first of all, incompetence of counsel can amount to a breach of natural justice, relying on *Balazs v Canada (Citizenship and Immigration)*, 2012 FC 596. The Applicant then argues that she was, as a result of the Second Lawyer's incompetence, denied the opportunity to present her case to the RAD. Further, the Applicant relies on *Mathon v Canada (Minister of Employment and Immigration)* (1988), 28 FTR 217 (Federal Court of Canada – Trial Division) to argue that she should not be required to bear the consequences of the Second Lawyer's errors, particularly as she had a continual intention to pursue her appeal and acted with the utmost care.

[23] The Applicant argues that a decision of an administrative tribunal may be set aside where (i) counsel was incompetent, (ii) the result of the decision would have been different but for the incompetence, and (iii) it is possible to rectify the situation without prejudice to the

opposing party. She cites a number of cases for this proposition including *Lahocsinszky v Canada (Minister of Citizenship and Immigration)*, 2004 FC 275, *Muhammed v Canada (Minister of Citizenship and Immigration)*, 2003 FC 828, and *Construction Gilles Paquette Ltée v Entreprises Végo Ltée*, [1997] 2 SCR 299 (SCC)). The Applicant also relies on the more recent decision of *Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 [*Zhu*], which summarized the law in this area as follows:

> [39] In *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 Justice Russell articulated the test for addressing allegations of ineffective or incompetent assistance of counsel:
>
> > [84] It is generally recognized that if an applicant wishes to establish a breach of fairness on this ground, he or she must:
> >
> > a. Provide corroboration by giving notice to former counsel and providing them with an opportunity to respond;
> >
> > b. Establish that former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and
> >
> > c. Establish that the outcome would have been different but for the incompetence.
> >
> > See, for example, *Memari*, above; *Nizar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 557; and *Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305.
>
> (Also see *Badihi v Canada (Citizenship and Immigration)*, 2017 FC 64 at paras 17-18; and, *Guadron* at para 18).
>
> [40] It must be established, first, that counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*GDB* at para 26). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a breach of procedural fairness (*Guadron* at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa* at para 12; *Memari* at para 36).

> [41] As stated by Justice Mosley in *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 ("*Jeffrey*"):
>
> > [9] […]The party making the allegation of incompetence must show substantial prejudice to the individual and that prejudice must flow from the actions or inaction of the incompetent counsel. It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different.
>
> (also see *Guadron* at para 11).

[24] For its part, the Respondent also relies on the case law summarized in the above paragraphs of *Zhu*, and submits that the Applicant has failed to demonstrate a breach of fairness based on the incompetence of the Second Lawyer.

[25] First, the Respondent argues that the Applicant has not given notice to the Second Lawyer of this Application, which it contends is required under the March 7, 2014 Federal Court Procedural Protocol regarding Allegations Against Counsel. That Protocol, in part, states that:

> Any perfected application which raises allegations against the former counsel or authorized representative must be served on the former counsel or authorized representative and proof of service be provided to the Court.

[26] Second, the Respondent submits that the Applicant has not established that the Second Lawyer acted in an incompetent manner. It argues that the Second Lawyer explained to the Applicant that her appeal record would be late as a result of the new evidence coming from Turkey, and that the Applicant acknowledged this. The Respondent points out that, at the time the Applicant sent her (untranslated) new evidence to the Second Lawyer, the appeal record was

already two weeks late. These materials were then further delayed due to translation, which the Respondent submits that the Applicant knew was a requirement for consideration by the RAD.

[27] The Respondent further argues that, based on the evidence in the record, the Second Lawyer's medical issues only became relevant after July 24, 2017 — namely, after the Applicant provided him with her further evidence. Specifically, as the Respondent notes, the Second Lawyer alleged that his illness only precluded him from dealing competently with the Applicant's file after July 24, 2017, when the appeal record was already well over two weeks late.

[28] The Respondent next argues that, in any event, the Applicant has not demonstrated that the outcome of her appeal would have been different but for the Second Lawyer's incompetence. It argues that the Applicant has failed to put before this Court the new evidence she received from Turkey, and that without these documents she cannot demonstrate that the result of the "original hearing" would have been different.

[29] Finally, the Respondent refers to Rule 49(7)(a) of the RAD Rules, which provides that the RAD must consider whether the application to reopen was made in a timely manner, and notes that the Applicant in this case delayed over two months before requesting a reopening.

## IV. Standard of Review

[30] In *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 [*Khakpour*], Justice Gleeson held that a decision by the RAD to decline to reopen an appeal under Rule 49(6) of the

RAD Rules is reviewed by this Court on a standard of reasonableness, notwithstanding that the RAD Rules also engage considerations of natural justice (at paras 19-21). Reasonableness applies because (i) the RAD's decision is one of mixed fact and law, and (ii) the RAD benefits from the presumption of deference in questions pertaining to the interpretation of its home statute (*Khakpour* at paras 20-21). *Khakpour* was followed in *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996 (at para 12) [*Aguirre*]).

[31] Thus, I must determine whether the RAD's decision not to reopen the Applicant's appeal is reasonable — in other words, I must be satisfied that the RAD's decision is transparent, intelligible, and justified, and that it falls within the range of acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

## V. Analysis

[32] In this judicial review, both parties frame the issue as turning on whether the Second Lawyer was incompetent. However, there is an important distinction to be made between the matter before me and the "incompetent counsel" cases cited by the parties. The Applicant did not seek judicial review of the RAD's dismissal of her appeal for lack of perfection. Had she done so, it would have been this Court's task to determine, on a correctness standard, whether the Second Lawyer's conduct amounted to a breach of natural justice.

[33] That, however, is not the case here. After the dismissal of her appeal, the Applicant applied to the RAD to reopen her file, arguing that the Second Lawyer's illness gave rise to a breach of natural justice. The RAD, after fully considering her submissions, rendered a negative

decision based on the evidence and arguments before it, and concluded that a breach of natural justice had not been shown. That Decision is now the subject of this judicial review, and the task of this Court, given the rationale in *Khakpour* and *Aguirre*, is to determine whether the RAD's Decision withstands scrutiny on a reasonableness standard. It is not, in other words, my job to make findings with respect to the competency of the Second Lawyer.

[34] With those comments in mind, I turn to the parties' arguments, many of which I find focus on the misguided assumption that I am conducting a first-level analysis of the Second Lawyer's incompetence, instead of judicially reviewing the RAD's refusal to reopen the appeal based on the impugned conduct of the Second Lawyer.

[35] First, given the nature of these proceedings, I find that the Applicant was not required to give the Second Lawyer notice of this judicial review. Incompetence of counsel is not a ground of judicial review in the matter before the Court. Rather, the Applicant's contention is that the RAD misapprehended the evidence before it in concluding that the Second Lawyer's illness had not given rise to a breach of natural justice. Further, the RAD reviewed the Second Lawyer's three sets of submissions, including his affidavit and medical letters submitted in response to the Applicant's request to reopen her appeal.

[36] I do not agree with the Respondent that the Applicant's delay in bringing her application to reopen has any bearing in this judicial review, since the RAD did not consider that as a factor in its reasons. Neither do I agree with the Respondent that the Applicant was required to put before this Court the new evidence she obtained from Turkey. It is not the Applicant's onus on

this judicial review to demonstrate that those documents would have had a material impact on the RAD's assessment of the RPD's negative determination. This Court's role in judicial review is rather to review what was before the RAD, and whether the Decision was reasonable under *Dunsmuir*.

[37] Likewise, and contrary to the Respondent's submissions, it is not the Applicant's onus to demonstrate, in this judicial review, that the Second Lawyer was incompetent. What matters is whether the RAD reasonably concluded, based on the materials before it, that the Second Lawyer's illness did not cause a breach of natural justice for the purposes of RAD Rule 49. Similarly, much of the case law cited by the Applicant is of little assistance to her in this judicial review, because this Court is not itself determining whether the Second Lawyer was incompetent, and neither were those cases nor their underlying principles put to the RAD for its consideration.

[38] Turning now to the Decision under review, I have not been persuaded that it was unreasonable. The RAD duly considered the evidence — accepting that the Second Lawyer had an illness which affected his work — but found that none of the Applicant's allegations or explanations bore on her missing the original deadline to file her appeal record, and thus perfect her appeal. Rather, everything spoke to what transpired after July 24, 2017, well after the RAD appeal deadline had passed. Although Applicant's counsel submitted in this judicial review that the Applicant was never informed by the Second Lawyer that there was a risk that her appeal would be dismissed for lack of perfection, again, this argument was not put to the RAD and so

cannot be used to now impugn the Decision (*Dougal & Co Inc v Canada (Attorney General)*, 2017 FC 1075 at para 24).

[39] Therefore, I find that it was open to the RAD to refuse the Applicant's request to reopen her appeal, based on the evidence and arguments presented to it, and based on its application of that evidence and those facts to the law, i.e., the RAD rules. I recognize that this is a difficult outcome for the Applicant who, at all times, based on the record, appeared to earnestly wish to pursue her appeal. However, considering all aspects of this matter within the parameters of this Court's role on judicial review, I have not been persuaded that the RAD's Decision fell outside of the range of reasonable outcomes.

## VI. Conclusion

[40] The Application for judicial review is dismissed. No questions for certification were argued, and none arise.

**JUDGMENT in IMM-1-18**

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

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arose.

"Alan S. Diner"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-1-18 |
| **STYLE OF CAUSE:** | CANAN ATIM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 28, 2018 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | JULY 5, 2018 |

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| Maria Burgos | FOR THE RESPONDENT |

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