

Federal Court



Cour fédérale

Date: 20150226

Docket: IMM-5049-14

Citation: 2015 FC 243

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 26, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SAMIR HAMIDI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Preliminary remarks

[1] The important issue for the Court is whether the Refugee Appeal Division [RAD] undertook an independent examination of the record on appeal as a whole (*G.L.N.N. v Canada (Minister of Citizenship and Immigration)*, 2014 FC 859 at para 18 [*G.L.N.N.*]; *Sajad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1107 at para 23).

[2] It was reasonable for the RAD to confirm the adverse credibility findings made by the Refugee Protection Division [RPD] against the applicant because of the lateness and central nature of the changes made to his story and the absence of any explanation that was considered satisfactory, plausible or credible in the circumstances (*Zeferino v Canada (Minister of Citizenship and Immigration)*, 2011 FC 456, above, at paras 31 and 32 [*Zeferino*]).

II. Introduction

[3] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the RAD confirming the RPD's determination that the applicant is neither a refugee nor a person in need of protection.

III. Facts

[4] The applicant is a 38-year-old Algerian businessman from the Kabylie region in northern Algeria.

[5] In his Basis of Claim [BOC] Form and an amendment to his BOC Form, the applicant claims to fear persecution by the Algerian police in Kabylie as a businessman and a sympathizer of the Movement for the Autonomy of Kabylie [MAK].

IV. Decision of the Refugee Protection Division

[6] In a decision dated January 21, 2014, the RPD determined that the applicant is not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA.

[7] The RPD identified the applicant's credibility as being central to the rejection of his claim, including in relation to the major omissions in his BOC Form and his amended BOC Form. The RPD found that the explanations provided by the applicant concerning those omissions were not credible in light of the evidence as a whole.

[8] In particular, the RPD found that the initial BOC Form did not state that the applicant was an MAK sympathizer and that he had personally been stopped and threatened by Algerian police officers in 2010, 2011 and 2012, even though these were elements central to his alleged fear. When asked to explain the omissions at the hearing, the applicant testified that he had thought he would supplement his story at the hearing and that he had not been represented by counsel when he completed his BOC Form.

[9] The RPD also took note of the applicant's failure to include his longstanding association with the MAK under question 9 of his IMM 5669 immigration form, especially since that association was the basis for the alleged persecution. The RPD rejected the applicant's explanation of that omission (the applicant testified that he had not written anything under that question because he did not have an MAK membership card), since the question required him to include any organization he had "supported, been a member of or been associated with".

[10] The RPD also noted that the applicant had answered "no" to question 2(a) of his BOC Form, "Have you or your family ever been harmed, mistreated or threatened by any person or group?". When confronted with that omission, the applicant did not provide an explanation that was considered credible and sufficient by the RPD.

[11] As well, the applicant testified at the hearing that police officers had threatened to kill him during a roadblock on May 15, 2012, which had convinced him to stop his work transporting sand by land. The RPD noted that that incident was not in either the applicant's initial BOC Form or his amended BOC Form. It rejected the applicant's explanation that he had left out that information because he planned to supplement his story at the hearing, in part because of the fact that the applicant was represented by counsel at the time he submitted amendments to his BOC Form on November 18, 2013.

V. Impugned decision by the Refugee Appeal Division

[12] On June 2, 2014, the RAD dismissed the appeal and confirmed the RPD's determination.

[13] The RAD began by addressing the preliminary issues concerning its jurisdiction and the scope of the appeal before it. First, it determined that no new evidence was being presented on appeal and that there was no cause to hold a hearing, in accordance with subsections 110(3), 110(4) and 110(6) of the IRPA.

[14] Next, by analogy with the regime of judicial review, the RAD found that the applicable standard for reviewing the RPD's decision was reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Ndam v Canada (Minister of Citizenship and Immigration)*, 2010 FC 513; *Ferencova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 443). With regard to its jurisdiction as an appellate administrative tribunal, the RAD stated that its role was not to reassess the evidence but rather to show deference to the RPD's credibility findings.

[15] On the merits of the appeal, following a thorough examination of the record and the RPD's findings, the RAD found that the RPD had not erred in assessing the evidence and the applicant's explanations.

VI. Statutory provisions

[16] Sections 96 and 97 of the IRPA set out the law applicable to the determination of refugee status in Canada:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of

Définition de réfugié

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son

nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[17] The following sections of the IRPA set out the applicable requirements concerning the RAD's role, the evidence that may be presented on appeal and the holding of hearings:

Appeal

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.

Procedure

(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that

Appel

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.

Fonctionnement

(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de

arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

Decision

111. (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it

preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés, au paragraphe (3) qui, à la fois:

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

Décision

111. (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

considers appropriate.

VII. Issue

[18] The issue raised by the application is whether the RAD's decision is reasonable.

VIII. Analysis

[19] On appeal, the central question before the RAD was the applicant's credibility.

[20] The Court's recent decisions concerning the scope of judicial review of RAD decisions indicate that, when reviewing questions of credibility, which are determinations of fact and of mixed law and fact, the applicable standard is reasonableness (*Yin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1209 at para 34 [*Yin*]; *Nahal c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 CF 1208 at para 25 [*Nahal*]; *Siliya v Canada (Minister of Citizenship and Immigration)*, 2015 FC 120 at para 20; *Dunsmuir*, above, at para 53).

[21] The RAD erred from the outset by stating that the applicable standard was reasonableness (*Djossou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1080 at para 39; *Nahal*, above, at para 26; *Genu c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2015 CF 129 at para 31).

[22] That error is not in itself determinative of the application. The important issue for the Court is whether the RAD undertook an independent examination of the record on appeal as a

whole (*G.L.N.N.*, above, at para 18; *Sajad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1107 at para 23).

[23] It is clear from the RAD's reasons that it did not simply confirm the RPD's findings without qualification. Rather, it relied on a thorough examination of the record and on the parties' submissions to confirm the RPD's credibility findings, resulting in the dismissal of the appeal.

[24] The Court finds that it was reasonable for the RAD to show some deference to the RPD's credibility findings; the RPD has the considerable advantage of hearing the testimony in person and weighing the credibility and probative value of the evidence presented by the parties (*Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 at para 12; *Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at paras 34 and 50; *G.L.N.N.*, above, at para 14; *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at para 2).

[25] As noted by the RAD and the RPD, the applicant added many central elements in support of his alleged fear in his amended BOC Form and his oral testimony, including his involvement with the MAK and the threats made against him by Algerian police officers. He thus presented a version of the facts that was very different from the one in his initial BOC Form.

[26] Moreover, when confronted with the many discrepancies and omissions in his initial story, the applicant was unable to provide explanations that were considered reasonable or sufficient by the RAD and the RPD.

[27] The case law has established that any omission in a previous version of the facts must be examined in its context and be assessed in light of all of the evidence; a claimant's credibility cannot be impugned when the changes made to the BOC Form are minimal and the claimant has provided a plausible explanation of the corrections made (*V.V. v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1097 at para 34 [*V.V.*]).

[28] However, "the impact is different when omissions have to do with the facts that directly concern the very basis of a claim for refugee protection" (*V.V.*, above, at para 35; see *Zeferino*, above, at paras 31-32; *Aragon v Canada (Minister of Citizenship and Immigration)*, 2008 FC 144 at para 21).

[29] From this perspective, it was therefore reasonable for the RAD to confirm the adverse credibility findings made by the RPD against the applicant because of the lateness and central nature of the changes made to his story and the absence of any explanation that was considered satisfactory, plausible or credible in the circumstances (*Zeferino*, above, at paras 31 and 32).

[30] In light of the foregoing, the Court is of the opinion that the RAD's findings are reasonable and reflect a thorough examination of the record in accordance with its role as an appellate tribunal (*Yin*, above, at paras 37 and 40).

IX. Conclusion

[31] The application for judicial review is dismissed.

JUDGMENT

THE COURT'S ORDERS AND ADJUDGES that the application for judicial review is dismissed. There is no question of importance to be certified.

“Michel M.J. Shore”

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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