Federal Court  Cour fédérale

**Date: 20151029**

**Docket: IMM-3559-14**

**Citation: 2015 FC 1225**

**Ottawa, Ontario, October 29, 2015**

**PRESENT: The Honourable Mr. Justice LeBlanc**

**BETWEEN:**

**JUAN MONTES BASTIDAS**
**MARITZA QUINTERO PADILLA**
**ANA VALERIA MONTES QUINTERO**
**SOFIA VALENTINA MONTES QUINTERO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] The Applicants seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [the RAD], dated April 9, 2014, wherein the RAD

confirmed the decision of the Refugee Protection Division [the RPD] that the Applicants are neither Convention refugees nor persons in need of protection within the meaning of section 96 and 97 of the Act.

[1] For the reasons that follow, the judicial review application is allowed.

## II. Background

[2] The Applicants, a family of four, are citizens of Columbia. They left Columbia in September 2012 to travel to the United States (USA). In July 2013, they left the USA for Canada where they claimed refugee protection on the basis that they are at risk of serious harm at the hands of guerrillas from the Revolutionary Armed Forces of Columbia (FARC) and cannot expect effective state protection from Columbia's law enforcement authorities.

[3] The Principal Applicant, Mr. Bastidas, alleges that over the last few years, he has been working as a cattle and pig trader in Cali's marketplace and was targeted by the FARC for extortion as he was perceived, along with other persons in his trade, to have money. He states that in May 2011, the FARC attempted to extort him and threatened him with death. He further states that on July 27, 2012, three men came to his apartment to tell him that he was to pay extortion money from the next day's proceeds. Mr. Bastidas then decided to move with his family to his mother's nearby residence. As indicated above, two months later, he and his family left Columbia for the USA.

[4] On December 5, 2013, the RPD found that the Applicants were lacking in credibility and had not established, as a result, that they had a subjective fear of persecution in Columbia. Before the RAD, they claimed that the RPD had (i) applied incorrect legal tests in determining whether they qualified as Convention refugees or persons in need of protection, (ii) committed eight errors in assessing their credibility, and (iii) erroneously found that they had an internal flight alternative.

[5] The RAD dismissed the Applicants' appeal. After having found that the RPD had indeed applied incorrect tests with respect to the sections 96 and 97 analysis, the RAD concluded that this error was not fatal to the RPD's decision as the Applicants' evidence was found not to be credible. On the issue of the credibility of the Applicants' evidence, the RAD concluded as follows:

> [53] The issue of the Appellants' subjective fear is a determinative issue as it grounds their allegation of being targeted and of facing a serious possibility of persecution if returned to Columbia. The RAD finds that the RPD's assessment of the Appellants' testimony related to their alleged subjective fear was reasonable particularly in light of the adverse credibility findings. The RPD's findings that the Appellants would not face a serious possibility of persecution, upon their return to Colombia, was also found to be reasonable.
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> [54] The RPD found that the Appellants failed to credibly establish the material allegations upon which their refugee claim are based. The RAD, having considered the credibility determinations in its totality, finds that the RPD's decision to reject the Appellants' refugee claim fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

## III. Issue

[6] The parties have spent a considerable amount of energy in their written and oral submissions discussing the standard of review the RAD should use in its consideration of appeals from the RPD. Therefore, the main issue to be determined in this case is whether the RAD reviewed the RPD's decision against a standard consistent with the role Parliament intended it to play.

[7] I find it did not.

## IV. Analysis

[8] Relying on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, and the Alberta Court of Appeal's decision in *Newton v Criminal Trial Lawyers' Assn*, 2010 ABCA 399, 493 AR 89, the RAD characterized its appeal function as follows:

> [30] 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 appropriate standard of review in this appeal is one of reasonableness.
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> [31] 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 the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[9] The issue of the role of the RAD – a fairly new issue given that the RAD has become legally operational in December 2012 – has generated several Judgments of this Court in the last year. The Court has consistently held that the RAD commits an error when it applies the reasonableness standard to its review of the RPD's decisions. In *Pataraia v Canada (Citizenship and Immigration)*, 2015 FC 465, Justice Simon Fothergill offered this summary of the Court's jurisprudence on this issue:

> [10] This Court has ruled repeatedly that the RAD commits an error when it applies the standard of reasonableness to its review of the RPD's factual findings (*Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 [*Djossou*] at paras 6 and 7). Nevertheless, the RAD owes deference to an assessment of credibility by the RPD that is based on witness testimony (*R v NS*, 2012 SCC 72 at para 25).
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> [11] Most judges of this Court have held that, because the RAD is a specialized tribunal which conducts a "full fact-based appeal", it owes deference to the RPD only when a witness' credibility is critical or determinative or when the RPD enjoys a particular advantage (*Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] at paras 54-55; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 at para 17; *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 [*Akuffo*] at para 39; *Bahta v Canada (Citizenship and Immigration)*, 2014 FC 1245 [*Bahta*] at para 16; *Sow v Canada (Citizenship and Immigration)*, 2015 FC 295 at para 13; see *contra Spasoja v Canada (Citizenship and Immigration)*, 2014 FC 913 at para 40 [*Spasoja*]).
>
> [12] Although not unanimous on this point (see *Spasoja* at para 39), most judges of this Court have concluded that the RAD must conduct its own independent assessment of the evidence (*Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at para 41; *Huruglica* at para 47; *Njeukam v Canada (Citizenship and Immigration)*, 2014 FC 859 [*Njeukam*] at para 15; *Akuffo* at para 45; *Djossou* at para 53). The RAD's obligation to conduct an independent assessment of the evidence extends to questions of credibility.

> [13] Some decisions of this Court have held that the RAD does not commit a reviewable error when it applies the standard of reasonableness to findings of pure credibility (*Njeukam*; *Akuffo*, *Allalou v Canada (Citizenship and Immigration)*, 2014 FC 1084; *Yin v Canada (Citizenship and Immigration)*, 2014 FC 1209 [*Yin*]). However, as explained by Justice Simon Noël in *Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 32, this Court will uphold the RAD's application of the reasonableness standard to the RPD's findings of credibility only when it is clear that the RAD has in fact conducted its own assessment of the evidence.
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> [14] This is also the thrust of Justice Shore's decision in *Youkap v Canada (Citizenship and Immigration)*, 2015 FC 249 at paras 36 and 37, where he notes that in cases involving findings of pure credibility, the point is not which standard was applied but rather "whether the RAD conducted an independent assessment of the evidence as a whole." Justice Shore has also observed that "the idea that the RAD may substitute an impugned decision by a determination that should have been rendered without first assessing the evidence is inconsistent with the purpose of the IRPA" (*Triastcin v Canada (Citizenship and Immigration)*, 2014 FC 975 at para 25 [*Triastcin*]).

[10] In *Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236, I sided with those of my colleagues who are of the view that an appeal before the RAD is intended to be a "full fact-based appeal," not just another form of judicial review, and involves, as a result, a complete review of the questions of fact, law, and mixed fact and law raised in the appeal. In other words, I am of the view that the RAD must conduct an independent assessment of the evidence and that this assessment extends to questions of credibility.

[11] Here, I find that the RAD's decision is entirely based on a reasonableness analysis of the RPD findings. There is no indication in the RAD's reasons for decision that an independent assessment of the evidence in connection with the issues raised by the Applicants was conducted. On all aspects of the issues raised by the Applicants, the RAD came to the conclusion that the

RPD's findings were reasonable and fell within a range of possible, acceptable outcomes defensible in regard of the fact and the law. This inescapably goes to the heart of the reasonableness analysis. In other words, the RAD approached this appeal as if it was just another form of judicial review.

[12] Coupled with the fact that the RPD was found to have applied the wrong legal test in its analysis of sections 96 and 97 of the Act, this error is dispositive of the present judicial review application.

[13] In all fairness to the RAD member who rendered the impugned decision, when the decision was issued in April 2014, this Court had yet to comment on the role of the RAD as an appellate body and the standard against which it is to review decisions of the RPD. Now it has and questions relating to this issue have, to date, been certified in at least five cases (*Huruglica*; *Triastcin*; *Yetna*; *Akuffo;* and *Spasoja,* above). Therefore, this important issue will be resolved by the Federal Court of Appeal in the near future.

[14] However, for the time being, what matters is that by deciding as it did in this case, the RAD, in my view, deprived the Applicants access to the appeal process Parliament created to the benefit of failed refugee claimants.

[15] While the Applicants had a question for certification to propose if their application for judicial review was dismissed, the Respondent had none. No question will therefore be certified.

## JUDGMENT

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

1. The application for judicial review is granted;

2. The decision of the Refugee Appeal Division, dated April 9, 2014, is set aside and the matter is remitted back to a different member for re-determination;

3. No question is certified.

"René LeBlanc"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3559-14 |
| **STYLE OF CAUSE:** | JUAN MONTES BASTIDAS, MARITZA QUINTERO PADILLA, ANA VALERIA MONTES QUINTERO, SOFIA VALENTINA MONTES QUIINTERO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 13, 2015 |
| **JUDGMENT AND REASONS:** | LEBLANC J. |
| **DATED:** | OCTOBER 29, 2015 |

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