

Federal Court



Cour fédérale

Date: 20150427

Docket: IMM-578-14

Citation: 2015 FC 536

Toronto, Ontario, April 27, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**SHERIKA COLEENA GREEN AND
CASEY LANAE BRYAN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the January 13, 2014 decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board. The RAD dismissed the applicants' appeal of the decision of the Refugee Protection Division [RPD] which determined that the applicants were not Convention refugees or persons in need of protection.

[2] For the reasons that follow, I find that the RAD erred, regardless of the standard of review that is applicable by this Court to RAD decisions and regardless of the standard of review that the RAD should apply in the context of appeals from the RPD.

Background

[3] The applicants, Sherika Coleena Green and her minor daughter, Casey Lanae Bryan, are citizens of Jamaica. Their refugee claim is based on a fear of Ms Green's ex-boyfriend, and Casey's father, Hannif Bryan. Mr Bryan became abusive to Ms Green in 2007 and the abuse escalated while she was pregnant. Mr Bryan's conduct included physical abuse, harassment and threats to Ms Green, harassment of Ms Green's mother, and two attempts to abduct Casey from her day care in 2011. Ms Green also recounted two knife attacks by unknown assailants in 2012.

[4] Ms Green contacted the police in May 2010, and was initially told there was nothing they could do. One officer subsequently told her that she could pursue a restraining order in family court. She started the process but later abandoned it. Ms Green recounts that she contacted the police on several occasions.

[5] The applicants claimed refugee protection in Canada in 2013. In June 2013, the RPD found Ms Green not to be completely credible and determined that state protection would be available to the applicants in Jamaica. The RAD dismissed the applicants' appeal.

The RAD decision

[6] After first determining not to admit the applicant's affidavit in accordance with subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA],

because it did not conform with procedural requirements and essentially restated the same information that was before the RPD, the RAD considered the standard of review it should apply. The RAD applied the factors set out in *Newton v Criminal Trial Lawyers' Assn*, 2010 ABCA 399 at para 44. The RAD considered the difference between the RPD, a tribunal of first instance given its authority to hear testimony, review evidence and determine a claim for refugee protection on the merits, and the RAD, which was created to review the decisions made by the RPD on questions of law, fact or mixed fact and law, with the ability to substitute a different determination where appropriate. The RAD noted that the RPD held a hearing on the totality of the evidence, heard from Ms Green directly, and was in the best position to assess credibility and to make findings on issues of fact, and mixed law and fact. In contrast, the RAD's authority to consider evidence is limited. The RAD concluded that it should defer to the RPD findings on questions of fact and review the decision on the standard of reasonableness.

[7] The RAD found, however, that the RPD's credibility findings were not reasonable and that the RPD had only paid lip service to the Chairpersons Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution [Gender Guidelines].

[8] The RAD then noted that state protection can be determinative regardless of credibility findings and concluded that the RPD reasonably found that there was adequate state protection in Jamaica and that the applicants had not rebutted the presumption.

The Issues

[9] The applicants argue that the RAD erred in three respects: by applying the wrong standard of review to the decision of the RPD; by making an unreasonable conclusion regarding

the RPD's assessment of the availability of state protection; and, by excluding the applicants' affidavit as new evidence due to an overly strict interpretation of subsection 110(4) of the IRPA.

The Applicants' Position

[10] With respect to the standard of review to be applied by this Court to the RAD decision on the standard of review it should apply, the applicants submit that correctness is the appropriate standard. This is not a matter of the RAD reviewing its own statute, but rather a question of more general interest regarding the deference owed by an appellate tribunal to an inferior decision-maker (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 60).

[11] With respect to the standard of review to be applied by the RAD to decisions of the RPD, the applicants argue that the RAD erred in applying the standard of reasonableness. No deference is owed to the RPD because the RAD has greater expertise, independence, and authority to conduct a *de novo* hearing and grant appeals.

[12] The applicants rely on the decision in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*], and other cases which have followed it, as having established that the common law principles of judicial review are not appropriate in the context of the RAD's role vis-à-vis the RPD. The applicants argue that the RAD was intended to be an appeal and that the RAD would duplicate the role of the Federal Court on judicial review if it only reviewed RPD decisions on the reasonableness standard.

[13] The applicants argue that the RAD's decision is not coherent or intelligible with respect to the key issues of credibility and state protection. Given that the RAD found that the RPD's adverse credibility findings were not reasonable, the RAD should have recognized that those same flawed credibility findings could not support the RPD's discounting of Ms Green's evidence about her efforts to seek police protection.

[14] The applicants further argue that both the RAD and the RPD ignored corroborating evidence regarding the applicants' efforts to obtain state protection and ignored contradictory evidence of state protection. The RPD ignored Ms Green's testimony that the police letter was not accurate with respect to the advice the police said had been provided and failed to consider that this letter, on which the Board relied, was sent after the applicant had left Jamaica. The RAD erred in accepting that the RPD had considered contradictory evidence.

The Respondent's Position

[15] With respect to the standard of review to be applied by this Court in reviewing the decision of the RAD, the respondent disagrees with the Court in *Huruglica*, which found that this Court should review the RAD's determination of the standard of review on the correctness standard and submits that the Court should apply the reasonableness standard.

[16] The respondent notes that the RAD is a specialized tribunal with expertise. Findings of fact and findings of mixed fact and law made by the RPD are reviewed by this Court on the standard of reasonableness and there is no reason why the same standard should not apply to the standard of review findings of the RAD.

[17] The respondent submits that although the determination of the appropriate standard of review is a legal question, questions which concern the interpretation of a tribunal's own statute and the tribunal's own function are reviewable on the reasonableness standard (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 45-46 [*Alberta Teachers' Association*]). A contextual analysis also leads to the conclusion that the Court should apply the reasonableness standard.

[18] With respect to the standard of review that the RAD should apply when reviewing a RPD decision, the respondent submits that the standard should be reasonableness.

[19] Reasonableness is the presumptive standard for appellate administrative tribunals, particularly when interpreting their home statute or a statute closely connected to their function and with which they are familiar (*Budhai v Canada (Attorney General)*, 2002 FCA 298; *Canada (Attorney General) v White*, 2011 FCA 190; *Dunsmuir* at paras 47-49; *Alberta Teachers' Association* at para 39; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 11-17; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42 at para 13). The respondent notes that none of the exceptions exist to justify a departure from the presumptive standard of reasonableness.

[20] The respondent agrees with the jurisprudence that has found that, however the standard of review is characterised, the RAD should show deference to the RPD when reviewing questions of fact and of mixed fact and law, such as credibility findings and evaluation of documentary

evidence (*Khachatourian v Canada (Citizenship and Immigration)*, 2015 FC 182 at para 29 [*Khachatourian*]).

[21] With respect to the RAD's findings that the RPD erred in its credibility findings but did not err in its state protection finding, the respondent argues that there was no inconsistency by the RAD. The respondent submits that the RAD found that only one specific credibility finding was not reasonable. The other findings were reasonable and were relied on to find that the applicants had not rebutted the presumption of state protection. The onus is on the applicants to establish that they have made efforts to obtain state protection which were to no avail (*Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 at para 7 (FCA); *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 52; *Zhuravljev v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 507 at paras 19 and 31; *Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397 at para 28). The RAD reasonably found that the RPD reviewed the documentary evidence and did not err in finding that Jamaica was providing adequate state protection to its citizens. Nor did the RAD err in upholding the RPD's finding that the applicants did not rebut the presumption of adequate state protection for victims of domestic violence in Jamaica.

What standard of review applies to this Court's review of the RAD decision?

[22] Over the last several months there have been many cases that have addressed the standard of review to be applied by this Court to decisions of the RAD on the issue of the standard of review the RAD should use in its consideration of appeals from the RPD. As noted by the applicant, in *Huruglica* at paras 25-33, Justice Phelan provided a comprehensive analysis leading

him to the conclusion that this Court should review the RAD's choice of standard of review on the correctness standard. Other decisions took the same approach including *Iyamuremye v Canada (Citizenship and Immigration)*, 2014 FC 494 at para 20 [*Iyamuremye*]; *Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702 at para 17 [*Alvarez*]; *Yetna v Canada (Citizenship and Immigration)*, 2014 FC 858 at paras 14-15 [*Yetna*]; *Triastcin v Canada (Citizenship and Immigration)*, 2014 FC 975 at para 18-19 [*Triastcin*]; *Tamayo v Canada (Citizenship and Immigration)*, 2014 FC 1127 at para 18 [*Tamayo*]; and *Bahta v Canada (Citizenship and Immigration)*, 2014 FC 1245 at para 10 [*Bahta*].

[23] More recently, Justice Gagné also conducted a comprehensive analysis in *Akuffo v Canada (Citizenship and Immigration)*, 2014 FC 1063 at paras 17-26 [*Akuffo*], and reached the contrary conclusion: that this Court should apply the reasonableness standard to the review of decisions of the IAD on the issue of its standard of review. In *Akuffo*, Justice Gagné found that the question of the standard of review to be applied by the RAD is not a question of central importance to the legal system even if the question may fall outside the RAD's expertise, and that there are no other circumstances that would justify departing from the standard of reasonableness which is the presumptive standard of review (see also Justice Martineau's analysis in *Djossou v Canada (Citizenship and Immigration)*, 2014 FC 1080 at paras 13-37 [*Djossou*] where he also concluded that this Court should apply the reasonableness standard).

[24] The issue remains to be clarified once and for all by the Federal Court of Appeal.

[25] In the present case, whether I apply the reasonableness standard or correctness standard makes no difference. The errors in the decision of the RAD require that the judicial review be allowed, as explained below. However, I have applied the reasonableness standard.

What standard of review should the RAD use in considering the appeal of a decision of the RPD?

[26] The jurisprudence has consistently held that it is a reviewable error for the RAD to perform a judicial review function and apply the reasonableness standard to the RPD's decision. Rather, the RAD should perform its appeal function; *Huruglica* at para 54; *Iyamuremye* at para 38; *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at para 10; *Guardado v Canada (Citizenship and Immigration)*, 2014 CF 953 at para 4; *Diarra v Canada (Citizenship and Immigration)*, 2014 FC 1009 at para 29; *Djossou* at para 37; *Bahta* at paras 11-16; *Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236 at paras 52-59 [*Aloulou*]; *Bui v Canada (Citizenship and Immigration)*, 2014 FC 1145 at para 22 [*Bui*]; *Genu v Canada (Citizenship and Immigration)*, 2015 FC 129 at para 30 [*Genu*]; *Alvarez* at para 30, and the list of cases continues to grow).

[27] Some of the jurisprudence supports the view that on questions of credibility, the RAD may or should defer to the RPD because the RPD has heard the witnesses directly, had an opportunity to probe their testimony or has had some advantage not enjoyed by the RAD; *Huruglica* at para 55; *Iyamuremye* at para 40; *Akuffo* at para 27; *Alvarez* at para 33; *Njeukam, v Canada (Citizenship and Immigration)*, 2014 FC 859 at para 14; *Allalou v Canada (Citizenship and Immigration)*, 2014 FC 1084 at paras 17-20; *Sajad v Canada (Citizenship and Immigration)*, 2014 FC 1107 at paras 19-20, 26; *Singh c Canada (Citizenship and Immigration)*, 2014 FC 1208

at para 25; *Yin v Canada (Citizenship and Immigration)*, 2014 FC 1209 at para 34; *Bui* at para 25; *Genu* at paras 26 and 28). As Justice Noel noted in *Khachatourian* at para 31, the RAD should assume its appellate role and the same level of deference may not be applicable to credibility findings in the appeal process as in a judicial review.

[28] There remains some nuances in the jurisprudence regarding whether the RAD must conduct an independent analysis in order to confirm the RPD decision or set it aside and substitute a decision (*Tamayo* at para 21; *Huruglica* at para 55; *Yetna* at paras 16-20; *Njeukam* at para 14; *Aloulou* at para 63).

[29] In this case, the RAD concluded that it should use the reasonableness standard in its consideration of the RPD decision and conducted more of a judicial review rather than an appeal. Although the RAD erred in its approach to its role, the RAD did not have the guidance of any jurisprudence from this Court when it made this determination.

[30] Although the RAD erred on its application of the standard of review, a more practical approach to the issues raised by the applicants in this judicial review is warranted, rather than simply determining the application on this basis. The Court of Appeal will provide welcome guidance on the standard of review and the appellate role to be applied by the RAD in due course.

[31] As noted above, the jurisprudence generally supports deference by the RAD to the RPD on findings credibility. In the present case, despite finding that the reasonableness standard

would be applied, the RAD did *not* defer to the RPD on the credibility findings. The RAD found the credibility findings – at least the finding with respect to the omission in Ms Green’s testimony and arguably the broader findings – to be unreasonable. So even if the reasonableness standard of review should not have applied, the RAD’s finding would have been the same; the credibility findings would have been found to be in error as not supported by the evidence.

[32] The RAD did, however, defer to the RPD with respect to the RPD’s assessment of state protection and its finding that the applicants failed to rebut the presumption of the adequacy of state protection.

Did the RAD err in making an unreasonable conclusion regarding the RPD’s assessment of the availability of state protection?

[33] The RAD found that the RPD’s determination of adequate state protection and the applicants’ failure to rebut the presumption of adequate state protection was reasonable, despite that this determination was based upon the RPD having found that Ms Green was not credible with respect to her efforts to seek state protection. The RAD cited portions of the RPD’s decision in its own decision, both as quotations and as paraphrased, where the RPD clearly states that the state protection findings were based on the credibility findings.

[34] The RAD found that an omission from Ms Green’s testimony about her fear that Mr Bryan would kill her daughter was not a major credibility determinant, given the explanation provided by Ms Green. The RAD noted “the RPD’s finding that the appellants lack credibility is, therefore, insufficiently supported by the evidence.”

[35] Although the respondent submits that the RAD only found an error with respect to one specific credibility finding, I am not persuaded that this is so. The RAD specifically identified the omission from Ms Green's testimony and her explanation for the omission as an unreasonable credibility finding, but the RAD's other comments are more general and fail to clarify whether the RAD accepted some credibility findings while rejecting others or found that, as a whole, the RPD's credibility findings were not reasonable. Given the RAD's finding that the RPD failed to consider the Gender Guidelines which have a bearing on the assessment of credibility more generally, I am more inclined to the view that the RAD found an error in the RPD's assessment of the applicant's overall credibility.

[36] The RAD noted that the RPD acknowledged Ms Green's claims that she was a victim of domestic abuse. Therefore, the RPD was required to take the Gender Guidelines into account and "not just pay lip service as appears to be the case". The RAD noted the example of the RPD telling Ms Green that it was up to her to settle her nerves, after she had explained that she was nervous in providing her testimony.

[37] After having found that the credibility findings were unreasonable, there was no basis for the RAD to uphold the RPD's finding that the applicants failed to rebut the presumption of adequate state protection.

[38] The RAD found that the RPD had considered the effectiveness of the state's efforts to address domestic assault in Jamaica and that the RPD had considered the contradictory evidence. The RAD stated that: "The RPD's analysis on the issue of state protection is thorough

considering that an oral decision was rendered, is mindful of the principles of state protection and mindful of the Appellants' particular profile and situation".

[39] In reaching this determination, the RAD referred to the RPD's credibility findings. For example, the RPD found that Ms Green was advised by the authorities to go to the court office and have a "threat summons" taken out against Mr Bryan. Ms Green had testified that she was not advised to do so and was not aware that this was an option. The RAD noted: "However, as previously stated, based on the panel's credibility findings, the panel does not accept the principal claimant's assertion that she was not advised by the police to have a threat summons taken out against Mr Bryan." It is not clear to me whether the RAD is referring to itself as "the panel" or to the RPD as "the panel", given its use of "the principal claimant" as opposed to "the appellant" as used in other places in the RAD decision, and given its use of the present tense, which could suggest it was referring to itself as the "panel".

[40] The RAD also noted that the RPD had found that Ms Green was advised by a family friend to make formal reports of every incident to the police and there was no evidence that more than one formal report was made. The RPD did not find it credible that Ms Green reported to the police as she had claimed.

[41] The RAD simply reiterates the RPD's credibility findings without any independent analysis, despite finding earlier in its decision that the RPD's finding that the "appellants lack credibility" was not sufficiently supported by the evidence.

[42] The applicants had also submitted to the RAD that, in accordance with the Gender Guidelines, the failure to seek help from other NGOs was not relevant to the rebuttal of state protection. The RAD acknowledged this, but found that the RPD had considered the situation of victims of domestic violence in Jamaica and “while the RPD did not elaborate on contradictory evidence, a careful read indicated that the RPD considered contradictory evidence”.

[43] Even if the reasonableness standard were appropriate, this conclusion or finding by the RAD is not supported in any way by a “careful read” of the RPD decision. The RPD decision is three pages, of which one page deals with state protection. The RPD did not allude at all to contradictory evidence. Rather it found that the police had given her advice but she did not follow up. In addition, the RAD did not conduct any independent assessment of the evidence with respect to the adequacy of state protection or the applicant’s efforts to seek state protection.

Conclusion

[44] As noted above, the standard of review to be applied by the Court in its judicial review of decisions of the RAD and the role of the RAD and the standard of review to be applied by the RAD to appeals from the RPD remains to be clarified by the Court of Appeal.

[45] If this application for judicial review of the decision of the RAD is considered on the standard of review of reasonableness, I find that the decision is not reasonable as it is not intelligible or justified by the record. The RAD erred in performing a judicial review type function rather than an appellate function. Moreover, the RAD erred by relying on credibility findings, which it found to be unreasonable, to support its finding that the applicant had not

rebutted the presumption of state protection, and in failing to independently assess the adequacy of state protection and the applicants' efforts to seek state protection.

[46] In the present case, the result would be the same whether a correctness standard or reasonableness standard were applied by the Court to the judicial review. No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the appeal is remitted to the RAD for reconsideration; and
2. No question is proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-578-14

STYLE OF CAUSE: SHERIKA COLEENA GREEN AND CASEY LANAE
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APPEARANCES:

Jason Currie FOR THE APPLICANTS

Sharon Stewart Guthrie FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor FOR THE APPLICANTS
Windsor, Ontario

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