Federal Court Cour fédérale

**Date: 20240429**

**Docket: IMM-466-23**

**Citation: 2024 FC 654**

**Ottawa, Ontario, April 29, 2024**

**PRESENT: The Honourable Madam Justice Ngo**

**BETWEEN:**

**NIRMAL KAUR, SUNNY SINGH et ANKITA KAUR**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Context

[1] The Applicants are Nirmal Kaur [Principal Applicant] and her two children [collectively referred to as "Applicants"].

[2] On August 22, 2005, the Refugee Protection Division [RPD] held a hearing of the Applicants' claim for refugee protection. On August 26, 2005, the RPD granted the Applicants' claim for refugee protection, thereby conferring refugee protection status on the Applicants [Decision].

[3] On May 10, 2017, the Canada Border Services Agency interviewed the Principal Applicant who was accompanied by counsel. In this interview, the Principal Applicant admitted to misrepresenting facts in the Personal Information Form dated February 28, 2005 filed in the claim for refugee protection and in submissions during the RPD hearing held on August 22, 2005. The misrepresentations were facts about the identity of the Principal Applicant, her husband and her children (i.e., dates of birth and names), among other things [misrepresentation].

[4] On August 1, 2017, the Minister of Public Safety and Emergency Preparedness [Minister] filed an application to vacate the Decision pursuant to section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Minister's Application to vacate] on the basis of misrepresentation. By this point in time, the Applicants had become Canadian citizens.

[5] The Minister's Application to vacate asserted that the Applicants obtained refugee protection status as a result of misrepresentation.

[6] On November 15, 2022, the RPD held a hearing of the Minister's Application to vacate the Decision. During the hearing, the Principal Applicant sought to introduce new evidence by applying to reopen the refugee protection claim under Rule 62 of the *Refugee Protection*

*Division Rules*, SOR/2012-256 [RPD Rules]. The Principal Applicant requested that the RPD consider new evidence of duress under Rule 62 of the RPD Rules. The Principal Applicant explained that she had been under duress at the time she submitted the application for refugee protection. This evidence was not part of the record when the RPD conferred her refugee protection in 2005. The RPD denied the Principal Applicant's request to reopen her refugee claim under Rule 62.

[7] On November 21, 2022, the RPD allowed the Minister's application to vacate the Decision [Vacating Decision]. The RPD found that the Applicants obtained refugee protection as a result of having directly or indirectly misrepresented or withheld material facts relating to a relevant matter of her claim for refugee protection. The RPD also found that the balance of the evidence (i.e., other than the misrepresentations) was insufficient to grant refugee protection. The RPD confirmed that the claims for refugee protection were rejected and that the Decision that granted the Applicants' refugee protection was nullified.

[8] In the Vacating Decision, the RPD explained that while it was sensitive to the testimony of the Principal Applicant, the jurisprudence clearly established that the defence of duress is irrelevant in an application to vacate under section 109 of the *IRPA*.

[9] The Applicants did not seek judicial review of the Vacating Decision of November 21, 2022 nullifying refugee protection.

[10] On December 27, 2022, the Applicants made a second request to the RPD to reopen the refugee claim under Rule 62.

[11] On January 4, 2023, the RPD denied the second request to reopen the refugee claim [Second Rule 62 Decision]. The RPD found that the Applicants were resubmitting the same application to reopen the refugee claim, which had been denied at the hearing on November 15, 2022. The RPD disagreed with the Applicants' argument that the Vacating Decision meant, "the (Applicants') status has reverted to refugee claimants and therefore are now eligible to have their refugee claim reopened." The RPD concluded that the Vacating Decision nullifying refugee protection does not mean the Applicants' status reverts to refugee claimants.

[12] The Second Rule 62 Decision is the subject of this application for judicial review.

## II. Issues

[13] The central issue is whether the Second Rule 62 Decision denying the Applicants' request to reopen their refugee claim under Rule 62 was reasonable.

## III. The Applicable Legislation

[14] Under subsection 109(3) of the *IRPA*, if an application to vacate is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified. Subsections 40(1)(c), 40(2)(a), 46(1)(d) of the *IRPA* cross-reference a final determination under subsection 109(3) of the *IRPA* removing permanent resident status if

they had it, and rendering the protected person inadmissible to Canada for a period of five (5) years.

[15] Finally, paragraph 110(2)(f) of the *IRPA* provides that a decision of the RPD allowing or rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection, may not be appealed to the Refugee Appeal Division [RAD].

[16] Rule 62(1) of the RPD Rules applies for reopening a refugee claim. The rule provides that at any time before the RAD or the Federal Court has made a final determination in respect of a claim for refugee protection that has been decided or declared abandoned, the claimant or the Minister may make an application to the RPD to reopen the claim.

[17] Rule 63(1) of the RPD Rules applies for reopening a vacation application. The rule provides that at any time before the Federal Court has made a final determination in respect of an application to vacate or to cease refugee protection that has been decided or declared abandoned, the Minister or the protected person may make an application to the Division to reopen the application.

[18] Rule 62(6) of the RPD Rules provides that the RPD must not allow the application for reopening a refugee claim unless it is established that there was a failure to observe a principle of natural justice. Rule 62(7) sets out the factors to be considered on an application to reopen a refugee claim. Similar language is found in Rule 63 for reopening a vacation application.

## IV. Standard of Review

[19] The Principal Applicant's position is that this is a question of statutory interpretation and the Court ought to apply the standard of correctness. To support this argument, the Principal Applicant refers to *Angara v Canada (Citizenship and Immigration)*, 2021 FC 376, at paras 21, 32, 58, 59 and *Jankovic v Canada (Citizenship and Immigration)*, 2022 FC 857, at paras 14, 16 [*Jankovic*]. The Principal Applicant also argues the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653 [*Vavilov*]require this Court to apply a standard of correctness considering this case raises "a general question of law of central importance" (*Vavilov*, at paras 33, 36). In the alternative, the Applicant indicates that the Court can apply the standard of reasonableness.

[20] The Respondent's position is that this Court ought to apply the standard of reasonableness. The Respondent contends that the Principal Applicant is trying to create an issue that simply does not exist. The references to "claimant" and "protected person" in Rules 62 and 63 are essentially red herrings. The Principal Applicant is obfuscating the purpose of the RPD Rules, and the result of a section 109 application to vacate refugee protection based on a misrepresentation. The Respondent states that *Jankovic* supports an application of the reasonableness standard considering this case raises the issue of whether the RPD was reasonable in finding that the Rule 62 of the RPD Rules did not apply, and thus did not reopen the claim on that basis.

[21] Contrary to the Applicants' assertion, Justice Go in *Jankovic* did not apply the correctness standard to the RPD's decision not to reopen the applicant's claim. In fact, the standard of correctness was applied to review the applicant's claim that the RPD breached procedural fairness in deciding not to reopen his claim. The Court applied the reasonableness standard to all of the remaining issues pertaining merits of the decision. In this case, the Applicants did not challenge the RPD's Second Rule 62 Decision not to reopen the claim because they were denied procedural fairness.

[22] I agree with the Respondent that the standard of review in this case is reasonableness. Indeed, the Court's jurisprudence is clear that the standard of review of the RPD's refusal to reopen an application under Rule 62 is reasonableness.

[23] Even on matters of statutory interpretation, the standard of review is still reasonableness (*Sedki v Canada (Citizenship and Immigration)*, 2021 FC 1071 at paras 27 to 30; *Vavilov*, at paras 115, 170).

[24] Reasonableness review respects the legislative intent for leaving "certain matters with the administrative decision makers rather than the courts," and as such, reasonableness review respects the legislature's intent for deference (*Vavilov*, at para 33).

[25] In conducting a reasonableness review, this Court will not take a *de novo* analysis of the question or "ask itself what the correct decision would have been." The Court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the

outcome that was reached (*Vavilov*, at para 116). The burden of proof lies with the party claiming that the decision is unreasonable. The party's burden is to demonstrate that the decision is so seriously flawed that it cannot be said to meet the requirements of justification, intelligibility and transparency (Vavilov, at para 100).

## V. Analysis

[26] The RPD's Second Rule 62 Decision, read holistically, essentially found that Rule 62 did not apply to the Applicants' case.

[27] The Applicants' position is that the RPD had incorrectly, and unreasonably, come to its decision denying her Rule 62 application. The Applicants argue that, because the claim for refugee protection was vacated, they are now eligible to reopen their refugee claim since their refugee protection status had been nullified. The Applicants contend that their status reverts to "refugee claimant." As such, they are "claimants" covered under Rule 62. The Applicants claim that they are no longer a "protected person," which is the term referred to in Rule 63.

[28] At the hearing, the Applicants confirmed that it was reasonable for the RPD to not allow new evidence at the hearing on the application to vacate. As a result, an application for judicial review on the Vacating Decision would not have been appropriate. However, the Applicants attempted to justify the misrepresentation. Without any means to introduce new evidence on the Minister's Application to vacate, the Applicants contend that the only way to adduce new evidence is under Rule 62.

[29] *Mella v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587 [*Mella*] dealt with an application seeking to vacate refugee protection on the basis of misrepresentation. The applicant in that case sought to explain the misrepresentations as a result of duress. Justice Norris confirmed that the defence of duress is irrelevant in an application to vacate because section 109 of the *IRPA* has nothing to do with the assignment of blame. The Court further explained that extenuating circumstances such as those that might otherwise constitute a "defence" of duress can be advanced on humanitarian and compassionate grounds under section 25(1) of the *IRPA* as grounds for being granted equitable relief from a rigid application of the law (*Mella*, at paras 29-30).

[30] Indeed, the Court in *Mella* explains that the decision to vacate an earlier decision to confer refugee protection serves to protect the integrity of the Canadian refugee protection system. To continue to confer refugee protection on someone when it has been determined that that protection was obtained on the basis of material falsehoods or by withholding material facts would undermine the integrity of the Canadian refugee protection system and bring it into disrepute (*Mella*, at para 29).

[31] The Respondent argues that the Applicants are trying to find another way to challenge the Vacating Decision and to circumvent the restriction on adducing new evidence in the Minister's Application to vacate. The Applicants are trying to use Rule 62 in a manner not consistent with its purpose.

[32] I agree with the Respondent.

[33] The interpretation of a statutory provision applies a “modern principle,” that is, that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Sekdi*, at para 28; *Vavilov*, at paras 117, 121).

[34] Furthermore, administrative decision-makers performing statutory interpretation are often guided by their expertise and knowledge of the practical realities of their administrative regime. The jurisprudence establishes that a presumption of deference applies to questions pertaining to the interpretation of a decision-maker’s home statute or statutes that are closely connected to its function (*Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25, at para 21)

[35] I repeat the language of Rule 62(6) that the RPD must not allow the application unless it is established that there was a failure to observe a principle of natural justice. It is clear on a plain reading of Rule 62, that the right to reopen is a limited and unusual right to be exercised carefully. This is confirmed by the restrictive language used *(Hegedus v Canada (Citizenship and Immigration)*, 2019 FC 428, citing *Huseen v Canada (Citizenship and Immigration)*, 2015 FC 845, at para 14). However, Rule 62 permits breaches of procedural fairness to be remedied when a claimant’s application has been denied as a result of this breach (*Ravi v Canada (Citizenship and Immigration)*, 2021 FC 1359, at paras 14, 15).

[36] A request to reopen a claim under Rule 62 of the RPD Rules serves the purpose of providing an applicant with an equitable remedy when a denial of natural justice or procedural

unfairness led to the denial of refugee protection. By corollary, it would be unnecessary for an applicant to need to reopen their successful claim.

[37] The Applicants' original refugee protection claim was decided in their favour in 2005. The Applicants sought to reopen the claim in 2022, approximately 17 years later and after the Decision that granted refugee protection was nullified because of misrepresentation. I cannot agree with the Applicants' contention that as a result of the Vacating Decision, they revert to being refugee claimants. As set out previously, once a determination to vacate has been made, it is a final determination, which then brings into effect other provisions of the *IRPA.*

[38] While I empathize with the Applicants' circumstances, I take guidance from the Court's decision in *Mella,* that adducing new evidence following a determination to vacate refugee protection under section 109(3) of *IPRA* can still be made under other provisions of the *IRPA.*

[39] In conclusion, this Court finds that the RPD's decision that Rule 62 did not apply and refusing to reopen the claim was not unreasonable.

## VI. Certification

[40] At the outset of the hearing, the Applicants' counsel informed the Court that he intended to propose a question for certification. Counsel acknowledged that he did not comply with the Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings dated June 29, 2023 [Guidelines] and did not provide an explanation for the delay.

[41] The Guidelines state that a proposal for a certified question to notify at least five (5) days prior to the hearing to provide opposing counsel an opportunity to respond (Guidelines, at para 36).

[42] The Applicants sought to certify the following question: “How should Rule 62 be interpreted when a refugee claim has been vacated by the Refugee Protection Division?” The Applicants’ counsel stated that this was a general question of law that needs to be clarified.

[43] I refer to Justice Gascon in *Medina Rodriguez v Canada (Citizenship and Immigration)*, 2024 FC 401 [*Medina*]. The Guidelines are there to be followed and submitting a certified question at the last minute is not helpful to the Court nor fair for the opposing party. Moreover, a certified question is supposed to be a question of general importance. These are not issues that should arise on the eve of a judicial review hearing, or as an afterthought. Such a practice is strongly discouraged by the Court, and may be the basis for a refusal to consider the merits of a proposed certified question, as it prejudices the other party as well as the Court and does not serve the interests of justice (*Medina*, at para 44).

[44] In any event, this case and the question do not meet the established test to certify a question (*Obazughanmwen v Canada (Public Safety and Emergency Preparedness*), 2023 FCA 151, at para 28)

[45] In considering the Guidelines, fairness to the opposing party and the interests of justice, I decline to certify the question.

## VII. Conclusion

[46] The application for judicial review is dismissed.

[47] There is no question for certification.

**JUDGMENT in IMM-466-23**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Phuong T.V. Ngo"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-466-23 |
| **STYLE OF CAUSE:** | NIRMAL KAUR, ET AL. V MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL (QUÉBEC) |
| **DATE OF HEARING:** | APRIL 4, 2024 |
| **JUDGMENT AND RESONS:** | NGO J. |
| **DATED:** | APRIL 29, 2024 |

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