

Federal Court



Cour fédérale

Date: 20150511

Docket: IMM-2906-14

Citation: 2015 FC 621

Ottawa, Ontario, May 11, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ILHAN OZDEMIR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] I have concluded that the decision of the Refugee Appeal Division [RAD] under review must be set aside.

[2] The RAD, in my view, clearly applied the “reasonableness” standard of review applicable to judicial review proceedings and not, in my view, to RAD proceedings. This is evident throughout the decision, but nowhere more so than at paragraph 88 where the RAD uses the

wording of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 when it writes: “For these reasons, the RAD finds that the RPD’s rejection of the Appellant’s refugee claim falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.”

[3] Notwithstanding the able submission of counsel for the respondent, I prefer the decision of Justice Phelan in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] and those that have followed it which have held that the standard of appeal to be used by the RAD is not that of reasonableness.

[4] The respondent submits that even if the RAD used the wrong standard, this application must fail as the RPD decision turned on its finding that the applicant lacked credibility and the RAD acted appropriately in giving deference to that finding. Moreover, the respondent submits that the RAD conducted its own credibility analysis. I am unable to accept that submission.

[5] In my view, this decision is much like that which was overturned by Justice Noël in *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182. In both cases, the RAD did not make its own analysis of the case but simply reviewed the RPD’s credibility determinations and found them reasonable. Throughout the section on credibility the RAD states that the RPD’s credibility findings were “reasonable” and never does its own analysis as to whether it would have reached a similar conclusion based on the evidence. I add that there was nothing in the RPD’s credibility analysis that turned on the demeanour of the applicant in the witness box. Rather, the assessment of credibility was based on omissions and

discrepancies between his Basis of Claim and his oral testimony. Accordingly, the RAD was in as good a position as the RPD to make its own determination of the applicant's credibility based on the recording of the hearing, the documents, and the explanation offered to the RPD.

[6] In light of these findings, it is not necessary to provide any opinion on whether the RAD erred in refusing to accept the "new" evidence offered by the applicant. I would note however, that in my view, it was an error to merely accept the cousin's positive RPD decision as "case law" and not evidence. It, and specifically the reasons of the RPD, is evidence that the cousin's testimony of certain events was found credible and accepted. To the extent that the same events were germane to this applicant's case, or were referenced in the cousin's letter, that evidence ought to have been accepted and considered.

[7] The applicant proposed that the same questions certified in *Huruglica* be certified if the application was dismissed. Given the disposition of the application, no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the appeal is referred back to the Refugee Appeal Division for reconsideration by a differently constituted panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2906-14

STYLE OF CAUSE: ILHAN OZDEMIR v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 6, 2015

JUDGMENT AND REASONS: ZINN J.

DATED: MAY 11, 2015

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