

Federal Court



Cour fédérale

Date: 20150902

Docket: IMM-695-15

Citation: 2015 FC 1037

Ottawa, Ontario, September 2, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

AHMED, ZAKA UD DIN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Federal Court of Appeal has held that for an error of law determination to suffice in setting aside an administrative decision, the error must be determinative of the outcome in respect of the decision. No deference is due to the Refugee Protection Division [RPD] by the Refugee Appeal Division [RAD] except in matters of credibility, where the RPD will have had the opportunity of a first instance tribunal to hear the testimony, to question thereon and to

demonstrate a review of the evidence. Therefore, the RAD, if it, itself demonstrates a thorough evaluation of the RPD's credibility findings, then the RAD's analysis will be considered as that of an independent decision-maker, as clearly stated by the Federal Court of Appeal in *Carter v Canada (Minister of Social Development)*, 2006 FCA 172 at para 7 [*Carter*].

II. Introduction

[2] The Applicant challenges a decision dated January 28, 2015, of the RAD pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] dismissing the Applicant's appeal and confirming the determination by the RPD that the Applicant is neither a Convention refugee nor a person in need of protection.

III. Background

[3] The Applicant is a citizen of Pakistan born on September 24, 1984. The Applicant alleges the following facts.

[4] In June 2013, the Applicant reported to the police that a car he was repairing at his shop had conflicting serial numbers and was likely stolen. After the "owners" took the vehicle away, they were stopped at a checkpoint by the police. The police found a suicide jacket and a hand grenade in the car.

[5] The "owners" of the car managed to escape but the Applicant was invited by the police to identify the car.

[6] Approximately one week later, the Applicant received a threatening call from the Taliban accusing him of informing the police about the car. The Applicant returned to the police and was told that the Taliban had informants within the police.

[7] Following the police's advice, the Applicant went into hiding in Gojra City for a few months.

[8] Upon return in December 2013, as he was on his way home from a restaurant, two motorcyclists approached the Applicant's car and opened fire on him. The Applicant sped up and escaped.

[9] The Applicant reported the incident to the police but no one was arrested.

[10] The Applicant went into hiding in Lahore, at a friend's house. While in Lahore, the Applicant received a threatening call from the Taliban even though he had changed his cellphone number.

[11] The Applicant decided to leave Pakistan and with the help of an agent, obtained a passport in May 2014 and traveled to Canada.

[12] The Applicant's claim was heard by the RPD on September 16, 2014, and was dismissed on September 23, 2014. The RPD found that the Applicant had not established on a balance of probabilities that he was targeted by the Taliban.

[13] An appeal was filed to the RAD on October 21, 2014. The RAD dismissed the appeal on January 28, 2015.

IV. Impugned Decision

[14] In its reasons, following the Federal Court's decision in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, the RAD first declares that its duty is to review all aspects of the RPD's decision and come to an independent assessment of the Applicant's refugee claim, deferring to the RPD only where the lower tribunal enjoys a particular advantage in reaching a conclusion, such as credibility issues.

[15] Second, the RAD assessed the admissibility of the evidence provided by the Applicant in appeal, pursuant to subsection 110(4) of the IRPA.

[16] Applying the factors set out in *Raza v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ 1632 [*Raza*], the RAD found that although the evidence submitted by the Applicant meets the statutory requirement provided in subsection 110(4) that became available to the Applicant after the RPD made its determination, it cannot be admitted, as it does fail to meet the credibility factor set out in *Raza*, above.

[17] Third, the RAD considers the Applicant's submission that an oral hearing be held pursuant to subsection 110(6) of the IRPA. The RAD found that in view of the previous denial of the admittance of the evidence adduced by the Applicant, an oral hearing is not warranted, following subsection 110(3) of the IRPA.

[18] Fourth, the RAD identifies credibility as the determinative issue on appeal and reviews the RPD's determinations and findings relating to the evidence and the Applicant's testimony before the RPD.

[19] After having considered the Applicant's submissions, the RAD concludes:

[54] The RAD has reviewed and assessed the panel's credibility findings concerning the December 2013 incident alleged by the Appellant. The RAD finds it was open to the panel to consider the documentary evidence submitted by the Appellant on its own terms. The RAD agrees with the panel's finding that the information in the newspapers was inconsistent with the information in the FIR. The RAD finds it was open to the panel to draw a negative inference in this regard. The RAD also concurs with the panel's finding regarding the FIR, whether original or copy, in the context of the inconsistencies noted above which occurred in all three newspaper article[s] submitted by the Appellant, and the information in country document evidence that fraudulent documents are available in Pakistan.

...

[56] The RAD has reviewed the evidence concerning the December 2013 incident and concurs with the panel's finding that the inconsistency between the Appellant's testimony and narrative was material to a central allegation in the claim, and not adequately explained by the Appellant. The RAD finds it was open to the panel to draw a negative inference and to find that the Appellant was not shot at by motorcyclists in December 2013.

(RAD's Decision, Certified Tribunal Record, at paras 54 and 56)

V. Legislative Provisions

[20] The following provisions are relevant to refugee determination:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui,

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 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,

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 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) 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.

(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 qualifié 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.

[21] The following legislative provisions are relevant in assessing the RAD's appeal:

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.

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.

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 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

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 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

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 considers appropriate

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.

VI. Issues

[22] The application for judicial review raises the following issues:

- a) Did the RAD err in dismissing the evidence provided by the Applicant on appeal? In particular, did the RAD err in applying subsection 110(4) of the IRPA?
- b) Is the RAD's decision dismissing the appeal reasonable?

VII. Analysis

[23] The Court is in agreement with the reasonableness of the RAD's decision. Credibility in respect of the subject-matter was seriously compromised by the Applicant in regard to the evidence on record. The body of the reasons is in approximately twenty-five paragraphs in which the RAD clearly analyzed the Applicant's entire evidence before the RPD and considered each of the RPD's considerations in respect of credibility.

[24] The RAD in a hearing does not hear a matter *de novo*. It cannot hear the same evidence again; all it can do is to analyze that which was done by the RPD. The RPD, as a trier of fact, had the opportunity to hear the Applicant and witnesses; and is best placed to evaluate evidence (see: *Canada (Attorney General) v Hunter*, 2013 FCA 12).

[25] The RAD did conduct an independent analysis. It evaluated the credibility findings thoroughly. This is demonstrated by its reasons and its independent analysis (see: *Carter*, above).

VIII. Conclusion

[26] For all the above reasons, the application for judicial review is rejected.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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