

Federal Court



Cour fédérale

**Date: 20160718**

**Docket: IMM-43-16**

**Citation: 2016 FC 814**

**Ottawa, Ontario, July 18, 2016**

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

**BETWEEN:**

**SVITLANA SERIKOVA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant is seeking judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision dated December 9, 2015 of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada. In that decision, made pursuant to section 111(1)(a) of IRPA, the RAD confirmed the determination of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection.

[2] For the reasons that follow, this application is dismissed.

## I. Background

[3] The Applicant, Ms. Svitlana Serikova, is a citizen of Ukraine, who seeks refugee protection because of fear of her former common-law husband, who she alleges abuses alcohol and began assaulting her physically in 2011. She claims that she approached the police and office of the public prosecutor, but did they not assist her.

[4] Ms. Serikova applied for a visa to Canada, using a travel agency which had assisted her with a similar application in 2010. She left Ukraine on October 12, 2013 and entered Canada. Having valid status under her visa until 2015, she alleges that she then learned from a neighbour in Ukraine that her former husband was still searching for and threatening her, as a result of which she initiated a claim for refugee protection in Canada.

## II. Impugned Decision

[5] The RPD rejected Ms. Serikova's claim on September 21, 2015, finding that she lacked credibility and that internal flight alternatives [IFAs] existed. She appealed this decision to the RAD, which concurred with the RPD that Ms. Serikova did not present as a credible witness and that the test applicable to IFAs had been met.

[6] The RAD referred to Justice Phelan's decision in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] as providing guidance as to the standard

of review applicable to the RAD's consideration of decisions of the RPD. The RAD stated that it would follow this guidance, quoting paragraphs 54 and 55 of Justice Phelan's decision:

[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.

[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".

[7] In the course of analyzing the issues surrounding Ms. Serikova's credibility, the RAD referred to the RPD noting that she had not included her former husband's name on her visa application. His name was omitted under applicable questions and the section listing her family information. Her explanation, that this information was copied by the travel agency from the visa application completed in 2010 (before she met her husband), was not accepted by the RPD, which drew a negative inference and found that this omission detracted from her credibility.

[8] The RAD found that the RPD did not err when it made this credibility finding. The RAD noted that Ms. Serikova had indicated that she would provide new evidence in this regard but that she had failed to do so. It reviewed the relevant segment of the audio recording of her RPD hearing, noted that she had testified that she had read and signed the application, and accordingly found that she bore responsibility for her actions.

[9] After concurring with the RPD's overall finding on credibility, the RAD proceeded to consider the RPD's finding of viable IFAs in Kiev, Odessa or Lviv. It considered the two prong test prescribed by *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.).

[10] On the first prong of this test, requiring the RPD to be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists, the RAD noted Ms. Serikova's argument before the RPD that Ukraine is extremely corrupt and that, because of the system of registration of addresses, her former husband could bribe officials to obtain her new address. The RAD stated that, after conducting an independent assessment of the record, it was not persuaded that the agent of persecution would be motivated to pursue Ms. Serikova or would have the ability to do so in any event. It was not satisfied that he had the means and profile necessary to locate and harm her.

[11] Turning to the second prong of the IFA test, that it would not be unreasonable for the claimant to seek refuge in the IFA, the RRD had found that Ms. Serikova could not provide any further reasons why she would be unable to live in the IFAs. It noted she was well-educated and had significant work experience, having owned her own business, and found that she would not be prevented from acquiring work and a means to support herself in one of the IFAs, even if not in her desired field.

[12] Ms. Serikova argued before the RAD that the RPD had erred by suggesting that she should live an underground life in order to avoid her assailant. However, the RAD found that there was no suggestion of this sort on the part of the RPD, as it had not found that her assertion that her husband could locate her was well-founded. The RAD referred to the documentary evidence to the effect that there were many internally displaced persons in Ukraine, with no evidence that authorities in regions to which such persons were going were refusing to accept them or denying them social services.

[13] The RAD therefore concurred with the RPD that either Ms. Serikova could access the registration system with a view to changing her address, without fear of her former husband being able to procure this information or, in the alternative, that she could move to another location without being compelled to live an underground life.

### III. Issues and Standard of Review

[14] The principal issue raised by Ms. Serikova is that she was denied procedural fairness, because the RAD did not consider new evidence that her counsel filed with the RAD the day before its decision was made. This was the new evidence to which Ms. Serikova had referred in argument before the RAD, which took the form of a letter from a translation bureau, confirming that it had assisted her in completing the questionnaire for a visitor's visa to Canada in both 2010 and 2013. The letter stated that it had copied the information from the 2010 questionnaire in completing the 2013 questionnaire.

[15] Ms. Serikova argues that the procedural fairness issue she raises is reviewable on a standard of correctness, and the Respondent concurs.

[16] In her further Memorandum of Argument, filed in this application on May 16, 2016, Ms. Serikova also argues that the RAD erred in applying the “hybrid appeal” standard of review prescribed by Justice Phelan, rather than the standard of correctness prescribed by the Federal Court of Appeal in its decision upholding *Huruglica in Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

#### IV. Analysis

[17] My decision to dismiss this application for judicial review turns on the fact that, independent of the credibility findings which Ms. Serikova argues could have been impacted by the new evidence to which her procedural fairness argument relates, the RAD also upheld the RPD’s findings that there were viable IFAs.

[18] The Respondent argues that Ms. Serikova has not challenged the IFA findings and that this alone is determinative that this application must fail. I am not prepared to adopt that position, as Ms. Serikova has argued that there is a linkage between the credibility findings and those related to the IFA. Instead, I have considered her position that the RAD’s IFA findings were influenced by its credibility conclusions and rejection of her allegations of abuse by her former husband. She points to the RAD’s analysis under the first prong of the IFA test and to its conclusion that it was not persuaded that the agent of persecution would be motivated to pursue her or would have the ability to do so in any event. However, I have reviewed the RAD’s reasons

and, as explained below, conclude that its findings related to the IFA are not premised on the adverse credibility determinations.

[19] Of course, a properly conducted IFA analysis is premised on either a finding or an assumption that there is an agent of persecution. The first prong of the IFA test considers whether there is a serious possibility of the claimant being persecuted in the part of the country being considered as an IFA. As a matter of logic, such consideration is only meaningful where there is an agent of persecution. If it has been found that there is no agent of persecution, as was the case in the present matter because of the adverse credibility findings, then the IFA analysis must be in the alternative, amounting to a consideration whether the test would be met even if it was assumed (contrary to the actual finding) that there is an agent of persecution.

[20] In the RPD's decision, it expressly states that it has determined that Ms. Serikova lacks credibility but that, in the alternative, if it did accept that she was being pursued by her former husband, it has gone on to examine IFAs. In the Conclusion in the RAD's decision, it states:

The RAD concurs with the RPD that the Appellant did not present as a credible witness. Having said this, however, the RPD went on to consider the viability of an internal flight alternative. After conducting an independent assessment of the entire record, the RAD concurs with the RPD that both prongs of the IFA test have been met in any of the named IFAs. (emphasis added)

[21] The highlighted language indicates that the RAD, which was concurring with the RPD's decision, recognized that the RPD was conducting its IFA assessment as an alternative analysis, i.e. not premised on the adverse credibility determinations. The RAD's own analysis indicates that it approached its own assessment the same way. Its findings include the following:

- A. Ms. Serikova has submitted insufficient evidence to persuade the RAD that the agent of persecution has a profile which would allow him to bribe authorities and therefore access personal records;
- B. The objective evidence indicates that: (1) the residential registration system is not mandatory and there are no legal ramifications for women who refuse to change their registration information because of a fear of domestic violence; and (2) even where a woman changes her registration, the offender will be unable to find her if he does not know where she has moved to;
- C. The agent of persecution has to have the means, the profile and the opportunity to locate first the city, and then the person, and then go on to harm the person; The RAD did not have sufficient credible evidence to make a finding that her former husband has the means to do all that;
- D. The RAD considered the fact that Ms. Serikova was not located when hiding at the home of a friend. Also, apart from the phone call to him indicating her potential return to Ukraine, there was insufficient evidence to suggest during the almost two year stay in Canada that, other than wanting to live in her apartment, he was threatening her in a way that would suggest he would pursue her in the future.

[22] I read this analysis as premised on the assumption that her former husband is an agent of persecution. It is in that context that the RAD considers his means and motivations. Its finding to



which Ms. Serikova refers, that he would not be motivated to pursue her, is not premised on the rejection of her allegations of abuse but on the lack of evidence of him threatening her while she was in Canada other than the phone call in 2015.

[23] I therefore find that Ms. Serikova has not demonstrated any linkage between her procedural fairness argument, related to the new evidence that goes to her credibility, and the IFA findings. As such, even if I were to accept that she was denied procedural fairness by the RAD not having considered that evidence, and that consideration of that evidence could impact the RAD's credibility findings, her claim would nevertheless fail because of the determinative IFA findings. This therefore falls into the category of cases, as referred to in *Mannan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 144 at para 53 and *Nagulesam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1382 at para 17, where a breach of procedural fairness can be overlooked if it has no material effect on the decision. It is therefore unnecessary for me to decide whether there has been a breach of procedural fairness.

[24] I have also considered Ms. Serikova's argument that the RAD erred in employing the wrong standard of review, relying on Justice Phelan's decision in *Huruglica* rather than that of the Federal Court of Appeal. However, the RAD's reasons do not support such a conclusion. The test as articulated by Justice Phelan requires a review of all aspects of the RPD's decision and the performance of an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Relying on such an articulation does not itself suggest that the review conducted by the RAD did not meet the correctness standard as subsequently expressed by the Federal Court of Appeal. Based on my reading of the RAD's reasons, its assessment of

the RPD's decision conforms with a correctness review. This case is therefore comparable to Justice Locke's recent decision in *Sui v Canada (Minister of Citizenship and Immigration)*, 2016 FC 406 at para 16:

[16] Even though the FCA modified somewhat the approach taken by Justice Phelan in *Huruglica* which was relied on by the RAD in the present case, I am of the view that the RAD made no reviewable error in describing and applying its role in the appeal of the RPD's decision.

[25] I therefore find no basis to interfere with the RAD's decision, and this application must be dismissed. Neither party proposed a question of general importance for certification for appeal, and none is stated.

**JUDGMENT**

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

No question is certified for appeal.

“Richard F. Southcott”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-43-16

**STYLE OF CAUSE:** SVITLANA SERIKOVA v THE MINISTER OF  
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**APPEARANCES:**

Asiya Hirji FOR THE APPLICANT

Sybil Thompson FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Asiya Hirji FOR THE APPLICANT  
Barrister & Solicitor  
Mamann, Sandaluk & Kingwell  
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Toronto, Ontario