Federal Court  Cour fédérale

**Date: 20150925**

**Docket: IMM-3081-14**

**Citation: 2015 FC 1106**

**Ottawa, Ontario, September 25, 2015**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**EDWARD CYRIL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP & IMMIGRATION**

**Respondent**

## AMENDED JUDGMENT AND REASONS

[1] This is an application for judicial review by Edward Cyril [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated April 2, 2014, and communicated to the Applicant on April 10, 2014, in which the RAD determined that the Applicant is not a Convention refugee and is not a person in need of protection. In my opinion, it should be dismissed for the following reasons.

[2] The Applicant is a 28 year old Tamil from Jaffna, Sri Lanka, whose family faced numerous incidents of violence by Sri Lankan authorities since 2000. He alleges he was detained and tortured in an open prison in Vanni in 2009. In his original Basis of Claim form [BOC] , the Applicant stated that he had arrived to Canada directly from Sri Lanka. In his BOC, the Applicant also alleged he had been arrested and detained by the police on his way to work at Jaffna University on January 23, 2013. The Applicant arrived in Canada on March 9, 2013. Upon arrival, he filled out an application for refugee protection. When confronted with biometrics evidence of his presence in Doha, Qatar in 2012, and of his subsequent trip to the United States in the same year with no return to Sri Lanka, the Applicant changed his story for the Refugee Protection Division [RPD] panel; he claimed the alleged January 23, 2013 detention had indeed taken place, but at a different time than stated in his BOC. The Applicant submitted an amended BOC after his untruthful allegations were disclosed. At the second sitting of the RPD hearing, the Applicant clarified that he had not been tortured while detained, and that the detention had taken place in June 2012, before he left for Qatar and the United States, where he spent several months before arriving in Canada.

[3] The Applicant's former counsel applied for and was granted permission to withdraw from the case at the first RPD sitting. The Applicant proceeded unrepresented at the second sitting of the RPD hearing which took place 12 days later. He did not request an adjournment nor ask for counsel; the second sitting proceeded on a self-represented basis. Among other things, the Applicant made accusations against both his agent and former counsel of counselling him to misrepresent the truth. The RPD rejected his claim almost entirely because of numerous concerns

the RPD had with his credibility (for completeness, the RPD also said his basic profile did not match profiles at risk given objective country condition documents).

[4] In his appeal to the RAD, the Applicant, represented by new counsel, attempted to introduce new evidence to show the usefulness of legal representation at immigration hearings (excerpts from international organization reports), and a letter from his former counsel.

[5] The RAD review proceeded on the basis of correctness for legal issues and reasonableness for others; the RAD decision was made before *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*].

[6] The issues on judicial review are: 1) the proper standard of review for the RAD and its application in this case; 2) the applicability of the Federal Court of Appeal's new evidence decision in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]; and 3) whether the Applicant was denied procedural fairness by the RPD in terms of the continuation of the hearing without counsel.

[7] Because this is a judicial review, I am required to assess the reasonableness of the RAD decision in accordance with *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] which explains what is required of a court reviewing on the reasonableness standard of review at para 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[8] In my view, *Huruglica* sets the correct test to be applied by the RAD on appeals such as this. Therefore, the RAD is required to conduct an independent review and full fact-based hybrid appeal as set out at paras 54-55 of *Huruglica*:

> 54 … 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.
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> 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".

[9] The threshold issue is whether the RAD conducted a *Huruglica* review. In my respectful view, and notwithstanding counsel's able submissions to the contrary, I am not persuaded that the Applicant was deprived of a *Huruglica* assessment. A RAD does not fall into fatal error merely by stating it will apply a reasonableness standard: *Siliya v Canada (Minister of Citizenship and Immigration)*, 2015 FC 120 [*Siliya*]. Indeed, as found in *Hossain v Canada (Minister of Citizenship and Immigration)*, 2015 FC 312, a RAD may have applied the correct i.e., *Huruglica*, standard of review, notwithstanding "prolific use of language associated with reasonableness". Instead, this Court must look beyond the words and determine what sort of review the RAD actually conducted: *Hamidi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 243. The substance of the review governs, not its form.

[10] Under *Huruglica*, findings on such issues as credibility, which primarily decided this case, are subject to special treatment; *Huruglica* expressly says, at para 55, that the RPD "can recognize and respect the conclusion of the RPD on such issues as credibility". Additionally, *Njeukam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 859 [*Njeukam*] holds that when considering credibility findings, the RAD is allowed to show deference to the RPD's findings. In my view, this law effectively disposes of the many issues the Applicant raised concerning the numerous credibility findings made against him by the RPD, and equally disposes of his arguments concerning the deference they could be and were afforded by the RAD. While the Applicant argued the RAD deferred excessively to the RPD on matters of credibility, as noted, the RAD is allowed to defer by *Huruglica*, and I am unable to see that its deference was excessive or unreasonable or contrary to law. I also note that this Court has instructed the RAD that it should defer to the RPD on matters of credibility: *Siliya a*t para 21; *Huruglica* at para 55; *Njeukam* at para 19; *Allalou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1084 at para 17; *Spasoja v Canada (Minister of Citizenship and Immigration)*, 2014 FC 913 at para 40; *Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at para 39. The RAD may not be criticized for following those instructions. While the Applicant disagrees with the RPD and the RAD's findings, I conclude that the RAD conducted the review of the evidence and testimony as required by *Huruglica* and this Court's jurisprudence.

[11] The second main issue on judicial review concerned the RAD's treatment of *Raza*. I am unable to agree with the Applicant's argument that *Raza* was applied "too strictly" in this case and/or that *Raza* should not have been applied at all. In this case, the RAD first looked at the statutory criteria set out in subsection 110(4) of the IRPA, which provides:

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| 110. (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. | 110. (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. |

This was entirely the correct and reasonable approach.

[12] Having regard to these statutory preconditions, the RAD found that the proposed "new" evidence met the tests set out in subsection 110(4) of the IRPA.

[13] However, the Applicant says the RAD fell into error by continuing on and assessing the "new" evidence having regard to three of the factors mentioned in *Raza*, namely, the evidence's credibility, relevance and materiality (the RAD did not undertake an analysis of newness because it conducted a newness review under subsection 110(4)). In my view, the RAD did not err or act unreasonably in assessing the evidence before it in terms of credibility, relevance and materiality. It seems to me these tests are applied to all evidence placed before every tribunal, whether "new" or not. Certainly, the law does not require the RAD, having accepted the "new" evidence under the statutory tests, to blindly apply it to the facts without regard to its credibility, relevance or materiality. The RAD could only proceed on its examination of the breach of procedural fairness issue in respect of which the "new" evidence was filed, on properly admitted and weighed evidence. In this case, in my respectful view, it made no difference in the result whether the credibility, relevance and materiality assessment of this particular evidence took

place before or after its admission as "new" evidence in terms of assessing the alleged breach. The RAD said it found "guidance" in *Raza*, and I find no error in that respect. In addition, the RAD considered and applied *Raza* in essentially the same manner as approved by this Court in *Abdi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 906 at paras 10-11. Therefore, I reject this ground of review.

[14] The final issue concerns procedural fairness. This is assessed on a standard of correctness. The Applicant says he was denied the right to a fair hearing because he was not given an adjournment when he appeared at the second hearing without counsel. He added he was also entitled to be advised of his right to counsel. I reviewed the law on the duty to provide self-represented litigants a fair hearing in *Thompson v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 808 at paras 12-13 (while dealing with the IAD, the same holds true for the RPD):

> 12 Self-represented claimants are not always or necessarily entitled to a higher degree of procedural fairness: *Martinez Samayoa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 441 at para 6 [*Martinez*]; *Turton v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1244; *Adams v Minister of Citizenship and Immigration*, 2007 FC 529 at paras 24-25; *Agri v Canada (Citizenship and Immigration)*, 2007 FC 349 at paras 11-12. However, while the IAD is to be shown much deference in its choice of procedure, and while it is not obligated to act as counsel for unrepresented parties, it nevertheless has a duty to ensure a fair hearing, and the content of such procedural rights is context-dependent and is to be determined on a case-by-case basis: *Singh Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 201 at paras 13-14; *Martinez* at para 7; *Kamtasingh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 45 at paras 9-10, 13; *Law v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1006 at para 14-19; *Nemeth v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590 at para 13.

> 13 The content of the Applicant's right to a fair hearing includes the opportunity to present his views and evidence fully and have them considered by the IAD: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22; *Wang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 531 at paras 13-15, 19.

[15] On the facts of this case, I am unable to agree with the Applicant that there was a breach of procedural fairness either in respect of the lack of an adjournment or respecting the issue of legal assistance. This is primarily because the RAD rejected the new evidence filed to support this argument. But in addition, there is no stand-alone duty to advise on the availability of or right to legal aid in immigration proceedings: *Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423; what is absolute is the right to a fair hearing (see paras 6-7).

[16] Therefore, the RAD was correct to conclude that there is "no obligation of the RPD to inform claimants of the availability of Legal Aid". There was no indication that the Applicant wanted or requested either legal assistance or an adjournment. The Applicant's hearing was adjourned after the first hearing. If the Applicant wanted more time to seek other counsel for the second sitting, he could have asked the panel at the first or second hearing, but did not. The RAD found the Applicant had ample opportunity to obtain alternate counsel, and that there was no evidence the Applicant could not afford counsel, or that the Applicant required more time to obtain counsel.

[17] The RAD expressly considered and rejected the Applicant's argument that a fair hearing required counsel because of the alleged complexity of this particular case. The RAD said the case was not complicated, particularly in that it involved the single issue of the Applicant's

credibility; moreover, the RAD said his allegations were straightforward. While the Applicant disagreed quite vigorously with these assessments by the RAD, I see no reason to reject them. This is exactly the sort of assessment the RAD is best positioned to make. Because the RAD conducts such appeals, it is able to distinguish between complicated and straightforward appeals. In my view, the RAD did not err in this aspect of its assessment of the alleged procedural unfairness.

[18] While I agree the RAD erred when it said there wasn't "any" evidence that the Applicant's former counsel was informed of the Applicant's allegations against him, it was open for the RAD to find the Applicant did not meet the onus of establishing that sufficient notice and an opportunity to respond were provided to former counsel. As discussed in *Pusuma v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1025 at para 56, the requirement of sufficiency of notice and opportunity to respond is analyzed on a case by case basis. While the Applicant sent former counsel a copy of the RPD decision, we do not know what other notice former counsel was given. We do know that the Applicant did not file a complaint with the Law Society of Upper Canada; the absence of such a complaint may of itself bar judicial review as held in *Molnar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 530 at para 60.

[19] Having reviewed the legal and procedural issues on the standard of correctness, as the reviewing Court, I must now turn to assessing the decision of the RAD against the standard of reasonableness per *Dunsmuir*. I am required to step back and review the decision of the RAD as an organic whole. Judicial review is not a treasure hunt for errors; rather, it is assessed in terms of its overall reasonableness. In my view, the RAD decision is reasonable in respect of the

credibility findings made by the RPD because the RAD's assessment of the evidence overall falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The RAD decision is reasonable with respect to the RAD's assessment of the "new" evidence; its decision in this regard also falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] In terms of procedural fairness, I have assessed these allegations on a standard of correctness, and found no merit in the argument that the hearing was procedurally unsound.

[21] Therefore judicial review must be dismissed.

[22] Three further points arose at the hearing. First, former counsel filed two letters and an affidavit in advance of the hearing further outlining his position on the allegations against him. Both parties objected to consideration of said material; it was not considered by the Court.

[23] Second, the Applicant asked that I reserve my decision pending the Federal Court of Appeal's hearing and determination of the appeal in *Huruglica*. With respect, I am not prepared to do so. The time needed by the Federal Court of Appeal to decide the *Huruglica* issues is unknown. In addition, a request for deferred judgment is tantamount to a request to adjourn, which was not made. Moreover, a delay in issuing judgment very openly invites a bifurcated hearing; indeed, counsel asked leave to file additional submissions after the Federal Court of Appeal pronounced judgment. Delaying the issuance of a decision would ignore the Court's duty

to decide cases as they arise, and offends Parliament's direction to "dispose of the application without delay" as set out in paragraph 72(2)(d) of the IRPA.

[24] Third, counsel asked for time to consider whether or not a request to certify a serious question of general importance under subsection 74(d) of the IRPA. No draft was provided. In my view, this was an irregular approach. The draft question should have been served and filed before the hearing. In the alternative, counsel should be able to address this part of their case at the hearing. The Court and the parties are entitled to have full argument on all issues on the day set for the hearing; judicial review should not be split into a multi-phase process without very good reasons, which frankly were absent in this case. That said, I granted a one-day extension for the Applicant to file submissions, with equal time for the Respondent to respond and the Applicant to reply. In the result, the Applicant asked that I certify the following question:

> Within its role and function as a full, fact-based appeal body, does Refugee Appeal Division (RAD) consider a refugee claim or does it consider an appeal from a refugee claim as determined by the Refugee Protection Division?

[25] I agree with the Respondent that this question will be argued before the Federal Court of Appeal in *Huruglica*, and that as held in *Alyafi v Canada (Citizenship and Immigration)* 2014 FC 952 and other cases, certifying the same questions does not facilitate timely interventions in an appeal where the same questions arise. Moreover, the Court ceased certifying questions on the standard of review in RAD matters some time ago, and I see no reason to depart from that practice.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3081-14 |
| **STYLE OF CAUSE:** | EDWARD CYRIL v<br>THE MINISTER OF CITIZENSHIP & IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 9, 2015 |
| **JUDGMENT AND REASONS:** | BROWN J. |
| **DATED:** | SEPTEMBER 23, 2015 |
| **AMENDED:** | SEPTEMBER 25, 2015 |

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