

Federal Court



Cour fédérale

Date: 20160516

Docket: IMM-4107-15

Citation: 2016 FC 549

Ottawa, Ontario, May 16, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

A.N.

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, A.N., is an 18 year old citizen of China. Prior to her arrival in Canada as a visitor on May 16, 2014 to attend her cousin's high school graduation, she lived with her father, mother, and younger sister in the Xinjiang Uyghur Autonomous Region of China. Since her arrival here, she has been residing with her paternal aunt, R.J. [the Aunt], who is a Canadian citizen and has become her primary caregiver.

[2] In October 2014, the Applicant made an inland claim for refugee protection based on her fear of persecution in China as a young woman of Uyghur ethnicity, her Muslim religion, and her perceived political opinion. Because the Applicant was a minor at the time of making her claim, her Aunt assumed the role of a designated representative at the hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Protection Board [the IRB]. In a decision dated February 11, 2015, the RPD rejected the Applicant's claim, finding that both the Applicant and her designated representative were not credible on certain key aspects of the claim. The Applicant appealed the RPD's decision to the Refugee Appeal Division [RAD] of the IRB, but in a decision dated August 17, 2015, the RAD dismissed the appeal and confirmed the RPD's findings and negative determination of the claim. The Applicant now asks this Court, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], to set aside the RAD's decision and return the matter to a different member of the RAD for re-determination.

I. The RAD's Decision

[3] Prior to rendering its decision, the RAD approved a request by the Aunt to withdraw as designated representative because she believed she had "interests that conflict" with those of the Applicant. After consulting with the Applicant's counsel, who suggested that a new representative should be someone independent from the Applicant's family, the RAD appointed a designated representative from the IRB's list of representatives in April 2015. Although the new designated representative attended several meetings with the Applicant and her lawyer and reviewed the affidavit evidence submitted for purposes of the appeal to the RAD, she made no submissions on the Applicant's behalf before the RAD.

[4] In its decision, the RAD first outlined the general background to the Applicant's claim. Amongst other things, the RAD noted that the Applicant had received over the internet on WeChat, from someone she did not know, an article critical of the Chinese government's treatment of Uyghurs; after she forwarded this article to some friends, they advised her that the person who initially sent the article was arrested by the police. After the Applicant had left China, her father told her and her relatives in Canada that the police in China had come looking for her to discuss this article.

[5] The RAD then proceeded to identify the issues raised by the Applicant's appeal, one of which was whether the Applicant's right to a full and fair hearing was compromised due to a conflict of interest of her designated representative or due to having a Uyghur interpreter for her RPD hearing. The RAD next acknowledged its role in view of *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811, to conduct an independent assessment of the claim based on the evidence. It also noted the divergent case law in *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022, [2015] 3 FCR 587, and *Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629, 254 ACWS (3d) 915, as to the conditions for new evidence as set out in subsection 110(4) of the *Act* and subsection 29(4) of the *Refugee Appeal Division Rules (SOR/2012-257) [RAD Rules]*. In this regard, the RAD considered whether exclusion of the proposed new evidence submitted by the Applicant would hinder a full fact based review of the appeal and at the same time respect and apply the legislation governing the acceptance of new evidence.

[6] The Applicant had submitted as new evidence before the RAD numerous news articles regarding the Uyghur minority in China, an affidavit from the Aunt, and two affidavits from the Applicant. The RAD rejected all but three of the news articles because they basically stated the same information that had been before the RPD. The three articles about the incarceration of a relative of the Applicant, S.N., were accepted as new evidence, however, since the Applicant had not become aware of S.N.'s incarceration until after her claim was rejected and could not have presented evidence about this at the time of her RPD hearing.

[7] In considering the affidavit of the Aunt, the RAD found that with the exception of three paragraphs about S.N., all of the other information in the affidavit had been available prior to the Aunt testifying at the RPD hearing. This affidavit stated, amongst other things, that subsequent to the RPD hearing she requested to withdraw as the Applicant's designated representative because she realized that her caution about what information she disclosed in the Applicant's refugee claim was not in the Applicant's interest; it also stated that: "I would say that she [the Applicant] is only about 60 percent fluent in her ability to speak and understand Uyghur...I know now that [the Applicant]...is more comfortable speaking in Mandarin and even though she is Uyghur, it would have been better if her refugee claim and hearing had been done in Mandarin...We were also very concerned that if we had a Mandarin interpreter we would increase the risk of having our story known in the Chinese community and having Chinese authorities find out about [the Applicant's] claim." The RAD rejected this affidavit, stating as follows:

[55] With the exception of paragraphs 41, 42, and 43 of her affidavit (the information regarding [S.N.]), everything [the Aunt] states in her affidavit was available to her at the time she testified at the appellant's hearing. Her statement that she was not as

forthcoming in her evidence as she could have been for fear of Chinese officials learning of the appellant's refugee claim and punishing her family does not stand up to close scrutiny.

[56] The appellant filed her refugee claim on or about October 19, 2014. [The Aunt] and her daughter ... were very much involved in this process, assisting the appellant every step of the way. ...

[57] [The Aunt] had access to experienced counsel ... who did (and still does) represent the appellant. The evidence is that [the Aunt] is concerned for the appellant and wants the best for her. I would expect that if [the Aunt] felt she could not give candid evidence at the confidential RPD hearing she would have discussed this with counsel.

[58] ... Without entering into an analysis as to the relevance of the information contained in this affidavit, the information it contains was available before the claim was rejected and with the exception of the information regarding [S.N.], could have been presented to the RPD at the time of the hearing and certainly before the claim was rejected.

[8] The RAD also rejected the Applicant's affidavit dated June 3, 2015 for not conforming to subsection 110(4) of the *Act*. In this affidavit, the Applicant stated, amongst other things, that: "I felt pressured to use Uyghur for my refugee claim even though I generally speak Mandarin or a combination of Mandarin and Uyghur to communicate with my relatives here in Canada....My family here thought it would be better to have a Uyghur interpreter than a Mandarin interpreter....At the refugee hearing, I feel [*sic*] like I wasn't able to fully express myself, especially my deeper feelings and emotions, in Uyghur. I hoped that if I didn't understand something or didn't communicate something, my aunt would intervene and put it right." In finding that this affidavit was not new evidence for purposes of subsection 110(4) of the *Act*, the RAD stated:

[61] The appellant was represented by a designated representative who was responsible for making decisions that were

in the best interest of the appellant. She also was represented by experienced counsel. ... Issues such as the language the appellant wished to testify in could, and should have been, identified to counsel.

[62] Information contained in the affidavit does not become new evidence because the appellant/designated representative chose not to identify their concern to counsel and/or to ask for a hearing in a language the appellant states she was not fluent in. ...

[63] She and the designated representative had ample opportunity to testify to the issues the appellant has documented in this affidavit. ...

[9] The RAD also rejected the Applicant's further affidavit dated June 16, 2015, finding that evidence on the exact familial relationship between the Applicant and S.N. was not new and was readily available to the Applicant at the time of her RPD hearing.

[10] In assessing the new evidence about S.N., the RAD found there was no evidence that a connection had been drawn by the Chinese authorities between S.N. and the Applicant or her family. It placed little weight on this evidence, and because it was not central to the Applicant's claim nor did it deal with her credibility the RAD determined that a hearing would not be ordered.

[11] The RAD then considered the RPD's negative credibility findings and proceeded to conduct its own assessment of the Applicant's credibility. Like the RPD, the RAD found it highly unlikely that the Aunt and her father would discuss the Applicant making a refugee claim without discussing the WeChat article forwarded by the Applicant and the police looking for the Applicant because of that. The RPD also found a lack of credibility in the Aunt's testimony that the Applicant's father failed to realize the significance of these events until he learned young

people had been jailed for spreading anti-government articles via the internet. The RAD agreed with this credibility finding by the RPD. The RAD also agreed with the RPD's negative credibility finding arising from the Applicant's failure to put in her narrative what happened to other youths involved in distribution of the WeChat article.

[12] The RAD concurred with the RPD that the evidence did not support a finding that the Applicant had any kind of political profile in China. The RAD also stated that the RPD's finding that the Applicant's delay in making her claim represented a lack of subjective fear was defensible based on the evidence before it. It further found that, although it would have been helpful if the RPD had made a specific finding about the Applicant having been subjected to an attack on a public street in broad daylight for being Uyghur, this incident was "not something that there is a reasonable chance of reoccurring should the appellant return to China."

[13] In considering whether the Applicant's right to a fair hearing was compromised, the RAD stated that much of its analysis as to whether the Aunt's affidavit met the test in subsection 110(4) also applied to this issue. It noted that the Aunt had not raised any concerns at the RPD hearing about being unable to be as forthcoming in her evidence as she wanted because, if the Chinese government found out about the Applicant's refugee claim, she and her family would be in a dangerous situation and their ability to visit China and her husband's ability to carry on his business there affected. The RAD determined that, as the primary caregiver for the Applicant and having been very involved in the refugee claim, it made no sense for the Aunt not to be able to be forthcoming and "therefore very little weight can be placed on [her] assertion that she was in a conflict position regarding the appellant."

[14] As to the use of a Uyghur interpreter, the RAD found that the Applicant had a designated representative and experienced counsel, and that if she had any issues about the language for her hearing “she was well placed to discuss it with the professional she had hired to represent her.” For the RAD, it was “inconceivable” that the Applicant and her Aunt would have made a decision on the matter without consulting their counsel. The RAD further found, after reading the hearing transcript, that there were no identifiable issues with the interpretation and none were raised by counsel. Thus, the RAD determined that the Applicant’s right to a fair hearing was not compromised by having her Aunt act as her designated representative or by having her hearing interpreted into Uyghur.

[15] The RAD concluded its decision by stating that, although the RPD had improperly considered the short duration of time the Applicant had left to complete school as a mitigating factor for any potential ill-treatment at school should she return to China, the RPD’s decision was solidly based on the evidence before it and it did not err in coming to a negative determination of the Applicant’s refugee claim.

II. Issues

[16] The issues raised by this application can be rephrased as follows:

1. What is the appropriate standard of review?
2. Did the RAD reasonably assess the new evidence?
3. Was the RAD’s decision reasonable?

A. *What is the appropriate standard of review?*

[17] The Federal Court of Appeal has recently determined that the appropriate standard of review for this Court when reviewing a decision of the RAD is one of reasonableness (see: *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at para 35, [2016] FCJ No 313).

[18] Accordingly, the Court should not interfere if the RAD's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 S.C.R. 708. The decision must be considered as an organic whole and the Court should not embark upon a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para 54, [2013] 2 SCR 458; see also *Ameni v Canada (Minister of Citizenship and Immigration)*, 2016 FC 164, at para 35, [2016] FCJ No 142).

[19] As for the issue of procedural fairness raised by the Applicant, the Supreme Court has stated recently that correctness continues to be the standard of review in respect of procedural fairness issues (see: *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502). With respect to this issue, therefore, the appropriate standard of review is one of correctness.

When applying the correctness standard, a reviewing court will show no deference to the decision maker's reasoning process and decide whether it agrees with the decision maker's determination; if not, the court will substitute its own view and provide the correct answer (see *Dunsmuir* at para 50).

B. *Did the RAD reasonably assess the new evidence?*

[20] The Federal Court of Appeal has also recently determined that the RAD's interpretation of subsection 110(4) of the *Act* must be reviewed in light of the reasonableness standard (see: *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96 at para 74 [*Singh*]). However, in determining the admissibility of new evidence under subsection 110(4), the RAD must comply with the explicit requirements of such subsection, while also having regard to the implicit considerations of admissibility of evidence in terms of credibility, relevance, newness, and materiality as stated in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13 to 15, 289 DLR (4th) 675 (see: *Singh*, at paras 38 and 74). Except for the materiality of new evidence, "it is not necessary to interpret subsection 110(4) and paragraph 113(a) differently" (*Singh* at para 64). The materiality of the new evidence must be assessed in the context of subsection 110(6) of the *Act* for the sole purpose of determining whether the RAD may hold a hearing (*Singh* at para 74). Furthermore, with respect to the materiality of new evidence before the RAD, the Court of Appeal observed in *Singh* that:

[47] ... there may be a need for some adaptations to be made. ... The RAD ... has a much broader mandate [than a PRRA officer] and may intervene to correct any error of fact, of law, or of mixed fact and law. As a result, it may be that although the new evidence is not determinative in and of itself, it may have an impact on the RAD's overall assessment of the RPD's decision.

[21] In this case, the RAD rejected all of the new evidence submitted by the Applicant except for three news articles and three paragraphs of the Aunt's affidavit concerning the incarceration of S.N. It did so because, in the RAD's view, the new evidence that was not accepted did not fall within the requirements of subsection 110(4) of the *Act*, which provides that:

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.

[22] In my view, however, the RAD unreasonably rejected those portions of the Applicant's affidavit dated June 3, 2015, and those of her Aunt's affidavit dated June 16, 2015, which dealt with the language of the hearing before the RPD and the representation of the Applicant by her Aunt as a designated representative. The affidavit evidence submitted in this regard went to the fairness of the Applicant's hearing before the RPD, and it was not reasonable for the RAD to restrictively assess and reject this evidence through the lens of subsection 110(4) of the *Act*. Moreover, it was contradictory and unintelligible and, therefore, not reasonable for the RAD to reject this evidence as not being admissible under subsection 110(4) of the *Act*, and then, later in its reasons, to review this rejected evidence to determine whether the Applicant's right to a full and fair hearing had been compromised.

[23] The restrictions on presenting evidence under subsection 110(4) of the *Act* and Rule 29(4) of the *RAD Rules* should not necessarily be applicable when the evidence presented

on an appeal to the RAD raises issues about the procedural fairness of the proceeding before the RPD and not about the credibility, facts, or substance of a refugee's claim. Even if it could be said that such restrictions may be applicable, the evidence of the Applicant's difficulty with the hearing being held in Uyghur and her Aunt's conflicting interests only emerged after rejection of the Applicant's claim and she could not reasonably have been expected in the circumstances of this case to have presented evidence of her Aunt's conflict of interest until it was revealed and disclosed to her.

C. *Was the RAD's decision reasonable?*

[24] Although the RAD unreasonably rejected the evidence presented to it as to the Applicant's difficulty with the hearing being held in Uyghur and her Aunt's conflicting interests, that in and of itself does not automatically render its decision as a whole unreasonable. Rather, the pertinent question is whether, in the face of such evidence, the RAD reasonably determined that the Applicant's right to a full and fair hearing had not been compromised due to a conflict of interest of her designated representative or due to having a Uyghur interpreter for her RPD hearing.

[25] In her affidavit, the Applicant's aunt stated that her conflict of interest was one arising out of fear for her other family members and her husband's business interests in China, as well as her ability to return to China in the future to see her father; she also deposed that she was careful about disclosing information in a way that was not in the Applicant's best interests and that there were other attacks against her and others of which she did not speak.

[26] Subsection 167(2) of the *Act* requires that: “if a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person. [emphasis added]” In other words, a refugee claimant who is a minor, like the Applicant was in this case before the RPD and also before the RAD, must have a designated representative.

[27] Subsections 20(4)(c) and (d) of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], stipulate that a designated representative must “be willing and able to act in the best interests of the claimant or protected person” and also “not have interests that conflict with those of the claimant or protected person.” A designated representative’s responsibilities include those as stated in subsection 20(10) of the *RPD Rules*:

<p>20 (10) The responsibilities of a designated representative include</p> <p>(a) deciding whether to retain counsel and, if counsel is retained, instructing counsel or assisting the represented person in instructing counsel;</p> <p>(b) making decisions regarding the claim or application or assisting the represented person in making those decisions;</p> <p>(c) informing the represented person about the various stages and procedures in the processing of their case;</p>	<p>20 (10) Les responsabilités d’un représentant désigné sont notamment les suivantes :</p> <p>a) décider s’il y a lieu de retenir les services d’un conseil et, le cas échéant, donner à celui-ci des directives, ou aider la personne représentée à lui donner des directives;</p> <p>b) prendre des décisions concernant la demande d’asile ou toute autre demande ou aider la personne représentée à prendre de telles décisions;</p> <p>c) informer la personne représentée des diverses étapes et procédures dans le traitement de son cas;</p>
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| <p>(d) assisting in gathering evidence to support the represented person's case and in providing evidence and, if necessary, being a witness at the hearing;</p> | <p>d) aider la personne représentée à réunir et à transmettre les éléments de preuve à l'appui de son cas et, au besoin, témoigner à l'audience;</p> |
| <p>(e) protecting the interests of the represented person and putting forward the best possible case to the Division;</p> | <p>e) protéger les intérêts de la personne représentée et présenter les meilleurs arguments possibles à l'appui de son cas devant la Section;</p> |
| <p>(f) informing and consulting the represented person to the extent possible when making decisions about the case; and</p> | <p>f) informer et consulter, dans la mesure du possible, la personne représentée lorsqu'il prend des décisions relativement à l'affaire;</p> |
| <p>(g) filing and perfecting an appeal to the Refugee Appeal Division, if required.</p> | <p>g) interjeter et mettre en état un appel devant la Section d'appel des réfugiés, si nécessaire.</p> |

[28] The upshot of the foregoing provisions is that a minor's designated representative is akin to a litigation guardian in the context of civil proceedings. The designated representative is not the minor, nor vice versa. The representative must act in the minor's best interest at all times during the proceedings and must not let any extraneous or outside concerns or interests impair his or her ability to protect the minor's interests and to put forward to the RPD the best possible case on the minor's behalf. Indeed, the Court in *Kurija (Litigation guardian of) v Canada (Citizenship and Immigration)*, 2013 FC 1158, at para 23, [2014] 4 FCR 657, placed the proper representation of young immigrant claimants in refugee proceedings "on the same plane as concerns over bias of a decision-maker....and [as]...an issue on which new evidence is admissible after the fact...". The role and importance of a designated representative for a minor

refugee claimant therefore should be neither minimized nor ignored (see further: *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51, at paras 31 to 36, [2012] 4 FCR 164).

[29] In this case, the RAD looked to the evidence it rejected in addressing whether the hearing before the RPD was procedurally unfair for the minor Applicant. This approach by the RAD cannot be justified and is, therefore, unreasonable, not only because the RAD had previously rejected the evidence as to the Applicant's difficulty with the hearing being held in Uyghur and the Aunt's conflicting interests, but also because the RAD misconstrued or misapprehended the nature of such evidence. It is clear from the affidavits of the Applicant and her Aunt that the Applicant "felt pressured" by her Aunt to use Uyghur for her refugee claim despite her fluency in Mandarin and that her Aunt selectively provided information in a manner that was not in the Applicant's best interests. Faced with this evidence, it was incumbent upon the RAD to fully assess the fairness of the RPD proceeding from the minor Applicant's perspective, having due regard to the fact that the Aunt was *in loco parentis* to her, and not blandly state and conclude that the Applicant and her Aunt should have consulted with and sought the advice of legal counsel (whom the RAD characterized as being "experienced" without identifying any basis for such characterization) concerning the conflicting interests and the language of the hearing.

III. Conclusion

[30] The Applicant's application for judicial review is therefore granted. The RAD's decision is set aside, and the matter returned to the RAD for a new determination by a different panel member in accordance with these reasons for judgment. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Refugee Appeal Division for redetermination by a different panel member in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4107-15

STYLE OF CAUSE: A.N. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MARCH 14, 2016

JUDGMENT AND REASONS: BOSWELL J.

DATED: MAY 16, 2016

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