Federal Court of Appeal  Cour d'appel fédérale

Date: 20160329

Docket: A-470-14

Citation: 2016 FCA 93

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

BUJAR HURUGLICA
HANIFE HURUGLICA
SADIJE RAMADANI

Respondents

and

CANADIAN ASSOCIATION OF REFUGEE LAWYERS and CANADIAN COUNCIL FOR REFUGEES

Interveners

Heard at Toronto, Ontario, on September 29, 2015.

Judgment delivered at Ottawa, Ontario, on March 29, 2016.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The Minister of Citizenship and Immigration (the appellant or the Minister) appeals from the decision of Justice Michael L. Phelan of the Federal Court allowing the three respondents'

application for judicial review: 2014 FC 799. In their application, the respondents were contesting the validity of the decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB), which dismissed their appeal from the Refugee Protection Division (RPD).

[2] Pursuant to subsection 74(d) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (*IRPA* or the Act), the judge certified the following question:

> What is the scope of the Refugee Appeal Division's review when considering an appeal of a decision of the Refugee Protection Division?

[3] The respondents, who are citizens of Kosovo and Muslim, claim that their lives were threatened by an Islamic extremist group, the Wahhabis, and that the local police were unresponsive to their requests for help. The RPD rejected their claim on the basis that, among other things, they had not satisfied their burden of providing clear and convincing evidence to rebut the presumption that state protection would be forthcoming to them in Kosovo. The Canadian Association of Refugee Lawyers and the Canadian Council for Refugees were granted intervener status to support the respondents' position.

[4] For the reasons that follow, I would dismiss the appeal.

I. Background

[5] Mr. Bujar Huruglica is married to Ms. Hanife Huruglica. Sadije Ramadani is Ms. Huruglica's mother. As mentioned, the respondents are all citizens of Kosovo and Muslim. Following Mr. Huruglica's and Ms. Ramadani's employment by U.S. government contractors,

they and their families were allegedly threatened in Kosovo by Islamic extremists. They testified that the Kosovar police were not responsive to their concerns and that their attempts to complain about the threats they received were not taken seriously. The respondents fled Kosovo in January 2013. They traveled through the U.S., where they stayed on a visitor's visa, and subsequently entered Canada, where they made their refugee claims in March 2013.

[6] Although the respondents testified in a straightforward manner, and the RPD did not note any significant inconsistencies or omissions in their testimony, the RPD rejected their claims on the basis that the respondents' failure to make asylum claims while in the U.S. diminished the credibility that they had subjective fear. The country conditions documentary evidence before the RPD was found not to support the respondents' allegation that they could not get adequate state protection in Kosovo. The RPD also noted that this documentation did not support the presence and power of Islamic extremists in Kosovo. As such, there was no persuasive evidence to establish that extremist Wahhabis – or any other extremists – had any significant influence over the police or other state institutions in Kosovo.

[7] Before the RAD, the respondents did not submit new evidence or seek an oral hearing. The respondents argued that the RPD's credibility assessment was flawed, in that the RPD had failed to consider their explanation for not seeking protection in the U.S., and that it had ignored objective evidence of Islamic extremism in Kosovo. They further submitted that the RPD's state protection analysis was deficient, as it ignored evidence of widespread corruption at all levels of government and of police inadequacy and misconduct.

[8] The RAD indicated that there was no need to deal with the alleged error in the assessment of the respondents' credibility, since in its view, the decision of the RPD in respect of state protection was reasonably open to the RPD and was sufficient to dismiss the respondents' claims.

[9] To reach its conclusion, the RAD determined the standard of review that applied to the appeal from the RPD's decision. The respondents had made no submissions in that respect.

[10] The RAD used the framework developed in *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, 493 A.R. 89 [*Newton*] in its standard of review analysis. It found that the so-called *Newton* factors were better suited to the task than those set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], given that the RAD is an administrative appeal body rather than a reviewing court. The *Newton* factors are the following:

a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;

b) the nature of the question in issue;

c) the interpretation of the statute as a whole;

d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;

e) the need to limit the number, length and cost of appeals;

f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and

g) other factors that are relevant in the particular context.

[11] First, after a brief summary of some of the provisions dealing with the RPD and the RAD, the RAD concluded that:

> These respective roles suggest deference is owed to findings of fact, or findings of mixed fact and law, that can be traced back to evidence given at the RPD hearing. Where the RAD has new evidence before it, either through documents or from an oral hearing, less deference may be owed, as the RPD will not have considered this evidence.
>
> (RAD Reasons at para. 13)

[12] Second, the RAD noted that the issues before it were factual, and that these questions were generally reviewed on a deferential standard in both appellate courts and judicial review contexts: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 89, [2009] 1 S.C.R. 339.

[13] Third, the RAD held that the purpose and provisions of the *IRPA* suggest that the RAD is empowered to bring finality to the refugee protection process, and that it may be entitled to show less deference to the RPD in order to do so. In particular, the RAD drew from paragraph 111(1)(b) and subsections 111(2), 171(c) and 162(2) of the *IRPA*.

[14] Turning to the expertise and advantageous position of the RPD versus that of the RAD, the RAD underlined that the RPD always has the advantage of seeing and questioning refugee

claimants, while the RAD will unfrequently have this opportunity. This "suggests that the RAD show deference to the RPD on findings of fact and particularly in respect to credibility, other than in situations where the RAD holds an oral hearing and therefore has opportunity to consider evidence first hand": RAD Reasons at para. 20.

[15] The last factor considered by the RAD was the need to limit the number, length and cost of appeals and preserve the economy and integrity of RPD proceedings. This, in the RAD's view, was the factor that outweighed the others and suggested a deferential approach to questions of fact, especially when added to the fact that the RPD has the advantage of hearing witnesses. In this respect, the RAD adopted the Alberta Court of Appeal's conclusion in *Newton* "that it is 'singularly inefficient' for a first-level hearing to be repeated at the appellate tribunal": RAD Reasons at para. 21. The RAD so held despite the fact that its interpretation of the legislation as a whole would lead to the conclusion that little or no deference was to be shown to the RPD findings: RAD Reasons at para. 22.

[16] Having so concluded, the RAD therefore determined that the appropriate standard of review in this appeal was that of reasonableness, as defined in *Dunsmuir* and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*]. The RAD did not consider other alternatives, including the standard of palpable and overriding error set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*].

[17] In its decision on the merits of the appeal, the RAD closely examined the reasoning offered by the RPD, as well as the arguments presented by the respondents. The RAD noted that in addition to the objective evidence cited by the RPD, there was further objective evidence supporting the RPD's conclusion on the adequacy of state protection. It noted that the objective evidence before the RPD was "mixed" , in that it set out deficiencies in the functioning of government institutions, but also reported on steps taken to improve the quality of law enforcement which had concrete results. This documentation also showed that the Kosovar population trusted its national police service and was largely satisfied with the police's work.

[18] Having noted that local failures to provide effective policing do not amount to a lack of state protection unless such failures are situated by documentary evidence within a broader pattern of state inability or refusal to extend protection, the RAD reviewed the actual efforts made by the respondents with their local police and concluded that it was not unreasonable for the RPD to expect the respondents to do more than make an initial approach like they had done.

[19] In his reasons for granting the application for judicial review, the judge held that the RAD's conclusion as to its role on appeal was reviewable on the standard of correctness. He justified this choice based on the fact that this question of law is one of general interest to the legal system as a whole that had particular significance outside the refugee law context. He noted that "setting the standard of review is a legitimate aspect of the superior court's supervisory role", and that both the Alberta Court of Appeal and the Nova Scotia Court of Appeal applied the standard of correctness to review a similar issue: *Newton*; *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*, 2009 NSCA 78 [*United Gulf*]. The judge also mentioned that

determining its standard of review fell outside the scope of the RAD's expertise and experience, even if it involved the interpretation of the *IRPA*, the RAD's home statute. For these reasons, the judge distinguished the case before him from that of *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, 2011 3 S.C.R. 654 [*Alberta Teachers*].

[20] The judge then held that the RAD had erred in applying the standard of reasonableness to its review of the RPD decision. He noted that this standard was adopted to recognize the division of powers between the executive and the judiciary, a concept that is of "lesser importance and applicability" in this case, which involves an administrative appeal body: Federal Court Reasons at para. 43. In the judge's view, the relationship between the RAD and the RPD "is more akin to that between a trial court and an appellate court but further influenced by the much greater remedial powers given to the appellate tribunal": Federal Court Reasons at para. 44.

[21] The judge held that it may be appropriate to give deference to the RPD's findings of fact when they turn on a witness' credibility, but that this was not the case in the application before him. In respect of country conditions documentary evidence, the judge found that the RAD had equal or greater expertise than the RPD.

[22] Having reviewed the relevant legislation and its purpose, and having compared the role of the RAD to that of the Immigration Appeal Division (IAD), the judge concluded as follows:

> [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".

II. Issues

[23] The questions to be determined are:

a) What is the standard of review to be applied by this Court, particularly in respect of the certified question?

b) What was the proper standard of review to be applied by the judge to the issue before him?

c) Did the judge properly apply this standard, that is, did the RAD make a reviewable error in defining the "scope of [its] review when considering an appeal of a decision of the RPD"? I note that this issue is narrower than the question certified by the judge, as the RAD's assessment in the present case did not involve a question of law, nor raise an issue relating to the credibility of oral evidence heard by the RPD.

[24] With respect to the certified question, which is set out at paragraph 2, I will simply answer the question that is determinative of this appeal, for this is the only question that should have been properly certified under section 74(d) of the *IRPA*.

III. Legislation

[25] The most relevant provisions of the *IRPA* are reproduced here, while other provisions referred to in these reasons are included in Appendix A:

Objectives and Application	**Objet de la loi**
Objectives — refugees	**Objet relatif aux réfugiés**
3. (2) The objectives of this Act with respect to refugees are	**3. (2)** S'agissant des réfugiés, la présente loi a pour objet :
(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;	a) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;
(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;	b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;
(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;	c) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;
(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;	d) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;
(e) to establish fair and efficient procedures that will maintain the	e) de mettre en place une procédure équitable et efficace qui soit

integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;

f) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada;

g) de protéger la santé des Canadiens et de garantir leur sécurité;

h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

Appeal to Refugee Appeal Division

Appel devant la Section d'appel des réfugiés

Appeal

110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.

Appel

110 (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

Restriction on appeals

(2) No appeal may be made in respect of any of the following:

(a) a decision of the Refugee Protection Division allowing or rejecting the claim for refugee protection of a designated foreign national;

(b) a determination that a refugee

Restriction

(2) Ne sont pas susceptibles d'appel :

a) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile d'un étranger désigné;

b) le prononcé de désistement ou

protection claim has been withdrawn or abandoned;

de retrait de la demande d'asile;

(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded;

c) la décision de la Section de la protection des réfugiés rejetant la demande d'asile en faisant état de l'absence de minimum de fondement de la demande d'asile ou du fait que celle-ci est manifestement infondée;

(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if

d) sous réserve des règlements, la décision de la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois :

(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and

(i) est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à un accord visé à l'alinéa 102(2)d),

(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;

(ii) n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c);

(d.1) a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1);

d.1) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile du ressortissant d'un pays qui faisait l'objet de la désignation visée au paragraphe 109.1(1) à la date de la décision;

(e) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister for a determination that refugee protection has ceased;

e) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant la perte de l'asile;

(f) a decision of the Refugee Protection Division allowing or rejecting an application by the Minister to vacate a decision to allow a claim for refugee protection.

f) la décision de la Section de la protection des réfugiés accordant ou rejetant la demande du ministre visant l'annulation d'une décision ayant accueilli la demande d'asile.

Procedure

(3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

Fonctionnement

(3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

Time limits

(3.1) Unless a hearing is held under subsection (6), the Refugee Appeal Division must make a decision within the time limits set out in the regulations.

Délais

(3.1) Sauf si elle tient une audience au titre du paragraphe (6), la section rend sa décision dans les délais prévus par les règlements.

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

Exception

(5) Subsection (4) does not apply in respect of evidence that is presented in response to evidence presented by the

Exception

(5) Le paragraphe (4) ne s'applique pas aux éléments de preuve présentés par la personne en cause en réponse à

Minister.

ceux qui ont été présentés par le ministre.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

(b) that is central to the decision with respect to the refugee protection claim; and

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

b) sont essentiels pour la prise de la décision relative à la demande d'asile;

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

Decision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

Décision

111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

(1.1) [Repealed, 2012, c. 17, s. 37]

(1.1) [Abrogé, 2012, ch. 17, art. 37]

Referrals

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that

(a) the decision of the Refugee

Renvoi

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

a) que la décision attaquée de la

Protection Division is wrong in law, in fact or in mixed law and fact; and

(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;

b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

Provisions that Apply to All Divisions

Attributions communes

Sole and exclusive jurisdiction

162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

Compétence exclusive

162 (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie.

Procedure

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

Fonctionnement

(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

Refugee Appeal Division

Section d'appel des réfugiés

Proceedings

171 In the case of a proceeding of the Refugee Appeal Division,

(a) the Division must give notice of any hearing to the Minister and to the person who is the subject of the appeal;

(a.1) subject to subsection 110(4), if a hearing is held, the Division must give the person who is the subject of the appeal and the Minister the opportunity to present evidence, question witnesses and

Procédure

171 S'agissant de la Section d'appel des réfugiés :

a) la section avise la personne en cause et le ministre de la tenue de toute audience;

a.1) sous réserve du paragraphe 110(4), elle donne à la personne en cause et au ministre la possibilité, dans le cadre de toute audience, de produire des éléments de preuve, d'interroger des témoins et de

make submissions;	présenter des observations;
(a.2) the Division is not bound by any legal or technical rules of evidence;	a.2) elle n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(a.3) the Division may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;	a.3) elle peut recevoir les éléments de preuve qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;
(a.4) the Minister may, at any time before the Division makes a decision, after giving notice to the Division and to the person who is the subject of the appeal, intervene in the appeal;	a.4) le ministre peut, en tout temps avant que la section ne rende sa décision, sur avis donné à celle-ci et à la personne en cause, intervenir dans l'appel;
(a.5) the Minister may, at any time before the Division makes a decision, submit documentary evidence and make written submissions in support of the Minister's appeal or intervention in the appeal;	a.5) il peut, en tout temps avant que la section ne rende sa décision, produire des éléments de preuve documentaire et présenter des observations écrites à l'appui de son appel ou de son intervention dans l'appel;
(b) the Division may take notice of any facts that may be judicially noticed and of any other generally recognized facts and any information or opinion that is within its specialized knowledge; and	b) la section peut admettre d'office les faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation;
(c) a decision of a panel of three members of the Refugee Appeal Division has, for the Refugee Protection Division and for a panel of one member of the Refugee Appeal Division, the same precedential value as a decision of an appeal court has for a trial court.	c) la décision du tribunal constitué de trois commissaires a la même valeur de précédent pour le tribunal constitué d'un commissaire unique et la Section de la protection des réfugiés que celle qu'une cour d'appel a pour une cour de première instance.
[Emphasis added]	[Je souligne]

IV. Analysis

A. *What is the standard of review to be applied by this Court, particularly in respect of the certified question?*

[26] When reviewing a decision of the Federal Court on a judicial review application, this Court must determine if the judge chose the appropriate standard(s) of review for the issue(s) before him and if he applied it (them) correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, 2013 2 S.C.R. 559 [*Agraira*]. The latter involves "stepping into the shoes" of the judge. This Court's focus will thus be on the decision of the RAD.

[27] That said, the interveners particularly insisted that this Court should give the correct answer to questions that have been certified pursuant to subsection 74(d) of the *IRPA*. In their written and oral submissions, they relied on this Court's decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113 at paras. 30-37, [2015] 1 F.C.R. 335. However, since then, the Supreme Court has reversed this decision: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, 391 D.L.R. (4th) 644 [*Kanthasamy*]. The Supreme Court confirmed that despite the fact that a certified question may well be of general importance to the refugee law system, it is not a type of question that falls within the exceptions to the application of the standard of reasonableness: *Kanthasamy* at para. 44.

[28] *Kanthasamy* will obviously have a tremendous impact, given that for many years, the Federal Court resorted to the certification process under subsection 74(d) to settle divergent

interpretations or disagreements on legal issues of general importance. This Court's providing the correct answer to certified questions appears to have been welcomed, particularly by the IAD and the RPD, who saw it as helpful in carrying out their functions.

[29] The legislator is obviously empowered to set the standard of review that it wants to see applied to questions certified pursuant to subsection 74(d) of the *IRPA*. However, this must be done very clearly. Should the legislator wish to continue the system that was in place before *Kanthasamy*, it would be required to amend the *IRPA* and clarify its intention that certified questions be reviewed on a correctness standard.

B. *What was the proper standard of review to be applied by the judge to the issue before him?*

[30] The appellant strongly argues that the judge chose the wrong standard of review. The judge's conclusion in that respect, as well as the precedents on which he relied (*Newton* and *United Gulf*), did not take into consideration all of the relevant Supreme Court of Canada decisions – especially those issued since 2011. Neither the judge nor the other two provincial courts of appeal turned their mind to the presumption that reasonableness applies to all questions of law arising from the interpretation of an administrative body's home statute: see, for example, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 [*McLean*]; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; and *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 [*CN v. Canada*]. The Minister submits that the judge misconstrued the limited exceptions where the standard of correctness may be applied. I agree with these submissions.

[31] With all due respect to the judge and his colleagues in the Federal Court who have agreed with his selection of standard of review, I simply cannot conclude that a question of law involving the interpretation of an administrative body's home statute so as to determine its appellate role has any precedential value outside of the specific administrative regime in question: see, among others, *Alvarez v. Canada (Citizenship and Immigration)*, 2014 FC 702, [2014] F.C.J. No. 740; *Yetna v. Canada (Citizenship and Immigration)*, 2014 FC 858, [2014] F.C.J. No. 906; *Spasoja v. Canada (Citizenship and Immigration)*, 2014 FC 913, [2014] F.C.J. No. 920 [*Spasoja*]; *Bahta v. Canada (Citizenship and Immigration)*, 2014 FC 1245, [2014] F.C.J. No. 1278; *Sow v. Canada (Citizenship and Immigration)*, 2015 FC 295, 252 A.C.W.S. (3d) 316; *Bellingy v. Canada (Citizenship and Immigration)*, 2015 FC 1252, 260 A.C.W.S. (3d) 566. In fact, this logically relates to the argument put forth by the respondents and the interveners that it is not useful to look at decisions regarding the role of administrative appeal bodies other than those created under the *IRPA*: see also the Federal Court Reasons at para. 53.

[32] Just as legal principles applicable to cost awards and to time limitations have been found to fall within the expertise of the administrative bodies involved in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 25, [2011] 3 S.C.R. 471 and *McLean* at para. 21, defining the scope of its appellate function (or its standard of review) must be within the RAD's expertise.

[33] I cannot agree with the respondents' position that the issue before the judge was a true jurisdictional question. The respondents framed the issue as involving the overlapping ability of both the RPD and the RAD to exercise their sole and exclusive jurisdictions in making findings

of fact, law and mixed fact and law on the same set of evidence. However, the Supreme Court has warned against an expansive interpretation of what it deems to be "true questions of jurisdiction", as well as questions of overlapping or competing jurisdiction between two administrative bodies. In my view, there is no question here that falls under the scope of such exceptions. I agree with the position taken by other judges of the Federal Court, such as Justice Luc Martineau in *Djossou v. Canada (Citizenship and Immigration)*, 2014 FC 1080, [2014] F.C.J. No. 1130 [*Djossou*] and Justice Jocelyne Gagné in *Akuffo v. Canada (Citizenship and Immigration)*, 2014 FC 1063, [2014] F.C.J. No. 1116, that this is not a question of true *vires*.

[34] Lastly, the Supreme Court made it clear in *Kanthasamy* that a question of general importance to the refugee law system does not fall under any of the other exceptions to the standard of reasonableness set out in *Dunsmuir*.

[35] I thus conclude that the judge erred in his selection of the standard of review applicable to the case before him, and that the proper standard ought to be that of reasonableness.

C. *Did the RAD make a reviewable error in defining the scope of its review in this appeal from the RPD decision?*

[36] Before embarking on a statutory interpretation analysis, it is important to delineate what is in dispute before us from what is not.

[37] It is not disputed that the role of the RAD is not to review RPD decisions in the manner of a judicial review. All the parties agree that the process before the RAD is a "hybrid appeal".

The parties have also agreed that in respect of questions of law, the RAD should intervene if the RPD erred. That is, it must apply the correctness standard. In fact, and as explained below, one of the roles of the RAD is to develop a coherent national jurisprudence.

[38] What the parties disagree on is what a "hybrid appeal" means here, and what the RAD's role is in respect of questions of fact and mixed fact and law.

[39] According to the Minister, the judge was wrong to the extent that his reasons can be interpreted as describing an appeal to the RAD as a *de novo* appeal. Indeed, the Minister submits that when the RAD does not hold a hearing and decides the issues raised by a claimant or the Minister on the basis of the record before the RPD (subsection 110(3) of the *IRPA*), the RAD is truly acting as an appellate court. Therefore, it should not carry out an independent assessment of the claim. Rather, the Minister says that the RAD should restrict its intervention to cases where the RPD made an unreasonable finding or, in the alternative, a palpable and overriding error: Appellant's Memorandum of fact and law (MFL) at paras. 78-81. The Minister argues that the reasoning of the Court in *Spasoja* and its conclusion as to the role of RAD should be followed, because it preserves the integrity of the RPD process: Appellant's MFL at para. 30. The Minister does not dispute that less deference, if any, would be owed in the relatively rare cases where the RAD holds a hearing pursuant to subsection 110(6) of the *IRPA* (see paragraph 110(6)(c) in particular). It is in that sense only that the appeal is a hybrid appeal in the Minister's view.

[40] On the other hand, the respondents and the interveners support the judge's findings at paragraphs 54 and 55 of his reasons. In fact, in their view, a finding of error should not be a pre-condition for all appellate intervention by the RAD: Respondents' MFL at para. 51.

[41] A few comments as to how I approached my task and what I consider necessary to include in my reasons are also warranted. In *Canada (Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237 at para. 45, 392 D.L.R. (4th) 351, I indicated that it is sometimes difficult to apply the standard of reasonableness to pure questions of statutory interpretation, and that further guidance from the Supreme Court would be welcomed as to the type of analysis that courts should perform in such cases.

[42] The parties referred to the conflicting approaches and conclusions reached by Federal Court judges on the issue before us. Thus, to ensure that I understood the various approaches to interpreting the relevant provisions that were adopted below, I reviewed all such Federal Court decisions, as well as a good sample of RAD decisions dealing with the issue (especially following the judge's decision in the present case).

[43] However, I gather from the Supreme Court decision in *Kanthasamy* that there is no real need for me to engage in a comparative analysis to explain whether or not an alternative statutory interpretation is reasonable. Section 25 of the *IRPA* was construed for many years by many administrative and judicial decision-makers differently from how it was ultimately construed by our highest Court in *Kanthasamy*. Despite this, the Supreme Court felt no need to refer to these

alternative constructions before concluding that section 25 of the *IRPA* bore only one reasonable interpretation, and that the decision under review was therefore unreasonable.

[44] This approach appears to be particularly well suited to the question before us in the present appeal. I agree with the position advanced by Dr. Paul Daly that the very nature of the question (that is, what role did the legislator intend the RAD to play) implies that it cannot have many answers: Paul Daly, "Les appels administratifs au Canada" (2015) 93 Can. Bar Rev. 71 at 105 [Les appels administratifs au Canada]. Accordingly, the range of legally acceptable outcomes will necessarily be narrow. In fact, as will be explained, it is my view that the legislative intent is not ambiguous. The controversy in RAD and Federal Court decisions can be more accurately described as a disagreement over whether to import either the standard from a judicial review of an administrative action (*Dunsmuir*) or an appellate court's review of a lower court decision (*Housen*) into the RAD's review of an RPD decision.

[45] I also note that in this particular case, the RAD did not have the benefit of any submissions in respect of its appellate role, nor of a record which included the legislative evolution and history of the relevant *IRPA* provisions. Further, it appears that the RAD was one of the first, if not *the* first, administrative appeal bodies outside of Alberta to rely on the *Newton* factors. This was mentioned by the British Columbia Supreme Court in *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board),* 2013 BCSC 2331 at para. 31, [2014] B.C.W.L.D. 966 [*BC Society*], where the B.C. Supreme Court declined to follow *Newton*.

[46] I do not find the decision in *Newton* particularly useful. I believe that the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the *IRPA* read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *IRPA* and its object (Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983)). The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the *IRPA* and the role of the RAD.

[47] The principles which guided and shaped the role of courts on judicial review of decisions made by administrative decision-makers (as set out in *Dunsmuir* at paras. 27-33) have no application here. Indeed, the role and organization of various levels of administrative decision-makers do not put into play the tension between the legislative intent to confer jurisdiction on administrative decision-makers and the constitutional imperative of preserving the rule of law.

[48] With all due respect to the contrary view, it would also be inappropriate to import the considerations set out in *Housen*, since the adoption of the high level of deference afforded by appellate courts of law to lower courts of law on questions of fact and mixed fact and law was mainly guided by judicial policy: *Housen* at paras.16-17.

[49] When the legislator designs a multilevel administrative framework, it is for the legislator to account for considerations such as how to best use the resources of the executive and whether it is necessary to limit the number, length and cost of administrative appeals. As will be discussed, the legislative evolution and history of the *IRPA* shed light on the policy reasons that guided the creation of the RAD and the role it was intended to fulfil. These policy considerations are unique to the RPD and the RAD. Thus, one should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies.

[50] To be clear, I am not saying that the standard of reasonableness will never apply in appeals to administrative appeal bodies. In fact, there are examples where the legislator clearly expresses an intention that such a standard be applied: see, for example, subsection 18(2) and section 33 of the *Commissioner's Standing Orders (Grievances and Appeals)* Regulation, SOR/2014-289, adopted pursuant to the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10; subsection 147(5) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (see Appendix A). This last provision was reviewed and construed by this Court in *Cartier v. Canada (Attorney General)*, 2002 FCA 384 at paras. 6-9, [2003] 2 F.C.R. 317.

[51] Rather, what I am saying is that one cannot simply decide that this standard will apply on the basis of one's own assessment of factors (e) and (f) listed in *Newton* (see paragraphs 10, 15 and 16 above). One must seek instead to give effect to the legislator's intent.

[52] With this in mind, I will now proceed with my statutory analysis, looking first at the relevant purpose and object of the *IRPA*.

(1) Purpose and Object of the *IRPA*

[53] The many objectives of the *IRPA* are expressly set out in subsection 3(2) of the *IRPA* (see paragraph 25 above). The Minister focuses particularly on paragraph 3(2)(e), which refers to the establishment of fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system. This is obviously very relevant when one considers the functions of the RPD and the RAD. That said, one should always keep in mind that the very first objective of the *IRPA* (paragraph 3(2)(a)) is to recognize that the refugee program is about saving lives and offering protection to the displaced and persecuted. This may be what prompted Robert Thomas to write that decision-making in respect of refugee claims is "perhaps the most problematic adjudicatory function in the modern state": Robert Thomas, Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication (Oxford: Hart Publishing, 2011) at 48, cited in Les appels administratifs au Canada at 95 fn 103.

(2) The Legislative Scheme and section 110 and 111 of the *IRPA*

[54] The *IRPA* creates two distinct divisions of the IRB to deal with refugee claims. The RPD plays a primary role in the refugee claims determination process, for it must hold a hearing in respect of every refugee claim: subsection 170(b) of the *IRPA*. It must also determine in advance the issues that will need to be addressed at its hearing. At the hearing, the member of the RPD plays a crucial role, quite distinct from that of a judge. Most of the time, he or she questions the claimant before he or she is examined by his or her own counsel, or cross-examined by counsel for the Minister, if any.

[55] The RPD is the final decision-maker in respect of all claims listed in subsection 110(2) of the *IRPA*. The respondents further point out that the RPD was in fact the final decision-maker in about 80% of the refugee claims assessed in 2013: Respondents' MFL at para. 53; *The Refugee Appeal Division: Presentation to the Toronto Regional Consultative Committee* by Ken Atkinson (February 5, 2014), Appellant's Appeal Book, Volume 1, Tab 7 at 68.

[56] When dealing with an appeal, the RAD has essentially the same powers as the RPD: see sections 162 and 171 of the *IRPA*. For example, the RAD has the same ability as the RPD to take "judicial notice of any facts that may be judicially noticed and of any other generally recognized facts, and information or opinion that is within its specialized knowledge": subsection 171(b) of the *IRPA*. Nevertheless, there are a few important distinctions between the RAD and the RPD. First, the RAD will rarely hold a hearing: subsection 110(6) of the *IRPA*. Although it may consider any new documentary evidence submitted by the Minister, it can only accept new evidence as defined in subsection 110(4) from a refugee claimant (See *Minister of Citizenship and Immigration v. Parminder Singh*, 2016 FCA 96. Moreover, 10% of its members, as well as its vice-president, must be lawyers or notaries: subsection 153(4) of the *IRPA*. When an appeal is heard by three members of the RAD, their decision has the same precedential value that an appellate court decision has for a trial court. Such a decision binds all RPD members, as well as any one-member panel of the RAD: subsection 171(c) of the *IRPA*.

[57] The *IRPA* also provides for a similar two-level process in respect of other immigration matters. In particular, appeals from a number of first-level decision-makers are made to another IRB division: the IAD. The wording of paragraph 67(1)(a) of the *IRPA*, which describes when

the IAD can intervene, is similar to that of paragraph 111(2)(a) (see Appendix A). However, I do not find it useful to say more about the IAD, because the cases discussing the IAD raised by the Minister are outdated: they are either old cases that were released before the *IRPA* came into force; or they are cases which were released after the *IRPA* came into force but which rely on the old cases. Both interpret language on when the IAD can intervene that is not current, and provide no analysis of the words "wrong in law or fact or mixed law and fact" found at subsection 67(1)(a).

[58] Sections 110 and 111, reproduced above, deal with appeals from the RPD to the RAD. Subject to my comments with respect to paragraph 111(2)(b), I generally agree with the RAD's finding that neither section 110 nor 111, nor the legislation as a whole, point to the need to show deference to the RPD's findings of fact. As acknowledged by the RAD in this case, these provisions evidence the legislator's intent that the RAD bring finality to the refugee claims determination process.

[59] In particular, paragraph 111(2)(a) indicates that the RAD does not need to defer for factual findings. Paragraph 111(2)(a) does not distinguish between errors of law, fact or mixed fact and law. It simply requires that the decision of the RPD be "wrong in law, in fact or in mixed law and fact" (in French: "erronée en droit, en fait ou en droit et en fait").

[60] At the hearing, the Minister argued that the wording of paragraph 111(2)(a) was such that it applied only to paragraph 111(1)(c), and not to paragraphs 111(1)(a) or (b). Thus, paragraph 111(2)(a) provides little guidance as to the role of the RAD when it confirms a RPD decision

under paragraph 111(1)(a) or sets it aside by substituting “the determination that, in its opinion, should have been made” under paragraph 111(1)(b). I cannot agree. The effect of this argument is that the RAD would be forced to reach the appropriate outcome for the case (under one of paragraphs 111(1)(a), (b) or (c)) before it could choose the proper standard of review to apply to that case: it would be forced to put the cart before the horse.

[61] Albeit in a different context, a similar approach was rejected by this Court in *Cartier* at paragraph 9. In that case, this Court noted that despite the awkward way the provision at issue was drafted, the applicable standard of review remained the same regardless of whether the appellate body confirmed or reversed the decision under appeal, thereby resulting in the release of an offender. I cannot see how this could be otherwise in the present case. Indeed, on appeal, the RAD must necessarily consider the RPD decision and the record available before determining how it should dispose of the matter, including whether it is preferable to dispose of the appeal in accordance with paragraph 111(1)(c) and subsection 111(2). The extent or nature of its review of the decision and its assessment of the record cannot depend on the ultimate conclusion that it will reach in this regard.

[62] In my view, subsection 111(2) is part of the context that must be examined as a whole to determine the legislative intent regarding the role of the RAD in all cases mentioned under subsection 111(1). This is especially so because paragraph 111(2)(b) expressly refers to paragraphs 111(1)(a) and (b).

[63] I also note that the Minister appears to suggest that the word “wrong” is synonymous or the equivalent to the word “unreasonable”: Appellant’s MFL at para. 80. Again, I cannot accept this argument. This is not the ordinary meaning of the word “wrong”, nor is it its customary meaning in a legal context.

[64] The ordinary meaning of the word “wrong” is “not correct or true”, “incorrect”, “mistaken”: *The Oxford English Dictionary*, 3d ed., s.v. “wrong”. The French version “erronée” has the exact same ordinary meaning, that is, “fausse”, “incorrecte”, “inexacte”, “mal fondée”: *Le nouveau petit Robert*, 2006, s.v. “erroné”. This wording definitively points to the standard of correctness. In addition, the legislator’s intent to use the word “wrong” in its ordinary meaning is, in my view, supported by the legislative history, to which I will refer later.

[65] In my view, the Minister’s position can only be based on the assumption that the legislator meant to apply one of the deferential standards of review applicable to findings of fact, be it in the context of a judicial review or of an appeal from a trial court. No such presumption applies here, as the legislator made it clear that the RPD is not entitled to err, be it in law, in fact or in mixed and fact and law. As mentioned earlier, it would make little sense to give the word “wrong” a different meaning depending on whether it relates to the words “in law”, “in fact” or “in law and in fact” used in paragraph 111(2)(a). This would be contrary to the most basic rule of statutory interpretation.

[66] Furthermore, it appears from a search of the federal legislation and regulations that the word “wrong”, as used in paragraphs 111(2)(a) and 67(1)(a) of the *IRPA*, has not been used in

any other federal statute or regulation. By contrast, there are many examples of statutes and regulations that capture the standard of reasonableness through the use of words such as "reasonable" or "reasonably". I gave an example of each at paragraph 50 above. Thus, the *IRPA*'s unique provisions were expressly crafted to give effect to the legislator's particular intent in respect of this *sui generis* scheme.

[67] At the hearing, the Minister submitted that the most telling characteristic of the RAD's appeal process is that in the vast majority of cases (including the matter before us), the RAD determines the appeal on the basis of the record of the RPD proceedings: subsection 110(3) of the *IRPA*. This, he submits, leads to the conclusion that the legislator intended that all findings of fact (and not only those involving the assessment of oral evidence) be reviewed on the standard of reasonableness or of palpable and overriding error. I need only use one example to illustrate why I disagree that this is not the only inference that can be drawn from subsection 110(3). The present appeal is based solely on the record available before the judge. Still, as mentioned earlier, once it has been ascertained that the judge chose the appropriate standard of review for the question before him, the Court "steps into the shoes" of the judge to assess if he correctly applied that standard. No deference is owed in that respect, although the Court will carefully consider the decision under appeal.

[68] Admittedly, inasmuch as paragraph 111(2)(a) is relevant to the analysis, subsection 110(3) is also part of the context that must be considered. However, subsection 110(3) is simply not as determinative as the Minister's argument above suggests.

[69] I now turn to paragraph 111(2)(b). It provides that once an error has been identified (paragraph 111(2)(a)), the RAD may refer the matter back for redetermination with the directions that it considers appropriate only if it is "of the opinion" that it cannot make a decision confirming or setting aside the RPD decision without hearing the evidence presented before the RPD. This possibility acknowledges the fact that in some cases where oral testimony is critical or determinative in the opinion of the RAD, the RAD may not be in a position to confirm or substitute its own determination to that of the RPD.

[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.

[71] One can imagine many possible scenarios. For example, when the RPD finds a witness straightforward and credible, there is no issue of credibility *per se*. This will also be the case when the RAD is able to reach a conclusion on the claim, relying on the RPD's findings of fact regarding the relative weight of testimonies and their credibility or lack thereof.

[72] Problems will occur when the credibility findings themselves are disputed on appeal, and the RAD has no way to reach a conclusion without endorsing or rejecting those findings. If the RAD can identify an error in situations where, for example, a claimant was not found credible because his story was not plausible based on common sense, the RPD may have no real advantage over the RAD.

[73] Similarly, there may also be cases where a finding that a witness is not credible was based on discrepancies that could not justify such a conclusion or that simply did not exist. If the assessment of the oral evidence contains an error which the RAD can easily identify, but the weight to be given to this testimony is essential to determine whether the RPD decision should be confirmed or set aside, the RAD may conclude that it is a proper case to refer back to the RPD with specific directions in respect of the error identified in the credibility findings.

[74] That said, it is not appropriate to say more about the various scenarios that may arise, for they are not before us. The RAD should be given the opportunity to develop its own jurisprudence in that respect; there is thus no need for me to pigeon-hole the RAD to the level of deference owed in each case.

[75] Before concluding my analysis of the wording and scheme of the *IRPA*, I will say a few words about another argument raised by the Minister that could in theory fit in this analysis, given that it may address the objective set out in paragraph 3(2)(a) of the *IRPA*. Without providing any evidence to support his argument, the Minister states that unless the RAD applies a standard involving a high level of deference to the RPD findings of fact, it would be impossible

for the RAD to fulfill its mandate because it would be required to peruse an enormous amount of documentation.

[76] As mentioned earlier, I reviewed a large sample of decisions of the RAD that applied the approach suggested by the judge in this case. The RAD members in question had chosen to do so even after other Federal Court decisions indicated that the standard of palpable and overriding error could be used to review the RPD's findings of facts. I note in passing that I was impressed by the general quality of those decisions; this certainly bodes well for the future. That said, I saw no indication that the RAD has any difficulty fulfilling its mandate when conducting substantive reviews of appealed RPD decisions. Certainly, there is no mention of this in any of the decisions that followed the approach described by the judge in this matter. A few members of the RAD have decided to follow the approach suggested in *Spasoja*. I understand that this is mostly because they felt that it was easier to apply a standard that was already well defined, not because they did not have the time or the resources to conduct the substantive review of the documents on file that would be mandated if a less deferential standard were applied.

[77] In any event, and as indicated above at paragraphs 49 and 51, the number of appeals and the time and effort required on each appeal is for the legislator to consider. 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.

[78] At this stage of my analysis, I find that the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the *IRPA*.

[79] I also conclude that an appeal before the RAD is not a true *de novo* proceeding. Recognizing that there may be different views and definitions, I need to clarify what I mean by "true *de novo* proceeding". It is a proceeding where the second decision-maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects. When the appeal is a true *de novo* proceeding, standard of review is not an issue. This is clearly not what is contemplated where the RAD proceeds without a hearing.

[80] I will now look at the *IRPA*'s legislative evolution and history. Despite the relatively low weight generally given to legislative history, I agree with the Federal Court in *Spasoja* that on the issue before us, it is particularly instructive and simply impossible to ignore. As mentioned, I believe that both the legislative evolution and its history confirm the conclusion that I have reached at this stage of my analysis.

(3) Legislative evolution and history

[81] Although much of what I will say here has been discussed in various decisions of the Federal Court (see, for example, *Djossou* at paras. 74-85 and *Spasoja* at paras. 32-38), it is

worthwhile to set it out again, as it provides useful indications as to how the legislator envisioned the role of the RAD and how the two-tier administrative decision-making process was understood to provide a fair and more efficient process.

[82] From 1985 until the enactment of the *IRPA*, the determination of refugee claims was governed by sections 67-69.1 of the *Immigration and Refugee Act*, R.S.C. 1985, c. I-2. Refugee claims were decided by a quorum of two members of the Convention Refugee Determination Division, unless claimants consented to have their case determined by a single member. There was no appeal, and the only recourse was judicial review.

[83] Bill C-11 (now the *IRPA*), which received Royal Assent on November 1, 2001, provided for the creation of a Refugee Appeal Division (the RAD) within the Immigration and Refugee Board. In 2007, a private Member's bill (Bill C-280) was introduced to implement the provisions relating to the RAD (sections 110 and 111 particularly), but it never received Royal Assent.

[84] Another Bill C-11, entitled the *Balanced Refugee Reform Act*, was introduced in March 2010. It proposed to bring the unproclaimed RAD provisions of the *IRPA* into force within two years of its Royal Assent. It also proposed changes to the existing RAD provisions, such that the RAD would have the power to accept new evidence in certain circumstances and the ability to hold a hearing in specified situations (subsections 110(4) and (6)). It received Royal Assent on June 29, 2010.

[85] In February 2012, Bill C-31, entitled *Protecting Canada's Immigration System Act*, was introduced. It proposed further changes to the RAD provisions; in particular, it proposed limitations on access to the appeal provided for in the *IRPA* by several categories of refugee claimants, and barred appeals on cessation and vacation decisions (see subsection 110(2) of the *IRPA*). It received Royal Assent on June 28, 2012.

[86] On December 15, 2012, the 2010 and 2012 amendments came into force and the RAD was formally launched. As mentioned, although the legislative history is not in any way determinative and should not to be given undue weight as to the legislative intent (*CN v. Canada* at para. 47), it remains useful to consider statements of the Minister responsible for the legislation, as well as those of others directly involved in its development.

[87] When Bill C-11 was tabled, Joan Atkinson, Assistant Deputy Minister, noted that the introduction of single-member RPD panels was to be offset by the introduction of the claimants' right of appeal before the RAD: Standing Committee on Citizenship and Immigration, 37th Parliament, 1st Session, meeting No. 27 (May 17, 2001) at 1140 in Joint Book of Authorities (JBA), Part II, Vol. 1, Tab 10. Similarly, the Honourable Elinor Caplan, who was the Minister responsible for the bill, underlined that:

> The whole purpose [of the RAD] is to ensure that the correct decision is made ... Our expectation is that … the ability of the RAD to fix mistakes will give greater assurance to the Federal Court in the decision making at the IRB. In that way, we will see fewer cases actually given review at the Federal Court.
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> (Standing Senate Committee on Social Affairs, Science and Technology, 37th Parliament, 1st Session, Issue 29 (October 4, 2001) in JBA, Part II, Vol. 1, Tab 11; emphasis added)

[88] Peter Showler, former Chairman of the IRB, stated the following as to why it would be appropriate to reduce the number of members dealing with refugee claims from two to one:

> In contrast to the present model, where claims are normally heard by two-member panels, the vast majority of protection decisions will be made by a single member. Single-member panels are a far more efficient means of determining claims. It is true that claimants will no longer enjoy the benefit of the doubt currently accorded them with two-member panels, and I think that should be noted. However, any perceived disadvantage is more than offset by the creation of the refugee appeal division, the RAD, where all refused claimants and the minister have a right of appeal on RPD decisions.
>
> Appeals to the RAD will be in writing only and will be reviewed by experienced RPD decision-makers with the power to affirm the RPD decision, to set it aside and substitute their own decision, or to refer the matter back to the RPD for a rehearing on particular issues in exceptional cases where it might be necessary to hear additional evidence. We estimate the workload of the RAD will be about 8,000 to 9,000 cases per year, and we intend to equip the division with a corresponding level of staff and resources.
>
> It is expected that the RAD will produce two different but complementary results. By reviewing individual RPD decisions on the merits, the RAD can efficiently remedy errors made by the RPD. That, if you will, is the safety net for the RPD. However, in addition the divisions will ensure consistency in refugee decision-making by developing coherent national jurisprudence in refugee law issues. As I said to this committee before, we don't see that as a benefit simply in that it will improve the quality of our decision-making. If there is more coherent, consistent jurisprudence, we think RPD decision-makers can actually make their decisions more quickly as well.
>
> […]
>
> So there's a significant difference between them. We think the total result will end up the same as before. But as I've already indicated, we think we will have a better-quality decision-because we'll have had two goes, two kicks, at the can. There's not only been the original decision, but also a clear, authoritative, experienced review of that decision.
>
> (Standing Committee on Citizenship and Immigration, 37th Parliament, 1st Session, meeting No. 5 (March 20, 2001) at 0915-20, 0925 in JBA, Part II, Vol. 1, Tab 6; emphasis added)

[89] Minister Elinor Caplan further stated that:

> Bill C-11 will create a new Refugee Appeal Division at the IRB to hear appeals on merit for decisions on refugee claims, rendering the system both faster and fairer by providing a mechanism to correct error in the first instance.
>
> […]
>
> Also I want to clarify that the RAD, the Refugee Appeal Division is not a second hearing. It is a review on merit of the hearing that took place at the Refugee Protection Division.
>
> (Standing Committee on Citizenship and Immigration, 37th Parliament, 1st Session, meeting No. 22 (May 8, 2001) at 0845, 0935 in JBA, Part II, Vol. 1, Tab 8)

[90] At the second reading of the private Member's bill presented in 2007, Member of Parliament Richard Nadeau referred to a number of systemic considerations justifying the establishment of the RAD, including the need for more efficiency. This particular need had been described as follows by the Canadian Council for Refugees: "[a] specialized appeal division for refugee matters can deal much more efficiently with unsuccessful claimants than the Federal Court… The refugee appeals division can do a better job of correcting errors of law and fact": House of Commons Debates, 39th Parliament, 1st Session, No. 122 (March 2, 2007) in JBA, Part II, Vol. 1, Tab 15 at 7569.

[91] During the debate on the second reading of Bill C-11 on April 26, 2010, the Honourable Jason Kenney, then-Minister of Citizenship and Immigration, stated:

> The proposed new system would also include, and this is very important, a full appeal for most claimants. Unlike the appeal process proposed in the past and the one dormant in our current legislation, this refugee appeal division, or RAD, would allow for the introduction of new evidence and, in certain circumstances, provide for an oral hearing.
>
> (*House of Commons Debates*, 40th Parliament, 3rd Session, No. 033, Vol. 145 (April 26, 2010) at 1945 in JBA, Part II, Vol. 2, Tab 24; emphasis added)

[92] Then, on May 4, 2010, Minister Kenney pointed out before the Standing Committee on Citizenship and Immigration:

> However, there is finally an appeal section, which is even better than what was provided by the legislation in 2002.
>
> This new appeal division would provide most claimants with a second chance, an opportunity to introduce new evidence about their claim and to do so in an oral hearing, if necessary. And, significantly, Mr. Chairman, the bill would make it possible to remove those who would abuse our system within a year of their final IRB decision.
>
> […]
>
> I want to underscore that the refugee appeal division foreseen in the *Immigration and Refugee Protection Act* 2003, and proposed, for instance, in Mr. St-Cyr's private member's bill, does not actually include, as does the RAD in Bill C-11, the ability to present new evidence and in certain cases to have an oral hearing before the appeal division decision-maker. This is an improved RAD. It's an additional level of administrative fairness, but it's not going to happen if we don't achieve the other streamlining in the system that the package speaks to.
>
> (Standing Committee on Citizenship and Immigration, 40th Parliament, 3rd Session, meeting No. 12 (May 4, 2010) at pp. 1535, 1610 in JBA, Part II, Vol. 2, Tab 25; emphasis added)

[93] Minister Kenney added before the Senate Committee on Social Affairs, Science and Technology:

> The result would be a streamlined system that would actually add greater procedural fairness, through the creation of what's known as the Refugee Appeal Division. This would allow failed claimants a full appeal of their claims.
>
> In terms of our system, Bill C-11 would provide for the following. First, the creation of a new interview with an Immigration and Refugee Board public servant, in place of a written form, early in the claims process. In our opinion, that would speed up the process and make it more efficient. Second, independent decision makers at the Refugee Protection Division of the IRB who are public servants rather than political appointees. That means that people who hold the hearings for asylum claimants will be, after those reforms, IRB officials rather than cabinet appointees. Third, a new fact-based refugee appeal division that even surpasses what refugee advocates have requested for a long time.

> […]
>
> The initial hearing at the Refugee Protection Division and the appeal at the Refugee Appeal Division both constitute an analysis of the risk faced by the claimant. Will they face a risk of torture or threat to their life if returned to their country of origin? . . . Our position is that once you have had two negative risk assessments — that is, once an IRB officer has looked at your case and said that you do not face risk if returned to your country and a refugee appeal decision maker has made the same decision — we do not think it is appropriate to have a third, redundant, risk assessment based on that legal criteria of risk, which is now embedded in sections 96 and 97 of the *Immigration and Refugee Protection Act*.
>
> (Standing Senate Committee on Social Affairs, Science and Technology, 40th Parliament, 3rd Session, Issue 11 (June 22, 2010) at 11:14, 11:19 in JBA, Part II, Vol. 2, Tab 34; emphasis added)

[94] The same idea was reiterated by Minister Kenney during the second reading of Bill C-31, when it was presented in the House of Commons in 2012:

> I reiterate that the bill would also create the new refugee appeal division. The vast majority of claimants who are coming from countries that do normally produce refugees would for the first time, if rejected at the refugee protection division, have access to a full fact-based appeal at the refugee appeal division of the IRB. This is the first government to have created a full fact-based appeal.
>
> (*House of Commons Debates*, 41st Parliament, 1st Session, No. 090, Vol. 146 (March 6, 2012) at 1515 in JBA, Part II, Vol. 2, Tab 36)

[95] Shortly thereafter, he added:

> What we are proposing in C-31 goes above and beyond our legal and humanitarian obligations under both the Charter of Rights and Freedoms and the UN convention on refugees. It proposes an asylum system that would be universally accessible and that would respect absolutely our obligation of non-refoulement of people deemed to be in need of our protection. It would provide access to a full and fair hearing at an independent quasi-judicial body, which again goes above and beyond our charter and UN convention obligations. It would create for the first time a full and fact-based appeal at the refugee appeal division, accessible to the vast majority of failed asylum claimants who lose at the first instance.

> (*House of Commons Debates*, 41st Parliament, 1st Session, No. 094, Vol. 146 (March 12, 2012) at 1545 in JBA, Part II, Vol. 2, Tab 37; Emphasis added)

[96] From these excerpts, I understand that the legislator expected to create a more efficient process by having a single member of the RPD evaluate each refugee claim, and enabling this decision-maker to issue his or her decision more quickly, with the assurance that any error would be corrected on appeal by another specialized decision-maker with experience and strong analytical skills.

[97] Rather than systematically holding a second hearing on appeal, which might delay the RAD's final decisions on refugee claims, the claimants' second "kick at the can" on appeal (see paragraph 89 above) was to be done on the basis of the record before the RPD, except in limited cases where new evidence would be admitted and the requirements of subsection 110(6) were fulfilled.

[98] The RAD was essentially viewed as the safety net that would catch all mistakes made by the RPD, be it on the law or the facts. This confirms my prior conclusion that the legislator intended the RAD to review the RPD decisions on the standard of correctness.

[99] This appears to be substantially in line with the submissions of the United Nations High Commissioner for Refugees (UNHCR) on Bill C-31, in which the UNHCR noted that on an appeal in respect of refugee claims, the decision-maker should have the jurisdiction to review questions of both fact and law, be able to accept and assess new evidence, and to recognize refugees independently: UNHCR Submission on Bill C-31 *Protecting Canada's Immigration*

System Act, May 2012, online: UNHCR Canada < http://www.unhcr.ca/newsroom/publications/> in JBA Part I, Vol. 4, Tab 93.

[100] It was certainly expected in 2001 that the workload of the RAD would be important (i.e., 8,000 to 9,000 cases annually) and the IRB's intent was to equip the new division with a corresponding level of staff and resources. The then-chairman of the IRB appears to have had no issue with respect to the capacity (in terms of staff and resources) of the RAD to substantively review RPD decisions on the merits and remedy errors made by the RPD: see above at paragraph 88. There is no indication that this exercise was viewed as a useless duplication of the work of the RPD, for this is exactly what justified reducing the number of members on the RPD panel involved in reviewing each refugee claim. It would certainly be more efficient to have only one instead of two decision-makers routinely involved in preparing and holding a hearing.

[101] The restrictions on the claimants' right to appeal introduced in 2012 would necessarily, in and of themselves, reduce the caseload of the RAD, while the other provision introduced expanded the RAD's ability to admit new evidence.

[102] The efficiency contemplated here by the legislator (that is, a more quickly-reached decision by a single member, usually reviewed – where the right of appeal exists – by a member of the RAD, generally without the need to hold a second hearing to correct any mistakes), as well as the legislator's intention to assign the resources necessary to achieve this aim, are quite distinct from the considerations driving the judicial policy described in *Housen* and incorporated in the factors of *Newton*.

(4) Conclusion on statutory interpretation

[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.

[104] Thus, the RAD erred by applying the reasonableness standard to the RPD's analysis of the objective evidence regarding state protection and to its conclusion in that respect. I would, therefore, dismiss the appeal with costs to the respondents.

[105] I wish to thank the interveners for their excellent submissions, which were quite useful.

[106] In light of paragraphs 23 and 24 above, I would reformulate the certified question as follows:

> Was it reasonable for the RAD to limit its role to a review of the reasonableness of the RPD's findings of fact (or mixed fact and law), which involved no issue of credibility?
>
> Answer: No. The RAD ought to have applied the correctness standard of review to determine whether the RPD erred.

"Johanne Gauthier"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D.G. Near J.A."

APPENDIX A – OTHER RELEVANT PROVISIONS

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**	***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**
Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
Effect	**Effet**
(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	**(2)** La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.
Application for judicial review	**Demande d'autorisation**
72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.	**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.

Application

(2) The following provisions govern an application under subsection (1):

(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;

(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

(c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;

(d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

Application

(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :

a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;

c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

Judicial review

74 Judicial review is subject to the following provisions:

(a) the judge who grants leave shall fix the day and place for the hearing of the application;

(b) the hearing shall be no sooner

Demande de contrôle judiciaire

74 Les règles suivantes s'appliquent à la demande de contrôle judiciaire :

a) le juge qui accueille la demande d'autorisation fixe les date et lieu d'audition de la demande;

b) l'audition ne peut être tenue à

than 30 days and no later than 90 days after leave was granted, unless the parties agree to an earlier day;

moins de trente jours — sauf consentement des parties — ni à plus de quatre-vingt-dix jours de la date à laquelle la demande d'autorisation est accueillie;

(c) the judge shall dispose of the application without delay and in a summary way; and

c) le juge statue à bref délai et selon la procédure sommaire;

(d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

d) sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

Qualification

153 (4) The Deputy Chairperson of the Immigration Appeal Division and a majority of the Assistant Deputy Chairpersons of that Division and at least 10 per cent of the members of the Divisions referred to in subsection (1) must be members of at least five years standing at the bar of a province or notaries of at least five years standing at the Chambre des notaires du Québec.

Qualité

153 (4) Le vice-président de la Section d'appel de l'immigration, la majorité des vice-présidents adjoints de cette section et au moins dix pour cent des commissaires visés au paragraphe (1) sont obligatoirement inscrits, depuis au moins cinq ans, au barreau d'une province ou membres de la Chambre des notaires du Québec.

Powers of a commissioner

165 The Refugee Protection Division, the Refugee Appeal Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing.

Pouvoir d'enquête

165 La Section de la protection des réfugiés, la Section d'appel des réfugiés et la Section de l'immigration et chacun de leurs commissaires sont investis des pouvoirs d'un commissaire nommé aux termes de la partie I de la *Loi sur les enquêtes* et peuvent prendre les mesures que ceux-ci jugent utiles à la procédure.

Proceedings

170 The Refugee Protection Division, in any proceeding before it,

Fonctionnement

170 Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :

(a) may inquire into any matter that it considers relevant to establishing

a) procède à tous les actes qu'elle juge utiles à la manifestation du

whether a claim is well-founded;	bien-fondé de la demande;
(b) must hold a hearing;	b) dispose de celle-ci par la tenue d'une audience;
(c) must notify the person who is the subject of the proceeding and the Minister of the hearing;	c) convoque la personne en cause et le ministre;
(d) must provide the Minister, on request, with the documents and information referred to in subsection 100(4);	d) transmet au ministre, sur demande, les renseignements et documents fournis au titre du paragraphe 100(4);
(d.1) may question the witnesses, including the person who is the subject of the proceeding;	d.1) peut interroger les témoins, notamment la personne en cause;
(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;	e) donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;
(f) may, despite paragraph (b), allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;	f) peut accueillir la demande d'asile sans qu'une audience soit tenue si le ministre ne lui a pas, dans le délai prévu par les règles, donné avis de son intention d'intervenir;
(g) is not bound by any legal or technical rules of evidence;	g) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(h) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and	h) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision;
(i) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge	i) peut admettre d'office les faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation.
Proceedings	**Fonctionnement**
175 (1) The Immigration Appeal Division, in any proceeding before it,	**175 (1)** Dans toute affaire dont elle est saisie, la Section d'appel de

l'immigration :

(a) must, in the case of an appeal under subsection 63(4), hold a hearing;

a) dispose de l'appel formé au titre du paragraphe 63(4) par la tenue d'une audience;

(b) is not bound by any legal or technical rules of evidence; and

b) n'est pas liée par les règles légales ou techniques de présentation de la preuve;

(c) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.

c) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

***Refugee Appeal Division Rules* (SOR/2012-257)**

***Règles de la Section d'appel des réfugiés* (DORS/2012-257)**

Content of appellant's record

Contenu du dossier de l'appelant

3 (3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

3 (3) Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

[…]

[…]

(g) a memorandum that includes full and detailed submissions regarding

g) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) the errors that are the grounds of the appeal,

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,

[…]

[…]

***Immigration and Refugee Protection Regulations* (SOR/2002-227)**

***Règlement sur l'immigration et la protection des réfugiés* (DORS/2002-227)**

Appeal to Refugee Appeal Division

Appel devant la Section d'appel des réfugiés

Time limit for appeal

159.91 (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act,

(a) the time limit for a person or the Minister to file an appeal to the Refugee Appeal Division against a decision of the Refugee Protection Division is 15 days after the day on which the person or the Minister receives written reasons for the decision; and

(b) the time limit for a person or the Minister to perfect such an appeal is 30 days after the day on which the person or the Minister receives written reasons for the decision.

***Commissioner's Standing Orders (Grievances and Appeals)* (SOR/2014-289)**

Decision at final level

18 (1) An adjudicator may dispose of a grievance at the final level by rendering a decision

(a) dismissing the grievance and confirming the decision rendered at the initial level; or

(b) allowing the grievance and

(i) remitting the matter, with directions for reconsidering the decision, act or omission, to the respondent or to the person who is responsible for the reconsideration,

(ii) remitting the matter, with directions for rendering a new decision to the adjudicator at the

Délais d'appel

159.91 (1) Pour l'application du paragraphe 110(2.1) de la Loi et sous réserve du paragraphe (2), la personne en cause ou le ministre qui porte en appel la décision de la Section de la protection des réfugiés le fait dans les délais suivants :

a) pour interjeter appel de la décision devant la Section d'appel des réfugiés, dans les quinze jours suivant la réception, par la personne en cause ou le ministre, des motifs écrits de la décision;

b) pour mettre en état l'appel, dans les trente jours suivant la réception, par la personne en cause ou le ministre, des motifs écrits de la décision.

***Consignes du commissaire (griefs et appels)* (DORS/2014-289)**

Décision au dernier niveau

18 (1) L'arbitre qui dispose d'un grief de dernier niveau peut rendre une décision :

a) le rejetant et confirmant la décision de premier niveau;

b) l'accueillant et :

(i) renvoyant l'affaire avec des directives relatives au réexamen de la décision, de l'acte ou de l'omission à l'intimé ou à la personne chargée de faire un tel réexamen,

(ii) renvoyant l'affaire à l'arbitre qui a rendu la décision au premier niveau ou à un autre

initial level or to another adjudicator, or

(iii) directing any appropriate redress.

Considerations

(2) An adjudicator, when rendering the decision, must consider whether the decision at the initial level contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[…]

Decision of Commissioner

33 (1) The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

Non-compliance with direction

(2) Despite subsection (1), the Commissioner may, subject to the principles of procedural fairness, dispose of an appeal against the interests of a party that has failed to comply with any of his or her directions.

***Corrections and Conditional Release Act* (S.C. 1992, c. 20)**

147 (5) The Appeal Division shall not render a decision under subsection (4) that results in the immediate release of an offender from imprisonment unless it is satisfied that

(a) the decision appealed from cannot reasonably be supported in law, under the applicable policies of the Board, or on the basis of the

arbitre, avec des directives en vue d'une nouvelle décision,

(iii) ordonnant la réparation qui s'impose.

Éléments à considérer

(2) Lorsqu'il rend la décision, l'arbitre évalue si la décision de premier niveau contrevient aux principes d'équité procédurale, est entachée d'une erreur de droit ou est manifestement déraisonnable.

[…]

Décision du commissaire

33 (1) Lorsqu'il rend une décision sur la disposition d'un appel, le commissaire évalue si la décision qui fait l'objet de l'appel contrevient aux principes d'équité procédurale, est entachée d'une erreur de droit ou est manifestement déraisonnable.

Décision — non-respect des directives

(2) Malgré le paragraphe (1), le commissaire peut, sous réserve des principes d'équité procédurale, disposer de l'appel à l'encontre des intérêts de la partie qui ne respecte pas l'une de ses directives.

***Loi sur le système correctionnel et la mise en liberté sous condition* (L.C. 1992, ch. 20)**

147 (5) Si sa décision entraîne la libération immédiate du délinquant, la Section d'appel doit être convaincue, à la fois, que :

a) la décision visée par l'appel ne pouvait raisonnablement être fondée en droit, en vertu d'une politique de la Commission ou sur les

information available to the Board in its review of the case; and

(b) a delay in releasing the offender from imprisonment would be unfair.

renseignements dont celle-ci disposait au moment de l’examen du cas;

b) le retard apporté à la libération du délinquant serait inéquitable.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED AUGUST 22, 2014 (AMENDED NOVEMBER 7, 2014) NO. IMM-6362-13 (2014 FC 799)

DOCKET:	A-470-14
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. BUJAR HURUGLICA, et. al.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 29, 2015
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	MARCH 29, 2016

APPEARANCES:

Tamrat Gebeyehu Nina Chandy Amy King	FOR THE APPELLANT
Cheryl Robinson	FOR THE RESPONDENTS
Audrey Macklin Anthony Navaneelan	FOR THE INTERVENORS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE APPELLANT
Chantal Desloges Professional Corporation Toronto, Ontario	FOR THE RESPONDENTS
Audrey Macklin, LL.M., LL.B. Prof. of Law and Chair in Human Rights Law Faculty of Law, University of Toronto Toronto, Ontario	FOR THE INTERVENORS
Mamann, Sandaluk and Kingwell LLP Toronto, Ontario	