Federal Court  Cour fédérale

Date: 20160713

Docket: IMM-4783-15

Citation: 2016 FC 778

St. John's, Newfoundland and Labrador, July 13, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

RAJA SINNARAJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Raja Sinnaraja (the "Applicant") seeks judicial review of a decision made by the Immigration and Refugee Board, Refugee Appeal Division (the "RAD"), dismissing his appeal from the decision of the Refugee Protection Division (the "RPD") by which his application for status as a Convention refugee or a person in need of protection, pursuant to section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") was denied.

[2] In its decision, the RAD confirmed the decision of the RPD.

[3] The Applicant is a citizen of Sri Lanka. He based his claim for protection in Canada on the grounds of identity, nationality, race/ethnicity, perceived or imputed political opinion and membership in a particular social group, that is Liberation Tigers of Tamil Eelan ("LTTE"). The determinative issue before the RPD was credibility.

[4] The RPD did not believe the Applicant's evidence about the manner of his exit from Sri Lanka, allegedly with the assistance of a smuggler and using a passport containing a visa for Malaysia, bearing the Applicant's photograph. The RPD did not believe that the People's Liberation Organization of Tamil Eelam ("PLOTE") would be interested in the claimant about alleged connections with the LTTE.

[5] The RPD did not accept the death certificate, registered in February 2015, recording the death of a brother on October 22, 1995, as being credible or probative. The RPD rejected a letter from the Applicant's mother, referring to the death of his brother Rasan, who died in 1995, as being probative. Likewise, the RPD found no probative value in a letter from the Applicant's uncle, also dated February 2015.

[6] The RPD found that the Applicant did not fit the profile of a failed refugee returning to Sri Lanka who would be at risk on account of that status.

[7] In its decision, the RAD reviewed its function, against the decision of the Federal Court in *Huruglica v. Canada (Minister of Citizenship and Immigration)*, [2014] 4 F.C.R. 811 (F.C.). At paragraph 12, the RAD said the following:

> Following *Huruglica* and *Njeukam*, I conclude that where in this appeal the issue turns on questions of fact, specifically the RPD's assessment of the credibility of the Appellant when applied to the specific situation of the Appellant, the RPD's determinative credibility assessment must be granted deference and I must provide my own assessment of the evidence. With respect to those areas of the appeal that turn on questions of mixed law and fact, specifically the RPD's assessment of country conditions in Sri Lanka, I must reach my own conclusion based on my own assessment of the evidence and I need not have to show deference to the RPD's conclusions.

[8] The Applicant argues that the RAD erred by failing to conduct its own independent assessment of the evidence and showing too much deference to the RPD. He also argues that the RAD erred by failing to conduct its own independent assessment of the objective basis of his claim.

[9] The Applicant also submits that the RAD made an unreasonable conclusion about his credibility by dealing with an issue about one of his brothers which had not been an issue identified by the RPD as undermining his credibility before that tribunal. The Applicant argues that if the RAD has concerns about his credibility, his appeal should have proceeded by way of an oral hearing.

[10] The Minister of Citizenship and Immigration (the "Respondent"), on the other hand, submits that the RAD properly undertook an independent assessment of the evidence, including

evidence relating to the objective basis of the Applicant's claim, and made its own conclusion. He argues there is no basis for judicial intervention.

[11] The determinative issue in this application is whether the RAD committed a reviewable error in reaching its decision. This issue squarely raises the standard of review to be applied by this Court to a decision of the RAD, as well as the standard of review to be applied by the RAD in an appeal from the RPD.

[12] The Federal Court of Appeal recently addressed both these standards of review in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 ("*Huruglica* FCA"). I am bound by that decision as "[s]*tare* decisis requires judges to follow binding legal precedents from higher courts"; see the decision in *Allergan Inc. et al. v. Canada (Minister of Health) et al.* (2012), 440 N.R. 269 at paragraph 43.

[13] I will begin with the first standard of review, that is the standard of review to be applied by this Court to the RAD. The appropriate standard of review for this Court when reviewing a decision of the RAD is reasonableness; see *Huruglica* FCA, *supra* at paragraph 35. Accordingly, the Court should not interfere if the RAD's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law; see the decision in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[14] I now turn to the second standard of review, that is the standard of review to be applied by the RAD upon an appeal from the RPD. In a judicial review of a decision of the RAD, the

reviewing court must look at the standard of review applied by the RAD to the RPD's decision. The Federal Court of Appeal in *Huruglica* FCA, *supra* at paragraph 77 said:

> … I find no indication in the wording of the *IRPA*, read in the context of the legislative scheme and its objectives, that supports the application of a standard of reasonableness or of palpable and overriding error to RPD findings of fact or mixed fact and law.

[15] I infer from this statement that the Federal Court of Appeal is excluding the application, by the RAD, of the standards of reasonableness and of palpable and overriding error to the RPD's findings of fact and of mixed fact and law.

[16] In light of the instruction from the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, there are generally only two standards of review, that is reasonableness and correctness. If the standard of reasonableness is not applicable, that leaves only the standard of correctness to be applied by the RAD in its review of certain issues before the RPD.

[17] At paragraph 103, the Federal Court of Appeal concluded:

> I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. …

[18] In my opinion, the paragraphs quoted above mean that the RAD must apply a correctness standard when reviewing decisions of the RPD which do not raise issues of the credibility of oral evidence.

[19] I note that the Federal Court of Appeal did not address the standard of review to be applied by the RAD to the RPD's assessment of the credibility of oral evidence since that issue was not raised in *Huruglica* FCA, *supra*; see its decision at paragraphs 23 and 24.

[20] The Federal Court of Appeal in *Huruglica* FCA, *supra*, in discussing the power of the RAD to refer a matter back to the RPD for redetermination pursuant to paragraph 111(2)(b) of the Act, said the following at paragraph 70:

> This also recognizes that there may be cases where the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law, because they require an assessment of the credibility or weight to be given to the oral evidence it hears. It further indicates that although the RAD should sometimes exercise a degree of restraint before substituting its own determination, the issue of whether the circumstances warrant such restraint ought to be addressed on a case-by-case basis. In each case, the RAD ought to determine 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.

[21] I understand that in *Huruglica* FCA, *supra*, the Federal Court of Appeal says that the RPD enjoys an advantage over the RAD in the assessment of the credibility of oral evidence.

[22] In oral submissions, the Respondent argued that the decision maker who hears and sees oral evidence has an advantage in the assessment of that evidence and is owed deference, relying

on the decision in *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319 at paragraph 42. He submits that this advantage means that the RAD must show deference to the RPD's credibility findings.

[23] I agree with the Respondent's argument that the RAD should apply the standard of reasonableness when reviewing the RPD's credibility assessment of oral evidence.

[24] However, according to the decision in *Huruglica*, FCA, *supra* at paragraph 103, the RAD must apply the correctness standard review when reviewing the RPD's findings of fact or of mixed fact and law, which do not involve an issue of the credibility of oral evidence alone.

[25] The standard of correctness requires the RAD to carry out "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred"; see *Huruglica* FCA, *supra* at paragraph 103. In my opinion, the RAD did not apply the applicable standard of review, that is the correctness standard, to its review of the RPD's findings. In failing to do so it committed a reviewable error.

[26] Further, I am not persuaded that the RAD conducted an independent analysis of the record. It is not apparent from its decision that the RAD made its own assessment of the evidence that was before the RPD, including the oral testimony of the Applicant. This is another error.

[27] I agree with the submissions of the Applicant that the RAD was too deferential to the RPD's decision. It is impossible to discern where the deference of the RAD stopped and its independent analysis began.

[28] The RAD's failure to apply the correctness standard is a reviewable error and warrants judicial intervention.

[29] Since I am satisfied that the RAD erred in its review of the RPD's findings of fact and mixed fact and law, which do not involve issues of the credibility of oral evidence, it is not necessary to address the other issues raised by the Applicant, including the RAD's treatment of the RPD's credibility findings.

[30] The Applicant proposed the following question for certification:

> Does the RAD owe any degree of deference to the RPD's finding on credibility? If so, what degree of deference?

[31] The Respondent opposes certification of this question on the basis that the question was addressed by the Federal Court of Appeal in *Huruglica* FCA, *supra* and, in any event, the question is not dispositive of this application, nor is it of broad significance.

[32] The test for certification is whether the case raises a question of general importance which would be dispositive of an appeal; see *Canada (Minister of Citizenship and Immigration) v. Zazai* (2004), 247 F.T.R. 320 (F.C.A.).

[33] I acknowledge the decisions of the Federal Court of Appeal in *Mudrak et al v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178, *Varela v. Canada (Minister of Citizenship and Immigration)* (2009), 391 N.R. 366, *Zhang v. Canada (Citizenship and Immigration)*, [2014] 4 FCR 290 and *Kunkel v. Canada (Citizenship and Immigration)* (2009), 398 N.R. 271, in which that Court cautioned this Court about certifying a question that is neither raised by the parties nor addressed in the Reasons, or is in the nature of a reference.

[34] The question as proposed by the Applicant has been answered, in part, in the Federal Court of Appeal decision in *Huruglica* FCA, *supra*. However, part of the question remains unanswered, that is the appropriate standard of review to be applied by the RAD to the RPD's findings on the credibility of oral evidence.

[35] Notwithstanding that this question was not addressed in *Huruglica* FCA, *supra*, it does not meet the test for certification set out in *Zazai, supra*. The fact that an issue remains outstanding does not mean that a question should be certified.

[36] I have found that the RAD committed a reviewable error in its review of the RPD's findings that do not involve the credibility of oral evidence. While the standard of review to be applied by the RAD to the RPD's findings on the credibility of oral evidence was raised as an issue by the Applicant, that issue is not determinative of this application for judicial review.

[37] I agree that the question of the standard of review to be applied by the RAD to the RPD's findings on the credibility of oral evidence is of general importance. However, I will not certify that question since it is not dispositive of the within application for judicial review.

[38] In the result, this application for judicial review is allowed and the matter is remitted to a differently constituted panel of the RAD for redetermination in accordance with the Federal Court of Appeal's decision in *Huruglica* FCA, *supra*.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the decision is set aside and the matter remitted to a differently constituted panel for re-determination in accordance with the Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4783-15
STYLE OF CAUSE:	RAJA SINNARAJA V. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 19, 2016
JUDGMENT AND REASONS:	JUSTICE HENEGHAN
DATED:	JULY 13, 2016

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