Federal Court Cour fédérale

Date: 20211130

Docket: IMM-2741-20

Citation: 2021 FC 1319

Ottawa, Ontario, November 30, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MAKBULE YANASIK; AZRA YANASIK;
AND EZGI YANASIK AND GOKHAN YANASIK,
BY THEIR LITIGATION
GUARDIAN MAKBULE YANASIK

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an Application for judicial review of a March 5, 2020 decision [Decision] of the Refugee Appeal Division [RAD] pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Decision dismissed the Applicants' appeal of a

Refugee Protection Division [RPD] decision denying the Applicants' claims for refugee protection under sections 96 and 97 of the *IRPA*.

[2] At the RAD, the Applicants argued that their counsel at the RPD was incompetent and that the RPD erred in assessing their residual profiles. The RAD determined that counsel at the RPD did not have the opportunity to respond to the allegations of incompetence and, therefore, the Applicants' claim of inadequate representation failed. The RAD also determined that the RPD did not err in its assessment of the Applicants' residual profiles.

[3] The application for judicial review is allowed.

II. Background

[4] The Applicants, Ms. Yanasik [Principal Applicant], her husband [Male Applicant], and their two children [Minor Applicants] are citizens of Turkey. The Principal Applicant is Kurdish and Alevi and supported pro-Kurdish political parties in Turkey. The Male Applicant was a petty officer in the Turkish military. He is neither Alevi nor Kurdish, but is secular and supported his wife's beliefs.

[5] The Applicants claimed two interactions with police in Turkey. The first occurred in July 2016, after attending a commemoration event for the Sivas massacre. The Principal Applicant and some relatives were on their way home when police stopped them, asked for their identification cards, held them near the police station for a few hours and assaulted them before releasing them.

[6] The second occurred later that same month, after an attempted coup in Turkey. The Applicants' home was raided and searched by police and they were told that their family would face harm if they discovered that they were part of the coup attempt. In mid-August 2016, their home was raided and searched again.

[7] In September 2016, the Principal Applicant and the Minor Applicants arrived in Canada while the Male Applicant arrived in January 2017 after resigning from the military. Before arriving in Canada, the Principal Applicant was referred to Cemal Gingoren [the Interpreter] by a relative residing in Alberta. The Principal Applicant's relative told her that the Interpreter was a lawyer. Upon arriving, the Principal Applicant and the Minor Applicants rented a room in the Interpreter's house. The Interpreter prepared their refugee claim in November 2016. He included his name as their representative/interpreter and listed Timothy Leach [RPD Counsel] as their lawyer. After the Male Applicant arrived in Canada, the Interpreter also prepared his refugee claim in the same manner.

[8] The Applicants repeatedly asked the Interpreter to introduce them to RPD Counsel. The Applicants claimed that they did not meet RPD Counsel until April 4, 2017. A later Law Society of Ontario [LSO] complaint indicates that they met in late January 2017 to sign a document and that the meeting lasted "five minutes or so." The LSO complaint also indicates that they met again on February 7, 2017, for hearing preparation but that the meeting was cut short due to RPD Counsel receiving a telephone call that cancelled the RPD hearing. In May 2017, on their way to see RPD Counsel, the Interpreter met with the Applicants and had them sign documents that turned out to be re-drafted Basis of Claim [BOC] narratives. The Applicants claim these BOC

narratives were not translated nor were the changes explained to them. The Applicants also claim that they were not advised that what they signed was to be filed with their claims.

[9] In a letter dated May 19, 2017 RPD Counsel provided “statements” to the RPD. He wrote, “[t]he statements are not intended to be amendments to their Basis of Claim narratives – they do not change any of the essential facts of those documents. Instead, they are intended that these statements of the claimants will provide a clearer account of the information in the Basis of Claim narratives.”

[10] At the hearing, the RPD refused to enter the re-drafted BOC narratives because they did not comply with Rule 9 of the RPD Rules. Rule 9 requires that any changes or additions to the BOC form be underlined, signed, dated, and accompanied by a declaration. The re-drafted BOC narratives were not discussed during the RPD hearing. However, the Principal Applicant’s affidavit filed before the RAD stated that she and the Male Applicant did not understand what statements the RPD was referring to. The hearing continued on September 28, 2017, and the Applicants claim that they were not told anything about the re-drafted BOC narratives in the interim.

[11] The RPD refused the Applicants’ refugee claims. The determinative issues were credibility, discrimination as opposed to persecution, and a lack of objective evidence supporting their fear of persecution under section 96 or harm under section 97(1) of the *IRPA*. The RPD decision does not mention the re-drafted BOC narratives.

[12] The Applicants subsequently hired Mr. Acikgoz [RAD Counsel] to represent them before the RAD. According to the Principal Applicant, RAD Counsel advised the Applicants that the “statements” that the Board refused were a more comprehensive and edited version of their initial BOC narratives.

[13] Before the RAD, the Applicants claimed that RPD Counsel was inadequate because he failed to comply with Rule 9 of the RPD Rules in relation to the re-drafted BOC narratives. They submitted that this resulted in a breach of procedural fairness. They also argued that the RPD erred by failing to assess the Principal Applicant's residual profile as an Alevi Kurd, independent of its credibility findings.

[14] The RAD agreed to accept certain new evidence submitted by the Applicants, including an affidavit of Selma Durmus. The RAD did not accept an affidavit from the Male Applicant’s lawyer in Turkey and a March 12, 2018 criminal court file in Turkey referencing an arrest warrant for the Male Applicant. The Applicants do not challenge the refusal to accept these two pieces of additional evidence.

[15] On January 8, 2020, the RAD sent the Applicants a copy of the Immigration and Refugee Board’s Practice Notice-Allegations against Former Counsel [Practice Notice]. The Practice Notice instructed the Applicants to provide their RPD Counsel with a copy of their memorandum of argument and affidavit, to inform him that he had ten days to provide a written response to the Applicants and the RAD, and to provide a signed authorization releasing privilege to allow him

to respond to the allegations. The Applicants were required to disclose the necessary documents by January 21, 2020.

[16] On January 20, 2020, the RAD received a copy of the documents that were disclosed to RPD Counsel. The Applicants did not disclose the memorandum of argument and affidavit to him. They also failed to provide a written notice to RPD Counsel informing him that he had ten days to provide a written response. Similarly, they did not provide a signed authorization that would release him from privilege. As a result, RPD Counsel never filed a response to the allegation.

III. The Decision

[17] On March 5, 2020, the RAD refused the appeal. The RAD was unpersuaded that RPD Counsel's representation resulted in a breach of procedural fairness. The RAD noted that the Applicants' evidence regarding the re-drafted BOC narratives was confusing and contradictory. For example, the Principal Applicant stated that she did not know what she signed or what statements the RPD was referring to during the hearing. Furthermore, she only became aware of the contents of the re-drafted BOC narrative after the denial of their claim. The RAD found that this contradicted the Principal Applicant's allegations that she experienced confusion during her hearing because she believed that the RPD was using the re-drafted BOC narratives filed by RPD Counsel.

[18] The RAD outlined the test for a breach of procedural fairness due to inadequate representation. The RAD found that the first step of the test, notice to counsel, was not satisfied

because the Applicants had not notified RPD Counsel and he was unable to respond to the allegations. Therefore, the RAD determined that the Applicants' allegations of inadequate representation failed.

[19] The RAD noted that the RPD found several credibility issues in the Applicants' claim including: (1) the Principal Applicant's political activities; (2) the Principal Applicant's detention by police; (3) the omission of the Principal Applicant's allegation that she and the Minor Applicants had previously been stopped from leaving Turkey; (4) the Applicants' delay in departure; (5) the Male Applicant's treatment in the military as a result of his wife's activities; and (6) the discrepancies around whether or not the Applicants were threatened when their house was searched the second time.

[20] The RAD acknowledged the Applicants' submission. that some of the discrepancies leading to adverse credibility findings. arose due to RPD Counsel's inadequate representation. However, the RAD noted that the Applicants did not otherwise dispute the RPD's credibility findings.

[21] The RAD also noted that the RPD accepted that the Principal Applicant is an Alevi Kurd and that the country condition evidence confirmed that Alevis and Kurds experience discrimination. However, the RAD found that the treatment the Principal Applicant described did not amount to persecution.

[22] The Applicants also claimed that the RPD should have also considered their alleged status as successful businesspersons. The RAD agreed with the RPD that this claim was inconsistent with their profiles and not relevant in assessing their risk. The RAD held that the RPD was correct to base its risk assessment solely on the Principal Applicant's identity as an Alevi Kurd.

[23] Ultimately, the RAD did not accept the Applicants' argument that the RPD failed to consider risk under section 97 of the *IRPA* as persons in need of protection. The RAD found that the anticipated treatment from the Principal Applicant's profile as an Alevi Kurd did not meet the threshold of a serious possibility of persecution nor did it meet the higher threshold under section 97.

IV. Issues and Standard of Review

[24] The Applicants do not dispute the merits of the Decision. Therefore, the issues are:

(1) Did the RAD fetter its discretion by relying on the Practice Notice?

(2) Was there a breach of procedural fairness or natural justice by the actions of incompetent legal counsel?

[25] In *Matharoo v Canada (Citizenship and Immigration)*, 2020 FC 664 [*Matharoo*], Justice Elliot canvassed the standard of review in relation to the issue of fettering discretion: “issues of fettering are not particularly amenable to a standard of review as a decision which is the product of fettered discretion is automatically unreasonable. It is best to resolve a question of fettering

therefore by asking whether the decision arose from a fettered discretion" (at para 21, citing *Austin v Canada (Citizenship and Immigration)*, 2018 FC 1277 at para 16).

[26] The second issue is reviewable on the standard of correctness because it is an issue of procedural fairness (*Canada (Minister of Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 43*; Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship),* 2020 FCA 196 at para 35*; Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23). Under the correctness standard, no deference is owed to the decision-maker. The Court must conduct its own analysis and ask whether the decision was correct (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 50).

V. Parties' Positions

A. *Applicants' Position*

[27] The Applicants state that the RAD fettered its discretion by relying on the Practice Notice to determine the outcome of the appeal. The RAD used a procedural technicality to avoid a proper analysis of the substantive issues the Applicants raised.

[28] The Applicants also submit that RAD Counsel's failure to represent them adequately has resulted in a breach of natural justice. The Applicants have complied with this Court's own protocol, *Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* [*Procedural Protocol*], by giving notice to RAD Counsel.

B. *The Respondent's Position*

[29] The Respondent submits that protocols such as the Practice Notice exist to support fairness and the administration of justice and do not amount to fettering discretion. An applicant must give notice to their former counsel regarding the alleged incompetency so that they have the opportunity to respond (*Satkunanathan v Canada (Citizenship and Immigration),* 2020 FC 470 at para 37 [*Satkunanathan*]). The onus is on the Applicants to satisfy the Court with evidence that counsel was incompetent and the outcome would be different. This burden is "very high" (*Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at para 21 [*Abuzeid*]). The Court must determine whether the omissions resulted in prejudice to the Applicant, without which, would have resulted in a different outcome (*Abuzeid* at para 22, *Gaudron v Canada (Citizenship and Immigration)* 2014 FC 1092 at para 9 [*Gaudron*]).

[30] The Respondent recognizes that it is not clear which lawyer caused the problems regarding the Applicants' refugee claims. It submits that the Applicants have not shown that there is substantial prejudice from incompetence of either of their former counsel. The Respondent submits that the Interpreter's involvement in having the various documents signed without explanation was a predominant part of the problems alleged.

[31] The Respondent submits that in any event, the RAD accepted the new evidence related to the merits of their claim, which was not before the RPD. Based on the new evidence the RAD proceeded to consider the allegations of risk and reasonably refused their claims.

VI. Analysis

A. *Did the RAD fetter its discretion by relying on the Practice Notice?*

[32] As set out by the Applicants, this matter is somewhat complicated because they allege incompetence on the part of both RPD Counsel and RAD Counsel. For the purposes of the RAD Decision, the Applicants submit that RAD Counsel did not properly notify RPD Counsel of the allegations against RPD Counsel. It is not disputed that RAD Counsel did not follow the Practice Notice. The RAD, however, used the absence of compliance for rejecting the appeal.

[33] In *Calandrini v Canada (AG)*, 2018 FC 52 Justice Mosley explained that "[t]he exercise of discretion by a decision-maker is said to have been fettered if the decision is made in accordance with the views of another without the exercise of independent judgment" (at para 126). This is also true if a decision-maker blindly follows a specific policy. A decision-maker cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant (*Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 62 citing *Maple Lodge Farms Ltd v Canada* [1982] 2 SCR 2).

[34] I find that the RAD fettered its discretion by basing its Decision on RAD Counsel's non-compliance with the Practice Notice and then refusing to consider the circumstances before it. The RAD Decision states the following:

> [36] In order to establish a breach of procedural fairness due to inadequate representation, it is generally recognized that the Appellants must demonstrate the following:
>
> > i) That they have given notice to the former counsel and provided them with an opportunity to respond,

> ii) That they have established that former counsel's act or omission constituted incompetence, without the benefit and wisdom of hindsight, and
>
> iii) That they have established that the outcome would have been different but for the incompetence.

> [37] The IRB practice notice intends to address the first step. In this case, I am not satisfied that former counsel has been given the opportunity to respond to the allegations. Absent this requirement, the Appellants' allegations of inadequate representation must fail.

[35] In reviewing RAD Counsel’s submissions to the RAD, though negligence or incompetence of counsel is not explicitly identified as a ground of appeal, RAD Counsel set out its position respecting RPD Counsel at paragraph 42:

> The Appellant's addenda provide details and clarify many issues that the RPD had to grapple with - the very issues that were relevant to the Appellants credibility. The fact that the interpreter (who initially held himself out as lawyer and initiated the claim) filed the Appellants' claim and subsequently transferred to their counsel, who in turn tried to minimize the interpreter's negligence albeit failed to comply with the Rules, is a clear indication that the Appellant became the victim of the poor representation. More importantly, the Appellants were not informed as to what had transpired regarding the drafting of their narrative.

[36] The above passage illustrates that the RAD had evidence before it concerning RPD Counsel’s negligence, which prompted the RAD to provide the Practice Notice to RAD Counsel. Nevertheless, to the detriment of the Applicants and with the RAD’s awareness, RAD Counsel did not follow the Practice Notice. I agree with the Respondent that protocols exist to provide fairness for counsel whose professional integrity is being impugned. However, in this case, there were materials before the RAD demonstrating issues with RPD Counsel’s representation of the Applicants and the RAD disregarded those circumstances. Instead, the RAD blindly relied on the

Practice Notice. As indicated above, the issue of credibility was tied to RPD Counsel's incompetence regarding the re-drafted BOC narratives. Yet, the RAD confirmed the RPD's credibility finding. In conclusion, the RAD never properly assessed the Applicants' issue with RPD Counsel's negligence because the RAD relied on the Practice Notice. In doing so, the RAD fettered its discretion.

B. *Was there a breach of procedural fairness or natural justice by the actions of incompetent legal counsel?*

[37] The Applicants submit both counsel were incompetent. They argue that it does not matter who is at fault but rather that unfairness ensued (*Pramauntanyath v Canada (Minister of Citizenship and Immigration)*, 2004 FC 174 at para 25).

[38] In *Satkunanathan,* Justice Pamel reviewed this Court's jurisprudence concerning the two-part test for a finding of counsel incompetency: an applicant must establish (1) their previous counsel's acts or omissions constituted incompetence and (2) the acts or omissions must have resulted in a miscarriage of justice (at paras 35-36). The Applicants bear the onus of proving all elements of the test for negligent representation, including rebutting the presumption that "the representative acted competently" (*Gaudron* at para 17).

[39] In *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 [*Galyas*] Justice Russell also noted that the threshold for an applicant to establish a breach of procedural fairness on the basis of incompetent counsel is very high (at para 83). For the reasons that follow, I find that the Applicants have satisfied this burden.

[40] In this case, due to RAD Counsel's actions, the RAD was never able to fully address the allegation of incompetence against RPD Counsel. In addition to the Principal Applicant's affidavit setting out issues with RPD Counsel, the RAD also accepted the affidavit of Selma Durmus. Like the Applicants, Ms. Durmus temporarily resided at the Interpreter's home and had a similar experience with the Interpreter and RPD Counsel. Ms. Durmus, however, retained other counsel prior to her RPD hearing. While there is a slight discrepancy between the Principal Applicant's affidavit and the LSO complaint in terms of meeting dates with the RPD Counsel, I find that this is not enough to discredit the Principal Applicant's allegations against RPD Counsel. The discrepancy is slight and understandable given the brief nature of these meetings as identified in the LSO Complaint. Additionally, there is no evidence contradicting the affidavits of the Principal Applicant or Ms. Durmus concerning the issues with both the Interpreter and RPD Counsel. As the RAD noted at the time of its Decision, there was still no reply from RPD Counsel.

[41] Furthermore, even after the RAD provided RAD Counsel with the Practice Notice, RAD Counsel did not comply with it because of the dilemma he was facing. As a result, the RAD refused to consider the Applicants' claim of inadequate representation by RPD Counsel. RAD Counsel describes this dilemma in his July 27, 2019 email in which he responded to the allegation of incompetence raised in this application:

> I reviewed the Appellants' claimants file thoroughly, and brought to their attention that the Board refused to enter their more detailed and perfected version Narrative into Record, which was filed a few days before the hearing notwithstanding that they had wait for their hearing for several months. This was not the first time the unconventional way of handling a matter and the relationship between counsel Mr. Timothy Leach and Mr. C. Gungoren came to my attention (I have had three other clients who faced exactly the

> same situation, and one of them was client close roommate/close friend).
>
> I explained to the Appellants about my dilemma in this case: On the appellants who did not want to deal with another lawyer due to their language barrier (did not want to work with another interpreter) and a senior lawyer friend whom I have known for 22 years. The lawyer's professional negligence was so obvious on the record, and I believed that the RAD would take my submissions on the point take into consideration and the matter would be sent back for a de novo hearing.
>
> After I received the notice from the RAD, I called the Appellants in and explained the situation and filed formal complaint against the council. I do acknowledge my hesitations and dilemma partly prejudiced the Appellant's case: I either should not have asked to Appellant's to go someone else or, once the accepted the case, complied with all rule and formalities regardless of the undesirable situation I would have created.

[42] Essentially, due to his relationship with RPD Counsel, RAD Counsel initially hesitated to bring the claim of inadequate counsel. RAD Counsel also recognizes his actions vis-à-vis RPD Counsel caused some prejudice to the Applicants. I agree with the Applicants that this evidence is sufficient to conclude that RAD Counsel acted incompetently, which satisfies the first prong of the test.

[43] Recently, in *Sayegh v Canada (Minister of Citizenship and Immigration)*, 2021 FC 795, Justice Elliot held that there was no breach of procedural fairness where an applicant alleged that their RAD counsel was incompetent. Justice Elliot relied on the fact that the applicant refused to pursue her RPD lawyer for incompetence or file a complaint to the relevant professional body. The applicant’s RAD counsel also filed extensive submissions addressing the allegations made by the applicant including that the applicant was uncooperative in filing the complaint against her former RPD counsel. In short, the applicant became the author of her own misfortune (at para

67). That is not the case here. As pointed out above, the Applicants made a complaint to the LSO against RPD Counsel and RAD Counsel's response, reproduced above, is that his actions likely caused the Applicants some prejudice.

[44] The second branch of the test requires the Applicants to show that due to counsel's incompetency, a miscarriage of justice e occurred. In this case, unlike in *Satkunanathan* and *Gaudron*, there are two levels of incompetence at play resulting in a miscarriage of justice. This makes it difficult to determine whether it is reasonably probable that the RAD outcome may have been different if not for the issue of RAD Counsel's incompetence. However, I ultimately disagree with the Respondent that the Applicants have failed to establish there is a reasonable probability that the result would have been different but for the incompetence of previous counsel (*Jeffrey v Canada (MCI)*, 2006 FC 605 at para 9).

[45] RAD Counsel's non-compliance with the Practice Notice resulted in a miscarriage of justice. RAD Counsel's July 27, 2019 email acknowledged that he caused some prejudice to the Applicants. I acknowledge that suffering prejudice does not necessarily translate into a miscarriage of justice. However, I find this admission to be telling in light of the evidence of RPD Counsel's incompetency. In my view, had the RAD considered the incompetence of RPD Counsel on the face of the record, including the involvement of the Interpreter and the evidence of the Principal Applicant and Ms. Durmus, the outcome may have been different. Unfortunately, the Applicants' allegations of incompetence against RPD Counsel were never fully considered due to the RAD's reliance on the Practice Notice.

[46] For the above reasons, I find that the Applicants have established a breach of procedural fairness.

VII. Conclusion

[47] The application for judicial review is allowed. The Applicants have demonstrated that the RAD fettered its discretion and that the Applicant's right to procedural fairness were breached.

[48] The parties did not raise any question of general importance for certification and none arises.

JUDGMENT in IMM-2741-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted to another member of the RAD for re-determination.
2. There is no question of general importance for certification.
3. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2741-20
STYLE OF CAUSE:	MAKBULE YANASIK; AZRA YANASIK; AND EZGI YANASIK AND GOKHAN YANASIK, BY THEIR LITIGATION GUARDIAN MAKBULE YANASIK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY TELECONFERENCE
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