Federal Court  Cour fédérale

Date: 20200430

Docket: IMM-4429-19

Citation: 2020 FC 575

Ottawa, Ontario, April 30, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

EVAS ROKISINI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Refugee Appeal Division ("RAD") to refuse the Applicant's application to re-open an appeal—that was dismissed for lack of perfection—pursuant to Rules 49(6) and 49(7) of the *Refugee Appeal Division Rules*, SOR/2012-257 ("*RAD Rules*"). The Applicant had failed to perfect his application record as a result of his misunderstanding between a notice of appeal and an application record. The Applicant also

claimed that he did not receive a letter from Legal Aid Ontario ("LAO"), which contained a refusal to fund the Applicant's application for his RAD appeal on the basis of insufficient merits. This letter had been addressed incorrectly.

[2] The Applicant submits that the RAD breached procedural fairness by failing to put the Applicant on notice of its credibility concerns. The Applicant also submits that the RAD ignored relevant factors and evidence that contradicted its conclusions.

[3] For the reasons below, the RAD decision is reasonable and the RAD did not breach procedural fairness. This application for judicial review is dismissed.

II. **Facts**

[4] Mr. Evas Rokisini (the "Applicant") is a 50-year-old citizen of South Africa. The Applicant sought refugee protection in Canada on the basis of being a victim of criminal activity in South Africa. The refugee claim was heard by the Refugee Protection Division ("RPD") on October 17, 2018, and refused on November 14, 2018.

[5] On December 6, 2018, the Applicant filed a notice of appeal to the RAD. By letter dated December 28, 2018, the RAD sent an acknowledgement of receipt of the Applicant's notice of appeal ("RAD Acknowledgement Letter"). The letter stated that the RAD received the Applicant's notice of appeal on December 6, 2018, and that the Applicant's appeal record was due on January 28, 2019. However, as the RAD did not receive further correspondence from the Applicant, the appeal was dismissed for lack of perfection by decision dated March 7, 2019.

[6] On April 1, 2019, the Applicant filed for judicial review of the RAD's decision. The Applicant subsequently sought and obtained an abeyance of this application in order to pursue an application to re-open his appeal with the RAD.

[7] On May 21, 2019, the Applicant submitted an application to re-open his appeal at the RAD. In the re-open application, the Applicant submitted procedural fairness arguments and explained why he had failed to perfect his application. For his initial RAD appeal, the Applicant had obtained a legal aid certificate that was conditional on a merit assessment. On January 2, 2019, LAO refused the merit assessment. The results of the assessment were sent by mail to the Applicant and by fax to the Applicant's counsel. However, the letter to the Applicant was incorrectly addressed to "Joan Garland Blvd" instead of "John Garland Blvd", as a result of which, the Applicant alleges he never received the letter.

[8] Furthermore, on his re-open application, the Applicant submitted that he had misunderstood the RAD process. When the Applicant received the RAD Acknowledgement Letter, he mistakenly believed that the January 28, 2019 deadline had been referring to his notice of appeal, assumed that he had already satisfied this requirement, and thus took no further action. The Applicant submits that he only discovered the refusal of the legal aid merit assessment and the missed deadline for perfecting the appeal record when the RAD appeal was dismissed on March 7, 2019. After receiving the refusal, the Applicant visited his former counsel and learned that his merit assessment had been refused, and that no appeal record had been submitted. The Applicant notes in his affidavit that he would have retained private counsel to receive assistance on his appeal had he received the letter from LAO.

[9] By decision dated June 24, 2019, the RAD refused the Applicant's application to re-open the appeal. The RAD concluded that the Applicant failed to establish a failure to observe a principle of natural justice.

[10] The RAD found that the Applicant would have been "well aware" of the process to follow from the RAD Acknowledgement Letter, and did not accept the Applicant's submission that he believed there was no further action to be taken. The RAD acknowledged that there was a "minor discrepancy in the street name" in the letter sent by LAO, but found that all of the other address components, such as the postal code, were correct. The RAD also found that the Applicant neglected to notify LAO and the RAD of his address change until well after his RAD appeal was dismissed. Overall, the RAD concluded that the Applicant did not demonstrate a continuing intent to pursue his appeal.

[11] This is the underlying decision on this application for judicial review.

III. **Issues and Standard of Review**

[12] The issues on this application for judicial review are:

A. Did the RAD breach procedural fairness by failing to put the Applicant on notice of its credibility concerns?

B. Was it reasonable for the RAD to refuse the application to re-open the appeal?

[13] Prior to the recent decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], this Court had 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 *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 (CanLII) at paras 24-25, citing *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 (CanLII) at paras 19-21; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996 (CanLII) at para 12; and *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 (CanLII) at para 31). However, there is no need to depart from the standard of review followed in previous case law, as the application of the *Vavilov* framework results in the same standard of review for the second issue: reasonableness.

[14] Pre-*Vavilov*, issues of procedural fairness were reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 72). In *Vavilov*, this approach remains the same. In *Vavilov* at paragraph 23, the Supreme Court writes:

> Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[15] The correctness standard continues to apply to the issue of procedural fairness.

IV. **Analysis**

A. *Procedural Fairness*

[16] The Applicant submits that the RAD's refusal relies on its finding that the Applicant lacked credibility, and that the RAD breached procedural fairness by failing to put the Applicant on notice of its credibility concerns. The Applicant submits that the RAD disbelieved the Applicant's assertions that he mistakenly equated the submission of a notice of appeal with the submission of an application record. The Applicant claims this is an implicit credibility finding doubting the accuracy of the Applicant's statements. The Applicant cites *Crudu v Canada (Citizenship and Immigration)*, 2019 FC 834 (CanLII) [*Crudu*] at paragraph 35 and argues that an officer cannot disregard a sworn statement from a refugee claimant who did not understand the application process that was communicated to them. Additionally, the Applicant submits that the case at bar is similar to *Skerritt v Canada (Citizenship and Immigration)*, 2010 FC 366 (CanLII) [*Skerritt*], where the Court found that the IAD relied on implicit credibility findings to discount the applicant's assertion that he had not received relevant mail.

[17] The Applicant further submits that the RAD doubted the accuracy of the Applicant's assertion that he never received the letter from LAO by relying on the similarities between the written and actual address, and discounted the Applicant's sworn statements. The Applicant argues that where an officer rejects an application based on credibility or accuracy concerns, such concerns must be put to the applicant for a response.

[18] The Respondent submits that the RAD did not breach procedural fairness and that the RAD did not make implicit credibility findings.

[19] In my view, the RAD did not draw its conclusions from credibility findings of the Applicant, but on a review of the evidence to determine whether there had been a failure to observe a principle of natural justice that would justify the re-opening of the appeal. It was open to the RAD to find that the Applicant "would be well aware of the process to follow".

[20] I am not persuaded by the Applicant's submissions that the case at bar bears similarities to *Skerritt*. The case in *Skerritt* can be distinguished on the facts. In *Skerritt*, the applicant alleged that he had not received several earlier notices sent by the IAD. However, the applicant received and responded to a later-mailed notice of abandonment. The Court found it problematic that the IAD failed to consider a logical possibility that the applicant's prompt reply to the notice of abandonment was evidence of his intention to pursue his appeal, and that he would have attended his hearings had he received the earlier notices.

[21] First, I note that the applicant in *Skerritt* was not represented by counsel, whereas in the case at bar, the Applicant had access to counsel, to whom he could have directed questions regarding the RAD Acknowledgement Letter, instead of blindly assuming that there was no action to be taken. Second, in *Skerritt*, the applicant alleged that he had not received the earlier notices, whereas in the case at bar, the Applicant attested that he received the RAD Acknowledgement Letter.

[22] Furthermore, the Applicant misstates the Court's findings in *Crudu*, as it certainly does not stand for the proposition that "an Officer cannot disregard a sworn statement from a refugee claimant who did not understand the application process that was communicated to them," as was submitted by the Applicant. *Crudu* is a decision in the context of an application to re-open a claim at the RPD. In *Crudu*, the applicants had provided statements and signatures after an interview with an immigration officer, which indicated that they understood the interpreter and that the contents of the Notice to Appear forms were communicated to them. However, the Court found that these statements and signatures should not have been determinative without a way to verify that the verbal information from the immigration officer and the contents of the forms had been accurately communicated (*Crudu* at para 35).

[23] On the contrary, in the case at bar, the Applicant noted in his own affidavit that he received the RAD Acknowledgement Letter, which clearly indicated that the RAD had received the Applicant's notice of appeal, and that the Applicant's appeal record was due on January 28, 2019. There are no issues arising out of miscommunication through inaccurate interpretation, but the facts simply portray the Applicant's unfortunate own misunderstanding and lack of follow up with counsel.

[24] In view of the facts, I find it difficult to accept that the RAD's refusal of the re-open application was a result of implicit credibility findings against the Applicant, as it appears to be based on an assessment of the documentary evidence and the Applicant's own statement that he received the RAD Acknowledgement Letter. For the reasons above, I find that the RAD did not breach procedural fairness.

B. *Reasonableness of the RAD Decision*

[25] The Applicant submits that the RAD ignored evidence that contradicted its findings. Specifically, the Applicant argues that the RAD failed to address the evidence that Canada Post would not deliver incorrectly addressed mail, i.e. the letter from LAO. The Applicant also submits that the RAD should have considered "any relevant factors" and the specific circumstances of the Applicant in determining a re-open application pursuant to Rule 49(7) of the *RAD Rules*, but failed to do so. The Applicant argues that he took immediate steps to rectify the situation when he discovered the RAD's refusal of his appeal based on a lack of perfection. The Applicant relies on *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845 (CanLII) at paragraph 25 for the proposition that an applicant's ignorance of the law does not necessarily end the inquiry, and that the particular circumstances of a delay in the claim (or appeal in this case) should be considered.

[26] The Respondent submits that the RAD reasonably found that the Applicant failed to establish a breach of natural justice based on the factual circumstances. The Respondent argues that the Applicant's misunderstanding around perfecting his appeal record is an insufficient basis to conclude that the RAD decision is unreasonable. The Applicant's failure to perfect his appeal record did not arise from any error or misleading conduct of the RAD or LAO, but from the Applicant's own failure to understand the instructions.

[27] Furthermore, the Respondent submits that several of the Applicant's arguments—that the RAD failed to consider evidence, such as the incorrectly mailed letter from LAO and Canada

Post's delivery policy; that the RAD made an implied credibility finding; and that the RAD erred in finding that the Applicant would have received an "information kit"—are peripheral to the RAD's determinative finding that there was no breach of natural justice. Regardless of whether the Applicant received the letter from LAO or an "Appellant's Kit for the RAD", it was sufficient that the Applicant received the RAD Acknowledgement letter.

[28] Although I agree with the Applicant's contention that context matters, the Applicant misses a key point in the RAD's role of determining whether the application to re-open the appeal should be allowed: there must be a failure to observe a principle of natural justice pursuant to Rule 49(6) of the *RAD Rules*. In my view, the RAD reasonably refused the Applicant's application to re-open the appeal.

[29] I find this Court's decision in *Singh v Canada (Citizenship and Immigration)*, 2019 FC 91 (CanLII) [*Singh*] to be helpful for the case at bar. In *Singh* at paragraph 15, Justice Barnes found that the inconsistency between the applicant's affidavit and the documentary record presented a material conflict in the determination of whether the IAD erred by refusing to re-open the applicant's appeal:

> Another fundamental problem with the Applicant's argument arises from a material conflict between his affidavit and the documentary record. The Applicant asserts that he had no knowledge of the requested extensions or that his appeal had not been perfected. This sworn evidence is completely inconsistent with the documents contained in the record. The Applicant was copied on the two letters sent by the IAD to Mr. Khaira confirming the grant of two extensions to provide the requested information. The IAD also wrote to the Applicant directly on February 1, 2017 telling him that a failure to perfect his appeal could lead to a finding of abandonment.

[30] Similarly, there is an inconsistency between the Applicant's affidavit and the documentary record. In his affidavit, the Applicant attested that he received the RAD Acknowledgement Letter, which clearly stated "The Refugee Appeal Division (RAD) has received your notice of appeal on December 6, 2018." The RAD Acknowledgement Letter also stated that the "appellant's record must be received by the RAD on **January 28, 2019**" (emphasis in original), and that the appeal may be dismissed for lack of perfection if the record was not provided. The Applicant also attested to having filed a notice of appeal to the RAD with the assistance of his counsel on December 6, 2018. Therefore, when the Applicant received the RAD Acknowledgement Letter stating the contents I noted above, it was reasonable for the RAD to conclude that the Applicant would have been aware of the procedures to follow, and that he should have reached out to his counsel for clarifications if he did not fully understand the contents of the letter. I am not persuaded by the Applicant's submissions that he "mistakenly assumed" that a hearing would be scheduled for the RAD appeal, and that the "notice of appeal" was the equivalent of an "appellant's record". A plain reading of the RAD Acknowledgement Letter would clearly compel the reader to take next steps, as the letter acknowledges that a "notice of appeal" has been received by the RAD.

[31] Additionally, although the Applicant's submissions emphasize the fact that the Applicant did not receive the letter from LAO, I find the letter's whereabouts to be of little significance in view of the chronology of events. As the RAD Acknowledgement Letter was mailed out much earlier than the LAO letter, regardless of whether the LAO letter reached the Applicant, it was incumbent on the Applicant take action when he received the RAD Acknowledgement Letter.

V. **Certified Question**

[32] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[33] The RAD did not breach procedural fairness, and the RAD decision is reasonable. For the foregoing reasons, this application for judicial review is dismissed.

JUDGMENT in IMM-4429-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4429-19
STYLE OF CAUSE:	EVAS ROKISINI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 12, 2020
JUDGMENT AND REASONS:	AHMED J.
DATED:	APRIL 30, 2020

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