Federal Court  Cour fédérale

Date: 20160720

Docket: IMM-5066-15

Citation: 2016 FC 847

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JUAN ANDRES RODRIGUEZ MARIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [the RAD], dated October 20, 2015, which dismissed the Applicant's appeal of the refusal of his refugee claim by the Refugee Protection Division [RPD].

II. Background

[2] The Applicant is a twenty-eight year old citizen of Colombia. His claim for refugee protection was based on the following allegations. While in Colombia, the Applicant ran a distribution business with his father. On January 17, 2014, he received a call at work from a man who identified himself as a member of the "Black Eagles," a criminal group with a political agenda involved in drug trafficking, extortion, looting, kidnapping and murder. This man asked the Applicant for money to be applied to the Black Eagle's "social cleansing" cause. The Applicant explained that he did not have any money to give. The man told him that he did not have to give the money right away, that he could take some time to think about it and "do what is right" for himself and his family in order to work in peace.

[3] The calls continued and at first, the Applicant did not pay much attention to them because this type of threat is very common in Colombia. The Applicant always told the caller that he had no money to give. In February 2014, the caller became more vulgar and aggressive. The caller was now saying that if the Applicant did not pay him, then he would be placing himself and his family at risk and he would be an enemy of the Black Eagles.

[4] On March 5, 2014, the Applicant received a letter from the Black Eagles demanding a financial contribution to their cause and four days later, when he arrived at work, he found a funeral wreath and an envelope with the name of the Black Eagles on it. He reported this incident to the police who told him that they would investigate. The Applicant then spent one week at home. After returning to work, he began receiving more calls from the Black Eagles. On March

25, 2014, feeling distressed, he decided to travel to the United States for a week. When he returned to Colombia, the Applicant took precautions regarding his family and business activities, however, the phone calls and threats got worse towards the end of April 2014.

[5] In June 2014, the Black Eagles sent the Applicant another threatening letter, this time demanding payment of $50 million pesos within fifteen days, or he would be sentenced to die. The Applicant brought the letter to the police who gave him advice on how to protect himself.

[6] On June 18, 2014, while in a taxi, two men on a motorcycle began shooting at the Applicant. The taxi driver tried to avoid the shots and ended up crashing into a light post. Following this incident, the Applicant proceeded to file a criminal complaint against the armed group with the Office of the Prosecutors and requested protection. He further filed a petition with the Office of the Ombudsman and asked it to protect his life. The Applicant alleges that the Office of the Ombudsman recommended that he leave the country.

[7] The Applicant then started to change residence, but every time he moved, he received a phone call from the Black Eagles who proceeded to describe his new location and would ask for a contribution.

[8] This led the Applicant to panic and decide to leave Colombia. He flew to the United States and illegally crossed the border into Canada on or about July 15, 2014. He claimed refugee protection in December 2014. In support his claim, the Applicant filed a police report where he reported the funeral wreath incident as well as pictures of the funeral wreath and the

letter from the Black Eagles submitted to the police. He also provided photos of the taxi that he was in when he was allegedly shot at.

[9] The main reason why the RPD found that the Applicant was neither a Convention refugee nor a person in need of protection was because of a lack of subjective fear. In this regard, the RPD found that given the Applicant's education, profession and economic class, it was inconceivable that he would not understand that his life, and that of his family, was at risk and that he would not use his financial resources to explore numerous options, including those suggested by the police, to keep him and his family safe from the alleged harm he asserts he faced for over six months at the hands of the Black Eagles, a well-known and well-documented criminal and extortionist group in Colombia. The RPD found that the Applicant's failure to act was evidence of a lack of subjective fear and that the lack of subjective fear negatively affected his credibility.

[10] The RPD also drew negative credibility inferences from the fact that the Applicant entered Canada illegally, waited four months to file for protection, failed on two occasions to claim asylum in the United States or to explore any other legal means to remain in that country, reavailed himself of the protection of Colombia when he returned to that country in March 2014 after spending a week in Miami, and did not tell either of his parents that their lives were at risk until he left Colombia in July 2014.

[11] The RPD further concluded that the Applicant's corroborating evidence was not credible. Notably, the RPD found that the pictures of the shot up taxi were not credible since "photos of taxis that are blown up and shot at, are not uncommon sights in Colombia." In this regard, the RPD stated "[w]e do not have the police report when the police showed up, when the taxi was allegedly shot at and hit a light post. The claimant testified that the police came to the scene. We do not have the insurance report. We do not have any report from the cab driver. We only have the claimant's evidence and his evidence is not credible."

[12] Before the RAD, the Applicant sought to have new evidence entered pursuant to section 110(4) of the Act. The new evidence included the personal ID card and business cards of the Applicant's counsel in Colombia [Mr. Aldana]; a letter drafted by Mr. Aldana to the Office of the Prosecutor [the Prosecutor] requesting information on the status of the Applicant's file and copies of the proceeding; and a letter by the Prosecutor replying to Mr. Aldana's request, which enclosed copies of various records and reports such as a record of a patrol officer delivering certain items that were seized after the taxi incident to the Prosecutor, a record of the Applicant going to the police station on June 18, 2014 to record the seizure of items such as photos of the funeral wreath with the Black Eagle's badge, three bullet casings and photos of the taxi damaged by bullet holes. Also included was a first responder's report from the day the Applicant was attacked in the taxi as well a document entitled "labeling of evidentiary items" from the Prosecutor describing the evidence collected on the date of that incident and a record of the evidence's "chain of custody."

[13] In its assessment of whether it should allow the filing of the new evidence, the RAD found that there were two competing approaches from this Court regarding the criteria the RAD must consider. One approach allowed for the importation of the criteria set out in *Raza v Canada (Citizenship and Immigration),* 2007 FCA 385 [*Raza*] in the context of the application of subsection 113(a) of the Act respecting the admission of new evidence where a foreign national is entitled to a pre-removal risk assessment [PRRA], while the other approach rejected the importation of the *Raza* criteria. The second approach, explained in *Singh v Canada, (Citizenship and Immigration),* 2014 FC 1022, 466 FTR 187 [*Singh FC*], preferred interpreting subsection 110(4) of the Act with sufficient flexibility so as to not limit a claimant's ability to get a "full fact-based appeal" rather than constricting subsection 110(4) of the Act by the application of the Raza criteria" (*Singh FC*, at paras 54-55).

[14] The RAD found that if the first approach applied, the new evidence would be inadmissible since it was in existence and reasonably available to the Applicant prior to the rejection of his refugee claim. In this respect, the RAD found that an appeal to the RAD is not intended to give the appellant a "do over" for poor strategic decisions made before the RPD. The RAD also found that if *Singh FC* applied, the new evidence was still inadmissible since the rejection of the new evidence would not affect its ability to conduct a full fact based review.

[15] With respect to the RPD's credibility findings, the RAD noted that those were the only findings that it could afford deference to on appeal. It then indicated that it made its own assessment of the Applicant's credibility based on a thorough review of the RPD record and reasons and agreed with the RPD's findings in the following terms:

> [64] The RPD came to a negative credibility finding based on a number of factors. They included failure to claim in the U.S. on two occasions (March 25, 2014 to April 1, 2014 and July 13, 2014 to July 15/16, 2014); re-availment to the country where the alleged agents of harm were located by leaving the U.S. and returning to Colombia on April 1, 2014, delay in departure from Colombia, and delay in claiming refugee protection once in Canada.
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> [65] The appellant must make a serious effort to apply for asylum in a foreign country. The Court has said that reasons for not claiming refugee status in a foreign country must be valid in order to avoid an adverse inference. The RPD questioned the appellant extensively on all of the subjective fear issues. Indeed the hearing audio recording has four hours and twenty-seven minutes of questions to the appellant, mostly posed by the RPD and mostly dealing with the subjective fear issues listed above. It is clear that the RPD considered the appellant's evidence and identified in the Reasons why it placed little weight on the explanations offered by the appellant.
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> [66] It is not necessary for me to restate in different words what the RPD adequately explained in its decision. The RPD clearly set out what inconsistencies and subjective fear issues it was concerned with and why it was not satisfied with the explanation offered by the appellant.

[16] The RAD proceeded to expand on one additional inconsistency that its review of the evidence revealed. Namely, the RAD found that the Applicant's explanation of how he came to acquire copies of pictures of the taxi to be implausible.

[17] The Applicant testified that he initially ran from the scene of the shooting but returned twenty to thirty minutes later to collect his belongings. When he returned, he saw the taxi driver's insurance company representatives taking pictures of the taxi using a digital camera and asked them if they could provide him with copies of the pictures. The Applicant testified that they took the camera to a local shop to have the pictures printed and then went to a Notary to

have the pictures certified. These were the pictures the Applicant submitted as evidence rather than originals.

[18] The RAD did not find this evidence to be credible, stating:

> [69] He testified that the insurance company employees were using a digital camera. If this was the case they would be able to print as many originals as they wanted not just the one as the appellant testified to. There would be no reason to make one copy and then photocopy the original. The evidence of the appellant in this regard defies common sense and I find it not to be credible.

[19] The Applicant contends that the RAD erred in rejecting the new evidence and violated the principles of procedural fairness by failing to provide the Applicant with an opportunity to respond to its concerns. As the Applicant did not pursue the procedural fairness argument during the hearing before me, this argument is not discussed in these reasons.

[20] The Applicant also argues that the RAD failed to conduct an actual independent assessment on the RPD's credibility finding. Instead, the RAD merely assessed whether the RPD's decision was reasonable, contrary to the teachings of this Court. He further submits that the RAD erred by failing to conduct a section 97 assessment. The Applicant contends that had the RAD taken the new evidence into account, the RPD's negative credibility finding would not stand.

III. Issues

[21] This application for judicial review raises the following two issues:

a. Was the RAD's decision not to admit new evidence reasonable?

b. Was the RAD's finding that the Applicant is neither a Convention refugee nor a person in need of protection reasonable?

IV. Analysis

A. *Refusal to Admit New Evidence*

[22] It is now firmly established that questions regarding the admission of new evidence before the RAD under subsection 110(4) of the Act are reviewable by this Court against the standard of reasonableness (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96, at para 29 [*Singh FCA*]).

[23] In *Singh FCA*, which post-dates the RAD's decision in this case, the Federal Court of Appeal held that in order to determine the admissibility of evidence, the RAD must always ensure compliance with the explicit requirements set out in subsection 110(4) and can, in this regard, be guided, subject to some necessary adaptations, with the implicit criteria made by that Court in *Raza* (*Singh FCA*, at para 74). It therefore rejected the position taken by this Court in *Singh FC*, that because subsections 110(4) and 113(a) concern different proceedings and different decision-makers, it was not appropriate to apply, *mutatis mutandis*, the restrictive

approach developed in *Raza* to interpret subsection 110(4) and that, as a result, a more flexible approach was warranted in order to allow the RAD to fulfill its mission.

[24] According to the explicit conditions set out in subsection 110(4) of the Act, which the Federal Court of Appeal found the RAD had no discretion to disregard (*Singh FCA*, at para 63), only the following evidence is admissible:

a. Evidence that arose after the rejection of the claim;

b. Evidence that was not reasonably available; or

c. Evidence that was reasonably available, but the person could not reasonably have been expected in the circumstances, to have presented at the time of the rejection.

[25] The *Raza* conditions are credibility, relevance, newness and materiality (*Raza*, at para 13). Yet, as explained by the Federal Court of Appeal, the materiality criterion must be assessed in the context of subsection 110(6), for the sole purpose of determining whether the RAD may hold a hearing (*Singh FCA*, at para 47).

[26] The Applicant in this case does not contest the availability of the "new" evidence at the time of the rejection of its claim by the RPD. On the contrary, the Applicant's previous counsel's explanation for failing to provide the "new" evidence to the RPD was to the effect that the Applicant "could not have been expected to know that the RPD would reject the entirety of his corroborative evidence as a "fabrication" […] and did not expect, or anticipate this occurring, given the amount of corroborative evidence he had provided." In sum, the Applicant is arguing that he did not think that the documents were necessary to support his claim before the RPD.

[27] It was not unreasonable for the RAD to find this explanation wanting. Refugee claimants bear the burden of proving their claim, which means that they must put their "best foot forward" in applications before the RPD and present all the evidence that is available at the time (*Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260, at para 14). This also means that a refugee claimant is not entitled to submit new evidence "every time he or she is surprised by the RPD's decision" (*Canada (Citizenship and Immigration), v Desalegn*, 2016 FC 12, at para 23).

[28] As the Federal Court of Appeal stated in *Singh FCA*, the role of the RAD "is not to provide the opportunity to complete a deficient record submitted before the RPD but to allow for errors of fact, errors of law or mixed errors of fact and law to be corrected" (*Singh FCA*, at para 54). It was therefore reasonable for the RAD to find that if other police reports were readily available to the Applicant upon request, he should have requested the documents prior to the rejection of his claim and presented these documents to the RPD instead of waiting until the appeal to do so.

[29] I see no reason to interfere with the RAD's finding respecting the admissibility of the Applicant's new evidence.

B. *Reasonableness of the RAD Decision*

[30] The RAD determined that the standard espoused by Justice Michael Phelan in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, 461 FTR 241 [*Huruglica FC*] applied to its assessment of the RPD's evidence. The RAD member stated in this regard 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" and did afford the RPD "such recognition and respect regarding its finding regarding the credibility of the appellant in the matter before me" (Decision of the RAD, at para 61).

[31] However, in *Huruglica FCA*, which, as *Singh FCA*, was rendered after the RAD's decision in the present case, the Federal Court of Appeal determined that the RAD must assess the degree of deference it owes to findings of fact or mixed fact and law made by the RPD on a case-by-case basis (*Huruglica FCA*, at para 70). Although it held that the Act recognizes that there may be cases where the "RPD enjoys a meaningful advantage over the RAD in making finds of fact or mixed fact and law" when assessing the "credibility and or weight to be given to oral evidence", the Federal Court of Appeal determined that the RAD must decide, on a case-by-case basis, the degree of restraint it will exercise before substituting its own determination by assessing "whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim" (*Huruglica FCA*, at para 70). In this regard, the Federal Court of Appeal recognized that the RPD may have no real advantage over the RAD on credibility issues where, for instance, "a claimant was not found credible because his story was not plausible based on common sense" (*Huruglica FCA*, at para 72).

[32] Although the choice of the *Huruglica FC* standard, as articulated by the RAD member in this case, does not, in and of itself, amount to a reviewable error in the context of *Huruglica FCA*, this Court has found, in light of the teachings of *Huruglica FCA*, that in order to sustain the

reasonableness of the RAD's decision, this Court must be satisfied that the RAD truly acted as an appeal tribunal and came to its own conclusions (*Ali v Canada (Citizenship and Immigration),* 2016 FC 396). In this respect, the RAD must conduct "in substance, a thorough, comprehensive, and independent review of the kind endorsed in *Huruglica FCA*" (*Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574, at para 20).

[33] I find, in the case at bar, that the RAD failed to conduct, in substance, an independent assessment of the evidence, and that this failure amounts to a reviewable error.

[34] The RAD's only assessment of the Applicant's credibility, which was the determinative issue in the RPD's decision, is found in the excerpt at paragraph 15 above. This excerpt demonstrates that the RAD accorded complete deference to the RPD's credibility finding without first assessing whether the RPD truly benefited from an advantageous position in its assessment of the Applicant's credibility. I find that had the RAD truly conducted a thorough, comprehensive and independent review of the evidence, it may have come to a different conclusion with respect to the RPD's credibility findings since the evidence demonstrates that:

a. The Applicant began reporting the threats to the police after receiving the funeral wreath, which was two months after the phone calls began and the moment the Applicant realized that the threats from the Black Eagles were real;

b. He began changing his habits to see if the threats would stop by working from home and by spending a week in the United States;

c. Following the taxi shooting, the Applicant filed complaints against the Black Eagles with the Office of the Prosecutors and the Office of the Ombudsman and neither organization was able to provide the Applicant with protection;

d. Once the Applicant realized that the Black Eagles were tracking his whereabouts throughout Colombia, he decided to leave Colombia for good; and

e. From the time the Applicant perceived the threats were real, it took him approximately four months to leave Colombia for good.

[35] This failure to conduct an independent assessment of the evidence of the kind endorsed in *Huruglica FCA* is all the more unreasonable since the RPD's credibility finding rests in large part on its contention that if the Applicant truly feared for his life, he would have left Colombia sooner and would have acted quicker to make his parents aware of the threats against him and his family. This, in my view, is a question related to the plausibility of the Applicant's story rather than the quality of the Applicant's oral testimony. In light of *Huruglica FCA***,** it seems clear that the RAD was, in such context, under a duty to assess whether the RPD truly benefited from an advantageous position warranting deference on its part. As this was clearly not done, I find that the Applicant was deprived access, in a material way, to the appeal process Parliament created to the benefit of failed refugee claimants.

[36] The RAD's decision will therefore be remitted back to a different RAD member to decide the issue with the benefit of the teachings from *Huruglica FCA*.

[37] The application for judicial review is allowed. No question has been proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The decision of the Refugee Appeal Division, dated October 20, 2015, is set aside and the matter is remitted back to a different member for redetermination; and

3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Shane Molyneaux	FOR THE APPLICANT
Marjan Double	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Molyneaux Law Barristers and Solicitors Vancouver, British Colombia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Colombia	FOR THE RESPONDENT