Federal Court  Cour fédérale

Date: 20160907

Docket: IMM-531-16

Citation: 2016 FC 1010

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 7, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SOPHEAKDEY YOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Court must apply the standard of reasonableness to the Refugee Appeal Division's (RAD) findings regarding the standard it should apply in relation to the appeal of the Refugee Protection Division's (RPD) decision (*Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paragraph 35 [*Huruglica*, FCA]).

[2] In *Huruglica*, FCA, at paragraph 103, the Federal Court of Appeal clarified that the RAD must apply the correctness standard to the RPD's findings of fact, and those of mixed fact and law, for which the RPD does not have a meaningful advantage over the RAD. The RAD therefore "carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred." (*Huruglica*, FCA, at paragraph 103).

[3] It is not up to the Federal Court, but rather to a specialized tribunal to ensure that allegations of intimidation, blackmail, and the applicant's perception are taken into consideration based on the conditions of the country and the applicant's perspective based on the inherent logic coming from his background.

> [9] We may well wonder whether this judgment does not involve the imposition of Western concepts on a subtle oriental totalitarianism and whether it is correct to interpret Chinese law enforcement in light of the more linear Western model, when the social control exercised by the Chinese state is omnipresent, through the co-opting of the vigilance of its citizens generally. [TRANSLATION] During oral argument, the respondent conceded that in none of the hundreds of relevant cases this Court has heard in recent years, have the Chinese authorities ever waited to arrest someone after a summons was delivered.
>
> (*Ye v. Canada (Minister of Citizenship and Immigration)*, [1992] FCJ 584 (FCA))
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> [1] Each case has its own narrative. Thus, its own story. Every nuance is important. Each has its own inherent logic, not that of the Court but that of the applicant. If the story holds according to its own logic, then it stands its test as being inherent to its logic or coherence (this is for the first-instance decision-maker, the trier of fact to decide.) Each story has its encyclopaedia of references, dictionary of terms and gallery of portraits, even a background music to the story, whether it is in harmony with the narrative or in a state of cacophony with it.
>
> (*Yakut v. Canada (Citizenship and Immigration)*, 2010 FC 628

II. Introduction

[4] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of the RAD's decision to confirm the RPD's decision that the applicant is not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA.

III. Facts

[5] The applicant, Sopheakdey You (30 years old), is a Cambodian citizen.

[6] The applicant alleged the following facts to support his refugee claim. While he was head cook in a restaurant in Phnom Penh, his employer, Ek Vuthy, introduced him to a Canadian restaurant owner, who apparently offered him a job in Canada. The Canadian restaurant owner made arrangements and after the applicant received a visa in February 2011, he arrived in Canada in March 2011. As soon as he arrived in Canada, the restaurant owner confiscated his passport and forced him to work 14 hours per day, six days a week, without wages, telling him that he had to repay the cost of his trip to Canada and the fees for obtaining his visa. When the applicant confronted the restaurant owner, he received death threats and was told that he would be killed if he stopped working.

[7] In December 2012, knowing that his visa was going to expire, the applicant asked his employer about it. The employer apparently told him to stop asking about his visa and passport, and said that the visa had been renewed. In 2014, a co-worker who found himself in the same

situation as the applicant ran away from the restaurant and helped the applicant find a lawyer. In November 2014, the applicant was able to get his passport back after he promised his employer that he would continue working and repay his debt.

[8] The applicant's refugee protection claim was heard by the RPD on January 30, 2015, and February 13, 2015. In a decision dated March 20, 2015, the RPD denied the applicant's refugee protection claim on the grounds of credibility. This decision was confirmed by the RAD in a decision dated December 2, 2015.

[9] In this judicial review, the applicant argues that the RAD erred in its assessment of the applicant's credibility because the RAD did not have sufficient grounds for denying the applicant's credibility, and that the RAD exceeded its jurisdiction and breached its duty of procedural fairness by bringing up a new reason without giving the applicant the opportunity to explain. Moreover, the applicant argues that the RAD erred when it found that a well-informed person would not conclude that there was not a reasonable apprehension of bias on the part of the RPD member.

IV. Issues in dispute

[10] This application for judicial review raises the following points:

1. Did the RAD err in finding that there was not a reasonable apprehension of bias on the part of the RPD member?
2. Did the RAD err in confirming the RPD's credibility findings?

V. Analysis

[11] In the context of a judicial review of an RAD decision, the Court must apply the standard of reasonableness to the RAD's credibility findings and the assessment of the evidence (*Bikoko v. Canada (Citizenship and Immigration)*, 2015 FC 1313, at paragraph 18).

[12] The applicable standard of review for questions of procedural fairness, such as allegations of bias, is that of correctness and the RAD raised a new reason for denying the appeal without giving the applicant the opportunity to provide an explanation (*Mission Institution v. Khela*, 2014 SCC 24; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339, 2009 SCC 12).

A. *Allegations of reasonable apprehension of bias*

[13] In *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC), the Supreme Court stated the applicable criteria for determining whether there is actual bias or a reasonable apprehension of bias:

> The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, According to the Court of Appeal, this criteria consists of asking "what would an informed person, viewing the matter realistically and practically—conclude?"

[14] Allegations of an apprehension of bias must rest on serious grounds, in light of the strong presumption of judicial impartiality (*Wewaykum Indian Band v. Canada*, [2003] 2 SCR 259, 2003 SCC 45, at paragraph 76). This type of allegation must not be made lightly because a

reasonable apprehension of bias calls into question not only the integrity of the presiding judge, but of the administration of justice itself (*R. v. Teskey*, [2007] 2 SCR 267, 2007 SCC 25, at paragraph 32).

[15] The Court is of the opinion that a well-informed person viewing the matter in-depth, realistically and practically would conclude that there is no aspect of the record that would suggest that the RPD showed the slightest appearance of bias.

[16] It is true that the same RPD member heard and denied the applicant's co-worker's refugee protection claim. However, the member took the time to conduct an in-depth review of the record and did not make a hasty decision. The applicant was in the courtroom for several hours.

[17] Moreover, the RPD's reasons for denying the applicant's claim differ in substance from those in his co-worker's case. For these reasons, the Court finds that the RPD member did not demonstrate what could reasonably be considered bias because he conducted an in-depth and independent review of the record before him. By so doing, the RPD could correctly find that there was no reasonable apprehension of bias.

B. *Assessment of the applicant's credibility*

[18] The Court must apply the standard of reasonableness to the RAD findings regarding the standard it should apply in relation to the appeal of the RPD's decision (*Huruglica*, FCA, above, at paragraph 35.

[19] In *Huruglica*, FCA, at paragraph 103, the Federal Court of Appeal clarified that the RAD must apply the correctness standard to the RPD's findings of fact, and those of mixed fact and law, for which the RPD does not have a meaningful advantage over the RAD. The RAD therefore "carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Huruglica*, FCA, at paragraph 103). The simple fact that the RAD chose to apply the standard as stated in *Huruglica v. Canada (Citizenship and Immigration)*, 2014 FC 799, instead of that set out in *Huruglica*, FCA, above, does not mean that the RAD committed an error of law—to the extent that the RAD conducted a thorough, comprehensive, and independent review (*Gabila v. Canada (Citizenship and Immigration)*, 2016 FC 574, at paragraph 20).

[20] In this case, this is not what the RAD did. It even erroneously specified that [TRANSLATION] "deference must be shown to [RPD] credibility [findings]" (RAD decision, at paragraph 15).

[21] The applicant argues that the RAD erred in confirming the credibility findings of the RPD without reviewing the matter as is its mandate, in other words, in keeping with the Federal Court of Appeal decision in *Huruglica*, FCA, above.

[22] It is not up to the Federal Court, but rather up to a specialized tribunal, to ensure that allegations of intimidation, blackmail, and the applicant's perception be taken into consideration based on the conditions of the country and the applicant's perspective based on the inherent logic coming from his background.

> [9] We may well wonder whether this judgment does not involve the imposition of Western concepts on a subtle oriental totalitarianism and whether it is correct to interpret Chinese law enforcement in light of the more linear Western model, when the social control exercised by the Chinese state is omnipresent, through the co-opting of the vigilance of its citizens generally. During oral argument, the respondent conceded that in none of the hundreds of relevant cases this Court has heard in recent years, have the Chinese authorities ever waited to arrest someone after a summons was delivered.
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> (*Yakut v. Canada (Citizenship and Immigration)*, 2010 FC 628)

[23] Moreover, the RAD found that it was [TRANSLATION] "extremely unlikely that the restaurant owner simply gave the applicant his passport." This finding by the RAD raised another point. The Court is therefore not satisfied that the standard in *Huruglica*, FCA, above, for the applicant's purposes of fact and law, was observed and that the RAD's implausibility finding was based on the evidence on file.

> [103] 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. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.
>
> (*Huruglica*, FCA, above)
>
> [7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]
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> (*Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776)

VI. Conclusion

[24] For the reasons set out above, the Court allows the applicant's application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and that the matter be dismissed and sent back to the Refugee Appeal Division for redetermination by a different panel. There is no question of importance to certify.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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