Federal Court  Cour fédérale

Date: 20151209

Docket: IMM-1609-15

Citation: 2015 FC 1361

Ottawa, Ontario, December 9, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GJIN VUKAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], the applicant applied to be a Convention refugee or a person in need of protection. This was refused by the Refugee Protection Division [RPD]. The decision was appealed to the Refugee Appeal Division [RAD] pursuant to subsection 111(1) of the Act. His request was refused. Pursuant to subsection 72(1) of the Act, he was granted leave to apply for judicial review of the RAD decision.

I. Background

[2] The applicant is a married 33 year-old citizen of Albania. He testifies that his family (Catholic) has been targeted by a Muslim family in a vendetta, due to the applicant's brother [the first brother] engaging in an intimate relationship with a daughter of a Muslim family in 2007. At the time of the original declaration of vendetta, the first brother fled with a second brother to Canada, where a third brother was already living with his wife as refugees since 2001. The first and second brothers were accepted as refugees on the grounds of the family vendetta. The applicant was working in Italy at the time of these events and only returned to Albania in 2009, when his work visa expired. He married the same year. The family residence, located in Durres, was sold in 2013.

[3] The applicant claims that he lived in hiding between 2007 and 2014 (when he came to Canada) and that the vendetta is still alive. He alleges he received threats in April 2010 and September 2011. He also states that between 2011 and 2014, he traveled multiple times to Italy and to Greece and once to Germany, in attempts to find fake documents enabling him to travel to Canada to reunite with his brothers in a safe country. He also applied for a visa to travel to the United States, which was denied. He finally arrived in Canada in March 2014 with a fake Italian passport; he immediately made a refugee claim.

[4] The RPD rejected his claim on June 24, 2014. The applicant then appealed to the RAD. The RAD upheld the RPD decision on March 3, 2015. The RAD's decision is presently under review.

II. Decision under Review

[5] The RAD confirmed that the applicant was neither a refugee nor a person in need of protection. The decision was communicated to the applicant on March 20, 2015.

[6] The panel determined that the RAD owed deference to the RPD's findings where the RPD had an advantage in its assessing position, stating that a reasonableness review was warranted.

[7] The panel also concluded that the RPD did not err in its assessment of the applicant's credibility. The RAD found reasonable the RPD's conclusion that the applicant gave contradictory testimony, in light of the recording of the interview.

[8] The panel gave credence to the RPD's finding that the applicant's repeated return to Albania after leaving the country led to a negative credibility and subjective fear inference; the RAD found this behaviour "impossible to explain", thus undermining the subjective fear element of the claim. The law is that subjective fear is a required element for refugee claims and the RAD made no error in finding that the applicant did not meet the requirement.

[9] The panel stated that in order for the RAD to be able to come to a different conclusion from the RPD in a case where there is a negative credibility finding, there would need to be independent and credible documentary proof capable of supporting a positive disposition of the claim. The RAD then confirmed that in considering the totality of the evidence, the attestation

letter could not by itself provide an independent and credible documentary proof capable of supporting a positive disposition of the claim, "because there were allegations that the office issuing such attestations was corrupt."

[10] The RAD further found that the RPD had provided sufficient reasons for its decision. The RAD found that it was reasonable for the RPD to find the applicant not credible, because he did not seek asylum in the countries he visited, because he was not satisfactorily answering questions pertaining to the places he lived and because the documentary evidence was not sufficient to overcome the negative credibility assessment.

III. Issues

[11] The applicant raises four issues:

1. Did the RAD err in law by failing to determine and apply the proper standard of review?
2. Did the RAD err by merely recycling the RPD's erroneous conflation of credibility with subjective fear?
3. Did the RAD err in failing to consider the circumstances of similarly situated individuals?
4. Did the RAD err in rejecting credible independent evidence?

[12] I would rephrase the issues as follows:

A. What is the standard of review to be applied by this Court when reviewing the RAD's decision?

B. Did the RAD err in its conduct of the appeal?

C. Did the RAD properly conclude that the RPD made a negative credibility finding?

D. Was the RAD's decision otherwise reasonable?

IV. Applicant's Written Submissions and Reply

[13] The applicant argues that the appropriate appeal to be conducted by the RAD is a hybrid appeal, as expressed in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] , with a new assessment on all issues, except on some aspects of credibility determinations, where the RPD may have an advantage, as the RAD conducts no oral hearing.

[14] The applicant submits that the RAD failed to conduct such an appeal and that this is sufficient to grant judicial review. The applicant cites *Ngandu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 423 at paragraph 11, which states: "the RAD commits an error when it applies a judicial review standard while fulfilling its appellate functions". The applicant further provides a list of examples where the RAD used wording that demonstrates the RAD incorrectly applied a standard of review to the appeal.

[15] The applicant argues that the RAD ought to have conducted its own independent assessment of the evidence, even for questions of credibility.

[16] The RAD failed to articulate credibility findings in clear and unmistakable terms by conflating credibility with subjective fear. The applicant submits that the RPD did not make clear credibility findings, specifically when the RPD decision states that the applicant's brothers may

have had a family vendetta declared against him and his brothers, but that either the dispute no longer existed or the applicant would no longer be at risk because of this dispute. These are inconsistent findings that the RAD erred in adopting from the RPD. In fact, the RPD never clearly stated that the applicant was not credible. Therefore, the RAD conflated the subjective fear analysis with credibility when it stated that the RPD had made a negative credibility finding with regard to the applicant.

[17] The applicant also claims that the RAD and RPD erred in giving so much importance to the information gleaned from the interview, given the possible translation difficulties when the applicant was questioned about his residence/home/where he lived for the period between his return from Italy in 2009 and his departure for Canada in 2014. There are reasonable explanations for the apparent confusion in this testimony; the applicant did not attempt to mislead the RPD member when testifying.

[18] The applicant further argues that the RPD and the panel failed to consider risk to similarly situated individuals and specifically failed to consider that his two brothers succeeded in their own refugee claims based on the same events and on some of the same evidence; this failure was unreasonable.

[19] The applicant argues that the RAD should have considered that he was part of a particular social group under section 96, given he was part of a family targeted by a blood feud, but the tribunal did not address this claim.

[20] Finally, the applicant states that the RAD failed to assess independent evidence, in this case the Pan-National Reconciliation Committee's attestation letters. Both the RPD and the RAD stated that such letters could be forged or stem from a corrupt organization. However, there was no evidence that this particular evidence was forged. Therefore, it was unreasonable for the RAD to find, as the RPD did, that the third party evidence could not support a positive determination, especially when some of the same letter was used in support of positive determinations for two of the other brothers.

[21] In its reply to the respondent's memorandum of argument, the applicant further argues that the RAD conducted the wrong type of hybrid appeal and therefore the credibility determination could not stand.

V. Respondent's Written Submissions

[22] The respondent says that the standard of review is reasonableness on the RAD's interpretation of its own statute and its own review of the RPD decision. The respondent argues that the question of the RAD reviewing a standard of review based on reasonableness review or as an appeal is not a true jurisdictional question, nor a question of law that is of central importance to the legal system as a whole and outside the adjudicator's experience, nor is the determination outside the tribunal's expertise.

[23] The respondent further argues that the RAD's choice of standard of review was not material in this case, where the RPD found that the applicant's actions undermined the credibility of his subjective fear claim. There is consensus that, on credibility issues based on evidence from

hearings, the RAD should defer to the RPD's determination. Therefore, because the determinative issue for this claim was credibility and there is no error in the choice of standard of review, the Court should not grant judicial review.

[24] The respondent replies to the applicant's contention that there was conflation of subjective fear and credibility. The respondent claims that there was a clear credibility finding by the RAD at paragraphs 41 and 42 of its decision. The RPD and the RAD state that the applicant's delay in claiming refugee protection and his returns to Albania undermined his claim of subjective fear. The RAD considered the applicant's explanations for not claiming refugee protection and found these to be unreasonable. On this basis, it was open for the RAD to find the applicant lacked subjective fear and credibility.

[25] The respondent did not have any obligation to consider the applicant's brothers' successful claims, which were assessed independently. The key finding of the applicant's lack of subjective fear means the refugee claim has to fail.

[26] The respondent states that blood feuds are not a Convention ground to claim protection under section 96 of the Act.

[27] The respondent states that third party evidence was assessed, including the letter evidence, but that it was reasonably deemed not to be credible. This finding was open to the RAD based on the record.

[28] Finally, the respondent argues that the translation difficulties experienced at the hearing were not raised before reaching judicial review and was therefore too late. The applicant and his counsel had a duty to raise any issue relating to the adequacy of translation at the earliest convenience. The applicant only raises the issue on judicial review, which is not the earliest opportunity. Therefore, the applicant raised his right to challenge adequacy of interpretation.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review to be applied by this Court when reviewing the RAD's decision?*

[29] I am of the opinion that this Court should review the RAD's decision on a standard of correctness. The RAD's decision dealt with the proper standard of review to be applied by the RAD in its review of the RPD decision. This is outside the area of expertise of the RAD.

(1) The Standard of Review Applied by RAD in Reviewing RPD Decision

[30] My review of the RAD decision satisfies me that the RAD applied the standard of reasonableness in its review of the RPD decision.

[31] Section 111 of the Act gives the RAD the following remedial powers:

111. (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:	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.
(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.	
(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that	(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :
(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and	a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;
(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.	b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

[32] A review of these powers of RAD leads me to the conclusion that the RAD was established to be an appeal body not a judicial review body. It follows that a standard of review analysis is not the appropriate approach for RAD to use when reviewing a RPD decision.

[33] By way of example, subsection 111(b) of the Act allows the RAD to set aside the RPD decision and substitute the determination that it believes should have been made. This is an appellate role not a judicial review role.

[34] Additionally, if the RAD was only meant to review the RPD decision, then there would have been no need to create it, as the review could be done on judicial review by this Court.

[35] Having already concluded that the Board made an error reviewing the RPD's decision on a standard of reasonableness, then how should the RAD review the decision?

[36] I have read the remarks of Mr. Justice Michael Phelan in *Huruglica* where he stated at paragraphs 54 to 56:

> 54 Having concluded that the RAD erred in reviewing the RPD's decision on the standard of reasonableness, I have further concluded that for the reasons above, the RAD is required to conduct a hybrid appeal. It must review all aspects of the RPD's decision and come to an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Where its assessment departs from that of the RPD, the RAD must substitute its own decision.
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> 55 In conducting its assessment, 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 but it is not restricted, as an appellate court is, to intervening on facts only where there is a "palpable and overriding error".
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> 56 The RAD's conclusion as to the approach it should take in conducting an appeal is, with respect, in error. It should have done more than address the decision from the perspective of "reasonableness". Therefore, the matter will have to be referred back.

[37] I agree with his analysis of the type of review to be carried out by the RAD of the RPD decision. As a result, I conclude that the RAD made a reviewable error by applying the reasonableness standard in its review of the RPD decision. The decision of the RAD must be set aside and the matter referred back for redetermination by a different panel.

[38] Because of my finding, I need not deal with the remaining issues.

[39] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Refugee Appeal Division is set aside and the matter is referred back to a differently constituted panel of the Refugee Appeal Division.

"John A. O'Keefe"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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