Federal Court  Cour fédérale

Date: 20200204

Docket: IMM-3074-19

Citation: 2020 FC 197

Ottawa, Ontario, February 4, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

MARGARITA ROSA CASTRO LOPEZ
HENRY RODRIGUEZ ZAMBRANO
LAURA SOPHIA RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Following the refusal of their refugee claim, the Applicants filed a Notice of Appeal to the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB]. The RAD dismissed their appeal due to lack of perfection. Alleging inadequate representation by their former counsel, the Applicants requested their appeal be reopened and considered on the

merits. On April 16, 2019, the RAD found no breach of natural justice and refused to reopen the appeal. The Applicants now seek judicial review of the RAD's refusal to reopen their appeal, pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. BACKGROUND

[2] The Applicants, Ms. Margarita Rosa Castro Lopez, Mr. Henry Rodriquez Zambrano, and their minor child are citizens of Colombia. They sought refugee protection on the basis of their fear of persecution from the *Autodefensas Unidas de Colombia* [AUC] and affiliated groups. On February 26, 2012, the AUC allegedly seized their family farm in the Cauca Valley region by force after accusing Ms. Castro Lopez' father of being a guerilla supporter. The Applicants complied with threats to leave or be killed and fled to Cali, Colombia. After reporting the incident to the Fiscalia, they were allegedly advised that if they remained, they would be declared military targets and the state could not protect them. The Applicants fled to the United States [US] on March 2, 2012 and settled in Nashville, Tennessee, where they had previously lived for a number of years. In the meantime, Ms. Castro Lopez' father relocated to Medellin, Colombia.

[3] On or about May 4, 2015, Ms. Castro Lopez' father was found dead on the farm, his cause of death unknown. In 2017, following crackdowns on irregular immigrants in the US, the Applicants—who had never applied for asylum in the US following the alleged events in Colombia—travelled to Canada and applied for refugee protection.

A. *The RPD's Denial of their Claim*

[4] At the outset, the Refugee Protection Division [RPD] of the IRB found the minor child, a US citizen by birth, was not personally a Convention refugee or person in need of protection, and did not increase the adult Applicants' risk profiles in Colombia.

[5] Finding that the Applicants were victims of crime with no nexus to a Convention ground as required by s 96 of the *IRPA*, the RPD assessed the Applicants' risk solely against s 97. Initially expressing doubt the AUC continued to operate, the RPD nonetheless accepted one division of the *Bandas Criminales* may have absorbed former AUC members and continued to operate post-2006. The RPD therefore conducted a two-part internal flight alternative [IFA] analysis and found the alleged threat was, on a balance of probabilities, localized to the Cuaca Valley region and that the Applicants could reasonably relocate to Bogota, Colombia. As such, the RPD dismissed the claim based on their having access to a viable IFA.

B. *The Imperfect Appeal to the RAD*

[6] The RAD noted s 159.91(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] requires applicants to perfect their appeal within 30 days after the day on which they receive written reasons for the decision. As of October 18, 2018—the date the Applicants were required to perfect their appeal—the RAD had not received the Applicants' record nor an application for an extension of time. Accordingly, the RAD dismissed the appeal for lack of perfection on December 19, 2018. The Applicants were subsequently issued a Direction to Report on February 21, 2019.

C. *Request to Reopen the Appeal*

[7] On February 25, 2019, the Applicants filed an application with the RAD to reopen their appeal pursuant to ss 37 and 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]. The Applicants explained that their former counsel, Mr. Luis Antonio Monroy, had filed their Notice of Application for their appeal on October 4, 2018 after receiving limited funding from Legal Aid Ontario [LAO] to draft an opinion on the merits of their appeal. They stress that a positive opinion was required to secure additional funding under LAO's funding policies. Despite their subsequent efforts to contact Mr. Monroy, they allege they were never able to re-establish contact on the status of their appeal. Ms. Castro Lopez swore she understood Mr. Monroy would be perfecting their appeal, as he had allegedly advised that he could reverse a negative decision after their hearing, had filed the Notice of Appeal, and had never advised them otherwise. The Applicants later discovered Mr. Monroy had inadvertently failed to submit the LAO opinion, which meant they failed to secure the necessary funding to pursue their appeal.

[8] In his responding affidavit, Mr. Monroy explained he had advised the Applicants he did not see merit to their appeal and therefore did not expect the Applicants' LAO funding application would succeed. He further explained he had drafted a negative merit opinion to LAO on October 6, 2018 as required by the Certificate and, until he was alerted otherwise, believed he had filed it the same day. Nonetheless, Mr. Monroy claimed he advised the Applicants he would pursue their appeal only if they paid privately, and recommended they instead file an application for humanitarian and compassionate [H&C] relief as it was the same cost and was more likely to yield better results. He explained that he signed their Notice of Appeal to maintain their appeal

rights but intentionally did not sign their Notice of Appeal as counsel of record, never advised the Applicants he would represent them on their appeal without a private retainer given the low likelihood of success, and remained contactable with respect to their potential application for H&C relief.

D. *Stay of Removal*

[9] On March 15, 2019, the Applicants were granted a stay pending this judicial review (*Castro Lopez v Canada (Immigration, Refugees and Citizenship)*, 2019 CanLII 21160 (FC)).

III. DECISION UNDER REVIEW

[10] On April 16, 2019, the RAD declined to reopen the Applicants' appeal, concluding that they had not demonstrated a failure to observe a principle of natural justice during the initial dismissal: *RAD Rules* at s 49(6). The RAD based its conclusion on the following:

a. the Applicants had benefitted from LAO assistance during their refugee claim and initial opinion assessment, as well as from the additional support of a social worker;

b. Mr. Monroy had advised them of their appeal deadlines after receiving their negative RPD decision, and continued communication with respect to the H&C application. The RAD found the Applicants did not disclose these continuing conversations related to the H&C application, and were therefore not consistent with the record and Mr. Monroy's statements;

c. Despite not filing the merit opinion to LAO, Mr. Monroy had turned his mind to their application and had consulted with the Applicants. The RAD felt Mr. Monroy's failure to file the merit opinion was not fatal to the Applicants not receiving continued LAO funding; and

d. Mr. Monroy was not listed as counsel on the Notice of Appeal, nor was there any persuasive documentation to confirm any contractual relationship between the Applicants and Mr. Monroy in respect of perfecting their appeal.

IV. ISSUES

[11] The only issue raised in the present matter is whether the RAD err in refusing to reopen the appeal.

V. STANDARD OF REVIEW

[12] The standard of review applicable to the RAD's refusal to reopen an application is reasonableness (*Djilal v Canada (Citizenship and Immigration)*, 2014 FC 812 at paras 6-7; *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at paras 20-21; *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at paras 30-31 [*Atim*]).

[13] As recently enumerated in *Vavilov*, reasonableness is equally concerned with the decision-maker's reasoning process and the ultimate outcome (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 83, 87 [*Vavilov*]). To satisfy the reasonableness standard, the decision must be internally coherent and justified in light of the factual and legal

constraints relevant to the decision, and sufficiently responsive to parties' submissions so as to demonstrate engagement with the core aspects of the Applicants' concerns (*Vavilov* at paras 102-107, 127-128).

VI. STATUTORY PROVISIONS

[14] *RAD Rule* 49 governs an application to reopen an appeal to the RAD:

Application to reopen appeal	**Demande de réouverture d'un appel**
49 (1) At any time before the Federal Court has made a final determination in respect of an appeal that has been decided or declared abandoned, the appellant may make an application to the Division to reopen the appeal.	49 (1) À tout moment avant que la Cour fédérale rende une décision en dernier ressort à l'égard de l'appel qui a fait l'objet d'une décision ou dont le désistement a été prononcé, l'appelant peut demander à la Section de rouvrir cet appel.
Form and content of application	**Forme et contenu de la demande**
(2) The application must be made in accordance with rule 37. If a person who is the subject of an appeal makes the application, they must provide to the Division the original and a copy of the application and include in the application their contact information and, if represented by counsel, their counsel's contact information and any limitations on counsel's retainer.	(2) La demande est faite conformément à la règle 37. Si la demande est faite par la personne en cause, celle-ci transmet à la Section l'original et une copie de la demande et indique dans sa demande ses coordonnées et, si elle est représentée par un conseil, les coordonnées de celui-ci et toute restriction à son mandat.
Documents provided to Minister	**Documents transmis au ministre**
(3) The Division must provide to the Minister, without delay,	(3) La Section transmet sans délai au ministre une copie de

a copy of an application made by a person who is the subject of an appeal .

la demande faite par la personne en cause.

Allegations against counsel

Allégations à l’égard d’un conseil

(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,

(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) 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

a) la personne en cause transmet une copie de la demande au conseil, puis l’original et une copie à la Section;

(b) the application provided to the Division must be accompanied by proof that a copy was provided to the counsel.

b) la demande transmise à la Section est accompagnée d’une preuve de la transmission d’une copie au conseil.

Copy of pending application

Copie de la demande en instance

(5) The application must be accompanied by a copy of any pending application for leave to apply for judicial review or any pending application for judicial review.

(5) La demande est accompagnée d’une copie de toute demande d’autorisation de présenter une demande de contrôle judiciaire en instance ou de toute demande de contrôle judiciaire en instance.

Factor

Élément à considérer

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.

(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

Factors

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

(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.

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 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.

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.

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.

Other Remedies

(9) If there is a pending application for leave to apply for judicial review or a pending application for judicial review on the same or similar grounds, the Division must, as soon as is practicable, allow the application to reopen if it is necessary for the timely and efficient processing of appeals,

Autres recours

(9) Si une demande d'autorisation de présenter une demande de contrôle judiciaire en instance ou une demande de contrôle judiciaire en instance est fondée sur des motifs identiques ou similaires, la Section, dès que possible, soit accueille la demande de réouverture si cela est

or dismiss the application.	nécessaire pour traiter avec célérité et efficacité les appels, soit rejette la demande.

VII. ARGUMENTS

A. *Applicants*

[15] The Applicants submit the RAD unreasonably ignored and misstated relevant evidence. First, by uncontrovertibly adopting Mr. Monroy's version of events the Applicants submit the RAD failed to consider they may have held different interpretations of these same events. Consequently, the RAD failed to assess the Applicants' subjective and reasonable understanding that their appeal was being handled by Mr. Monroy—something Mr. Monroy's evidence did not explicitly refute. The Applicants stress Mr. Monroy never confirmed he was not working on their appeal and, in his subsequent email advising of their appeal timelines, invited them to contact him should they have any questions. When they attempted to seek clarification on their appeal, their questions remained unanswered despite Mr. Monroy's ability to be contacted on other matters.

[16] Second, the Applicants submit the RAD showed a lack of awareness and understanding of LAO's funding procedures. Contrary to the RAD's conclusion that Mr. Monroy's failure to submit the merit opinion "did not prevent the Applicants from obtaining funding from Legal Aid…," in reality LAO would not provide any further funding without a positive opinion. Moreover, the Applicants submit the phrase "You need to find a lawyer **who is willing to accept** your legal aid case" (emphasis added), found on the LAO Eligibility form, suggests that where counsel accepts an LAO Certificate for a merit opinion they must believe in the merits of the

case. Given that Mr. Monroy had accepted their LAO Certificate, it was reasonable for the Applicants to believe he was representing them throughout the appeal. Their belief in such was further evidenced by their failure to contact other counsel. The Applicants submit that, by filing his negative opinion (after being alerted to his oversight), Mr. Monroy further prejudiced them because their new counsel was subsequently precluded from accessing LAO funding.

[17] Third, the Applicants submit the RAD failed to appreciate they had a contractual relationship with Mr. Monroy. They emphasize Mr. Monroy interpreted the Notice of Appeal to them at the time of filing, and that there was no evidence to suggest he clearly emphasized he was not listing himself as counsel when doing so. The Applicants' continuing to contact him post-filing further indicates they believed he represented them throughout the entire appeal. Moreover, the Applicants emphasize the LAO Certificate is akin to a retainer: by accepting to provide the merit opinion, Mr. Monroy created a contractual relationship for the appeal. They further note he failed to take steps to remove himself as their representative with the LAO.

[18] Finally, the Applicants submit that the RAD failed to consider that they had always maintained an intention to pursue their appeal and that the Minister would not be prejudiced in any way by the reopening. The Applicants emphasize that the *RAD Rules* must be interpreted liberally so that claims can be heard on their merits (*Andreoli v Canada (Citizenship and Immigration)*, 2004 FC 1111 at paras 20-23; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 27). As such, procedural defects alone should not preclude decisions on their merits (*Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 at paras 23, 35). Despite this, the RAD applied an unreasonably strict interpretation of *RAD Rule* 49(6) by

focusing solely on timelines, and failed to consider the Applicants' ongoing intention, the difficulty they faced with Mr. Monroy as counsel, their language barriers, and the difficulties associated with LAO funding.

[19] Responding to the Minister's submissions, the Applicants assert they implicitly raised the issue of Mr. Monroy's actions further prejudicing their ability to seek LAO funding, and their continuing intention to proceed with their appeal, before the RAD. Conceding *Atim* does suggest such arguments cannot be raised on judicial review where they are not raised before the RAD, the Applicants submit *Atim* is distinguishable because, unlike in *Atim* and its underlying authorities, no new evidence was placed before the Court (*Atim* at para 38; *Dougal & Co v Canada (Attorney General)*, 2017 FC 1075 at paras 21-25). As Mr. Monroy was no longer retained, it was also implicit he had no authority to file additional submissions to LAO, and that by seeking to reopen the Applicants had maintained their intention to appeal.

B. *Respondent*

[20] The Minister maintains the RAD reasonably dismissed the reopening request and asserts the Applicants' application amounts to no more than a request for this Court re-weigh the evidence. Ultimately, the RAD correctly determined that the result of the hearing on the merits would not have been different but for the Applicants' former counsel's actions (*Etik v Canada (Citizenship and Immigration)*, 2019 FC 762 at para 9).

[21] Contrary to the Applicants' submissions, the Minister submits the LAO Certificate did not provide Mr. Monroy an unrestricted right to continued funding; rather, it allowed only for his

assessment and opinion on the merits of the case moving forward. In this respect, the evidence demonstrated Mr. Monroy had reviewed the file and determined there was an insufficient likelihood of success. The Minister stresses it was not the role of the RAD to determine whether Mr. Monroy was (in)competent: *Atim* at para 37. Rather, the RAD reasonably confirmed Mr. Monroy had turned his mind to the merits of the appeal, had consulted with the Applicants, and had advised them of their options and his recommendation to file an H&C application—all steps which demonstrated respect for natural justice. That the Applicants interpreted these events differently is not in itself a breach of natural justice. Similarly, the Minister emphasizes Mr. Monroy's continued communication regarding the H&C file corroborated his version of events, and it was reasonable for the RAD to rely on his assessment.

[22] The Minister asserts the Applicants did not raise the issue of Mr. Monroy's displacing a potentially positive opinion with his late-filed negative opinion before the RAD. As such, this argument cannot be used now to impugn the RAD's decision. Moreover, the Minister notes Mr. Monroy's late filing did not change the fact that the Applicants' appeal was unlikely to succeed, based on his opinion.

[23] Finally, the Minister submits that the test to re-open required the Applicants to demonstrate a breach of natural justice or fairness. Whether the Applicants showed a continuing intention to appeal, had a right to appeal, or that the Minister would not be prejudiced are therefore not appropriate considerations (*Atim* at para 39). Nor were these arguments before the RAD during the reopening.

VIII. ANALYSIS

A. *Introduction*

[24] In their application to the RAD to re-open their appeal, the Applicants put forward the merits of their appeal and the inadequate representation of former counsel that they allege was the cause of their failure to perfect their appeal.

[25] The grounds and submissions set out in their application to re-open for allegations of inadequate representation by former counsel were as follows:

> 46. It is submitted that the inadequate representation the Applicants received by counsel after the RAD hearing resulted in a breach of natural justice.
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> 47. The Applicants' former lawyer, Mr. Monroy, failed to submit an assessment as to the merits of an appeal to LAO. As a result, the Applicants failed to achieve funding for their appeal process.
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> 48. Mr. Monroy claimed that he thought he had submitted an opinion to LAO, but LAO confirmed to Grice & Associates that no merit assessment was ever submitted to LAO on the Applicants' appeal. Further, Mr. Monroy confirmed his error to Grice & Associates via email dated January 21, 2019.
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> 49. Moreover, as the principal Applicant swears in the enclosed Affidavit, the lawyer, Mr. Monroy, failed to clearly disclose to the Applicants that he was not going to perfect their appeal.
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> 50. Mr. Monroy failed to clearly communicate to the Applicants of his intention not to perfect the appeal and he failed to carry out his professional duty to consult with the Applicants. In failing to advise them, he neglected his duty as counsel.
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> 51. The test for determining whether inadequate representation on the part of counsel amounts to a breach of natural justice is set out in *R. v G.D.B.* First, it must be established, that counsel's acts or omissions did not fall within the range of reasonable

> professional assistance, and second, that a miscarriage of justice resulted.
>
> 52. It is submitted that this test is clearly met in the circumstances of the present case. Counsel's lack of advice and consultation with the Applicants, inaction in perfecting the appeal, and lack of submission of an assessment as to the merits of an appeal to LAO before the deadline to perfect the appeal amount to inadequate representation. It is submitted that these errors have given rise to a clear breach of procedural fairness, denying the Applicants of their chance to a hearing at the appeal stage, and that the principles of fairness and natural justice favour re-opening the appeal.
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> [References omitted.]

[26] In considering their application to re-open the appeal in accordance with *RAD Rule* 49, the RAD relied upon *RAD Rule* 49(6) which reads as follows:

(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

[27] In essence, the RAD concluded that "[i]t is for the Applicants to demonstrate that there has been a breach of natural justice or fairness" (para 8) and the Applicants failed to demonstrate such a breach on the evidence and submissions placed before the RAD.

[28] In reaching this conclusion the RAD assessed both the evidence and submissions of the Applicants against the evidence provided by former counsel as to his interaction with the Applicants, and his role in the appeal to the RAD. I note the RAD received the Applicants' Notice of Appeal of the decision of the RPD on October 4, 2018, and that the Applicants' record was therefore due on or before October 18, 2018. It was, therefore, the failure to perfect the

appeal application by this date that led to the dismissal for lack of perfection on December 19, 2018.

[29] In dealing with the application to re-open their appeal, the RAD addressed the evidence on the record before it, which included the Applicants' evidence and written submissions, as well as an affidavit from former counsel. The RAD's analysis was as follows:

> [9] New Counsel for the Applicants has communicated with the RAD and submits that the Appellant's former counsel was negligent, which led to a failure to observe a principal of natural justice. The Applicants met with the counsel (Luis Monroy), who represented them at the RPD on October 3, 2018. As requested by the new Counsel, former Counsel, Monroy has submitted an affidavit documenting the steps he took with the Applicants in reference to their appeal. He states he explained to the Applicants in the Spanish language;
>
> - He had reviewed the grounds for the appeal and he was not going to be able to provide Legal Aid with a positive opinion as to the merits of their case.
> - He was not able to represent them in their appeal before the RAD because he felt their appeal lacked merit and Legal Aid would not fund their appeal.
> - If they chose to retain him privately he would charge them $4500, but he explained that this did not make sense for the Applicants to invest in an appeal that had no merit.
> - They might have a better opportunity to obtain permanent residence in Canada through making a humanitarian and compassionate (H&C) relief application.
> - If the Applicants decided to pursue a H&C application, he would also charge them $4500 to prepare the application.
> - He offered to file the NOA on the Applicants' behalf to ensure that they did not miss the deadline and lose their right to appeal to the RAD, should they choose to continue their appeal.

- He completed the NOA for the RAD, but he did not enter himself as Counsel of Record. The Applicants' mailing address was the address entered for correspondence from the RAD.

- He confirmed with the Applicants that he would take no further action in their appeal to the RAD, but if they decided to move forward with a H&C application, he would be able to discuss issues arising from that application.

[10] The Applicants submit that Mr. Monroy discussed "Legal Aid" with them, but they state that they did not understand the meaning of "Legal Aid". The RAD has reviewed the affidavit of their former counsel, where he states that it is not plausible that they did not understand the meaning of "Legal Aid", as they had assistance in their refugee claim from Legal Aid, as well as seeking assistance from a social worker to apply for a Legal Aid certificate for assessment of their appeal. The RAD further notes that the affidavit of their former counsel confirms that his communication with the Applicants following the October 3, 2018, was in the form of an email dated October 5, 2018, to remind the Applicants that if they were going to pursue their RAD appeal, they had fifteen (15) days to prepare arguments. He also reminded them that there were time deadlines to be met, should they wish to prepare a H&C application.

[11] Their former counsel additionally confirmed in his affidavit and the associated evidence that he communicated with the Applicants on October 17, 2018 in reference to their potential H&C claim. The RAD notes the Applicants' statements do not refer to this interaction in the affidavit submitted in support of the reopening application. Yet the Applicants have submitted copies of screen shots of a series of text messages that were sent to their former counsel on October 15-22, 2018, implying that Mr. Monroy was not responding. The RAD finds in its assessment of the evidence that these messages may have been received, but the evidence confirms that the Applicant's former counsel only continued to address the possibility of advancing a H&C claim on behalf of the Applicants.

[12] The RAD further notes the Applicants submit that the failure of their former counsel to submit the opinion document to assess the merits of the appeal, to Legal Aid until January 20]9,4 [*sic*] prevented them from obtaining funding for their appeal. The RAD finds that the evidence confirms that their former counsel turned his mind to assessing the issue and consulted with the Applicants. The fact that Mr. Monroy did not submit the document

> in a timely manner did not prevent the Applicants from obtaining funding from Legal Aid.
>
> [13] The RAD has reviewed and considered the Applicants' submissions in this issue. The RAD finds the statements of the Applicants are inconsistent with the facts in the record and with the sworn statements of their former counsel. The RAD notes the Applicants' former counsel was not indicated as counsel on their NOA submitted to the RAD. The RAD further finds there is no persuasive documentation to confirm any contractual relationship between the Applicants and their former counsel in respect to perfecting their appeal to the RAD.
>
> [14] The RAD recognizes that a factor to be considered by the RAD is the principle of natural justice. The RAD has reviewed the evidence and submissions of the Applicants and their former counsel. The RAD finds a breach of natural justice has not occurred.
>
> [References omitted.]

B. *Reviewable Errors Raised*

[30] Against this background, the Applicants have raised a number of grounds for reviewable error.

(1) Ignoring and Mistaking Evidence

[31] The Applicants say that the RAD ignored and misstated relevant evidence. They argue that the RAD "has appeared to engage in complete agreement with Mr. Monroy's sworn statements, *without any consideration as to the statements by the Applicants and the corroborating evidence*" (emphasis added).

[32] A simple reading of the Decision reveals that this is not the case. The RAD makes it clear that it has examined the competing evidence and, as it must, has weighed and reached a conclusion. There is no indication that the RAD ignored the Applicants' evidence and submissions. In fact, much of what the Applicants argued under this heading is no more than an invitation to the Court to re-weigh evidence and reach a conclusion favourable to the Applicants. This is not the role of the Court on judicial review (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

[33] What is important in this context is the Applicants' assertion that they were prejudiced and thwarted in their appeal efforts because former counsel failed to respond to their questions that specifically pertained to their RAD appeal, despite repeated efforts to get answers from him. In written submissions, they summarize their positions as follows:

> 39. In fact, the group of messages sent by the Applicants to Mr. Monroy from October 15-22, 2019 was one of the most important facts which was ignored by the RAD Member. The RAD Member's reasons are not clear or intelligible as to why such evidence was not afforded more weight. The only comment provided by the RAD Member regarding these messages is as follows:
>
> > The RAD finds in its assessment of the evidence that these messages may have been received, but the evidence confirms that the Applicant's [sic] former counsel only continued to address the possibility of advancing an H&C claim on behalf of the Applicants.
>
> 40. Even up until October 22, 2018, the Applicants were messaging their former counsel about their appeal. This evidence, at the very least, showed that the Applicants were unclear as to what was occurring with their appeal. The evidence shows that there was a very real possibility that they were not fully understanding that Mr. Monroy, who continued to be in possession

of the Legal Aid certificate authorizing an opinion as to the merits of an appeal to the RAD and thus the only route to obtaining funding from LAO was not in fact working on their appeal. Instead, the evidence shows that Mr. Monroy ignored these requests for information and only messaged the Applicants about an H&C, for which he would receive payment privately rather than through LAO.

41. The very least that Mr. Monroy could have done was to notify the Applicants that he was not working on their appeal. However, there is no evidence of any communication from Mr. Monroy about the appeal at any point during these texts from October 15-22, 2018, other than the irrelevant text message about the H&C fees.

42. Certainly, from October 18, 2018 onwards, there was no communication from Mr. Monroy.

43. Mr. Monroy did not dispute this or put forth any evidence to contradict this, despite his obligation to make it clear to the Applicants that he was not working on their case despite being the Applicants authorized lawyer with LAO.

44. When the evidence shows that the Applicants approached Mr. Monroy and thought that they were still Mr. Monroy's clients, why did he not simply clarify the issue with them even at that point in time? The RAD Member failed to appreciate this fact and was unreasonable in finding that this did not constitute negligence or inadequate representation.

45. The RAD Member also highlighted the email from Mr. Monroy to the Applicants on October 5, 2018, in which he reminded the Applicants that they had 15 days to prepare arguments for the appeal. However, the RAD Member made no note of the fact that Mr. Monroy ended the email saying that the Applicants should contact Mr. Monroy **if they had any questions**. As the messages from October 15-22, 2018 show, the Applicants did ask questions about their appeal, but they went unanswered.

46. In fact, the October 17, 2018 text message further corroborates the fact that Mr. Monroy chose to respond to the Applicants, and thus was able to do so, but he chose not to answer their questions about the RAD appeal. The Applicants acknowledged in their reply text that this message only concerned the H&C application but were left in the dark when it came to their appeal.

[Emphasis in original, references omitted.]

[34] As the Decision makes clear, the RAD fully acknowledged the text messages that the Applicants sent to former counsel and conceded that they may have been received by former counsel, "but the evidence confirms that the Applicant's [*sic*] former counsel only continued to address the possibility of advancing an H&C claims on behalf of the Applicants" (para 11).

[35] In his affidavit, former counsel provided evidence as to the role he played – or did not play – in the Applicants' appeal of the RPD decision to the RAD. As summarized above, former counsel told the Applicants that he would not represent them on the appeal before the RAD because the appeal lacked merit, and he thought they would fair better in achieving their objectives if they made an H&C application. However, rather than leaving the Applicants in the lurch, and to give them time to find alternative counsel and decide whether they wished to continue with an appeal, he filed a Notice of Appeal on their behalf so that they would not miss the deadline to file such notice. There is nothing implausible or unconvincing about former counsel deciding to act in this way. He was quite at liberty to tell the Applicants that he would not represent them on the appeal but that he would file a Notice of Appeal so that they would not miss the deadline for that notice and would have time to find alternative counsel. In fact, it is difficult to see how responsible counsel would or could act in any other way.

[36] Former counsel's position was supported by other evidence. When he completed the Notice of Appeal, he did not enter himself as counsel of record and he entered the Applicants' own mailing address for any correspondence from the RAD. In addition, there was evidence that in an email dated October 5, 2018, he reminded the Applicants that, if they were going to pursue

their RAD appeal, they had 15 days to prepare arguments and that there were other deadlines to be met if they wanted him to prepare an H&C application. The RAD specifically refers to this evidence and balances it against the Applicants' own statements and evidence that former counsel was not responding to their inquiries about an appeal to the RAD.

[37] The Applicants' case on this point, at its strongest, is that because they messaged former counsel about their RAD appeal this means that they were unclear about the process and former counsel's role in that appeal. The Applicants point out that former counsel had indicated to them that they could contact him if they had any questions and that their messages from October 15-22, 2018 show that they did have questions about the appeal that were not answered. The Applicants now say that, at least, former counsel should have realized they were confused about the appeal and whether he was acting for them in this matter and that he should have advised them further.

[38] In my view, this is the crux of the Applicants' case in the present application, as became clear at the oral hearing before me in Toronto. In other words, the real issue is whether the RAD failed to consider whether former counsel's failure to repeatedly advise them he was not representing them on the appeal and needed to take alternative steps to perfect the appeal amounted to a breach of natural justice.

[39] In written submissions to the RAD to re-open the appeal, present counsel submitted the facts it wanted the RAD to consider. On the issue of inadequate representation, present counsel submitted that:

> Mr. Monroy failed to convey to the Applicants that he never intended to perfect the appeal.

[40] On the issue of a breach of natural justice , present counsel submitted as follows:

> 49. Moreover, as the principal Applicant swears in the enclosed Affidavit, the lawyer, Mr. Monroy, failed to clearly disclose to the Applicants that he was not going to perfect their appeal.
>
> 50. Mr. Monroy failed to clearly communicate to the Applicants of his intention not to perfect the appeal and he failed to carry out his professional duty to consult with the Applicants. In failing to advise them, he neglected his duty as counsel.

[41] The evidence from former counsel was that:

> 15. At that same meeting of October 3, 2018 we further discussed that in my opinion they would have a better chance to succeed in an application for permanent residence on humanitarian and compassionate grounds (H&C), and explained the Appellants very clearly in Spanish that I was not going to represent them in their appeal because, in my opinion, Legal Aid was not going to finance their legal costs as, in my assessment, their appeal lacked legal merit.
>
> …
>
> 17. That day, the Appellants and I sat for approximately hour and a half and they had the opportunity to ask me as many questions as they wished, and I answered their concerns to the best of my ability. I also offered the Appellants to file their notice of appeal on their behalf in order for them not to lose their right to appeal in case they decided to retain other counsel, taking into consideration that the certificate that Legal Aid had issued to them would cover the costs of filing it.
>
> 18. It is important to notice that I did not sign their notice of appeal as counsel of record or even wrote my address as their mailing address. I was very clear with them that I would not take any further steps for them in connection with their appeal but would be willing to discuss with them any issue related to the preparation of an H&C if they were interested.

…

22. In relation to the allegations contained at paragraphs 11, 18, 19, 33 and 34 of Ms. Castro's affidavit that they did not realize that I was going to stop work on their file, I repeat that I explained to them very clearly in Spanish that I was not going to take any further steps in their appeal, and answered any questions they had in that regard. As to the statement that after the hearing l told them that "I could reverse a negative decision" just have to say that it is also very inaccurate, what I did tell them was that they would have the right to appeal in case that their claim was refused, but that the possibilities of succeeding in an appeal vary from case to case.

…

24. I am aware that the Appellants tried to contact me after I filed their notice of appeal on their behalf, however, as mentioned before, I had already explained to them that I was not going to represent them or take any steps for them regarding their appeal.

25. It is important for me to point out that I did communicate with the Appellants on October 17, 2018 via text message for the purposes of explaining that the processing fee for their H&C was of $550 for each adult applicant, and $150 for the minor. This information is missing from Ms. Castro's affidavit, and in my opinion, confirms the fact that I was communicating with the Appellants for the sole purpose of discussing their H&C application.

[…]

26. In fact, looking at the email that I sent them on 5 October 2018, contained at page 14 of the Appellants' application to re-open their appeal, it can be seen that I clearly stated "**You** have 15 days from today within which **you may** present your arguments, **if you deem it pertinent**. I am also taking the opportunity **to remind you** of **the need to start preparing an application for humanitarian reasons**, which might result in you obtaining your permanent residence". (emphasis added)

27. From the above message it is clear to me that the language that I used was very specific and clearly reflects our understanding that I was not going to represent the Appellants in their appeal, and that they had to make their own decisions in that regard. However, as stated before, the statement also reflects our conversation regarding what I considered to be their best option, an application for permanent residence on humanitarian grounds.

[42] While the Applicants raise valid points, there is no indication these were overlooked in the Decision. The RAD specifically refers to messages relied upon by the Applicants but points out the clear evidence from former counsel that he had fully explained that he would not act for them on the appeal and that in subsequent communications he only ever dealt with the possibility of an H&C application. His indication that he was willing to answer questions does not mean he had not made it clear he would not represent the Applicants on appeal so that they would have to find alternative counsel if the deadlines he had brought to their attention were to be met.

[43] Mr. Monroy was not cross-examined on this affidavit. As such, the Court as well as the RAD would have to accept that an officer of the Court was lying under oath if these words are not true. Consequently, notwithstanding the Applicants' evidence and assertions to the contrary, there was substantial reliable evidence before the RAD to allow it to reasonably conclude that former counsel had made it clear to the Applicants that he was not representing them on the appeal and they needed to find alternative counsel.

[44] As referenced, the Applicants now argue that, even if former counsel had made his position clear to them, their messaging shows that they were confused so that former counsel should have advised them again, or reminded them, that he was not representing them on the appeal and that they needed to engage alternative counsel. In my view, however, this alternative arguments was not raised in counsel's submissions to the RAD.

[45] A similar issue was recently canvassed in *Soultani Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12. While Justice Norris was dealing with an appeal to the RAD from a

decision of the RPD, I see no reason why the same principle should not apply to the facts of the present case:

> [23] Once again, the RAD's decision must be assessed in the context of how the applicants framed their appeal. The applicants did not raise any alleged error in relation to the RPD's assessment of the police or medical reports. It is well-established that the RAD is not required to consider potential errors that an appellant did not raise: see *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 18-20; *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 39; *Broni v Canada (Citizenship and Immigration)*, 2019 FC 365 at para 15; and *Canada (Citizenship and Immigration) v Chamanpreet Kaur Kaler*, 2019 FC 883 at paras 11-13 (IMM-57-19).
>
> [24] The RAD member was required to address the specific errors alleged by the applicants (*Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at para 30). This is exactly what she did. She was not required to go beyond the applicants' grounds of appeal and consider other potential errors. As a result, it was not unreasonable for her to dispose of the appeal as she did.

[46] In the present case, the RAD was obliged to address the specific errors raised in the application to re-open made by present counsel. I cannot say that the RAD's Decision is unreasonable because it failed to deal with an issue that was not clearly articulated in the application to re-open. The RAD is not obliged to consider potential errors the Applicants did not clearly raise in their submissions. In their evidence before the RAD, the Applicants say that former counsel never made it clear to them that he would not be acting for them on the appeal which is why they continued to contact him on this issue. On the evidence, it was reasonable for the RAD to conclude that former counsel had made this very clear to them and that they needed alternative counsel in the appeal to meet the looming deadlines. The Applicants' continuing attempts to have former counsel assist them on the appeal is just as consistent with a reluctance to find alternative counsel and an attempt to make Mr. Monroy continue to act and guide them on

the appeal. It does not necessarily mean that they were confused and it certainly does not prove that Mr. Monroy had not made it clear to the Applicants that he would not be acting for them on the appeal.

[47] Moreover, there appears to be no convincing evidence that the Applicants did not understand that they had to perfect their appeal by October 18, 2018, or that former counsel ever indicated that, if they did not engage alternative counsel to assist them, he would step into the breach. All indications are otherwise, and the Applicants did eventually engage alternative counsel. There is no indication that this could not have been done in a way that would have allowed them to meet the filing deadline. While I recognize they now assert that their evidence proves that they were, at least, confused about whether former counsel was acting for them on the appeal, that evidence is just as consistent with a refusal or reluctance on their part to engage former counsel until it was too late and this issue was not clearly placed before the RAD.

(2) Misunderstanding Legal Aid Funding Procedures

[48] The Applicants argue that the RAD made errors with findings of fact regarding LAO funding procedures that resulted in an unreasonable Decision. Specifically, this argument is summarized by the Applicants as follows:

> 55. In any case, Mr. Monroy accepted the certificate to provide LAO with an opinion. That opinion was the only way for the Applicants to obtain further funding. The fact that Mr. Monroy failed to provide the merit assessment in a timely manner directly prevented the Applicants from obtaining LAO funding and prejudiced the clients. This is in direct contravention to the statement made by the RAD Member, whereby it was held that the failure of Mr. Monroy to submit a merit assessment "did not prevent the Applicants from obtaining funding from Legal Aid".

> This statement showed a severe misunderstanding of LAO and its funding processes by the RAD Member.
>
> 56. The Applicants could not easily change lawyers since it had been acknowledged by Mr. Monroy. The fact that the Applicants did not approach another lawyer or request a change of lawyers with LAO is strong evidence of the fact that they: a) did not fully understand how LAO functioned, as per their statement in their affidavit, and b) they were not aware that Mr. Monroy was not acting on their appeal.
>
> 57. It is submitted that if the RAD Member had appreciated this very crucial fact concerning LAO, he would not have arrived at an unreasonable decision.
>
> [references omitted.]

[49] There is no evidence that the RAD misunderstood LAO funding procedures. The Applicants simply misrepresent the basis of the RAD's Decision and its conclusions:

> [12] The RAD further notes the Applicants submit that the failure of their former counsel to submit the opinion document to assess the merits of the appeal, to Legal Aid until January 20]9,4 [*sic*] prevented them from obtaining funding for their appeal. The RAD finds that the evidence confirms that their former counsel turned his mind to assessing the issue and consulted with the Applicants. The fact that Mr. Monroy did not submit the document in a timely manner did not prevent the Applicants from obtaining funding from Legal Aid.

[50] The evidence is clear from the LAO Eligibility form that the Applicants received, that it was only for four hours of funding so that former counsel could assess the merits of filing an appeal. Former counsel came to the conclusion that he could not provide a positive opinion to LAO because he examined the case and concluded an appeal would have no merit. This is why he recommended that the Applicants pursue an H&C application.

[51] Applicants' present counsel believes that an appeal of the RPD decision does have merit. This does not mean, however, that previous counsel did not turn his mind to the issue or that his opinion that there was no merit to the appeal was either wrong or unreasonable.

[52] The Applicants did obtain legal aid to enable former counsel to assess the merits of their appeal. Former counsel was not obliged to say that any appeal would have merit when he did not believe this to be the case. This was explained to the Applicants. Had former counsel submitted his opinion earlier, the Applicants would not have received funding for an appeal based upon that opinion, so that the late submission of the opinion was not the cause of the Applicants' failure to obtain funding for an appeal.

[53] The Applicants have not convinced me that the RAD misunderstood the LAO funding process. Their real complaint is that former counsel should not have accepted the certificate to provide an opinion on the merits of any appeal unless he supported the clients' case for an appeal. But this does not mean that the RAD misunderstood the LAO funding system, and the point that the Applicants now argue before me that former counsel should not have agreed to provide an opinion if he did not agree that an appeal had merit is not supported by any legal authority or evidence that was before the RAD or is before the Court in the present application. The four hours of funding was not provided on the basis that former counsel would only provide a positive opinion. It was provided so that he could assess the merits and advise the Applicants and LAO of his conclusions.

[54] Perhaps more importantly, the Applicants' present argument that former counsel should not have submitted a negative opinion but should have left the matter to present counsel was not placed before the RAD in a way that would allow the Court to say that it was unreasonable for the RAD not to consider this issue. The onus was upon the Applicants to provide the evidence and the grounds upon which they relied for their request to re-open.

(3) Continuing Contractual Relationship

[55] The Applicants argue that there was evidence of a continuing contractual relationship with former counsel and that the RAD erred in concluding there was no such evidence.

[56] The RAD, in fact, says the following on this issue:

> [13] The RAD has reviewed and considered the Applicants' submissions in this issue. The RAD finds the statements of the Applicants are inconsistent with the facts in the record and with the sworn statements of their former counsel. The RAD notes the Applicants' former counsel was not indicated as counsel on their NOA submitted to the RAD. The RAD further finds there is no persuasive documentation to confirm any contractual relationship between the Applicants and their former counsel in respect to perfecting their appeal to the RAD.

[57] The RAD clearly indicates that the documentary evidence does not establish a continuing contractual relationship. This conclusion is not without a significant and reasonable basis in the evidence before the RAD. The Applicants may disagree with the RAD's conclusions regarding this evidence, but this does not mean that the RAD held there was "no evidence" as now alleged by the Applicants or that the RAD's conclusion on the evidence were unreasonable.

(4) Continuing Intention to Appeal

[58] The Applicants say that the RAD did not dispute, but failed to consider, their continuing intention to appeal the RPD decision. These submissions were not put to the RAD and there is no indication in the Decision that the RAD doubted the Applicants' continuing intention to appeal the RPD decision.

[59] The Applicants appear to be citing one of the factors set out in *Canada (Attorney General) v Hennelly*, (1999) 244 NR 399 (Fed CA) and related cases that should be considered for an extension of time under the *Federal Courts Rules*, SOR/98-106.

[60] As the RAD makes clear in its Decision, it is bound by *RAD Rule* 49 which provides, in relevant part, as follows:

Factor	**Élément à considérer**
(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	(6) La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.
Factors	**Éléments à considérer**
(7) In deciding the application, the Division must consider any relevant factors, including	(7) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :
(a) whether the application was made in a timely manner and the justification for any delay; and	a) la question de savoir si la demande a été faite en temps opportun et la justification de tout retard;
(b) if the appellant did not	b) si l'appelant n'a pas

make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made.	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.

[61] It is not clear whether a continuing intention to appeal is a "relevant factor" in considering whether there has been a failure to observe a principle of natural justice because of inadequate representation by former counsel. On the present facts, the Applicants were clearly advised by former counsel that he would not represent them on an appeal because he did not believe their case had merit, and he also advised them that, if they were going to appeal, tight timelines had to be met. He also assisted them in this regard by filing the requisite Notice of Appeal so that they would have time to perfect the record.

[62] In their submissions to the RAD the Applicants claim, *inter alia*, that they did not understand this, but the RAD examined the evidence and concluded that it could not accept their reasons for failing to file on time. If the Applicants had a continuing intention to appeal, this does not mean that they did not understand that they had to perfect their record by the due date, or that their failure to do so was the result of a failure to observe a principle of natural justice, which was the issue before the RAD.

[63] This point was made clear by the Court in *Atim*, above:

> [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.

[64] The same can be said of the present case and there is no indication in the Decision that the RAD did not understand or accept that the Applicants wished to pursue their appeal. Had continuing intention been an important factor to consider in this case when considering a breach of natural justice, then the Applicants should have raised and explained the importance of that factor in their submission to the RAD. But, in any event, there is no evidence that the RAD did not accept and consider their continuing intention. The RAD is not obliged to assist the Applicants by addressing issues they have not raised. It is counsel's responsibility to ensure that this is done in written submissions.

C. *Other Issues*

[65] The Applicants also raise other factors and issues that they say were not considered by the RAD, including that they were unable to communicate in English and that there was no prejudice to the Respondent in allowing their application to be re-opened. As former counsel makes clear in his evidence, he communicated with the Applicants on the material points in Spanish.

[66] Such additional factors were not raised, argued or established by the Applicants in their submissions to the RAD and it is difficult to see how a lack of prejudice to the Respondent is relevant to whether, under *RAD Rule* 49, there was a failure to observe a principle of natural

justice. The Respondent certainly has a justifiable interest and obligation in ensuring that timelines are met. Otherwise, chaos would result. That is why there are time deadlines in the legislation and the relevant rules. Requiring any applicant to meet those timelines is not a breach of any principle of natural justice. And the Applicants did not explain or establish to the RAD's reasonable satisfaction that it was a breach of natural justice that prevented them from complying with the deadline for perfection of their appeal in this case.

[67] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-3074-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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