Federal Court  Cour fédérale

Date: 20160215

Docket: IMM-7710-14

Citation: 2016 FC 200

Ottawa, Ontario, February 15, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

KRISHNAKUMAR SANMUGALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] which confirmed the decision of the Refugee Protection Division [RPD] and found that he is not a Convention refugee or person in need of protection.

[2] For the more detailed reasons which follow, I find that the RAD performed its appellate role and did not err by refusing to admit new evidence or by declining to hold an oral hearing and that its confirmation of the decision of the RPD was reasonable. The application for judicial review is dismissed.

I. Background

[3] The applicant is a Tamil from northern Sri Lanka. He arrived in Canada on August 16, 2013 and claimed refugee protection shortly thereafter. He recounts harassment, arrests, assaults and detention by the Liberation Tigers of Tamil Eelam [LTTE] in the early 2000s and upon his return to Sri Lanka in 2005 and 2008.

[4] He worked in Dubai from December 2005 to October 2008. He recounts that, upon his return, he was detained by the police three times, but was released upon paying a bribe.

[5] He also worked in Saudi Arabia from 2009 to 2011 and recounts that upon his return, he was detained and questioned at the airport as a way to extort money because he is Tamil.

[6] In 2012, the applicant was engaged in a video business in Jaffna, Sri Lanka. In the course of filming a wedding, he observed and filmed a protest which arose in response to the army's attack on students who were celebrating Heroes Day. In his Basis of Claim form [BOC] he states that the police took his camera and smashed it. He was later arrested, questioned about his involvement in the rally and turned over to the army on the suspicion he was a member of the LTTE. He was released 28 days later upon payment of a bribe. He then left Sri Lanka.

II. The RPD Decision

[7] The RPD heard the applicant's claim on January 30, 2014 and issued its decision on March 20, 2014, finding that he is neither a Convention refugee nor a person in need of protection.

[8] The RPD found that the applicant was not credible because he exaggerated the dangers he faced.

[9] The RPD did not dispute that dangers surround those suspected of being LTTE members in Sri Lanka, citing a UNHCR report which listed particular groups as being at risk due to "more elaborate" links to the LTTE. The RPD noted that the applicant stated that he was not a member of one of these groups.

[10] The RPD found that the applicant had not satisfied his onus of establishing that he would face a serious possibility of persecution, noting that his testimony was not consistent with the documentary evidence. The RPD also found that the applicant failed to produce documents that would have established his claim, such as confirmation of his travels, his passport, confirmation of his registration at a shelter in Buffalo or a medical report to substantiate his injuries in Sri Lanka.

III. The RAD Decision

New Evidence

[11] The applicant sought to submit an affidavit of his wife dated April 24, 2014 and the 2014 National Documentation Package [NDP], which included the 2013 US Department of State [DOS] report and several articles.

[12] The RAD noted that, pursuant to subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], an applicant is only permitted to submit evidence that arose after the rejection of the claim that could not reasonably have been expected to have been presented at the time of the rejection.

[13] The RAD found that the affidavit failed to meet the criteria in subsection 110(4) as it was reasonably available to the applicant before the RPD decision.

[14] The RAD noted that in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4th) 675 [*Raza*], the Federal Court of Appeal set out factors to be considered in assessing new evidence, in addition to the statutory requirements. The RAD noted that, even if it were to admit the affidavit because it arose after the rejection of the applicant's claim, further consideration would be warranted, including its credibility, relevance, newness and materiality.

[15] The RAD considered the contents of the affidavit and other circumstances and found it was not credible.

[16] With respect to the 2014 NDP, the RAD found that the 2013 US DOS report was similar to the 2012 report and could not be considered new evidence. In addition, it was not material.

[17] The RAD found that the news releases included in the NDP were available on the internet in 2012, before the RPD rendered its decision.

[18] The RAD acknowledged that it was not certain whether the 2012 "Landinfo" report, which describes the situation in Sri Lanka between 2010 and 2012, had been translated at the time of the RPD decision. The RAD accepted that it might not have been available before the RPD decision, but found that the report was not material to the claim because the information within the document was also found within the 2013 NDP, which was on the record.

Oral Hearing

[19] With respect to the request for an oral hearing, the RAD noted that in accordance with subsections 110(3) and (6) of the Act, a new hearing may be held if there is new evidence that raises a serious issue with respect to the credibility of the applicant that is central to the RPD's decision and that, if admitted, would justify allowing or rejecting the claim. Given that the new evidence was found not to be admissible, the RAD denied the application for an oral hearing. The RAD added that if the new evidence had been admitted, it would not justify allowing or rejecting the claim.

The Merits of the Appeal

[20] The RAD noted that in accordance with *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811 [*Huruglica*], it would review all the evidence and come to its own independent assessment of whether the applicant is a Convention refugee or person in need of protection and acknowledged that it could defer to the RPD where the RPD "enjoys a particular advantage" on issues such as credibility.

[21] The RAD found that the RPD erred by making credibility findings on the basis of the applicant's lack of passport, shelter registration documentation and medical documentation, but found that the RPD's error was not determinative of its decision.

[22] The RAD found that it was open to the RPD to find that some aspects of the applicant's testimony lacked credibility, such as his exaggeration of the dangers experienced by Tamils, and still find that he may be subject to harassment.

[23] With respect to his risk, the RAD found that there was no evidence that the RPD failed to take into account all of the applicant's evidence, including the arrests and detentions which were not the subject of credibility findings.

[24] With respect to his fear, the RAD noted that there was no evidence that the applicant had any problems leaving Sri Lanka in 2005 and 2009, no evidence that he was perceived to be a

member or sympathizer of the LTTE, and no evidence that he is being pursued by Sri Lankan authorities.

[25] However, the RAD found that the RPD's analysis of whether the applicant would be in jeopardy as a young male Tamil was not extensive and conducted its own additional analysis based on the evidence in the record. The RAD noted the UNHCR Guidelines dated July 2010 which indicated that there was no longer a need for group-based protection or presumption of eligibility for Sri Lankan Tamils from the North. The 2012 Guidelines also stated that each claim should be determined on its merits, but that Tamils are more often subject to arbitrary action.

[26] The RAD acknowledged that the record is mixed regarding the post-war settlement and the government's turn to authoritarianism in Sri Lanka, but noted that the 2012 Guidelines did not retract the statements from the 2010 Guidelines regarding the changed circumstances since the end of the war.

[27] The RAD found that the applicant's profile did not fit that of a person suspected of having links with the LTTE. He did not allege that he has ever been a member or supporter of the LTTE. No evidence was disclosed, other than his testimony, that he is perceived to be associated with the LTTE. Most of his detentions were brief and were the result of general round-ups which did not target him. The applicant was released after two to three weeks in his other detentions. The RAD confirmed the RPD's finding that he would not have been released in 2001 if the authorities believed that he was associated with the LTTE. The RAD also found that, while the RPD erred by not analyzing all of the applicant's detentions, in each of the incidents that were

not addressed, the applicant was released and the incidents did not reflect that he was suspected of being associated with the LTTE.

[28] With respect to whether the applicant's profile as a failed asylum seeker supports a well-founded fear of persecution, the RAD noted the evidence that Tamils are subject to the same screening process as others returning to Sri Lanka, regardless of whether they are returning voluntarily or because of a failed refugee claim. The RAD acknowledged the mixed evidence, but found that the evidence supported that the applicant would not attract persecutory attention from the Sri Lankan authorities.

[29] The RAD concluded that the applicant is not a Convention refugee or person in need of protection and confirmed the RPD's decision.

IV. The Issues

[30] The applicant raised several arguments regarding errors made by the RAD in its conduct of the appeal, some of which overlap or are related. The arguments focus on three questions:

(1) Did the RAD err by refusing to admit the new evidence pursuant to subsection 110(4) of the Act, including by applying the *Raza* factors?

(2) Did the RAD err by not convening an oral hearing pursuant to subsection 110(6) of the Act and did the RAD breach procedural fairness by making credibility findings without providing the applicant an opportunity to respond?

(3) Did the RAD err by performing more of a judicial review role, including by relying on the RPD's credibility concerns and finding them to be reasonable, without conducting an independent analysis?

V. The Standard of Review

[31] The applicant argues that the RAD did not perform an appellate function and for this reason alone the decision cannot stand.

[32] 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 apply has been the subject of a great deal of jurisprudence and will soon be settled by the Federal Court of Appeal in its consideration of *Huruglica*.

[33] The jurisprudence has been consistent in establishing that it is an error for the RAD to perform a judicial review function and apply the reasonableness standard to the RPD's decision. The RAD should perform its appeal function: *Huruglica* at para 54; *Iyamuremye v Canada (Minister of Citizenship and Immigration)*, 2014 FC 494 at para 38, [2014] FCJ No 523 (QL); *Alyafi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 952 at para 10, [2014] FCJ No 989 (QL); *Diarra v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1009 at paras 27-29, [2014] FCJ No 1111 (QL); *Djossou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1080 at para 37, [2014] FCJ No 1130 (QL); *Aloulou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1236 at paras 52-59, [2014] FCJ No 1307 (QL); *Bui v*

Canada (Minister of Citizenship and Immigration), 2014 FC 1145 at para 22, [2014] FCJ No 1271 (QL); and other more recent cases.

[34] With respect to questions of credibility, although there are some nuances, the jurisprudence has established that the RAD may defer to the RPD because the RPD has heard the witnesses directly, has had an opportunity to probe their testimony or has had some advantage not enjoyed by the RAD (see for example, *Huruglica* at para 55; *Akuffo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1063 at para 39, [2014] FCJ No 1116 (QL); *Nahal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1208 at para 25, [2014] FCJ No 1254 (QL)). However, the Court has also noted that such deference should follow from an independent assessment of the evidence, given that the RAD is performing an appellate function (see for example, *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 at para 31, [2015] FCJ No 156 (QL) [*Khachatourian*]; *Balde v Canada (Minister of Citizenship and Immigration)*, 2015 FC 624 at para 23, [2015] FCJ No 641 (QL)).

[35] With respect to the RAD's determination regarding the admissibility of new evidence, the standard of reasonableness applies (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 36-42, 246 ACWS (3d) 433 [*Singh*]; *Khachatourian* at para 37).

[36] Similarly, the RAD's decision whether to hold an oral hearing in accordance with subsection 110(6) is based on its assessment of whether the criteria have been established and if so, whether to exercise its discretion to hold an oral hearing and is reviewed on the standard of reasonableness.

[37] Issues of procedural fairness are reviewable on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 313 at para 12, [2013] FCJ No 350 (QL)).

VI. Did the RAD err in refusing to admit new evidence?

The Applicant's Submissions

[38] The applicant argues that the RAD erred by relying on the *Raza* factors to inform its consideration of whether to admit the new evidence in accordance with subsection 110(4) and erred in refusing to admit the new evidence. The applicant argues that his wife's affidavit addressed the credibility concerns of the RPD, which were central to the decision, and its acceptance would have led to a different outcome.

[39] The applicant submits that it was unfair for the RAD to find that his wife's affidavit could have been provided earlier given that the police visited his wife after the RPD hearing had concluded (although before the decision was made). The applicant adds that he had no way of knowing when the RPD would render its decision.

[40] The applicant also argues that the RAD erred in applying the *Raza* factors, which were established with reference to subsection 113(a) of the Act in the context of a PRRA decision not an appeal. The applicant points to the decision of Justice Gagné in *Singh* which noted that the

context is an important distinguishing factor and that it should not be assumed that the *Raza* factors govern subsection 110(4) determinations regarding the admissibility of new evidence.

The Respondent's Submissions

[41] The respondent submits that the RAD's consideration of the factors set out in *Raza* in its determination of whether the documents should be admitted as "new evidence" was reasonable.

[42] The respondent notes that the RAD's decision to not admit the new evidence is supported by the wording of subsection 110(4).

[43] The respondent adds that Rule 43 of the *Refugee Protection Division Rules*, SOR/2012-256 [Rules] provides that the applicant could have provided the affidavit to the RPD at any time before its decision was rendered. The applicant had an opportunity to have the affidavit prepared and submitted to the RPD but did not do so until he appealed to the RAD. The RAD did not err by finding that the document could have been submitted before the decision.

[44] In addition, the RAD conducted an independent assessment of the affidavit and reasonably found it was not credible. The respondent submits that the RAD would not be required to admit evidence that is not credible.

The RAD did not err by refusing to admit the new evidence

[45] In the present case the issue is first, whether the RAD relied on the *Raza* factors to determine the admissibility of the new evidence and second, whether the RAD erred in doing so without considering the different context of an appeal.

[46] I acknowledge that there is currently some uncertainty with respect to the application of *Raza* factors - where the Federal Court of Appeal identified factors or questions that implicitly arise from the criteria for new evidence on a PRRA application in accordance with subsection 113(a) to an appeal before the RAD. On one hand, the principles of statutory interpretation support the view that the same words should be interpreted in the same manner, and there is no dispute that the wording of subsection 110(4) and subsection 113(a) are almost identical. In addition, both provisions are aimed at limiting the evidence that may be provided. On the other hand, in *Raza*, Justice Sharlow noted that four of the questions or factors (credibility, relevance, newness and materiality) are necessarily implied from the purpose of subsection 113(a) within the Act (at para 14) and that a PRRA is not an appeal of the RPD decision, although it may require consideration of some or all of the same issues (at para 12).

[47] In *Singh*, Justice Gagné highlighted the need to consider the different context of a PRRA decision and a RAD decision. In my view, Justice Gagné did not exclude consideration of the *Raza* factors, as long as the decision maker understands that in the context of an appeal, more latitude may be needed to accept "new" evidence.

[48] Justice Gagné noted at para 58, that the "main issue is whether the evidence 'was not reasonably available, or that the person could not reasonably (or normally according to the French version) have been expected in the circumstances to have presented.'" In other words, the statutory language should be the key consideration.

[49] Pending the resolution of the issue by the Federal Court of Appeal in *Singh*, the jurisprudence supports the view that reference to the *Raza* factors for guidance is not an error where the RAD acknowledges that it is conducting an appeal and is considering whether to admit new evidence in this context. Nor is it an error where the RAD refers to the *Raza* factors, but the determination whether to admit the new evidence is clearly supported by the application of the words of subsection 110(6).

[50] In *Oluwole v Canada (Minister of Citizenship and Immigration)*, 2015 FC 953 at paras 36-37, [2015] FCJ No 962 (QL), Justice Southcott acknowledged Justice Gagné's analysis in *Singh*, and Justice Mosley's different analysis and conclusion in *Denbel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 629, [2015] FCJ No 646 (QL) [*Denbel*], and found that the *Raza* factors could be considered in the context of the applicant's right to a "full-fact based appeal".

[51] In *Denbel*, Justice Mosley noted at para 43:

> [43] When interpreting legislative intent, the Court must give priority to the written text in the absence of any lexical ambiguity. The Court's opinions on best policy cannot supplant the text of the law; nor can select passages from the Hansard. In my view, Parliament intended these two provisions to enshrine the same legal test. If Parliament had intended to establish more flexible

> admissibility rules in RAD appeals, it would not have replicated the restrictive language which governs PRRAs.
>
> […]

[52] In *HAK v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1172 at paras 14-15, [2015] FCJ No 1231 (QL), Justice Fothergill noted that the application of *Raza* was not settled, but found that regardless of whether there was a strict or flexible application of *Raza*, the RAD's rejection of the new evidence, which could have been provided earlier and which was not probative, was justified.

[53] In *Majebi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 14, [2016] FCJ No 12, Justice Fothergill found the RAD's rejection of new evidence to be reasonable, where it found that the evidence could have been provided earlier, no explanation was provided for not so doing and the rejection was in accordance with the express statutory requirements, noting at para 19:

> […] The flexible approach described in *Singh* concerns the admissibility of evidence only after the threshold requirements of s 110(4) of the IRPA have been met (*Fida v Canada (Minister of Citizenship and Immigration)*, 2015 FC 784 at paras 6-8; *Deri v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1042 at paras 55-56). Justice Gagné in *Singh* acknowledged that the central issue regarding the admissibility of new evidence is whether "the evidence was not reasonably available, or that the person could not reasonably ... have been expected in the circumstances to have presented" the evidence before the RPD (*Singh* at para 58). […]

[54] The applicant appears to accept that the documents in the NDP were not new evidence because the documents reiterated the same information included in the previous year's version

which was part of the record before the RPD. Although I note the applicant's objection to the RAD's references to the lack of materiality of the evidence, which the applicant regards as an inappropriate reference to the factors in *Raza*, the NDP and the "Landinfo" document were found to not be "new" within the meaning of subsection 110(4).

[55] The applicant focuses on the affidavit from his wife. However, the applicant's argument that the RAD erred in referring to the *Raza* factors overlooks that the RAD clearly found at the outset that the affidavit failed to meet the test in subsection 110(4) as it was reasonably available to the applicant before the RPD decision. The RAD noted that the affidavit stated that the police had come to the applicant's home in Sri Lanka on March 6, 2014 and that the applicant's wife advised the applicant by phone immediately thereafter. The RAD found that this affidavit could have reasonably been prepared and submitted before the RPD decision, which was rendered on March 20, 2014 and that there was no explanation why the applicant's wife waited until April 24, 2014 to prepare and send the affidavit. It is true that the applicant would not have known when the decision would be rendered, but this does not explain the delay. The newness of a document is not based on the date of its creation; rather, the focus is on the date of the event or circumstance that the document seeks to prove (*Raza* at para 16).

[56] The RAD's finding that the affidavit failed to meet the test in subsection 110(4) as it was reasonably available to the applicant before the RPD decision has nothing to do with the RAD's consideration of the *Raza* factors, which were additional or alternative findings.

[57] In addition, the applicant could have submitted documents after the hearing, but before the decision, pursuant to Rule 43 of the Rules governing the RPD.

[58] The RAD set out the reasons for its credibility findings regarding the affidavit noting that it reiterated what the applicant had recounted in his BOC and added the March event. The RAD noted that the police would not likely have waited until March 2014 to follow up on a video taken in November 2012 and that this story was inconsistent with the applicant's allegation in his BOC that the police took his video camera and smashed it (so there would have been no video). These credibility findings, although not determinative of the admissibility of the affidavit, are reasonable. I also agree with the respondent that a decision maker would be remiss in not considering the credibility of the proposed new evidence.

[59] In summary, the RAD's determination of whether to accept the new evidence was based primarily on the statutory requirements in subsection 110(4) because the evidence was found to have been reasonably available before the RPD rejected the claim. The consideration of the *Raza* factors was in the alternative or in addition to the primary determination based on the statutory wording.

[60] Moreover, as noted above, it is not an error to consider the *Raza* factors where the RAD does so with regard to the context and purpose of the appeal.

VII. Did the RAD err by declining to convene an oral hearing?

The Applicant's Submissions

[61] The applicant submits that the affidavit of his wife responded to the RPD's credibility concerns, which were central to his claim and would have resulted in a different outcome. As a result, the criteria of subsection 110(3) were met and the RAD should have held an oral hearing to permit him to address the RAD's concerns.

[62] The applicant also argues that, regardless of subsection 110(3), the duty of procedural fairness requires that an oral hearing should have been held to provide him with an opportunity to respond to the RAD's credibility concerns regarding his wife's affidavit and the credibility findings which the RAD adopted from the RPD, which the applicant argues were done without an independent assessment.

[63] To support his argument that the RAD did not independently assess the findings, the applicant points to the concluding paragraph of the decision, where the RAD notes that it relied on the RPD's credibility findings.

[64] The applicant adds that in accordance with *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 at paras 9-10, [2015] FCJ No 687 (QL) [*Husian*], the RAD should have provided an opportunity for him to respond to its credibility concerns, because like in *Husian*, the RAD went on a "frolic" into the evidence of the RPD.

The Respondent's Submissions

[65] The respondent submits that the RAD reasonably rejected the affidavit as new evidence in accordance with subsection 110(4); therefore, the statutory criteria in subsection 110(6) were not satisfied.

[66] The respondent notes that the RAD conducted an assessment of the evidence before the RPD, deferred to some of the RPD's credibility findings, as it was entitled to do, and rejected others.

The RAD did not err by declining to convene an oral hearing

[67] The general rule set out in subsection 110(3) is that the RAD must proceed without an oral hearing. However, subsection 110(6) provides an exception where a hearing may be held where certain criteria are met. Even if those criteria are met, the RAD still has discretion and can decline to hold an oral hearing. In the present case, the RAD found that the criteria were not met because the new evidence was not admissible. That finding, as noted above, is reasonable.

[68] With respect to the RAD's common law duty of procedural fairness, the applicant's reliance on *Husian* is misplaced and somewhat inconsistent with his allegations that the RAD did not conduct an independent assessment. In *Husian*, Justice Hughes found that where the RAD makes new credibility findings, the parties must be given the opportunity to make submissions. Justice Hughes highlighted the pitfalls of the RAD making credibility findings, which are then open to review, noting at paras 9-10:

> [9] We come to the basis for sending the matter back to the RAD for re-determination. Had the RAD simply reviewed the findings of the RPD as to the adequacy of the Applicant's evidence and agreed with it, that would have ended the matter. It did not. For whatever reason, the RAD went on to give further reasons, based on its own review of the record, as to why the Applicant's evidence was not to be believed. It held, at paragraph 43, that it was unable to locate any evidence to support the Applicant's claim to also being a member of the Dhawarawayne clan. That was wrong; there is such evidence in the Responses to Information Requests. The comments by the RAD as to the differences in the spelling of the Applicant's name in the US proceedings versus the Canadian proceedings is nonsense: of course, there will be differences where a different alphabet and language is in question such as Somali and English. There are other errors.
>
> [10] The point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions.

[69] The present circumstances are markedly different than *Husian*. Here, the RAD rejected some of the RPD's credibility findings and deferred to the RPD with respect to other credibility findings after its own assessment of the evidence on the record. The RAD did not "take a frolic and venture into record" to make new credibility or additional findings based on the RPD's record. The RAD's new credibility finding was with respect to the affidavit tendered as new evidence. That affidavit was not in the RPD's record as it was only submitted to the RAD.

[70] In addition, after finding that the RPD assessment was not extensive, the RAD conducted its own assessment of the country condition evidence regarding the risk the applicant faced. The RAD was entitled and, in fact, required to conduct an independent assessment of the evidence on the record (*Huruglica* at para 47).

[71] The RAD did not breach the common law duty of procedural fairness. The applicant had the opportunity to respond to the RPD's credibility concerns in his submissions to the RAD, including by requesting to submit new evidence. The RAD was not required, on the facts of this case, to provide an opportunity for the applicant to respond to its concerns about an affidavit that they refused to admit primarily based on statutory criteria.

VIII. Did the RAD err by performing a judicial review role?

The Applicant's Submissions

[72] The applicant argues that despite the RAD stating that it applied *Huruglica* and would conduct an independent assessment of the evidence, the RAD's review was more akin to a judicial review as it readily deferred to the RPD, including on credibility, and used judicial review language.

[73] The applicant points to the RAD's comment with respect to the 2014 NDP, which the RAD found was not "new" evidence. The RAD noted that "had this evidence been available to the RPD, it would not have resulted in a positive decision regarding this claim." Similarly, the RAD found that if the "Landinfo" document had been available, it would not have resulted in a positive decision.

[74] The applicant argues that the RAD should have conducted its own analysis of this evidence rather than speculate on the RPD's view and that the RAD's approach shows the type of deference more typical of a judicial review.

[75] The applicant also submits that the RAD found that certain findings of the RPD were "reasonable" and that the concluding paragraph of the RAD decision states that the RAD relied on the RPD's credibility findings, which also suggests a judicial review approach.

[76] The applicant also argues that the RAD either failed to assess or erred in its assessment of the evidence, particularly the May 2013 Response to Information Request [RIR], in finding that all Tamils are subject to the same screening process upon their return to Sri Lanka. The documentary evidence supports the view that failed asylum seekers who are Tamil face different screening and often face lengthy interrogations and abuse, on suspicion or perception that they may have had affiliations with the LTTE, particularly those returning from countries with large Tamil communities and after lengthy absences.

The Respondent's Submissions

[77] The respondent submits that the applicant's position that the RAD relied entirely on the RPD's reasons is without merit: the RAD agreed the RPD made some errors, but found these errors were not fatal to the claim. The respondent adds that the RAD decision reflects its independent assessment of the evidence.

[78] The respondent also points out that the applicant does not take issue with the RAD's agreement with the RPD's findings that the applicant exaggerated the danger that he might face as a young Tamil and that he admitted that he is not part of one of the groups that are likely to face problems in Sri Lanka.

The RAD did not perform a judicial review; it conducted an independent assessment

[79] As noted above, the jurisprudence has established that the RAD should perform its appellate role and conduct an independent assessment of the evidence. It did so.

[80] The jurisprudence also supports the view that the RAD may defer to the credibility findings of the RAD but should conduct its own independent assessment of those findings before doing so.

[81] The RAD did not take a judicial review approach and simply find that the RPD's credibility findings were reasonable because the RPD had heard first hand from the applicant. To the contrary, the RAD conducted an independent assessment of the evidence on the record and only deferred to some of the RPD's credibility findings. The RAD found that other credibility findings were in error, but those findings were not determinative. For example, the RAD explicitly rejected the finding of the RPD that the applicant's failure to produce documentation detracted from his credibility. Instead, the RAD found that it was open to the RPD to find that some aspects of the applicant's testimony lacked credibility and exaggerated the dangers experienced by Tamils.

[82] The few phrases of the RAD decision highlighted by the applicant simply do not suggest inappropriate deference to the RPD or suggest that the RAD performed a judicial review function. Both comments were made in the context of whether new evidence should be admitted in accordance with subsection 110(4) and the RAD's consideration of how the *Raza* factors

would apply. The applicant's argument that the RAD should have assessed this evidence and not considered whether it would have made a difference to the RPD overlooks that the RAD did assess the evidence and found that it was not admissible, primarily based on the statutory criteria, as found above. Moreover, these comments do not show deference, but reflect the materiality factor from *Raza*.

[83] There is only one reference in the RAD's decision (at para 40) where the RAD found the RPD finding that the applicant exaggerated or overstated the everyday danger and drew a negative credibility inference was "reasonable". As repeatedly noted, the RAD is entitled to defer to credibility findings, since it conducted its own assessment.

[84] The RAD's concluding paragraph is clear in stating that its decision is based first on its own assessment: "on the basis of its review of all the evidence in this case, and also on the basis of the RPD's credibility findings concerning the alleged perception by Sri Lankan authorities, that the Appellant was associated with the LTTE, and also on the basis of the additional analysis provided by the RAD…." [Emphasis added.]

[85] That summary does not suggest in any way that the RAD failed to conduct the independent assessment expected on an appeal or that it deferred to the RPD's findings.

[86] With respect to the applicant's argument that the RAD misinterpreted the RIR within the May 2013 NDP it relied on to find that the evidence, although mixed, supported that the applicant would not be targeted if he returned to Sri Lanka. I have reviewed that RIR and the

document referred to within (LKA103815.E dated August 2011). The RAD did not misinterpret or misstate any of the information included in that document. Based on the RAD's review of the country condition documents, including the RIR and, as noted by the RAD, the UNHCR Guidelines and British Home Office Report, the RAD concluded that the applicant would not be targeted and would not face a serious possibility of persecution. That finding is supported by the evidence and is reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is proposed for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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JUDGMENT AND REASONS:	KANE J.
DATED:	FEBRUARY 15, 2016

APPEARANCES:

Robert Israel Blanshay	FOR THE APPLICANT
Norah Dorcine	FOR THE RESPONDENT

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