Federal Court Cour fédérale

Date: 20200128

Docket: IMM-2026-19

Citation: 2020 FC 149

Ottawa, Ontario, January 28, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

SALINDE KAMBURONA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Refugee Appeal Division (RAD) who refused to hear her appeal from the Refugee Protection Division (RPD), on the ground that it did not have jurisdiction due to section 36 of the *Balanced Refugee Reform Act*, SC 2010 c 8 [*BRRA*].

[2] By way of brief background, the Applicant, Ms. Kamburona is a citizen of Namibia whose refugee claim was dismissed. She claimed that as a bisexual women, she feared her father, and for her general safety in Namibia.

[3] The Applicant arrived in Canada on October 4, 2010, and made a refugee claim the following day. In July 2012, the RPD denied her refugee claim on the grounds of credibility. She successfully sought judicial review of the RPD decision in May 2013 when Justice Kane ordered a redetermination of her refugee claim (Federal Court Action IMM-7745-12).

[4] On February 25, 2019, her claim was redetermined by the RPD and was again denied. The Applicant then filed an appeal to the RAD.

[5] On March 15, 2019, the RAD dismissed her appeal on jurisdictional grounds. The RAD stated:

> [3] On August 15, 2012, section 36 of the *Balanced Refugee Reform Act* came into force by Order in Council which was published in the Canada Gazette on that date. Subsection 36(1) establishes, where a refugee claim is referred to the RPD before August 15, 2012, there is no right of appeal to the RAD.
>
> [4] The Claim of the Appellant was referred to the RDP on October 5, 2012. Therefore, this appeal is dismissed for lack of jurisdiction.

[6] The RAD dismissed the appeal on the basis that it did not have jurisdiction. Although the RAD decision refers to the wrong referral date, based upon a full review of the record, it is clear the date the RAD intended to refer to was October 5, 2010 and not October 5, 2012. Therefore, for the reasons that follow, this judicial review is dismissed.

ISSUES

[7] The issues raised by the Applicant are:

1. What is the appropriate standard of review?
2. What was the referral date?
3. Was the RAD's finding that it did not have jurisdiction reasonable?

ANALYSIS

What is the appropriate standard of review?

[8] The Applicant urged the Court to apply the standard of correctness to the RAD's conclusion that it did not have jurisdiction. The Applicant argues that jurisdictional issues are subject to the correctness standard.

[9] However, the RAD decision on whether it has jurisdiction to hear an appeal is not a true question of jurisdiction, but rather, a question of statutory interpretation (*George v Canada (Citizenship and Immigration)*, 2016 FC 884 at para 9). There is a rebuttable presumption that reasonableness will be the standard of review for substantive review of administrative decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 23 [*Vavilov*]). Statutory interpretation is not one of the exceptions to this presumption; "[m]atters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard" (*Vavilov* at para 115).

[10] Here, the reasonableness standard of review applies.

What was the referral date?

[11] During submissions, the Applicant argued that the RAD got the referral date wrong. She argues that the "referral date" is the date Justice Kane ordered the matter back to the RPD for redetermination (May 16, 2013). The Applicant argues that the redetermination was a "*de novo*" consideration of her refugee claim, therefore the date the reconsideration was ordered (May 16, 2013) is the appropriate date to use as the "referral date". In my view, this submission has no merit.

[12] Justice Kane's Order did not have any impact on the applicable "date of referral" for the purposes of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Justice Kane ordered a redetermination of the Applicant's refugee claim; the date of referral is related to the timing of the Applicant filing her refugee claim, not the timing of subsequent orders of this Court. Further, Justice Kane's Order does not contain any analysis pertaining to s. 36 of the *BRRA*, or its affect on the Applicant's right to appeal to the RAD in the event that her claim before the RPD was unsuccessful a second time.

[13] Additionally, the Applicant's argument that the referral date is October 5, 2012, must also fail. Despite the reference in the RAD decision to what is clearly a wrong date, when the decision considered against the full record, it is clear that the RAD's reference to October 5, 2012 is a typographical error. The Applicant's Personal Information Form (PIF) lists October 5, 2010 as the date the Applicant claimed refugee protection. Additionally, the RAD Request Record, which forms part of the CTR, states that the referral date was October 5, 2010, as does the Jurisdiction and Early Review Checklist, which is also part of the CTR.

[14] The Applicant has not provided any case law to support her claim that the words "referred to the RPD" means anything other than a point in time when the claim is determined to be eligible by an Officer. As a result, I find that the Applicant's referral date was neither October 5, 2012 nor May 16, 2013, but was October 5, 2010.

Was the RAD's finding that it did not have jurisdiction reasonable?

[15] Section 36(1) of the *BRRA* states:

No appeal to Refugee Appeal Division	Aucun appel en cas de rejet de la demande
36. (1) A decision made by the Refugee Protection Division before the day on which this section comes into force is not subject to appeal to the Refugee Appeal Division.	36. (1) N'est pas susceptible d'appel devant la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés rendue avant la date d'entrée en vigueur du présent article.

[16] An Order in Council dated August 15, 2012 (SI/2012-65) brought section 36 of the *BRRA* into force on August 15, 2012 (*Mathos v Canada (Citizenship and Immigration),* 2017 FC 1050) [*Mathos*].

[17] The Applicant relies on *Mathos* in support of her position that the RAD had jurisdiction to hear her appeal. Although *Mathos* is of no assistance to the Applicant's argument, it does contain a review of the legislative history of s. 36(1) of the *BRRA.* In *Mathos,* the Court noted that Parliament passed section 167 of the *Economic Action Plan 2013 Act, No 1,* SC 2013 c 33 [*EAP*] which extended the date to which appeals to the RAD from the RPD were barred for claims referred to the RPD from August 15, 2012 to December 15, 2012. The referral date in

Mathos was December 13, 2012, and therefore an appeal to the RAD was barred and the judicial review was dismissed.

[18] The Applicant also relies upon *Y.Z. v Canada (Citizenship and Immigration)*, 2015 FC 892 [*Y.Z.*] to argue that access to the RAD is a substantial benefit and that the deprivation of this benefit can only be remedied by making the date of her successful 2013 judicial review application the applicable referral date. Although the Court in *Y.Z.* did find that access to the RAD is a "substantial benefit" (*Y.Z.* at para 129), *Y.Z.* involved a different factual context in which there was a denial of access to the RAD for all claimants who came from designated countries. It was in that context that the Court found a violation of section 15 of the *Canadian Charter of Rights and Freedoms* and declared s. 110(2)(d.1) of *IRPA* invalid. However, this factual situation is entirely different, and the Applicant has decided not to advance the constitutional argument she made in her written submissions. In the absence of any such argument, there are no grounds upon which to declare s. 36 of the *BRRA* invalid; all that remains is the assessment of whether the RAD's finding that it did not have jurisdiction due to s. 36 of the *BRRA* was reasonable.

[19] Although the Applicant argues that the decision itself is unintelligible, the contents of the CTR must be considered as part of the overall context of the decision and must be read along with the decision (*Vavilov* at para 103):

> … formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis… A decision will also be unreasonable where the

> conclusion reached cannot follow from the analysis undertaken …or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical. [Citations omitted].

[20] One clerical error is not a sufficient ground to find this decision unreasonable. When the reasons are read in light of the record, it reveals a rational chain of analysis on a critical point, which is that October 5, 2012 must not have been the Applicant's referral date because the RPD first heard her claim on April 30, 2012 and issued its decision on July 5, 2012. The Applicant's matter could not have been referred to the RPD for the first time after it had already heard and decided her case. Further, the CTR references the referral as being October 5, 2010 in two different places. As a result, I find that the clerical error is not sufficient ground to render the full decision unreasonable.

[21] Given that the Applicant has not demonstrated why s. 36 of the *BRRA* should not apply or that the referral date falls outside the timeframe during which there was no right of appeal to the RAD, I see no reason to disturb the RAD's decision.

[22] This judicial review is dismissed. There is no question for certification.

JUDGMENT in IMM-2026-19

THIS COURT'S JUDGMENT is that the judicial review is dismissed. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2026-19
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