Federal Court  Cour fédérale

Date: 20170208

Docket: IMM-3133-16

Citation: 2017 FC 149

Ottawa, Ontario, February 8, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MUDALIGE DON HEWAGAMA MANIK MADAVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Mudalige Don Hewagama Manik Madava (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD"), dated June 28, 2016.

[2] The RAD dismissed the Applicant's appeal from the negative determination of his refugee protection claim before the Refugee Protection Division (the "RPD"). The RPD dismissed his claim on the basis of negative credibility findings.

[3] The Applicant is a citizen of Sri Lanka. He claims to be at risk from the Sri Lankan Army Intelligence and Police, due to his occupation as a journalist and a reporter. The RPD did not believe his account about abduction and torture.

[4] In his appeal to the RAD, the Applicant sought to introduce new evidence and requested an oral hearing.

[5] The RAD determined that the new evidence, consisting of "updated country condition reports 2016" and articles relating to failed asylum-seekers, did not meet the criteria of "new evidence" within the meaning of s. 110(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), and declined to allow an oral hearing.

[6] In its decision, the RAD reviewed the findings of the RPD and confirmed all of the negative findings, concluding that the Applicant was not credible. It confirmed the decision of the RPD and dismissed the appeal.

[7] The RAD referred to the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Huruglica* (2016), 396 D.L.R. (4th) 527 (F.C.A)**.** It said the following about its role in determining the Applicant's appeal:

> In *Huruglica*, the Court determined that the RAD is to conduct a "hybrid appeal". It is to review all aspects of the RPD's decision and come to an independent assessment of the Appellant's refuge claim, deferring to the RPD only where the lower tribunal enjoys a particular advantage in reaching a conclusion. Where the RAD's assessment departs from that of the RPD, the RAD must substitute its own determination.

[8] The Applicant now argues that the RAD committed a reviewable error by failing to independently assess his claim, as required by *Huruglica*, *supra*. He submits that the RAD merely endorsed the findings of the RPD.

[9] The Applicant also argues that the RAD erred by failing to accept the "new objective country evidence" as new evidence.

[10] The Minister of Citizenship and Immigration (the "Respondent") submits that the RAD treated the decision of the RPD as one turning upon the credibility of the Applicant, subject to review upon the standard of reasonableness. He argues that the RAD carefully reviewed the negative credibility findings of the RPD and found no error.

[11] The Respondent argues that the RAD reasonably excluded the new evidence because the evidence was available prior to the RPD hearing.

[12] The first question to be addressed is the standard of review. I will begin with the first standard of review, that is the standard of review to be applied by this Court to the RAD.

[13] The appropriate standard of review for this Court when reviewing a decision of the RAD is reasonableness; see *Huruglica*, *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] Next, I refer to the second standard of review, that is the standard of review to be applied by the RAD upon an appeal from the RPD.

[15] 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*, *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.

[16] According to the decision of 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 does not apply, only the standard of correctness remains to be applied by the RAD in its review of certain issues before the RPD.

[17] At paragraph 103, of *Huruglica*, *supra*, 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 paragraph quoted above means 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] Upon considering the written and oral submissions of the parties, I agree with the Applicant that in this case**,** the RAD did not conduct its own assessment of the claim. Rather, it referred to specific findings made by the RPD and simply endorsed those findings.

[20] The RAD was too deferential. Its decision does not clearly show that it exercised independent judgment. Such failure was found to be an error in the decision in *Khachatourian v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 182. In my opinion, the undue deference by the RAD here is a reviewable error.

[21] In these circumstances, it is not necessary for me to deal with the remaining issue.

[22] In the result, the 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 *Huruglica, supra*.

[23] Counsel for the Applicant requested that I certify the same question that was proposed for certification in *Sinnaraja v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 778, that is:

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

[24] Counsel for the Respondent opposes certification of this question.

[25] I agree with the submissions of the Respondent on this point.

[26] The error in the present proceeding does not turn on the credibility of the Applicant’s oral evidence. The proposed question for certification is not dispositive of this application for judicial review and will not be certified.

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 (Minister of Citizenship and Immigration) v. Huruglica*, 369 D.L.R. (4th) 527 (F.C.A.). There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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