Federal Court  Cour fédérale

Date: 20150729

Docket: IMM-5149-14

Citation: 2015 FC 930

Ottawa, Ontario, July 29, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MUSTAFA SISMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction and Background

[1] This is an application for judicial review of a decision made by the Refugee Appeal Division of the Immigration and Refugee Board.

[2] The Applicant is a 36-year-old citizen of Turkey who claims to fear that he will be persecuted in that country for being an Armenian Orthodox Christian. He was a seafarer who left

Turkey on a job in July 2013, but he abandoned his employment once his ship arrived in the United States of America in September, 2013. After spending some time in New York City, he entered Canada illegally and made an inland claim for refugee protection in October, 2013.

[3] On February 7, 2014, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] determined that the Applicant was neither a Convention refugee nor a person in need of protection. The RPD found that much of the Applicant's story was not credible. It doubted that the Applicant was a practicing Christian while he lived in Turkey, as his Turkish identity card stated his religion was Islam. Although the Applicant said his parents had declared that was his religion to protect him from discrimination and he was a "hidden Armenian," the RPD found this did not make sense since the Applicant also claimed that it would be obvious from his last name that he was Armenian, and Armenians were generally presumed to be Christian. Moreover, the Applicant had submitted a letter from an evangelist at a church in Toronto who said the Applicant "expressed his desire to study about Christianity with a view to becoming a Christian," and was only baptized in Canada on November 6, 2013. Other letters submitted to support the Applicant's claims were unconvincing. The RPD therefore found that the Applicant "was not a fully practicing Christian before coming to Canada and pursued officially becoming one in Canada only as a means to bolster his refugee protection claim."

[4] The RPD gave a number of reasons for doubting other aspects of the Applicant's claim:

- The Applicant claimed he never personally applied for a visa to the United States and was in the United States on September 6, 2013, but a biometrics report

showed he applied for a United States visa from Istanbul on September 19, 2013, and his application was denied.

- The Applicant said he fled his home town in 1998 because he was threatened, yet later said he and his entire family returned to their home town for half a year, every year.
- Some of the Applicant's central allegations were that he talked to some Christian missionaries who his captain invited aboard the ship he worked on, that he was beaten up by his fellow shipmates after they found a bible in his room, and that he was mistreated by the police and charged with "talking negatively about Turkey." However, some details of these incidents were omitted from his narrative and he never pointed to any particular law that he was accused of violating. The RPD found it was implausible that the police would apprehend the Applicant for "missionary activities" when the ship's captain specifically invited missionaries on board and the maximum number of people he could influence was 24.
- The Applicant did not supply corroborating documents which the RPD expected to see, such as copies of court documents relating to his alleged arrest or any materials from the ship documenting the incident that allegedly occurred on board. Other documentary evidence that was supplied was not convincing.
- The Applicant never made any asylum claim in the United States, which undermined his claim of subjective fear.

[5] The RPD then assessed the likelihood of future persecution, and it found the Applicant was exaggerating when he claimed that, as an Armenian Christian, he would never be able to

work again. He had previously worked on his family's farm, in a mall selling t-shirts, and on a ship whose captain regularly invited Christian missionaries on board. The RPD said there was no reason he could not find similar employment, even living openly as a Christian, in Turkey. The RPD next recited some of the documentary evidence and concluded that "there is some societal discrimination against Christians but overall they are able to practice their religion freely as the claimant alleges he did before he left Turkey – he stated that he attended Church every Sunday." The RPD therefore dismissed the Applicant's claim as he had not established that "he would face harm rising to the level of persecution should he return to Turkey on account of his ethnicity and or [*sic*] religion."

[6] The Applicant appealed the RPD's decision, but the Refugee Appeal Division [RAD] of the IRB dismissed the appeal on June 10, 2014, and confirmed that the Applicant was not entitled to protection under either section 96 or subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*]. The Applicant now seeks judicial review pursuant to subsection 72(1) of the *Act*, asking the Court to set aside the RAD's decision and order a different panel of the RAD to re-determine his appeal.

II. Issues

[7] This application raises the following issues:

1. What standard of review should this Court apply to the RAD's decision?
2. Did the RAD apply an appropriate standard of review to the RPD's decision?
3. Did the RAD err by upholding the RPD's decision that the Applicant was not a practicing Christian in Turkey?

4. Having found that the RPD erred by expecting documentary evidence that was not reasonably available, was it an error for the RAD to still dismiss the appeal?

III. The RAD Decision

[8] The RAD began its reasons by rejecting the new evidence presented by the Applicant: i.e., a freedom of information request he made in the United States looking for anything relating to his alleged visa applications, and another letter from an evangelist at his church. Although the freedom of information request was made after the RPD decision, the RAD noted that subsection 110(4) was very similar to paragraph 113(a), the provision which governs the introduction of new evidence for pre-removal risk assessments. It therefore applied the factors set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13, 289 DLR (4th) 675, and decided that the request for information was irrelevant; only the results of that request could be expected to disturb the RPD's evaluation of the evidence, and those had not been presented. As for the letter from his church, the RAD determined it was not really new evidence; it was identical to the letter which had been submitted to the RPD and only the date had been changed.

[9] The RAD then considered how it should review decisions of the RPD, basing its analysis on *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399, 14 Admin LR (5th) 181 [*Newton*]. It concluded that the correctness standard should apply for questions of law, but reasonableness was the appropriate standard of review for questions of fact and mixed fact and law.

[10] As for the substance of the appeal, the Applicant had alleged that the RPD erred in five ways: (1) by applying too high a test for the likelihood of persecution; (2) by failing to analyze the section 97 claim; (3) by failing to justify its findings about the Applicant's religious identity; (4) by expecting the Applicant to supply documents that were not reasonably available; and (5) by finding that he would not be perceived as an activist for his faith.

[11] The first objection was based on the RPD's statement that the Applicant had not proven that "he would face harm rising to the level of persecution should he return to Turkey on account of his ethnicity and or [*sic*] religion." The RAD agreed with the Applicant that, taken alone, that statement could be an error since it did not set out a test for the likelihood of persecution. However, the RAD determined that the RPD had earlier stated the correct test by noting that the Applicant needed to show a serious possibility of persecution, and it was clear from the rest of the RPD's decision that the correct test was applied.

[12] As for the absence of a full section 97 analysis, the RAD found there was no credible evidence to support a section 97 claim once the RPD had rejected the Applicant's story, and there was therefore no need to analyze it separately (citing *Fang v Canada (Citizenship and Immigration)*, 2008 FC 856 at paragraphs 9-13).

[13] The RAD then endorsed the RPD's reasons for finding that the Applicant, although an Armenian Orthodox Christian, had not "vigorously practiced his faith in Turkey or … suffered discrimination or persecution because of his religion." The RAD also determined it was

reasonable for the RPD to draw a negative inference from the fact that the biometric information from the United States' authorities was inconsistent with the Applicant's story.

[14] The RAD did find that some of the RPD's findings were unreasonable though. Specifically, the RAD said it was unreasonable to expect to see court documents since the Applicant had allegedly been subject to extra-judicial treatment, and it was also unreasonable to expect documents from his former employer since the Applicant allegedly left the ship without notice and owed the company money. However, the RAD found that these errors were not fatal because the RPD's other grounds for not believing the Applicant's story were reasonable and sufficient to justify the negative decision. The RAD thus dismissed the Applicant's appeal.

IV. Analysis

A. *What standard of review should this Court apply to the RAD's decision?*

[15] The standard by which this Court should review the RAD's determination about the scope of its review of RPD decisions is not settled. As noted by Mr. Justice Simon Noël in *Yin v Canada (Citizenship and Immigration)*, 2014 FC 1209 at paragraph 32 [*Yin*], the case law diverges on this subject. Some decisions state that the correctness standard applies, either because the issue is one of central importance to the legal system and outside of the RAD's expertise, or because it affects the jurisdictional lines between the RPD and the RAD (e.g. *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at paragraphs 25-34, [2014] 4 FCR 811 [*Huruglica*]; *Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at paragraphs 7-8 [*Spasoja*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 60-61, [2008]

1 SCR 190 [*Dunsmuir*]). Other decisions disagree and state that it is no more than a question of interpreting the RAD's home statute, which presumptively attracts the reasonableness standard (*Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 at paragraphs 16-26 [*Akuffo*]; *Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 at paragraphs 13-37 [*Djossou*]; *Brodrick v Canada (Citizenship and Immigration)*, 2015 FC 491 at paragraphs 20-29 [*Brodrick*]; *Dunsmuir* at paragraph 54; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 26-33, [2013] 3 SCR 895). Questions on this issue have been certified in several of these cases, so this division in the case law will soon be considered by the Federal Court of Appeal.

[16] In the meantime, I agree with Mr. Justice Luc Martineau's pragmatic approach to the issue in *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at paragraphs 46-52 [*Alyafi*]. As he notes and as I summarize below, the case law is also divided on the scope of review that the RAD should apply. This creates a problem similar to one this Court once faced with respect to the residency test for citizenship (*Huang v Canada (Citizenship and Immigration)*, 2013 FC 576 at paragraphs 1, 24-25, [2014] 4 FCR 436). If the correctness standard is applied by every judge of this Court, the RAD could diligently follow one line of cases only to see its decisions set aside whenever they are reviewed by a judge who favours the other line of cases. The law requires more certainty than that. As the Federal Court of Appeal observed in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at paragraph 52, 467 NR 201 [*Wilson*], "the meaning of a law should not differ according to the identity of the decision-maker." The Federal Court cannot fix the problem at the RAD level so long as the judges of this Court disagree on the solution, and applying the correctness standard in this situation would

undermine the rule of law even more than if the dispute was just at the RAD level (*Wilson* at paragraph 52). For similar reasons, Justice Martineau concluded in *Alyafi* that decisions of the RAD should be upheld so long as either of the two approaches currently accepted by the Court is applied by the RAD.

[17] Adopting such an approach in this case, I find that the RAD's decision should be reviewed on a standard of reasonableness. This standard also applies to the RAD's factual findings and its assessment of the evidence before it is entitled to deference (see: *Dunsmuir* at paragraph 53; *Siliya v Canada (Citizenship and Immigration)*, 2015 FC 120 at paragraph 20 [*Siliya*]; *Yin* at paragraph 34; *Akuffo* at paragraph 27; *Lin v Canada (Citizenship and Immigration)*, 2008 FC 1052 at paragraphs 13-14). The RAD's decision should therefore not be disturbed so long as it is justifiable, intelligible, transparent, and defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708).

B. *Did the RAD apply an appropriate standard of review to the RPD's decision?*

[18] The Applicant contends that the RAD was wrong to apply the reasonableness standard when reviewing the RPD's factual findings, and that it was at least required to independently reassess the evidence (citing *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at paragraph 3; *Huruglica* at paragraphs 43, 54-55). In his view, judicial standards of review are

inappropriate because they were developed to negotiate a relationship between the judicial and executive branches of government, and no such concerns are engaged here. Rather, the Applicant says the RAD "should just do what the statute tells it to do" (citing *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at paragraph 23, 290 NSR (2d) 361).

[19] The Applicant further contends that the broad remedial powers granted to the RAD by subsection 111(1) of the *Act* indicate that it should not defer to any findings of the RPD, and that interpretation is supported by the objectives of saving lives, bringing finality to the refugee determination system, and discouraging applications to this Court.

[20] The Respondent defends the RAD's decision to adopt the reasonableness standard of review, since finding the facts is a job for which the RPD is much better suited to perform than the RAD. Unlike the RAD, the RPD must hold hearings and has a key role in questioning witnesses and building the evidentiary record (citing *Act*, ss 110(3), 110(4), 110(6), 170; *Refugee Protection Division Rules*, SOR/2012-256, s 33). The RPD's expertise in this regard cannot be doubted, since there are many claims that will never even go to the RAD (*Act*, s 110(2)). The Respondent further contends that it would be wasteful and inefficient for the RAD to completely reassess all the evidence, and its function is instead to supply a "true appeal" (citing e.g. *Canada (AG) v Bedford*, 2013 SCC 72 at paragraphs 49, 51, 55 and 56, [2013] 3 SCR 1101; *Budhai v Canada (AG)*, 2002 FCA 298 at paragraph 47, [2003] 2 FCR 57).

[21] As mentioned above, judges of this Court disagree about how the RAD should review the RPD's findings of fact and mixed fact and law. One line of cases concludes that the RAD should review the RPD's findings of fact for palpable and overriding errors (see e.g.: *Eng v Canada (Citizenship and Immigration)*, 2014 FC 799 at paragraphs 26-34; *Spasoja* at paragraphs 14-46; and *Triastcin v Canada (Citizenship and Immigration)*, 2014 FC 975 at paragraphs 27-28 [*Triastcin*]). Another line of cases concludes that the RAD must independently come to a decision and is not limited to intervening on the standard of palpable and overriding error, although it can "recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion" (*Huruglica* at paragraph 55; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 at paragraphs 16-20 [*Yetna*]; *Akuffo* at paragraph 39; and *Ozdemir v Canada (Citizenship and Immigration*), 2015 FC 621 at paragraph 3).

[22] In this case, the RAD applied *Newton* to determine that the reasonableness standard applied to the factual findings of the RPD, and concluded as follows:

> [33] The *Newton* factors are better authority than those in *Dunsmuir* for the purpose of determining the appropriate standard of review in this appeal, as they address a situation which is more similar to the context of the RAD and the RPD. There remains the matter of the interpretation of the legislation as a whole, and the conclusion that intended finality might lead the RAD to consider the refugee claim on its merits, showing little or no deference to the findings of the RPD. However, this is outweighed by other factors which favour a more deferential approach on questions of fact. The RAD is restricted in ways that the RPD is not, specifically in admitting evidence and holding oral hearings. Some questions here are ones of fact, and the Courts have consistently held that triers of fact are better situated to make findings of fact at first instance. The RPD has the opportunity to see and question the refugee claimant, while the RAD may not. Failure to defer to the RPD on matters of fact and credibility would be singularly

> inefficient, would undermine the integrity of the RPD process, and would do nothing to limit the length and cost of appeals to the RAD, as the RPD's proceedings would be reduced to little more than preliminary inquiries.
>
> [34] For these reasons, the RAD concludes that, in considering this appeal, it must show deference to the factual and credibility findings of the RPD. The notion of deference to administrative tribunal decision-making requires a respectful attention to the reasons offered or which could be offered in support of the decision made. Even if the reasons given do not seem wholly adequate to support the decision, the RAD must first seek to supplement them before it substitutes its own decision.
>
> [35] The appropriate standard of review for questions of fact raised in this appeal is one of reasonableness. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the RPD's decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. [Footnotes omitted]

[23] Both lines of cases noted above have condemned this approach by the RAD (see e.g. *Alyafi* at paragraphs 17-18, 39 and 46; *Huruglica* at paragraphs 45 and 54; *Spasoja* at paragraphs 12-13, 19-25 and 32-38; *Djossou* at paragraph 37; *Brodrick* at paragraphs 32-34; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paragraphs 48, 50; and *Bahta v Canada (Citizenship and Immigration)*, 2014 FC 1245 at paragraphs 11-16). The RAD has an appellate function, and it cannot limit its analysis merely to whether the RPD acted reasonably and reached a decision that fell within the range of acceptable outcomes which are defensible in respect of the facts and the law. Applying the reasonableness standard when reviewing RPD decisions, as the RAD did in this case, is typically an unreasonable error of law (*Siliya* at paragraph 23).

[24] However, that need not always end the matter (see e.g. *Pataraia v Canada (Citizenship and Immigration)*, 2015 FC 465 at paragraphs 13-14 [*Pataraia*]; *Ali v Canada (Citizenship and Immigration)*, 2015 FC 500 at paragraphs 8-9 [*Ali*]). Judicial review is discretionary, and relief can be withheld even in the face of such an error (see: *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at paragraph 38, 372 DLR (4th) 567). The issue thus reduces to this question: might the RAD have reached a different result had it selected an appropriate standard of review?

[25] In this case, the Applicant mainly criticizes the RAD for deferring to the RPD's credibility findings. In *Huruglica*, however, Mr. Justice Michael Phelan opined (at paragraph 55) that the RAD "can recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion." Following that approach, this Court has sometimes declined to set aside deferential decisions of the RAD where the central issue was whether the Applicant was credible (see e.g. *Yin* at paragraph 36; *Ali* at paragraphs 8-9).

[26] However, the RAD must still analyze the case independently, and the level of deference owed to the RPD by the RAD may not be as high as that which is demanded by the reasonableness standard (see *Pataraia* at paragraph 13; and *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at paragraphs 31-33 [*Khachatourian*]). Not every judge agrees entirely with that approach (*Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629 at paragraphs 37-38). But the point is that the RAD must assume its role as an appellate body. If the RAD instead judicially reviews the RPD's decision and, by reason of the

reasonableness standard, unduly defers to the RPD's findings, it is not assuming its responsibility as an appellate body.

[27] In this case, it was neither justifiable nor reasonable for the RAD not to make its own assessment of the case in clear terms. It articulated and adopted the reasonableness standard and focused unduly upon the RPD's reasons in its analysis at paragraphs 50-62 of its decision. As in *Khachatourian*, the RAD here did not make its own independent analysis of the Applicant's claim; it simply reviewed the RPD's determinations and judged them reasonable. Throughout its decision, the RAD used judicial review language and stated "the RPD found", "it [the RPD] gave little weight", "the panel concluded", "the RPD wrote", "the RPD reasonably noted", "the RPD concluded", "the RPD considered", "it was reasonable for the RPD to make". As noted in *Awet v Canada (Citizenship and Immigration)*, 2015 FC 759 at paragraph 8, "[i]n the face of the RAD's unequivocal assertions of deference it would be unsafe to assume that it fully carried out the kind of independent review of the evidence that is required."

[28] Accordingly, the RAD's decision cannot be justified as an acceptable outcome defensible in respect of the facts and the law. The matter must be returned to the RAD for redetermination by another panel member. The Applicant is entitled to an appeal before the RAD, not just a recitation of the facts found by the RPD.

[29] In view of this conclusion, there is no need to address the other two issues as stated above.

V. Certified Question

[30] The Applicant proposes that the following question should be certified in this case:

> What is the scope of the review conducted by the Refugee Appeal Division when it considers an appeal of a decision of the Refugee Protection Division?

[31] The Respondent submits that no question of general importance should be certified. The issue is already on its way to the Federal Court of Appeal, and certifying the same question over and over again does not facilitate timely interventions (citing e.g. *Alyafi* at paragraph 57).

[32] Pursuant to paragraph 74(d) of the *Act*, "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question." Such a question "must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at paragraph 9, [2014] 4 FCR 290 [*Zhang*]).

[33] The proposed question was dispositive of this matter. The second criterion in *Zhang* is also satisfied in this case, and many cases have already certified the question proposed by the Applicant or ones similar to it (see e.g. *Huruglica* at paragraph 62; *Spasoja* at paragraph 48; *Akuffo* at paragraph 53; *Triastcin*; *Yetna*; *Kurtzmalaj v Canada (Citizenship and Immigration)*, 2014 FC 1072 at paragraph 43; *Nnah v Canada (Citizenship and Immigration)*, 2015 FC 77 at paragraphs 12-13).

[34] However, the test in *Zhang* only sets out the threshold requirements for certifying a question. Nothing in the statute obligates the Court to certify a question whenever those criteria are met. In *Alyafi*, Justice Martineau declined (at paragraphs 56-57) to certify the same question because there is already an appeal progressing and it would not facilitate timely intervention. The same reasoning was followed in *Pataraia* (at paragraph 24).

[35] On the other hand, in *Akuffo*, Madam Justice Jocelyne Gagné (at paragraph 51) certified a question because she did not want the applicant to lose his "right to propose a question for certification." Similarly, in *Zumaya Sanchez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 921 at paragraph 27, 56 Imm LR (3d) 74, duplicative questions were certified on the basis that it would be unfair for an applicant to lose the benefits of appellate guidance on an issue solely because the Court failed to preserve his appeal rights.

[36] I favour the view in *Alyafi*. Certifying duplicative questions can be useful in some circumstances, since there is no guarantee that an appeal will proceed or that the Court of Appeal will even answer the question certified. However, the appeal in *Minister of Citizenship and Immigration v Huruglica*, A-470-14, will likely proceed. The hearing has been scheduled for later this year, and the Federal Court of Appeal will address the question.

[37] In these circumstances, it is contrary to the purpose of paragraph 74(d) to certify a question. An appeal is denied to most applicants because Parliament has decided that the need for timely intervention outweighs the need to have an additional error-correction mechanism (*Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at paragraph 27, [2010] 1 FCR

129); and that bar is lifted only because the "general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice" (*Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paragraph 43, 160 DLR (4th) 193). Once that objective is satisfied by allowing a case which raises the issue to proceed to the Court of Appeal, I see no reason to flood the Court of Appeal with every case that raises the same issue in the interim. While it may seem unfair to deny someone the chance to have an alleged error corrected only because their case was not the first one to raise the question of general importance, it is no more unfair than denying somebody the chance to have an alleged error corrected only because the issue is not generally important. In other words, it is exactly as fair or unfair as Parliament intended paragraph 74(d) to be.

VI. Conclusion

[38] In view of the foregoing reasons, the Applicant's application for judicial review is granted, the RAD's decision is set aside and the matter returned to the RAD for a new determination.

[39] No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Refugee Appeal Division for redetermination by a different panel member; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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