Federal Court  Cour fédérale

Date: 20200217

Docket: IMM-3926-19

Citation: 2020 FC 254

Ottawa, Ontario, February 17, 2020

PRESENT: Madam Justice Walker

BETWEEN:

TALEB DRISS
NADA MANSOUR
ADAM DRISS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Taleb Driss, Nada Mansour and Adam Driss, seek judicial review of a decision (Decision) of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada dated May 17, 2019. In the Decision, the RAD refused the Applicants' request to reopen their appeal from a 2016 decision of the Refugee Protection Division (RPD).

[2] The RAD had dismissed the Applicants' appeal on January 26, 2017 for failure to perfect. The Applicants submitted a request to reopen in February 2019. A new RAD panel found that the Applicants' former representative incompetently represented them in their RAD appeal, thereby breaching the principles of natural justice. Nevertheless, the RAD concluded that the Applicants had not provided a compelling explanation for the two-year delay in filing the request to reopen.

I. Background

[3] The Applicants are a family from Syria and Lebanon who arrived in Canada in 2016. Their refugee claim was denied by the RPD on November 14, 2016 and the Applicants filed a Notice of Appeal of the RPD decision on November 30, 2016 (Appeal). The Applicants were represented at the time by an immigration consultant (Consultant).

[4] The Consultant advised the Applicants that she would seek an extension of time to file and perfect the Appeal. The Applicants signed an Application for an extension of time to perfect an appeal (Extension Application) on December 12, 2016. They state that the Extension Application was faxed to the RAD on December 15, 2016 but the RAD record contains no reference to the Extension Application.

[5] On January 26, 2017, the RAD dismissed the Appeal for lack of perfection (January 2017 Decision). The original RAD panel stated that it had not received any documents or other applications from the Applicants subsequent to the Notice of Appeal.

[6] In his affidavit filed in support of the request to reopen the Appeal, Mr. Driss acknowledged that the Applicants received the RAD's January 2017 Decision in the mail in January 2017. He stated that he did not understand the significance of the document and that neither he nor his wife could read English. He also stated that the Applicants were relying on the Consultant to take care of the Appeal and that he took no action upon receipt of the January 2017 Decision.

[7] In January 2019, the Canada Border Services Agency (CBSA) contacted the Applicants to schedule their removal to Lebanon.

[8] On February 21, 2019, the Applicants applied to the RAD to reopen the Appeal pursuant to Rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 (Rules). The Applicants argued that: (1) the original RAD panel breached their right to procedural fairness in dismissing the Appeal as they had filed the Extension Application; (2) the Consultant's incompetence in failing to perfect the Appeal resulted in a failure to observe a principle of natural justice; and (3) the two-year delay in applying to reopen the Appeal was justified given their circumstances.

[9] On May 17, 2019, the RAD issued the Decision, dismissing the Applicants' application to reopen. The Applicants filed this Application for leave and judicial review of the Decision on June 25, 2019.

[10] On July 3, 2019, the Applicants submitted a request to the RAD that it withdraw or reopen the Decision and reconsider their application to reopen the Appeal. The RAD dismissed the Applicants' request on October 22, 2019.

II. Decision under review

[11] The RAD found that the original RAD panel did not fail to observe a principle of natural justice as the RAD had no record of receipt of the Applicants' Extension Application. However, the RAD also found that the Consultant's incompetence in failing to perfect the Appeal caused the Applicants serious prejudice such that a principle of natural justice was not observed (Rule 49(6)). The RAD reviewed copies of text messages Mr. Driss exchanged with the Consultant in which she asserted that she had not been retained in respect of the Appeal but concluded that the Consultant acted as the Applicants' counsel from November 2016 to January 2017. The Consultant filed the Applicants' Notice of Appeal in which she was named as their counsel and took no steps to inform the RAD that she was no longer acting for the Applicants.

[12] In addition to the Consultant's incompetence in failing to perfect the Appeal, the Applicants criticized her for omitting to notify them of: the January 2017 Decision; their rights to ask the RAD to reopen the Appeal or to seek judicial review of the January 2017 Decision; and the fact that a removal order could be made against them. Further, the Consultant did not at any time inform the Applicants that she was no longer their counsel or that, in 2018, her status as a consultant was revoked. The RAD considered each of these arguments and found them to be either moot, unrelated to the request to reopen, or subsumed in its findings that the Consultant

was incompetent in December 2016/January 2017 but that the Applicants knew or ought to have known of the RAD's disposition of the Appeal when they received the January 2017 decision.

[13] The RAD then addressed whether the request to reopen was timely and the Applicants' justification for any delay (Rule 49(7)). The RAD first emphasized the Applicants' acknowledgment that they received the January 2017 Decision in January 2017.

[14] Second, the RAD considered the Applicants' explanation for the two-year delay in requesting that the RAD reopen the Appeal. They argued that the delay was justified due to their inability to speak or read English and lack of understanding of the significance of the January 2017 Decision. The RAD disagreed and stated that, if the Applicants did not understand the content or import of the January 2017 Decision, it was their responsibility to seek help from their lawyer or a third party. The RAD found that the Applicants had to have known that the January 2017 Decision was related to their refugee protection claim as it arrived on letterhead of the Immigration and Refugee Board.

[15] The RAD also found that the Applicants' evidence regarding their efforts to contact the Consultant during the two-year period was insufficient to justify the delay. The Applicants filed one July 2018 text message asking the Consultant for an appointment and telling her that they wanted to change their address with immigration services. They also filed undated text messages exchanged after the 2019 CBSA call. Assuming the Applicants tried to contact the Consultant to no avail, the RAD stated that they should not have waited two years before taking action. Their long inaction denoted a lack of concern about the Appeal. The RAD concluded that the

Applicants had not justified the significant delay from their receipt of the January 2017 Decision to their application to reopen in February 2019. The RAD drew the same conclusion regarding the Applicants' failure to apply for leave and judicial review of the January 2017 Decision.

[16] The RAD stated:

> Thus, although the panel found that there was a failure to observe a principle of natural justice because of the former counsel's incompetence, the application to reopen cannot be allowed because it was not made in a timely manner and the explanations provided for not having filed an application for leave and for judicial review are not sufficient.

III. Issue and standard of review

[17] The sole issue before me is whether the Decision was reasonable.

[18] On December 19, 2019, the Supreme Court of Canada (SCC) rendered its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), establishing the presumptive standard of review of an administrative decision as reasonableness (*Vavilov* at para 10). I invited counsel, when appearing before me, to address the *Vavilov* decision. The parties submit and I agree that the Decision must be reviewed for reasonableness. None of the situations identified by the SCC for departing from the presumptive standard of review apply in this case.

[19] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard. I have applied that guidance in my review, exercising restraint but conducting a robust review of the Decision for justification and internal coherence (*Vavilov* at

paras 12-15, 85-86, 99; see also *Canada Post Corp. v Canada Union of Postal Workers*, 2019 SCC 67 at paras 28-29 (*Canada Post*)).

[20] My review must begin with the reasons given for the Decision, read in conjunction with the relevant law and the record (*Vavilov* at paras 86, 95). Before the Decision can be set aside as unreasonable, I must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

IV. Analysis

[21] The framework within which the RAD considered the Applicants' request to reopen the Appeal is set out in Rules 49(6) and (7):

Reopening an Appeal	**Réouverture d'un Appel**
[. . .]	[. . .]
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 make an application for leave to apply for judicial review or an application for judicial review, the reasons why an application was not made.	**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.

[22] The RAD found that the Consultant's incompetence in failing to perfect the Applicants' Appeal of the January 2017 Decision resulted in a breach of the principles of natural justice, a necessary condition for an appeal to be reopened (Rule 49(6)). The RAD then considered whether the Applicants' request to reopen was made in a timely manner, the justification for the delay, and the Applicants' reasons for not having applied for leave and judicial review of the January 2017 Decision (Rules 49(7)(a) and (b); see *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 at para 28).

[23] The Applicants submit that the RAD's rejection of their explanation for the delay in requesting the reopening of the Appeal was unreasonable because the RAD (1) ignored the Applicants' evidence that they were not aware of the content and import of the Decision until 2019; (2) misconstrued the Applicants' evidence regarding the Consultant's negligence and its impact on their inaction through 2017 and 2018; and (3) failed to take into account the acknowledged incompetence of the Consultant and breach of natural justice.

[24] The Applicants first submit that the RAD ignored material evidence they presented justifying their failure to act until February 2019 (*Canada (Citizenship and Immigration) v Alharbi*, 2019 FC 395 at paras 14, 16; *Hinzman v Canada (Citizenship and Immigration)*, 2007

FCA 171 at para 60). The Applicants point to the completion of the Extension Application in December 2016 and their sworn evidence that they attempted to contact the Consultant during the 2017-2019 period. They also argue that the RAD ignored evidence that they did not comprehend the content of the January 2017 Decision due to their inability to read English. In the Applicants' view, the RAD failed to take a contextual approach to the evidence (*Andreoli v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1111 at paras 15-16).

[25] I am not persuaded by the Applicants' arguments. First, the Extension Application was signed by the Applicants in December 2016 and does not reflect an ongoing intention to pursue the Appeal thereafter. Further, the RAD addressed at some length the Applicants' evidence regarding their inability to understand English and their attempts to contact the Consultant between January 2017 and February 2019. The panel did not question the Applicants' submission that they could not read English but found that, having chosen English as the language of the proceedings, they bore a responsibility to seek help from either their representative or a third-party upon receipt of the January 2017 Decision. The RAD also considered the evidence that the Applicants attempted to contact the Consultant during 2017-2019. The panel accurately described the evidence in the record as one text message in 2018 seeking an appointment with the Consultant and the sworn statement by Mr. Driss that he also called the Consultant but in vain. The RAD did not ignore material elements of the Applicants' evidence. Rather, the panel engaged with the evidence but found it insufficient to justify a two-year delay.

[26] The Applicants next submit that the RAD misconstrued and unreasonably discounted the evidence of the Consultant's incompetence during the 2017-2019 period (*Vavilov* at para 128). The Applicants' submission centres on a number of omissions by the Consultant to inform them of the implications of the January 2017 Decision and the recourse available to challenge that decision. They argue that the evidence was introduced not only as evidence of incompetence but also as justification for their continuing reliance on the Consultant to ensure proper carriage of the Appeal. In other words, had the Applicants been competently represented, they would have taken action in a timely manner.

[27] I agree that the Consultant's omissions highlighted by the Applicants were material. However, I do not agree that the RAD erred in its analysis of those omissions. The Consultant's incompetent representation occurred in the December 2016-January 2017 time period and adversely impacted the Applicants' actions at that time. The RAD accepted that the Applicants did not understand the implications of the January 2017 Decision upon receipt in late January 2017. The issue for the panel was the Applicants' subsequent and lengthy period of inaction. The fact that the RAD did not consider the Consultant's various omissions to competently inform the Applicants as material to its assessment of the Applicants' two-year delay is not a reviewable error.

[28] Finally, the Applicants submit that the RAD unreasonably refused to reopen the Appeal notwithstanding the great prejudice they suffered due to the Consultant's incompetence. The Applicants argue that the panel unduly restricted its analysis to the timeliness element of the request to reopen, failing to take into account the other obstacles they faced.

[29] The Applicants rely on the decision of my colleague, Justice Diner, in *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 (*Huseen*). The applicants in that case had made a request to the RPD to reopen their refugee claim, a request that proceeds largely on the same basis as a request to the RAD to reopen an appeal pursuant to Rule 49. Justice Diner stated that, while timeliness was a factor to be considered, it was certainly not the only one (*Huseen* at para 22). In *Huseen*, the applicants had missed the 15-day deadline within which they were required to file their Basis of Claim forms. The RPD held an abandonment hearing on January 7, 2014 in Toronto. The applicants were then living in Alberta and missed the hearing. The applicants retained counsel on January 10, 2014 and, on January 14, 2014, counsel submitted an application to the RPD to reopen their refugee claim. Justice Diner found that the RPD unreasonably focused solely on the missed 15-day deadline in refusing to reopen the applicants' claim. The panel failed to meaningfully consider that the applicants took steps to immediately request a change of venue after moving across the country and to engage counsel (*Huseen* at para 24).

[30] Both the factual record and the Decision in the present case are materially different from those in *Huseen*. Here, the RAD was faced with a two-year delay in the Applicants' request to reopen the Appeal. The evidence before the panel was that the Applicants received the January 2017 Decision in a timely manner but failed to understand its significance or to make any attempt to understand its content.

[31] The RAD fully considered the Applicants' explanation of the lengthy delay and did not base its refusal to reopen the Appeal on a rigid application of procedural requirements. The RAD's Decision is internally coherent and reflects a fulsome consideration of the material

elements of the Applicants' evidence. The panel addressed each of the Applicants' submissions regarding their inability to read English and their continued reliance on the Consultant, against the length of the delay. The RAD provided detailed reasons for its conclusion that the Applicants' evidence was insufficient to justify a two-year delay. I find that the RAD made no reviewable error in finding that the Applicants bore ultimate responsibility for failing to take timely action to safeguard their rights of recourse against the January 2017 Decision. Its findings are amply supported in the evidence. For these reasons, I am dismissing the application for judicial review.

[32] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-3926-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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