Federal Court  Cour fédérale

Date: 20181102

Docket: IMM-244-18

Citation: 2018 FC 1103

Ottawa, Ontario, November 2, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

SHELONE SHERENE BROWN
MEGAN MARJORIE DRISDALE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicants seek judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of the December 8, 2017, decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB] denying their request to re-open their appeal from a negative refugee determination by the Refugee Protection Division

[RPD] of the IRB. Their appeal had been dismissed by the RAD for lack of perfection on August 21, 2017.

[2] For the reasons that follow, the application for judicial review is allowed and the matter is remitted for reconsideration before a differently constituted panel of the RAD.

II. BACKGROUND

[3] The applicants are citizens of Jamaica. They claim they are a same-sex couple who fled Jamaica due to fear of persecution because of their sexual orientation. They entered Canada on farm work visas in June 2016. They initially worked in Nova Scotia but moved to Toronto because they had heard that they could get help there with a claim for refugee protection. In Toronto, the applicants retained an immigration consultant who assisted them with filing their claims for protection and who attended with them at their hearing before the RPD.

[4] For reasons dated May 17, 2017, the RPD rejected the applicants' claims on the basis of adverse credibility findings. The member concluded that the applicants were not lesbians and, consequently, had not established grounds for protection. The Notice of Decision is dated May 24, 2017. The copy of the reasons for decision that had been mailed to the applicants was returned to the RPD but the applicants were deemed to have received the reasons for the decision on May 31, 2017. In any case, as subsequent events demonstrate, the applicants learned of the result shortly after the decision was released.

[5] The applicants decided to appeal the RPD's decision. The immigration consultant assisted them by preparing a Notice of Appeal, which was received by the RAD on June 7, 2017. The Notice of Appeal indicated that the immigration consultant was counsel for the applicants on the appeal. However, the immigration consultant informed the applicants that he could not assist them further with their appeal, explaining that this was because he is not gay. He referred them to a lawyer who he said was a lesbian and who had won an appeal for another of his clients. This lawyer turned out to be unavailable so the immigration consultant suggested someone else. The second lawyer submitted an opinion on the merits of the appeal to Legal Aid Ontario [LAO]. In a decision dated June 30, 2017, LAO denied coverage for the appeal. This lawyer did not assist the applicants further. There is no indication that he ever communicated with the RAD concerning the applicants' appeal. As well, there is no indication that the immigration consultant took any steps to be removed as counsel of record before the RAD.

[6] The applicants set out to find a new lawyer to assist them with their appeal. They first consulted their current lawyer, Ms. Guetter, in the first week of July 2017. Ms. Guetter provided them with a list of items they should request from the immigration consultant, including his complete file in their matter and a copy of the recording of the RPD hearing. The immigration consultant gave the applicants a number of the items they asked for but he did not give them the recording of the hearing, despite several requests.

[7] Ms. Guetter then wrote to the IRB on July 25, 2017. In her letter, she stated that she had been retained by the applicants very recently for the purpose of an appeal of the decision of the RPD. Ms. Guetter included a completed counsel contact form with her letter. She also urgently

requested a copy of her clients' file at the RPD as well as the recording of the RPD hearing. Ms. Guetter explained that her clients had not received the decision in the mail. (As became clear later in the materials filed in support of the application to re-open, the first copy of the decision the clients had received from the immigration consultant was incomplete, although they were able to obtain a complete copy from him subsequently.) Ms. Guetter also explained that her clients had been unable to obtain a copy of the recording of the hearing from the immigration consultant. She noted that the deadlines for filing a Notice of Appeal and for perfecting the appeal had already passed. Ms. Guetter's letter was received by the IRB on July 26, 2017.

[8] The RPD provided Ms. Guetter with a copy of the recording of the hearing on or about August 3, 2017.

[9] On August 21, 2017, the applicants' file was placed before a RAD member with a request for directions dated August 14, 2017, because the date for perfecting the appeal had passed and the appellants' record had not been filed. The applicants were not given any notice that this would be happening. The reasons for dismissing the appeal are brief. After noting that the appellants' record was due to be received by the RAD on or before June 30, 2017, and that to date the RAD "has received neither the appellant's [*sic*] record nor an application for an extension of time to perfect an appeal," the member dismissed the appeal for lack of perfection. There is no mention of Ms. Guetter's July 25, 2017, letter in the reasons or in the request for directions.

[10] The Statement of Service sheet attached to the reasons and decision dismissing the appeal indicates that a copy of the decision and reasons was sent to, among others, the applicants and the immigration consultant (who by this point was no longer representing the applicants). The reasons and decision were not sent to Ms. Guetter.

[11] On October 18, 2017, the applicants applied to re-open their RAD appeal. Ms. Guetter continued to represent them. The application to re-open was supported by detailed evidence and submissions addressing, among other things, the alleged inadequate assistance provided to the applicants by the immigration consultant when their matter was before the RPD and during the initial stages of their appeal to the RAD.

[12] In a covering letter sent to the RAD along with the application to re-open the appeal, Ms. Guetter stated that she had sent the immigration consultant a copy of the application as well as a copy of the applicants' complaint to the Immigration Consultants of Canada Regulatory Council [ICCRC] about him. Ms. Guetter also stated that proof of delivery "will be filed as soon as it is available." This proof (a print-out of a Canada Post tracking form) was provided to the RAD a few days later under a covering letter from Ms. Guetter dated October 23, 2017.

[13] The RAD denied the application to re-open on December 4, 2017.

[14] Before considering the RAD's reasons for denying the application, it may be helpful first to set out the timelines and procedures that govern appeals to the RAD.

III. TIMELINES AND PROCEDURES GOVERNING APPEALS TO THE RAD

[15] The respective rights of an unsuccessful refugee claimant and the Minister of Citizenship and Immigration [the Minister] to appeal to the RAD are established by section 110 of the *IRPA*. The procedures for pursuing an appeal, including the applicable timelines, are found in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] and the *Refugee Appeal Division Rules*, SOR/2012-257 [Rules].

[16] Generally speaking, an appeal to the RAD must be commenced within fifteen days of when the person or the Minister receives the RPD's written reasons for the decision (Regulations, s 159.91(1)(a)). The appeal must then be perfected within thirty days of receipt of the written reasons (Regulations, s 159.91(1)(b)). The contents of the appellant's record required to perfect an appeal are set out in sections 3(3) and 9(2) of the Rules for, respectively, an appeal by an unsuccessful refugee claimant and an appeal by the Minister. Among other things, the appellant must provide all or part of the transcript of the RPD hearing that the appellant wishes to rely upon in the appeal and any new evidence the appellant is seeking to rely on under section 110(4) of the *IRPA*.

[17] Under section 159.91(2) of the Regulations, the RAD may extend the time limits for commencing or perfecting an appeal "for reasons of fairness and natural justice." Under Rule 6(4), an application for an extension of time to commence an appeal must be accompanied by three copies of a written notice of appeal. Under Rule 6(5), an application for an extension of time to perfect an appeal must be accompanied by two copies of the appellant's record. (Rule 6

also provides for extensions of time to file a reply to a Minister's intervention in an appeal but this has no bearing on the present application.) Rule 6(7) provides that, in deciding an application for an extension of time, the RAD "must consider any relevant factors, including (a) whether the application was made in a timely manner and the justification for any delay; (b) whether there is an arguable case; (c) prejudice to the Minister, if the application was granted; and (d) the nature and complexity of the appeal." Rule 12 similarly provides for extensions of time in appeals by the Minister.

[18] Under Rule 7, the RAD may, without further notice to the appellant or to the Minister, decide an appeal on the basis of the materials provided if, among other contingencies, "the time limit for perfecting the appeal set out in the Regulations has expired." Rule 13 makes similar provision for the disposition of appeals by the Minister (although not, apparently, simply because the appeal has not been perfected within time).

[19] Under Rule 49, an appellant may apply to the RAD to re-open an appeal that has been decided or declared abandoned. Such an application must be made before the Federal Court has made a final determination in respect of the appeal. (Under section 171.1 of the *IRPA*, the RAD does not have jurisdiction to re-open an appeal on any ground – including a failure to observe a principle of natural justice – if the Federal Court has made a final determination with respect to that appeal.) In this connection, Rule 49(5) states that 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.

[20] Under Rule 49(7), in deciding an application to re-open an appeal, the RAD "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." However, Rule 49(6) states that the RAD "must not allow the application [to re-open] unless it is established that there was a failure to observe a principle of natural justice." Given the context, I take this to mean a failure to observe a principle of natural justice in relation to the appeal that is the subject of the application to re-open, and not in the original proceeding before the RPD.

[21] Finally, under Rule 49(4), if it is alleged in the application to re-open an appeal that the appellant's counsel "in the proceedings that are the subject of the application provided inadequate representation," a copy of the application must first be provided to the former counsel and the application provided to the RAD "must be accompanied by proof that a copy was provided to the counsel." Again, given the context, I take "the proceedings that are the subject of the application" to mean the appeal that has been disposed of and whose re-opening is now being sought, as opposed to the original proceeding before the RPD.

[22] The pertinent sections of the *IRPA*, the Regulations and the Rules are set out in the Annex to these reasons.

IV. DECISION UNDER REVIEW

[23] The RAD member found that the applicants had not established that there was a failure to observe a principle of natural justice and, as a result, dismissed the application to re-open the appeal. This conclusion was based on the following findings:

- The member rejected the applicants' contention that the immigration consultant had told them he did not know how to proceed with an appeal because he was not gay. The member found that the immigration consultant must have known how to proceed with an appeal since he had filed the Notice of Appeal.

- The member apparently rejected the applicants' contention that the immigration consultant had represented them inadequately because "[t]here is no confirmation from the ICCRC that this complaint was received or acted upon" by the ICCRC and because counsel for the applicants failed to provide proof that a copy of the application to re-open and the ICCRC complaint had been provided to the immigration consultant, as required by Rule 49(4).

- The member found that Rules 49(5) and 49(7)(b) had not been followed: "There is nothing in the documentation to indicate that the judicial review was initiated or the reasons why it wasn't." (Confusingly, the member also states that Rule 49(7)(a) had not been followed either but then later in the reasons appears to accept counsel's explanation for the time it took to file the application to re-open.)

- Finally, the member found that Ms. Guetter's letter of July 25, 2017, was "not probative in indicating that the Applicants were continuing to pursue the appeal."

V. STANDARD OF REVIEW

[24] Although the issue has arisen only a few times, this Court has consistently held that the standard of review applicable to the RAD's decision to deny an application to re-open an appeal is that of reasonableness: see *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at paras 19-21; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996 at para 12; and *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at para 31 [*Atim*]. (In *Raza v Canada (Citizenship and Immigration)*, 2016 FC 250, the question of the standard of review was left open.) Applying the reasonableness standard, the reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[25] At first glance, it may appear surprising that the reasonableness standard of review would apply since the question the RAD must address is whether there was a failure to observe a principle of natural justice, an issue that usually engages the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]). However, it is the RAD that is tasked with determining whether there was a failure to observe a principle of natural justice in relation to the appeal whose re-opening was sought, not this Court (*Atim* at para 33). A decision on such a question is typically one of mixed fact and law, something that is generally reviewed on a reasonableness standard (*Dunsmuir* at paras 51 and 53-54).

[26] On the other hand, if the allegation were that the RAD member who denied an application to re-open an appeal had failed to observe a principle of natural justice, it would be this Court's task to determine whether the process the member followed satisfied the level of fairness required in all of the circumstances (*Khosa* at para 43; *Canadian Pacific Railway Co. v Canada (Attorney General)*, 2018 FCA 69 at para 54). This is an issue with respect to which no deference is owed to the decision-maker; the reviewing court would make its own determination. The same is true if the allegation on judicial review were that counsel who had acted for an applicant on an application to re-open an appeal had provided inadequate assistance in that proceeding: see *Atim* at para 32.

VI. ISSUE

[27] The sole issue on this application is whether the RAD member's decision to deny the application to re-open the applicants' appeal is reasonable.

VII. ANALYSIS

[28] As set out above, Rule 49(6) states that the RAD may re-open an appeal that has been dismissed only if it finds that there was a failure to observe a principle of natural justice. In other words, a failure to observe a principle of natural justice is a necessary condition for an appeal to be re-opened. The presence of Rule 49(7) suggests that this alone may not also be a sufficient condition to re-open an appeal; other "relevant factors" may warrant denying an application to re-open, even if a failure to observe a principle of natural justice is established (e.g. an unexplained failure to bring the application to re-open in a timely manner).

[29] In a nutshell, the applicants' position on the application to re-open was that they had an ongoing intention to pursue their appeal to the RAD, they were unable to perfect the appeal within time because of the uncooperativeness and, more generally, the inadequate representation of the immigration consultant after the RPD denied their claims, and the dismissal of their appeal under such circumstances constituted a denial of natural justice.

[30] In my view, the RAD member's decision to deny the application to re-open is unreasonable in the following key respects.

[31] First, the member found no merit in the applicants' claim that the immigration consultant had told them that he did not know how to proceed with an appeal because he was not gay. The member rejected this claim because the consultant "obviously was aware of the procedure because he initiated the [Notice of Appeal]." In doing so, the member fundamentally misunderstood what the applicants said they were told by the immigration consultant. The immigration consultant did not mean that he did not know how to conduct an appeal. What he meant was that he could not assist the applicants with their appeal because, not being gay, he would not be able to advance the appeal effectively. This was why he recommended a lesbian lawyer to them. More to the point, whether or not the immigration consultant's reason for withdrawing withstands scrutiny, it is indisputable that, shortly after the Notice of Appeal was filed, he refused to assist the applicants further, they had to find new representation, and this contributed to the delay in perfecting their appeal.

[32] Second, the member faults the applicants for not following Rule 49(5). However, this rule was not even engaged. The applicants could not file a copy of an application for leave for judicial review or an application for judicial review because there was none to file.

[33] Third, the member also faults the applicants for not following Rule 49(7)(b). This rule requires the RAD to consider, if an applicant 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. It is true that the applicants did not say anything in their application to re-open about why they had not applied for leave for judicial review. However, any reasonable person would recognize that such an application would have little chance of success unless and until the alternative remedy available under Rule 49 had been exhausted. The approach taken by the applicants promotes the efficient and effective use of judicial resources. While it would have been preferable if the applicants had addressed Rule 49(7)(b) in their submissions, the member's reliance on this factor is unreasonable.

[34] Fourth, the member appears to disregard the applicants' allegations of inadequate representation because there was no "confirmation" that the ICCRC had received or acted upon a complaint about the immigration consultant and because there was no proof that the application to re-open and the ICCRC complaint had been provided to the immigration consultant. The absence of a decision from the ICCRC is a red herring. While a decision on the complaint could have some probative value for the RAD on the question of whether the immigration consultant's representation of the applicants was inadequate, the absence of a decision is evidence of nothing. More importantly, there was proof that the application to re-open (which included the complaint

to the ICCRC) had been sent to the immigration consultant – namely, Ms. Guetter's written representations to this effect. Ms. Guetter may not have followed best practices in how she sought to fulfill the requirements of Rule 49(4)(b). Nevertheless, in the circumstances of this case, it was unreasonable for the member not to accept the representations of a member of the bar at face value.

[35] Fifth, on a related point, the member faults the applicants for not providing the immigration consultant with a copy of the application to re-open before it was filed with the RAD, as required by Rule 49(4)(a). Certainly it simplifies matters if proof of delivery can be filed with the RAD at the same time as the application to re-open. Counsel should make every effort to ensure that this is what happens. When this does not happen, the important question is whether the rationale for the rule has been met. This rule, like Rule 62(4) of the *Refugee Protection Division Rules*, SOR/2012-256 (concerning re-opening a refugee claim), and like this Court's March 7, 2014, Procedural Protocol regarding allegations against counsel or authorized representatives, serves the important function of ensuring that an individual whose conduct is impugned has an opportunity to respond to the allegations. This is only fair to the former counsel or representative. It also enhances the ability of the tribunal to adjudicate the issue properly (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 67; *Shabuddin v Canada (Citizenship and Immigration)*, 2017 FC 428 at para 18; *Pacheco v Canada (Citizenship and Immigration)*, 2018 FC 617 at paras 19-22).

[36] Here, no doubt Ms. Guetter was trying to file the application record as soon as possible and wanted to avoid the additional delay that would be caused by waiting for proof of delivery to

the immigration consultant. Her attempt to expedite matters, while understandable, did not comply with Rule 49(4)(a). That being said, the rationale for the rule was met: the immigration consultant was provided with a copy of the application record promptly and had an opportunity to respond (which opportunity he chose not to take up). In such circumstances, to allow the failure to comply with Rule 49(4)(a) to weigh against granting the application to re-open is to permit form to triumph over substance.

[37] Finally, it was unreasonable for the member to find that Ms. Guetter's letter of July 25, 2017, "is not probative in indicating that the Applicants were continuing to pursue the appeal." I simply cannot fathom how the letter could mean anything but this. Ms. Guetter stated that she had been retained by the applicants for the purpose of the appeal. She was urgently requesting material she required to perfect that appeal, the time for which she acknowledged had already passed. It is true that the letter does not state that she had requested an extension of time to perfect the appeal. However, under Rule 6(5) she could not make such an application until she was ready to file the appellants' record and she could not prepare the appellants' record until she had the recording she was requesting with the July 25, 2017, letter.

[38] In a case where an extension of time is sought to perfect an appeal, the timeliness of the application and the justification for any delay have a direct bearing on whether an extension should be granted (see Rule 6(7)). The reasons why an appeal that has been dismissed for lack of perfection was not perfected within time are just as important on an application to re-open the appeal (cf. Justice Diner's helpful discussion of the rules governing applications to re-open

refugee claims in *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845, especially paras 31-33 and the cases cited therein).

[39] Having taken the view of the July 25, 2017, letter he did, perhaps it is not surprising that the member did not go on to consider whether the August 21, 2017, decision dismissing the appeal was rendered without regard to this letter and whether this, in and of itself, occasioned a violation of the principles of natural justice. However, given the only meaning this letter could reasonably bear, it was unreasonable for the member not to address these questions.

VIII. CONCLUSION

[40] For these reasons, the RAD member's decision denying the application to re-open the appeal must be set aside. The matter is remitted to a differently constituted panel for reconsideration.

[41] The parties did not suggest any questions of general importance. I agree that none arise.

[42] Finally, the original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(1). Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-244-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.

2. The application for judicial review is allowed.

3. The decision of the Refugee Appeal Division dated December 4, 2017, is set aside and the matter is remitted to a differently constituted panel for reconsideration.

4. No question of general importance is stated.

"John Norris"
Judge

ANNEX

Immigration and Refugee Protection Act, SC 2001, c 27

Appeal to Refugee Appeal Division	**Appel devant la Section d'appel des réfugiés**
Appeal	**Appel**
110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	110 (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
Notice of appeal	**Avis d'appel**
(1.1) The Minister may satisfy any requirement respecting the manner in which an appeal is filed and perfected by submitting a notice of appeal and any supporting documents.	(1.1) Le ministre peut satisfaire à toute exigence relative à la façon d'interjeter l'appel et de le mettre en état en produisant un avis d'appel et tout document au soutien de celui-ci.
Restriction on appeals	**Restriction**
(2) No appeal may be made in respect of any of the following:	(2) Ne sont pas susceptibles d'appel :
(a) a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a designated foreign national;	a) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile d'un étranger désigné;
(b) a determination that a refugee protection claim has been withdrawn or abandoned;	b) le prononcé de désistement ou de retrait de la demande d'asile;
(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly	c) la décision de la Section de la protection des réfugiés rejetant la demande d'asile en faisant état de l'absence de minimum de fondement de la demande d'asile ou du fait que celle-ci est manifestement infondée;
	d) sous réserve des règlements, la décision

unfounded;

(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if

(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and

(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;

(d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);

(e) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased;

(f) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection.

Making of appeal

(2.1) The appeal must be filed and perfected within the time limits set out in the regulations.

de la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois:

(i) est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à un accord visé à l'alinéa 102(2)d),

(ii) n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c);

d.1) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile du ressortissant d'un pays qui faisait l'objet de la désignation visée au paragraphe 109.1(1) à la date de la décision;

e) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant la perte de l'asile;

f) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant l'annulation d'une décision ayant accueilli la demande d'asile.

Formation de l'appel

(2.1) L'appel doit être interjeté et mis en état dans les délais prévus par les règlements.

…

No reopening of appeal

171.1 The Refugee Appeal Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — an appeal in respect of which the Federal Court has made a final determination.

…

Appels non susceptibles de réouverture

171.1 La Section d’appel des réfugiés n’a pas compétence pour rouvrir, pour quelque motif que ce soit, y compris le manquement à un principe de justice naturelle, les appels à l’égard desquels la Cour fédérale a rendu une décision en dernier ressort.

Immigration and Refugee Protection Regulations, SOR/2002-227

Appeal to Refugee Appeal Division	**Appel devant la Section d'appel des réfugiés**
Time limit for appeal	**Délais d'appel**
159.91 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act,	159.91 (1) Pour l'application du paragraphe 110(2.1) de la Loi et sous réserve du paragraphe (2), la personne en cause ou le ministre qui porte en appel la décision de la Section de la protection des réfugiés le fait dans les délais suivants :
(a) the time limit for a person or the Minister to file an appeal to the Refugee Appeal Division against a decision of the Refugee Protection Division is 15 days after the day on which the person or the Minister receives written reasons for the decision; and	a) pour interjeter appel de la décision devant la Section d'appel des réfugiés, dans les quinze jours suivant la réception, par la personne en cause ou le ministre, des motifs écrits de la décision;
(b) the time limit for a person or the Minister to perfect such an appeal is 30 days after the day on which the person or the Minister receives written reasons for the decision.	b) pour mettre en état l'appel, dans les trente jours suivant la réception, par la personne en cause ou le ministre, des motifs écrits de la décision.

Refugee Appeal Division Rules, SOR/2012-257

Content of appellant's record	**Contenu du dossier de l'appelant**
3(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:	3(3) Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :
(a) the notice of decision and written reasons for the Refugee Protection Division's decision that the appellant is appealing;	a) l'avis de décision et les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel;
(b) all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript in the appeal, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;	b) la transcription complète ou partielle de l'audience de la Section de la protection des réfugiés, si l'appelant veut l'invoquer dans l'appel, accompagnée d'une déclaration signée par le transcripteur dans laquelle celui-ci indique son nom et atteste que la transcription est fidèle;
(c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal;	c) tout document que la Section de la protection des réfugiés a refusé d'admettre en preuve pendant ou après l'audience, si l'appelant veut l'invoquer dans l'appel;
(d) a written statement indicating	d) une déclaration écrite indiquant :
(i) whether the appellant is relying on any evidence referred to in subsection 110(4) of the Act,	(i) si l'appelant invoque des éléments de preuve visés au paragraphe 110(4) de la Loi,
(ii) whether the appellant is requesting that a hearing be held under subsection 110(6) of the Act, and if they are requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing, and	(ii) si l'appelant demande la tenue de l'audience visée au paragraphe 110(6) de la Loi et, le cas échéant, s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66,
(iii) the language and dialect, if any, to be interpreted, if the Division decides that a hearing is necessary and the appellant needs an interpreter;	(iii) la langue et, le cas échéant, le dialecte à interpréter, si la Section décide qu'une audience est nécessaire et que l'appelant a besoin d'un interprète;
(e) any documentary evidence that the	e) tout élément de preuve documentaire que

appellant wants to rely on in the appeal;

(f) any law, case law or other legal authority that the appellant wants to rely on in the appeal; and

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

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

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

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

(iv) the decision the appellant wants the Division to make, and

(v) why the Division should hold a hearing under subsection 110(6) of the Act if the appellant is requesting that a hearing be held.

…

Extension of Time

Application for extension of time to file or perfect

6 (1) A person who is the subject of an appeal who makes an application to the Division for an extension of the time to file or to perfect an appeal under the Regulations must do so in accordance with rule 37, except that the person must provide to the Division the original and a copy of the application.

l'appelant veut invoquer dans l'appel;

f) toute loi, jurisprudence ou autre autorité légale que l'appelant veut invoquer dans l'appel;

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

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

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

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

(iv) la décision recherchée,

(v) les motifs pour lesquels la Section devrait tenir l'audience visée au paragraphe 110(6) de la Loi, si l'appelant en fait la demande.

…

Prorogation de délai

Demande de prorogation du délai pour interjeter ou mettre en état un appel

6 (1) La personne en cause qui fait une demande de prorogation du délai à la Section pour interjeter ou mettre en état un appel aux termes du Règlement le fait conformément à la règle 37, mais la personne transmet à la Section l'original et une copie de la demande.

Copy provided to Minister

(2) The Division must provide a copy of an application under subrule (1) to the Minister without delay.

Content of application

(3) The person who is the subject of the appeal must include in an application under subrule (1)

(a) their name and telephone number, and an address where documents can be provided to them;

(b) if represented by counsel, counsel's contact information and any limitations on counsel's retainer;

(c) the identification number given by the Department of Citizenship and Immigration to them; and

(d) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that they received the written reasons for the decision.

Accompanying documents — filing

(4) An application for an extension of the time to file an appeal under subrule (1) must be accompanied by three copies of a written notice of appeal.

Accompanying documents — perfecting

(5) An application for an extension of the time to perfect an appeal under subrule (1) must be accompanied by two copies of the appellant's record.

Copie transmise au ministre

(2) La Section transmet sans délai au ministre une copie d'une demande visée au paragraphe (1).

Contenu de la demande

(3) Dans la demande visée au paragraphe (1), la personne en cause indique :

a) ses nom et numéro de téléphone, ainsi que l'adresse à laquelle des documents peuvent lui être transmis;

b) les coordonnées de son conseil, le cas échéant, et toute restriction au mandat de celui-ci;

c) le numéro d'identification que le ministère de la Citoyenneté et de l'Immigration lui a attribué;

d) le numéro de dossier de la Section de la protection des réfugiés, la date de l'avis de décision concernant la décision portée en appel et la date à laquelle elle a reçu les motifs écrits de la décision.

Documents joints — interjeter un appel

(4) La demande de prorogation du délai pour interjeter un appel visée au paragraphe (1) est accompagnée de trois copies d'un avis d'appel écrit.

Documents joints — mettre en état un appel

(5) La demande de prorogation du délai pour mettre en appel visée au paragraphe (1) est accompagnée de deux copies du dossier de l'appelant.

Application for extension of time to reply

(6) A person who is the subject of an appeal may make an application to the Division for an extension of the time to reply to a Minister's intervention in accordance with rule 37.

Demande de prorogation du délai pour répliquer

(6) La personne en cause peut faire, conformément à la règle 37, une demande de prorogation du délai pour répliquer à une intervention du ministre.

Factors — reply

(7) In deciding an application under subrule (6), the Division must consider any relevant factors, including

Éléments à considérer — réplique

(7) Pour statuer sur la demande visée au paragraphe (6), 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;

a) le fait que la demande a été faite en temps opportun et la justification de tout retard;

(b) whether there is an arguable case;

b) la question de savoir si la cause est soutenable;

(c) prejudice to the Minister, if the application was granted; and

c) le préjudice que subirait le ministre si la demande est accordée;

(d) the nature and complexity of the appeal.

d) la nature et la complexité de l'appel.

Notification of decision on application

(8) The Division must without delay notify, in writing, both the person who is the subject of the appeal and the Minister of its decision with respect to an application under subrule (1) or (6).

Avis de décision sur la demande

(8) La Section avise sans délai par écrit la personne en cause et le ministre de sa décision sur la demande visée aux paragraphes (1) ou (6).

…

…

Content of appellant's record

9(2) In addition to the documents referred to in subrule (1), the Minister may provide, first to the person who is the subject of the appeal and then to the Division, the appellant's record containing the following documents, on consecutively numbered pages, in the following order:

Contenu du dossier de l'appelant

(2) En plus des documents visés au paragraphe (1), le ministre peut transmettre à la personne en cause, puis à la Section, le dossier de l'appelant qui comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

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

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

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

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

(c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the Minister wants to rely on the documents in the appeal;

c) tout document que la Section de la protection des réfugiés a refusé d'admettre en preuve pendant ou après l'audience, si le ministre veut l'invoquer dans l'appel;

(d) a written statement indicating

d) une déclaration écrite indiquant :

(i) whether the Minister is relying on any documentary evidence referred to in subsection 110(3) of the Act and the relevance of that evidence, and

(i) si le ministre veut invoquer des éléments de preuve documentaire visés au paragraphe 110(3) de la Loi et la pertinence de ces éléments de preuve,

(ii) whether the Minister is requesting that a hearing be held under subsection 110(6) of the Act, and if the Minister is requesting a hearing, why the Division should hold a hearing and whether the Minister is making an application under rule 66 to change the location of the hearing;

(ii) si le ministre demande la tenue de l'audience visée au paragraphe 110(6) de la Loi et, le cas échéant, les motifs pour lesquels la Section devrait en tenir une et s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66;

(e) any law, case law or other legal authority that the Minister wants to rely on in the appeal; and

e) toute loi, jurisprudence ou autre autorité légale que le ministre veut invoquer dans l'appel;

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

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

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

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

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

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

Division hearing, and

(iii) the decision the Minister wants the Division to make.

…

Extension of Time

Application for extension of time — Minister

12 (1) If the Minister makes an application to the Division for an extension of the time to file or to perfect an appeal under the Regulations, the Minister must do so in accordance with rule 37.

Accompanying documents — filing

(2) An application for an extension of the time to file an appeal under subrule (1) must be accompanied by two copies of a written notice of appeal.

Accompanying documents — perfecting

(3) An application for an extension of the time to perfect an appeal under subrule (1) must be accompanied by any supporting documents, and an appellant's record, if any.

Application for extension of time — person

(4) A person who is the subject of an appeal may make an application to the Division for an extension of the time to respond to an appeal in accordance with rule 37.

Content of application for extension of time to respond to appeal

(5) The person who is the subject of the appeal must include in an application under subrule (4)

l'audience tenue devant cette dernière,

(iii) la décision recherchée.

…

Prorogation de délai

Demande de prorogation de délai — ministre

12 (1) Si le ministre fait une demande de prorogation du délai à la Section pour interjeter ou mettre en état un appel aux termes du Règlement, il le fait conformément à la règle 37.

Documents joints — interjeter un appel

(2) La demande de prorogation du délai pour interjeter un appel visée au paragraphe (1) est accompagnée de deux copies d'un avis d'appel écrit.

Documents joints — mettre en état un appel

(3) La demande de prorogation du délai pour mettre en état un appel visée au paragraphe (1) est accompagnée de tout document à l'appui et du dossier de l'appelant, le cas échéant.

Demande de prorogation de délai — personne en cause

(4) La personne en cause peut faire, conformément à la règle 37, une demande de prorogation du délai à la Section pour répondre à un appel.

Contenu de la demande de prorogation pour répondre à un appel

(5) Dans la demande visée au paragraphe (4), la personne en cause indique :

(a) their name and telephone number, and an address where documents can be provided to them;

(b) if represented by counsel, counsel's contact information and any limitations on counsel's retainer;

(c) the identification number given by the Department of Citizenship and Immigration to them; and

(d) the Refugee Protection Division file number, the date of the notice of decision relating to the decision being appealed and the date that they received the written reasons for the decision.

a) ses nom et numéro de téléphone, ainsi que l'adresse à laquelle des documents peuvent lui être transmis;

b) les coordonnées de son conseil, le cas échéant, et toute restriction au mandat de celui-ci;

c) le numéro d'identification que le ministère de la Citoyenneté et de l'Immigration lui a attribué;

d) le numéro de dossier de la Section de la protection des réfugiés, la date de l'avis de décision concernant la décision portée en appel et la date à laquelle elle a reçu les motifs écrits de la décision.

Factors — respond

(6) In deciding an application under subrule (4), the Division must consider any relevant factors, including

(a) whether the application was made in a timely manner and the justification for any delay;

(b) whether there is an arguable case;

(c) prejudice to the Minister, if the application was granted; and

(d) the nature and complexity of the appeal.

Éléments à considérer — réponse

(6) Pour statuer sur la demande visée au paragraphe (4), la Section prend en considération tout élément pertinent, notamment :

a) le fait que la demande a été faite en temps opportun et la justification de tout retard;

b) la question de savoir si la cause est soutenable;

c) le préjudice que subirait le ministre si la demande est accordée;

d) la nature et la complexité de l'appel.

Notification of decision on application

(7) The Division must without delay notify, in writing, both the person who is the subject of the appeal and the Minister of its decision with respect to an application under subrule (1) or (4).

Avis de décision sur la demande

(7) La Section avise sans délai par écrit la personne en cause et le ministre de sa décision sur la demande visée aux paragraphes (1) ou (4).

Disposition of an Appeal

Decision without further notice

13 Unless a hearing is held under subsection 110(6) of the Act, the Division may, without further notice to the parties, decide an appeal on the basis of the materials provided

(a) if a period of 15 days has passed since the day on which the Minister received the respondent's record, or the time limit for providing it set out in subrule 10(6) has expired; or

(b) if the Minister's reply has been provided.

…

Reopening an Appeal

Application to reopen appeal

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.

Form and content of application

(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.

Documents provided to Minister

(3) The Division must provide to the Minister, without delay, a copy of an application made

Décision sur l'appel

Décision sans aviser les parties

13 Sauf si une audience est tenue au titre du paragraphe 110(6) de la Loi, la Section peut, sans en aviser les parties, rendre une décision sur l'appel sur la foi des documents qui ont été présentés, dans l'une ou l'autre des circonstances suivantes :

a) un délai de quinze jours s'est écoulé après la date de réception par le ministre du dossier de l'intimé ou le délai de transmission de celui-ci prévu au paragraphe 10(6) est expiré;

b) le ministre a transmis une réplique.

…

Réouverture d'un Appel

Demande de réouverture d'un appel

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.

Forme et contenu de la demande

(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 transmis au ministre

(3) La Section transmet sans délai au ministre une copie de la demande faite par la

by a person who is the subject of an appeal .

Allegations against counsel

(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,

(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

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

Copy of pending application

(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.

Factor

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

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.

personne en cause.

Allégations à l'égard d'un conseil

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

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

Copie de la demande en instance

(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.

Élément à considérer

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

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, or dismiss the application.

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 nécessaire pour traiter avec célérité et efficacité les appels, soit rejette la demande.

FEDERAL COURT

SOLICITORS OF RECORD

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