Federal Court  Cour fédérale

Date: 20150806

Docket: IMM-6058-14

Citation: 2015 FC 949

Ottawa, Ontario, August 6, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHAROF SHUKUROV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Sharof Shukurov has brought an application for judicial review pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. Mr. Shukurov challenges the dismissal by the Refugee Appeal Division of the Immigration and Refugee Board [the RAD] of his appeal of a decision of the Refugee Protection Division [the RPD]. The RPD determined

that Mr. Shukurov was neither a Convention refugee within the meaning of s 96 of the IRPA nor a person in need of protection as defined in s 97(1) of the IRPA.

[2] For the reasons that follow, I have concluded that the RAD applied the wrong standard of review to the RPD's decision and the wrong test to determine the admissibility of additional evidence submitted on appeal. I am unable to say whether the result would have been the same if the appropriate standard and test had been applied, and accordingly the application for judicial review is allowed.

II. Background

[3] Mr. Shukurov is a citizen of Uzbekistan. His claim for refugee protection was based on the following contentions:

- Mr. Shukurov was employed as a hotel manager in Samarkand, Uzbekistan. In January, 2013, a police officer called to reserve the hotel's pool and sauna in order to entertain his guests. Mr. Shukurov complied and made a note of the reservation.

- The owner of the hotel saw the reservation and recognized the name of the police officer. Based on previous experience, the owner was concerned that the police officer would not pay for the use of the pool and sauna. The owner therefore arranged for signs to be placed indicating that both were out of service.

- When the police officer arrived with his guests and discovered that he would not be able to use the sauna or the pool, he became angry with Mr. Shukurov. Mr. Shukurov, who was unaware of the hotel owner's actions, could offer no explanation.

- Two days after the incident, the police officer demanded the equivalent of $5,000 from Mr. Shukurov as "compensation" for the embarrassment he had suffered in front of his guests. When Mr. Shukurov objected, the police officer threatened to bring false criminal charges against him.

- Mr. Shukurov complied with the police officer's demands with an initial payment of $1,000. The police officer indicated that he expected the balance to be paid in instalments of $500 every month.

- Mr. Shukurov approached another police officer and a state prosecutor to explain his predicament and to lodge a complaint. He was told by these officials that a complaint would be futile and that the police officer would be protected by other public officials, as this kind of extortion was commonplace.

- Mr. Shukurov then decided to leave the country. He applied for a Canadian visa on February 24, 2013. Mr. Shukurov continued to make monthly payments to the police officer until he arrived in Canada on May 14, 2013.

[4] Mr. Shukurov made a refugee claim on June 13, 2013. His claim was rejected by the RPD on November 21, 2013. Mr. Shukurov then appealed the decision to the RAD. The appeal was dismissed on July 28, 2014.

[5] Mr. Shukurov brought an application for leave and for judicial review in this Court on August 11, 2014. Leave was granted on March 12, 2015.

III. The RAD's Decision

[6] Mr. Shukurov submitted a number of additional documents in support of his appeal in accordance with s 110(4) of the IRPA. The RAD relied on this Court's decision in *Raza v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1385 [*Raza*] to reject all but one of these documents due to its concerns about their provenance and authenticity. The appeal was therefore heard on the basis of the record of proceedings before the RPD, the submissions of the parties, the testimony of Mr. Shukurov, and one additional document.

[7] Mr. Shukurov argued before the RAD that the RPD's decision was flawed in three respects: a) the RPD's finding that there was no nexus between the risk faced by Mr. Shukurov and the grounds for refugee status contained in the Convention; b) the RPD's negative credibility assessment based on a lack of corroborative evidence; and c) adverse inferences made by the RPD due to inconsistencies in Mr. Shukurov's oral evidence and its rejection of Mr. Shukurov's explanations for those inconsistencies.

[8] The RAD referred to the decision of this Court in *Iyamuremye c Canada (Ministre de Citoyenneté et de l'Immigration)*, 2014 CF 494 [*Iyamuremye*] in support of its conclusion that the standard of review to be applied to appeals that involve mixed questions of fact and law is reasonableness.

[9] The RPD found there to be no nexus between the risk faced by Mr. Shukurov and the criteria for refugee protection because the police officer's threats and extortion did not amount to persecution within the meaning of the Convention. In reviewing this finding, the RAD noted that Mr. Shukurov had not expressed any views regarding police corruption that could be perceived as political opinion against the government. Furthermore, the evidence submitted by Mr. Shukurov to demonstrate that he was a "wanted person" in Uzbekistan was found by the RPD not to be credible. The RAD concluded that the RPD's determination was reasonable.

[10] The RAD then considered the RPD's adverse finding regarding Mr. Shukurov's credibility. The RAD observed that the RPD had identified a number of questions regarding the provenance of the documents submitted by Mr. Shukurov, including how he came to receive them in Canada. The RAD concluded that it was reasonable for the RPD to insist on corroborative evidence, and to assign little or no probative value to the documents when this was not forthcoming. The RAD accepted that the absence of corroborative documentation would not, in itself, be a reason to reject Mr. Shukurov's credibility. However, combined with the inconsistencies in Mr. Shukurov's oral testimony, the RAD once again found the RPD's conclusion to be reasonable.

[11] Finally, the RAD noted that Mr. Shukurov was given an opportunity by the RPD to dispel its concerns. However, Mr. Shukurov was unable to recall key facts because he had "forgotten" them. The RAD concluded that it was open to the RPD to find that Mr. Shukurov's account of events was not reasonable and to expect medical reports if Mr. Shukurov was suffering from memory loss.

[12] The RAD confirmed the determination of the RPD that Mr. Shukurov was neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the IRPA, and dismissed the appeal.

IV. Issues

[13] The following issues are raised by this application for judicial review:

A. Whether the RAD applied the wrong standard of review to the RPD's decision; and

B. Whether the RAD applied the wrong test to determine the admissibility of additional evidence submitted on appeal.

V. Analysis

A. *Whether the RAD applied the wrong standard of review to the RPD's decision*

[14] The RAD is a relatively new appellate tribunal. The law regarding the standard of review to be applied by this Court to the RAD's determination of its own standard of review is not yet settled. This Court's decision in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] is currently before the Federal Court of Appeal. Until the matter is resolved by higher courts, I align myself with Justice Martineau in adopting a "pragmatic approach". As Justice Martineau observed in *Djossou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1080 [*Djossou*] at para 37:

> [37] […] For the time being, there appear to be a number of possible approaches, but what is clear, however, is that the option chosen by the RAD (a judicial review-based approach) is not an acceptable outcome in law. Even applying the lesser standard of reasonableness, I still arrive at the same end result as my colleagues who applied the more stringent correctness standard. Intervention is warranted in this case. In this way, the choice of appropriate standard of review will not be determinative of the matter.

[15] I have discussed this Court's jurisprudence regarding the legal issues raised in this application for judicial review in a number of recent decisions: *Ngandu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 423 [*Ngandu*]; *Pataraia v Canada (Minister of Citizenship and Immigration)*, 2015 FC 465 [*Pataraia*]*; Razak v Canada (Minister of Citizenship and Immigration)*, 2015 FC 529. Based upon the analysis found in these decisions, I am satisfied that the RAD commits an error when it reviews the RPD's findings against the standard of

reasonableness and fails to conduct its own assessment of the evidence. Although not unanimous on this point (see *Spasoja v Canada (Minister of Citizenship and Immigration*), 2014 FC 913 at para 39), most judges of this Court have come to the same conclusion (*Iyamuremye* at para 41; *Huruglica* at paras 47 and 54; *Njeukam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 859 at paras 15 and 16; *Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at para 45; *Djossou* at para 53).

[16] Some judges of this Court have held that the RAD does not commit a reviewable error when it applies the standard or reasonableness to findings of pure credibility (*Njeukam*; *Akuffo*; *Allalou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1084). However, as explained by Justice Noël in *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 [*Khachatourian*] at para 32, this Court will uphold the RAD's application of the reasonableness standard to the RPD's findings of credibility only when it is clear that the RAD has in fact conducted its own assessment of the evidence. This is also the thrust of Justice Shore's decision in *Youkap v Canada (Minister of Citizenship and Immigration)*, 2015 FC 249 at paras 36 and 37, where he notes that in cases involving findings of pure credibility, the point is not which standard was applied but rather "whether the RAD conducted an independent assessment of the evidence as a whole." I am therefore of the view that the RAD's obligation to conduct an independent assessment of the evidence extends to questions of credibility; although where no hearing is held before the RAD, deference may be owed to credibility findings of the RPD that are based on a witness' conduct before the panel (*Pataraia* at para 12).

[17] In this case, the RAD said the following about the standard of review it should apply to decisions of the RPD:

> […] counsel submitted that "the RPD is required to (re-) consider the evidence filed at the RPD and form its own opinion to assess the decision". It would appear that counsel meant to say that the RAD is to consider the totality of the evidence. I concur if that is what the Appellant has submitted.
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> In this case, the issues are to be considered on the standard of reasonableness. The reasonableness standard is concerned with the "existence of justification, transparency and intelligibility in the decision-making process" and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law as per *Dunsmuir*.

[18] This statement is ambiguous and appears to be internally inconsistent. I am not persuaded that the RAD properly understood its obligation to conduct a full, fact-based assessment of Mr. Shukurov's claim. The RAD reviewed the decision of the RPD against the *Dunsmuir* standard of reasonableness and made a determination as to whether each of the RPD's conclusions fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47). The RAD's misplaced reliance on *Dunsmuir* and its application of the reasonableness standard is confirmed by the following statement in its decision:

> Counsel submitted that the jurisprudence requires the RAD to look at the totality of the evidence before it. I have done so and find that the RPD's finding and determination is reasonable and meets the [*Dunsmuir*] test as stated above. Based on the foregoing, I find that the RPD's decision is reasonable.

[19] It is therefore clear that the RAD did not conduct an independent, fact-based assessment of the evidence. The RAD is an appellate body and it commits a reviewable error when it applies the standard of judicial review while fulfilling its appellate functions (*Djossou* at para 7). While it is possible for the RAD to misstate the applicable standard of review but nevertheless conduct an independent review of the evidence, for the reasons expressed above I find that this did not happen here. The application for judicial review must be allowed.

B. *Whether the RAD applied the wrong test to determine the admissibility of additional evidence submitted on appeal*

[20] Questions regarding the admissibility of additional evidence before the RAD are reviewable against the standard of reasonableness (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 36-42 [*Singh*]; *Khachatourian* at para 37).

[21] Mr. Shukurov objects to the RAD's reliance on the Federal Court of Appeal's decision in *Raza* to determine whether additional evidence should be permitted on appeal. *Raza* concerned the admission of new evidence in the context of a Pre-Removal Risk Assessment (PRRA). The RAD described *Raza* as "the leading case on new evidence," but it did not address why the criteria for admitting new evidence in the context of a PRRA should also apply to an appeal before the RAD.

[22] Mr. Shukurov notes that in *Singh* and *Khachatourian,* this Court held that the criteria identified in *Raza* should not automatically be applied to a determination of whether additional evidence may be adduced before the RAD. Mr. Shukurov argues that even if the RAD was

entitled to apply the *Raza* criteria, then the RAD's application of these criteria was unreasonable because its analysis of the evidence's materiality and credibility was flawed.

[23] The Minister points out that the language of the new evidence provisions in the PRRA context (s 113(a) of the IRPA) and in the RAD context (s 110(4) of the IRPA) are very similar, and it was therefore reasonable for the RAD to apply the *Raza* criteria to determine whether additional evidence should be admitted before the RAD. The Minister relies on the recent decision of Justice Mosley in *Denbel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 629.

[24] This issue is also the subject of differing jurisprudence from this Court. As I discussed in *Ngandu*, the similarity of the provisions does not necessarily mean that the *Raza* criteria apply to the admission of additional evidence in an appeal before the RAD. The purposes of an appeal before the RAD and a PRRA are distinct. This was recognized by the Court of Appeal in *Raza*:

> [12] A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection. In such cases there is an obvious risk of wasteful and potentially abusive relitigation. The IRPA mitigates that risk by limiting the evidence that may be presented to the PRRA officer. The limitation is found in paragraph 113(a) of the IRPA…
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> [13] As I read paragraph 113(a), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD.
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> [Emphasis added.]

[25] The role of a PRAA officer is markedly different from that of the RAD. As Justice Gagné observed in *Singh*:

> [50] A PRRA officer is not a quasi-judicial body, nor does he or she have an appellate function when faced with a RPD decision. The PRRA officer is an employee of the Minister, acting within his or her employer's discretion (insofar as it is circumscribed by the Act and the Regulations). The PRRA officer must give deference to the RPD's determination of the claim, to the extent that the facts remain unchanged from the time it had rendered its decision. Instead, the PRRA officer is specifically looking as to whether new evidence has come to life since the RPD's rejection of the claim for determining a risk of persecution, a danger of torture, a risk to life or a risk of cruel and unusual treatment or punishment.
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> [Emphasis added.]

[26] This may be contrasted with the function of the RAD, which is a quasi-judicial appellate body that is intended by Parliament to conduct a "full fact-based appeal" of decisions of the RPD. A "full fact-based appeal" requires that the rules of evidence be applied with a measure of flexibility, especially given the strict timelines faced by refugee claimants (*Singh* at paras 53-56; *Khachatourian* at para 37) *singh* is currently before the Federal Court of Appeal. I acknowledge that the application of the *Raza* criteria remains unsettled pending the decision of higher courts (see *Iyamuremye* at para 45; *Denbel* at paras 40-44). I nevertheless continue to hold the view that the RAD commits a reviewable error when it applies the *Raza* criteria without modification to determine the admissibility of additional evidence submitted on appeal (*Singh*; *Katchatourian*; *Ngandu*).

[27] I am unable to say whether the application of a more flexible test for the admission of evidence would have changed the outcome of the appeal. The application for judicial review must therefore be allowed on this ground as well.

VI. Conclusion

[28] The application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for re-determination.

[29] The standard of review to be applied by this Court when reviewing the RAD's determination of its own standard of review is before the Federal Court of Appeal in *Huruglica*. The application of the *Raza* criteria to determining the admissibility of additional evidence under s 110(4) of the IRPA is before the Federal Court of Appeal in *Singh*. I therefore agree with the parties that it is neither necessary nor appropriate to certify a question for appeal in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is remitted to a differently-constituted panel of the RAD for re-determination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6058-14
STYLE OF CAUSE:	SHAROF SHUKUROV v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 10, 2015
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	AUGUST 6, 2015

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