Federal Court  Cour fédérale

Date: 20160727

Docket: IMM-243-16

Citation: 2016 FC 876

Ottawa, Ontario, July 27, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JEDIDIAH IAN ZHI TAN (AKA JEDIDIAH IAN TAN ZHI AN)

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated December 23, 2015 of the Refugee Appeal Division ("RAD") of the Immigration and Refugee Board of Canada. Pursuant to s 111(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), the RAD allowed the appeal, set aside the determination of the Refugee Protection Division ("RPD") and substituted its determination that the Applicant is neither a Convention refugee nor a person in

need of protection. This application for judicial review is brought pursuant to s 72(1) of the IRPA.

Background

[2] The Applicant is a citizen of Singapore and was born on December 24, 1992. He entered Canada on January 23, 2015 and, shortly thereafter, sought refugee protection on the basis of the alleged persecution he faced in Singapore as a male who was granted a medical exemption from military service.

[3] More specifically, in March or April of 2013, the Applicant received notice from the Singapore Armed Forces ("SAF") that he was to report for a medical examination in preparation for compulsory military service. At the medical examination, the Applicant informed the SAF doctor that he had been diagnosed with scoliosis, suffered back pain, had difficulty walking and could not sit down for long periods of time. Nevertheless, the Applicant was found to be medically fit for service and was required to report for training in December 2013.

[4] The Applicant claims that military training was very difficult for him and caused him to suffer greatly, both physically and psychologically. Following a series of consultations and exchanges with various medical professionals, the Applicant was notified on May 23, 2014 that he had been exempted from military service. He claims that the basis for his exemption is psychological medical grounds.

[5] Subsequent to receiving the military service exemption, the Applicant and his father received telephone calls and text messages from several SAF officers of his former platoon threatening to have him returned to continue his military training. The Applicant claims he fears his military service exemption will be revoked and he will be required to complete his national military service. Additionally, he says he faces employment discrimination due to the fact that he is required to disclose his military history when applying for jobs in Singapore.

[6] In response to an application by the Applicant pursuant to s 50 of the IRPA, the RPD found that the Applicant was a vulnerable person as his ability to present his case was severely impaired and, accordingly, ordered priority scheduling and procedural accommodations.

[7] By its decision dated May 11, 2015, the RPD found that the Applicant was a Convention refugee on the basis that he had a well-founded fear of persecution in Singapore by reason of being a member of a particular social group of men who are exempted from military service. It further found that state protection would not be reasonably forthcoming to the Applicant and that he did not have an internal flight alternative ("IFA").

[8] The Respondent filed an appeal of the RPD's decision, which decision the RAD subsequently set aside.

Decision Under Review

[9] The determinative issue before the RAD was the issue of state protection. In deciding this issue, the RAD considered the Applicant's submission that military justice is all that would

be available to him in Singapore to address all but one of the grounds of alleged persecution. However, the RAD found that the Applicant is no longer a serviceman as a result of his military service exemption and, therefore, he is entitled to redress from civilian authorities. In support of this finding, the RAD referred to documentary evidence in the record which showed that Singapore has effective mechanisms in place to address abuse and corruption in the police and armed forces. Further, should the authorities consider revocation of the Applicant's military service exemption, he would be entitled to due process.

[10] The RAD also found that there is adequate protection for the Applicant in Singapore with respect to employment and healthcare and that it would not be objectively unreasonable for him to seek protection from the state. The RAD noted that the National Health Plan in Singapore provides affordable healthcare to all Singaporeans and that the Applicant would have access to adequate medical treatment for his physical and psychological conditions. The RAD also stated that the Applicant has adequate employment protection in Singapore on the basis that he has access to government programs such as "Job Club" which help people with mental illness obtain suitable employment.

[11] On the basis of the foregoing, the RAD determined that the Applicant failed to rebut the presumption of state protection with clear and convincing evidence. The RAD held that it was not persuaded on a balance of probabilities that the state of Singapore would not be reasonably forthcoming with adequate state protection, should the Applicant seek it. Due to its finding on state protection, the RAD found that it was not necessary to review the RPD's further findings with respect to membership in a particular social group or discrimination versus persecution. For

these reasons, the RAD found that the Applicant is not a Convention refugee or a person in need of protection under ss 96 or 97 of the IRPA.

Issues

[12] The Applicant submits that the RAD's decision is procedurally unfair as the RAD addressed issues not raised by either party to the appeal and made findings on issues that were not put to the Applicant by any party or the RPD. Further, that the RAD's decision is unreasonable in that its factual conclusions lack transparency, justification and intelligibility.

[13] I would frame the issues as follows:

i. Did the RAD breach its duty of procedural fairness?

ii. Is the RAD's decision reasonable?

Standard of Review

[14] The parties submit that breaches of procedural fairness are reviewable on the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]) and that reasonableness is the standard of review for the RAD's decision on the issue of state protection (*Dunsmuir* at paras 47, 50 and 60; *Bellingy v Canada (Citizenship and Immigration)*, 2015 FC 1252 at paras 39-40).

[15] I agree that the standard of review for questions of procedural fairness is correctness; no deference is owed to the RAD in deciding such questions (*Dunsmuir* at para 50). The RAD's

assessment of state protection involves questions of mixed fact and law, therefore, it attracts the reasonableness standard of review (*Kandha v Canada (Citizenship and Immigration)*, 2016 FC 430 at para 15). On this standard the Court will only intervene if the decision is not transparent, justifiable, intelligible and within the range of possible, acceptable outcomes (*Dunsmuir* at para 47).

ISSUE 1: Did the RAD breach its duty of procedural fairness?

Applicant's Submissions

[16] The Applicant submits that when a claimant has succeeded before the RPD their evidence and documentation has already been found to be sufficient and reliable. And, because a claimant cannot be expected to anticipate and address matters that the Minister does not raise on appeal, the RAD is bound by the issues raised within the appeal records. Issues not raised or challenged by the Minister are considered settled. The Applicant submits that the RAD rendered its decision relying on issues not raised by either party to the appeal and/or issues that were not raised by either party before the RPD. According to the Applicant, this was procedurally unfair as it precluded him from addressing these matters. Further, this approach was beyond the RAD's jurisdiction as, when additional evidence is required, the RAD is obliged to return the claim to the RPD for redetermination.

[17] While the 'theme' of state protection was known to the Applicant, the arguments and considerations raised by the Respondent were not those that the RAD actually addressed. If the RAD had an issue with how the evidence was assessed, apart from the issues raised by the

Respondent, it was incumbent on the RAD to advise the parties and to provide an opportunity for them to provide new evidence and submissions on the issue (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71 [*Ching*]; *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at paras 19-20 and 23 [*Ojarikre*]; *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551 at para 12 [*Jianzhu*]).

[18] The Applicant points to the following factual conclusions relied upon by the RAD in support of its decision on the issue of state protection that were not put to him for comment:

- The RAD determined that the Applicant's military service exemption was permanent, whereas the RPD determined that it was revocable. This was not raised by either party to the appeal;
- The RAD determined that the Applicant would have employment protection through government programs such as Job Club. The Applicant had not been asked about Job Club when appearing before the RPD and the issue was not raised by either party to the appeal; and
- The RAD determined that the Applicant is entitled to redress through civilian authorities as he has been exempted from military service. However, he was not asked about this during the RPD hearing and the issue was not raised by either party to the appeal.

Respondent's Submissions

[19] The Respondent submits that, contrary to the Applicant's contention that the RAD unfairly caught him by surprise by making findings on new issues, all three of the examples of new issues given by the Applicant were findings made by the RAD in response to the Applicant's arguments on appeal (*Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at paras 24-30 [*Ibrahim*]). For that reason, the jurisprudence relied upon by the Applicant is

distinguishable on its facts. Nor is this a situation where the RPD canvassed an issue but did not rely upon that issue in its decision.

[20] The Respondent contends that there is nothing unfair about the RAD pointing to evidence of Job Club and other such organizations which assist persons with mental health issues to find employment. The RAD pointed to this evidence directly in response to the Applicant's arguments of employment discrimination. In assessing that argument the RAD considered the evidence and the submissions advanced by the Applicant, but it was also entitled to consider countervailing evidence before the RPD. Furthermore, the RAD has a statutory duty to conduct the appeal on the basis of the record before the RPD (IRPA, s 110(3)) and it is not limited to the evidence contained in the RAD appeal records. There is also no error in taking into account other evidence in the record before the RPD which was not flagged by either party (*Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at paras 30-31 [*Sary*]).

[21] Moreover, in refugee matters there is no 'case to be met'. The onus and burden lies with the claimant to make out their claim for refugee protection. Although the Respondent brought the appeal before the RAD, the RAD's role is the same namely, to conduct an independent assessment of the claim on the basis of the record before the RPD. Further, it is well-established that a refugee claim may be decided solely on the basis of state protection (*Canada (Citizenship and Immigration) v Foster*, 2016 FC 130 at paras 24-28 [*Foster*]). This is so even when the psychological profile of the claimant reasonably justifies their subjective fear of availing state protection (*Foster* at paras 12, 21, 24-28).

Analysis

[22] It is useful to first set out the legislative framework for appeals to the RAD.

[23] Section 110 of the IRPA states that a person or the Minister may appeal on a question of law, of fact or of mixed law and fact, to the RAD against a decision of the RPD to allow or reject the person's claim for refugee protection (s 110 (1)). The Minister may satisfy any requirement respecting the manner in which an appeal is filed and perfected by submitting a notice of appeal and any supporting documents (s110 (1.1)). The RAD must proceed without a hearing, "on the basis of the record of the proceedings of the Refugee Protection Division", and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal (s 110(3)). However, 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 (s 110(4)). The RAD may hold a hearing if, in its opinion, there is documentary evidence referred to in s 110(3) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal, is central to the decision with respect to the refugee protection claim; and if accepted, would justify allowing or rejecting the refugee protection claim (s 110(6)).

[24] The RAD must make a decision in accordance with s 111:

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:	111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait

(a) confirm the determination of the Refugee Protection Division;	dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.
(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or	
(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.	
(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that	(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :
(a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and	a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;
(b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.	b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont été présentés à la Section de la protection des réfugiés.

[25] The *Refugee Appeal Division Rules*, SOR/2012-257, (RAD Rules) address what is required to bring and perfect an appeal.

[26] Part 1 sets out the rules applicable to appeals made by a person who is the subject of the appeal, including that:

3(3) The appellant's record must contain the following documents, on consecutively numbered pages, in the following order:

(a) the notice of decision and written reasons for the Refugee Protection Division's decision that the appellant is appealing;

(b) all or part of the transcript of the Refugee Protection Division hearing if the appellant wants to rely on the transcript in the appeal, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;

(c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the appellant wants to rely on the documents in the appeal;

(d) a written statement indicating

(i) whether the appellant is relying on any evidence referred to in subsection 110(4) of the Act,

(ii) whether the appellant is requesting that a hearing be held under subsection 110(6) of the Act, and if they are requesting a hearing, whether they are making an application under rule 66 to change the location of the hearing, and

3(3) Le dossier de l'appelant comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

a) l'avis de décision et les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel;

b) la transcription complète ou partielle de l'audience de la Section de la protection des réfugiés, si l'appelant veut l'invoquer dans l'appel, accompagnée d'une déclaration signée par le transcripteur dans laquelle celui-ci indique son nom et atteste que la transcription est fidèle;

c) tout document que la Section de la protection des réfugiés a refusé d'admettre en preuve pendant ou après l'audience, si l'appelant veut l'invoquer dans l'appel;

d) une déclaration écrite indiquant :

(i) si l'appelant invoque des éléments de preuve visés au paragraphe 110(4) de la Loi,

(ii) si l'appelant demande la tenue de l'audience visée au paragraphe 110(6) de la Loi et, le cas échéant, s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66,

(iii) the language and dialect, if any, to be interpreted, if the Division decides that a hearing is necessary and the appellant needs an interpreter;

(iii) la langue et, le cas échéant, le dialecte à interpréter, si la Section décide qu'une audience est nécessaire et que l'appelant a besoin d'un interprète;

(e) any documentary evidence that the appellant wants to rely on in the appeal;

e) tout élément de preuve documentaire que l'appelant veut invoquer dans l'appel;

(f) any law, case law or other legal authority that the appellant wants to rely on in the appeal; and

f) toute loi, jurisprudence ou autre autorité légale que l'appelant veut invoquer dans l'appel;

(g) a memorandum that includes full and detailed submissions regarding

g) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) the errors that are the grounds of the appeal,

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the appellant is appealing or in the transcript or in any audio or other electronic recording of the Refugee Protection Division hearing,

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout enregistrement audio ou électronique de l'audience tenue devant cette dernière,

(iii) how any documentary evidence referred to in paragraph (e) meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant,

(iii) la façon dont les éléments de preuve documentaire visés à l'alinéa e) sont conformes aux exigences du paragraphe 110(4) de la Loi et la façon dont ils sont liés à l'appelant,

(iv) the decision the appellant wants the Division to make, and

(iv) la décision recherchée,

(v) why the Division should hold a hearing under

(v) les motifs pour lesquels la Section devrait tenir l'audience

subsection 110(6) of the Act if the appellant is requesting that a hearing be held.	visée au paragraphe 110(6) de la Loi, si l'appelant en fait la demande.

[27] Similarly, and relevant to this matter, Part 2 of the RAD Rules deals with the rules applicable to appeals made by the Minister, including:

9 (1) To perfect an appeal in accordance with subsection 110(1.1) of the Act, the Minister must provide, first to the person who is the subject of the appeal and then to the Division, any supporting documents that the Minister wants to rely on in the appeal.	9 (1) Pour mettre en état un appel aux termes du paragraphe 110(1.1) de la Loi, le ministre transmet à la personne en cause, puis à la Section, tout document à l'appui qu'il veut invoquer dans l'appel.
(2) In addition to the documents referred to in subrule (1), the Minister may provide, first to the person who is the subject of the appeal and then to the Division, the appellant's record containing the following documents, on consecutively numbered pages, in the following order:	(2) En plus des documents visés au paragraphe (1), le ministre peut transmettre à la personne en cause, puis à la Section, le dossier de l'appelant qui comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :
(a) the notice of decision and written reasons for the Refugee Protection Division's decision that the Minister is appealing;	a) l'avis de décision et les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel;
(b) all or part of the transcript of the Refugee Protection Division hearing if the Minister wants to rely on the transcript in the appeal, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;	b) la transcription complète ou partielle de l'audience de la Section de la protection des réfugiés, si le ministre veut l'invoquer dans l'appel, accompagnée d'une déclaration signée par le transcripteur dans laquelle celui-ci indique son nom et atteste que la transcription est fidèle;

(c) any documents that the Refugee Protection Division refused to accept as evidence, during or after the hearing, if the Minister wants to rely on the documents in the appeal;

c) tout document que la Section de la protection des réfugiés a refusé d'admettre en preuve pendant ou après l'audience, si le ministre veut l'invoquer dans l'appel;

(d) a written statement indicating

d) une déclaration écrite indiquant :

(i) whether the Minister is relying on any documentary evidence referred to in subsection 110(3) of the Act and the relevance of that evidence, and

(i) si le ministre veut invoquer des éléments de preuve documentaire visés au paragraphe 110(3) de la Loi et la pertinence de ces éléments de preuve,

(ii) whether the Minister is requesting that a hearing be held under subsection 110(6) of the Act, and if the Minister is requesting a hearing, why the Division should hold a hearing and whether the Minister is making an application under rule 66 to change the location of the hearing;

(ii) si le ministre demande la tenue de l'audience visée au paragraphe 110(6) de la Loi et, le cas échéant, les motifs pour lesquels la Section devrait en tenir une et s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66;

(e) any law, case law or other legal authority that the Minister wants to rely on in the appeal; and

e) toute loi, jurisprudence ou autre autorité légale que le ministre veut invoquer dans l'appel;

(f) a memorandum that includes full and detailed submissions regarding

f) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) the errors that are the grounds of the appeal,

(i) les erreurs commises qui constituent les motifs d'appel,

(ii) where the errors are located in the written reasons for the Refugee Protection Division's decision that the Minister is appealing or in the transcript or in any audio or other electronic

(ii) l'endroit où se trouvent ces erreurs dans les motifs écrits de la décision de la Section de la protection des réfugiés portée en appel ou dans la transcription ou dans tout

recording of the Refugee Protection Division hearing, and

(iii) the decision the Minister wants the Division to make.

…

10 (1) To respond to an appeal, the person who is the subject of the appeal must provide, first to the Minister and then to the Division, a written notice of intent to respond, together with the respondent's record.

…

(3) The respondent's record must contain the following documents, on consecutively numbered pages, in the following order:

(a) all or part of the transcript of the Refugee Protection Division hearing if the respondent wants to rely on the transcript in the appeal and the transcript was not provided with the appellant's record, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;

(b) a written statement indicating

(i) whether the respondent is requesting that a hearing be held under subsection 110(6) of the Act, and if they are requesting a hearing, whether they are making an application

enregistrement audio ou électronique de l'audience tenue devant cette dernière,

(iii) la décision recherchée.

…

10 (1) Pour répondre à un appel, la personne en cause transmet au ministre, puis à la Section, un avis écrit d'intention de répondre, accompagné du dossier de l'intimé.

…

(3) Le dossier de l'intimé comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

a) la transcription complète ou partielle de l'audience de la Section de la protection des réfugiés, si l'intimé veut l'invoquer dans l'appel et qu'elle n'a pas été transmise avec le dossier de l'appelant, accompagnée d'une déclaration signée par le transcripteur dans laquelle celui-ci indique son nom et atteste que la transcription est fidèle;

b) une déclaration écrite indiquant :

(i) si l'intimé demande la tenue de l'audience visée au paragraphe 110(6) de la Loi et, le cas échéant, s'il fait une demande de changement de lieu de l'audience en vertu de

under rule 66 to change the location of the hearing, and

(ii) the language and dialect, if any, to be interpreted, if the Division decides that a hearing is necessary and the respondent needs an interpreter;

(c) any documentary evidence that the respondent wants to rely on in the appeal;

(d) any law, case law or other legal authority that the respondent wants to rely on in the appeal; and

(e) a memorandum that includes full and detailed submissions regarding

(i) the grounds on which the respondent is contesting the appeal,

(ii) the decision the respondent wants the Division to make, and

(iii) why the Division should hold a hearing under subsection 110(6) of the Act if the respondent is requesting that a hearing be held.

…

11 (1) To reply to a response by the respondent, the Minister must provide, first to the respondent and then to the Division, any documentary evidence that the Minister wants to rely on to support the reply and that was not provided at the time that the

la règle 66,

(ii) la langue et, le cas échéant, le dialecte à interpréter, si la Section décide qu'une audience est nécessaire et que l'intimé a besoin d'un interprète;

c) tout élément de preuve documentaire que l'intimé veut invoquer dans l'appel;

d) toute loi, jurisprudence ou autre autorité légale que l'intimé veut invoquer dans l'appel;

e) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) les motifs pour lesquels l'intimé conteste l'appel,

(ii) la décision recherchée,

(iii) les motifs pour lesquels la Section devrait tenir l'audience visée au paragraphe 110(6) de la Loi, si l'intimé en fait la demande.

…

11 (1) Pour répliquer à une réponse de l'intimé, le ministre transmet à l'intimé, puis à la Section, tout élément de preuve documentaire qu'il veut invoquer à l'appui de sa réplique et qui n'a pas été transmis au moment où l'appel a été mis en état ou avec le

appeal was perfected or with the respondent's record.

dossier de l'intimé.

(2) In addition to the documents referred to in subrule (1), the Minister may provide, first to the respondent and then to the Division, a reply record containing the following documents, on consecutively numbered pages, in the following order:

(2) En plus des documents visés au paragraphe (1), le ministre peut transmettre à l'intimé, puis à la Section, un dossier de réplique qui comporte les documents ci-après, sur des pages numérotées consécutivement, dans l'ordre qui suit :

(a) all or part of the transcript of the Refugee Protection Division hearing if the Minister wants to rely on the transcript to support the reply and the transcript was not provided with the appellant's record, if any, or the respondent's record, together with a declaration, signed by the transcriber, that includes the transcriber's name and a statement that the transcript is accurate;

a) la transcription complète ou partielle de l'audience de la Section de la protection des réfugiés — n'ayant pas été transmise en même temps que le dossier de l'appelant, le cas échéant, ou le dossier de l'intimé — si le ministre veut l'invoquer à l'appui de sa réplique, accompagnée d'une déclaration signée par le transcripteur dans laquelle celui-ci indique son nom et atteste que la transcription est fidèle;

(b) any law, case law or other legal authority that the Minister wants to rely on to support the reply and that was not provided with the appellant's record, if any, or the respondent's record; and

b) toute loi, jurisprudence ou autre autorité légale — n'ayant pas été transmise en même temps que le dossier de l'appelant, le cas échéant, ou le dossier de l'intimé — que le ministre veut invoquer à l'appui de sa réplique;

(c) a memorandum that includes full and detailed submissions regarding

c) un mémoire qui inclut des observations complètes et détaillées concernant :

(i) only the grounds raised by the respondent, and

(i) uniquement les motifs soulevés par l'intimé,

(ii) why the Division should hold a hearing under

(ii) les motifs pour lesquels la Section devrait tenir l'audience

subsection 110(6) of the Act if the Minister is requesting that a hearing be held and the Minister did not include such a request in the appellant's record, if any, and if the Minister is requesting a hearing, whether the Minister is making an application under rule 66 to change the location of the hearing.	visée au paragraphe 110(6) de la Loi, si le ministre en fait la demande et qu'il n'a pas inclus cette demande dans le dossier de l'appelant, le cas échéant, et s'il demande la tenue d'une telle audience, s'il fait une demande de changement de lieu de l'audience en vertu de la règle 66.

[28] It is also of note, as a preliminary point, that the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica FCA*] recently considered the role of the RAD in reviewing a decision of the RPD on the merits. There, Justice Gauthier held that an appeal before the RAD is not a true *de novo* proceeding (para 79). The role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law, and if there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set aside the RPD's decision, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD (para 78). Justice Gauthier stated that, rather than systematically holding a second hearing on appeal, a claimant's second "kick at the can" on appeal is to be done on the basis of the record before the RPD, except in limited cases where new evidence is admitted and the requirements of s 110(6) are fulfilled (para 97). She concluded her reasons with the following statement:

> [103] I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its

> own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[29] In the subject appeal before the RAD, credibility was not at issue. The RPD found the Applicant to be a credible witness and, on appeal, credibility was not raised as an issue by either party and was not addressed by the RAD. Nor was any new evidence tendered before the RAD. The RAD elected to dispose of the matter by substituting a determination which, in its opinion, should have been made. The Applicant submits, however, that the RAD raised new issues and, as he had not had an opportunity to address those new issues, he was denied procedural fairness.

[30] The jurisprudence on this issue starts with Justice Kane's decision in *Ching*, where she noted that the Supreme Court of Canada in *R v Mian*, 2014 SCC 54 [*Mian*] addressed the question of what constitutes a new issue on appeal:

> [67] The Court defined a "new issue" at para 30:
>
> > An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately. [Emphasis added]

[31] Justice Kane also noted that although the comments in *Mian* were made in the context of a criminal case, the principles established by the Supreme Court have been applied in the administrative context. The Supreme Court found that an appellate court has jurisdiction to raise a new issue, however, this would be rare. Additionally, the considerations regarding the discretion of appellate courts to raise new issues include whether there is a sufficient basis in the record on which to resolve the issue and whether there would be any procedural prejudice to either party (i.e. whether the parties will have the opportunity to respond). Justice Kane concluded, in the context of RAD appeals, these principles mean that:

> [71] … The RAD should first consider if the issue is "new" and if failing to raise the new issue would risk injustice. If the RAD pursues the new issue, it seems clear that procedural fairness requires that the party or parties affected be given notice and an opportunity to make submissions.

[32] Further, that it is a basic principle of natural justice and procedural fairness that a party should have an opportunity to respond to new issues and concerns that will have a bearing on a decision affecting them (para 74). Justice Kane concluded that, at a minimum, the applicant in that case should have had some opportunity to respond to the RAD's concerns regarding the RPD's positive credibility findings, which had not been raised on appeal.

[33] In *Jianzhu* the RPD made no findings about the risk to the claimant based on a *sur place* claim. And, although that topic was not raised by the claimant on the appeal, the RAD independently evaluated it, examining the record and relying on the RPD's credibility findings to conclude that the claimant did not have such a claim. Justice Simpson found that the RAD did not have jurisdiction to independently decide the *sur place* claim. Subsection 111(1)(b) of the

IRPA had no application because there was no RPD decision on that point to set aside. In that situation, the RAD should have referred the *sur place* claim back to the RPD for a decision.

[34] Similarly, in *Ojarikre*, while the issue of an IFA was fully canvassed before the RPD, it made no determination on the matter. Nor was an IFA raised by either party before the RAD. In considering whether the RAD erred in deciding the appeal on this basis, Justice Annis referred to *Ching* and *Jianzhu* and concluded that the RAD did not have jurisdiction to consider an issue that was not relied upon by the RPD in its decision and, therefore, was not the subject matter of the appeal. Further, the claimant had been deprived of her statutory right under s 110(4) to submit further evidence with respect to the new issue because she was not aware that it would be the subject of the RAD's decision. Additionally, there had been a breach of procedural fairness as the RAD raised a new issue without first providing the parties with an opportunity to file new documentary evidence and submissions.

[35] In *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 24 [*Kwakwa*], Justice Gascon found that the RAD is entitled to make independent findings of credibility or plausibility against a claimant, without putting it before the claimant and giving him or her the opportunity to make submissions, but only in situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the claimant. That exception did not apply in *Ching*, *Ojarikre* and *Jianzhu* or in the matter before him. In *Kwakwa*, the RPD had not made firm conclusions on the fraudulent nature of certain documents in issue. Justice Gascon found that it was not a situation where the RAD simply

assessed the evidence on file independently. Instead, the RAD identified new arguments that were not raised or addressed specifically by the RPD.

[36] Justice Gascon also distinguished the situation before him in *Kwakwa* from his prior decision in *Sary*. There, the claimant argued that the RAD breached procedural fairness by raising a new reason for undermining the claimant's credibility and denying him the opportunity to respond. The new reason was the contradiction between the claimant's visa file and his testimony. Justice Gascon found that the claimant's visa application was part of the file before both the RPD and the RAD and that the claimant had referred to it in the evidence and in the factum submitted to the RAD. He concluded that there is no breach of procedural fairness when the RAD performs an independent assessment of the evidence in the record, as it did in the case before him (*Haji v Canada (Citizenship and Immigration)*, 2015 FC 868 at paras 23 and 27 [*Haji*]). In *Sary*, similar to *Haji*, no new evidence was presented before the RAD and the RAD considered the RPD's assessment of the claimant's credibility and found it to be reasonable based on its review of the evidence.

[37] In *Sary*, Justice Gascon also distinguished *Ching*, *Ojarike* and *Jianzhu*:

> [30] When pleading her case before the Court, Mr. Sary's counsel emphasized some recent decisions rendered by the Court, including *Ching v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 [*Ching*]. However, these decisions deal with situations where the RAD raised a new issue or argument in its decision, and did not give the applicant the opportunity to respond. For example, in *Ching*, the Court found that the RAD had reviewed the RPD's credibility findings whereas the applicant had not raised these reasons in its appeal. It was a "new issue" and the RAD was then obliged to notify the parties and provide them with an opportunity to respond. An issue is new when it raises a new basis (beyond the grounds of appeal as framed by the parties) for

> potentially finding error in the decision under appeal. Similarly, in *Ojarikre v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at paragraph 20 and *Jianzhu v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at paragraph 12, cited by Mr. Sary, the RAD's decision had raised issues that had not be studied by the RPD or put forward by the applicant.
>
> [31] The situation is quite different in this case. The RAD did not raise a "new issue" by pointing out the contradiction between Mr. Sary's visa application and his testimony on how he found his job in Trois Rivières. It simply made reference to another piece of evidence in the tribunal's file which supported the RPD's findings on Mr. Sary's lack of credibility. The RPD's decision and Mr. Sary's submissions dealt extensively with this credibility issue and the arguments in its regard. This is not a situation where the decision maker considered extrinsic evidence without giving Mr. Sary the opportunity to review it. On the contrary, Mr. Sary's credibility constituted the very basis of the RPD's decision and the appeal filed by Mr. Sary.
>
> [Emphasis added]

[38] Finally, and most recently, in *Ibrahim*, the applicant claimed that a basis relied upon by the RAD in upholding a credibility finding of the RPD was a new issue and that the RAD owed her a duty to confront her with its concern but failed to do so. The applicant relied on *Ching* at para 71 and *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10, in support of that position. In *Ibrahim*, the RAD made it clear that the finding at issue was not a finding made by the RPD, nor was it raised by the applicant in her appeal. The RPD did ask questions on the point at the hearing, but it made no express finding on the evidence.

[39] Justice Zinn distinguished the cases relied on by the applicant and found that the RAD was addressing the very issue raised by the applicant and that the RAD was entitled to review and assess the evidence afresh:

[26] I find that both of these authorities are distinguishable from the facts here. In both of these cases, the RAD went beyond the issues that were before it; whereas in this case, it did not. Here the issue did not change nor did the RAD explore a new issue; rather, the RAD's assessment of the evidence going to the issue the applicant raised, differed from the RPD's assessment.

[27] In *Ching* the RPD found the applicant to be generally credible. That credibility finding was not an issue on appeal to the RAD. Nevertheless, the RAD, on its own motion, raised the issue of the applicant's credibility. Justice Kane, quite correctly, found that this was a breach of procedural fairness because this was a "new" issue and the applicant would have had no reason to think that it would be considered by the RAD in the appeal.

[28] The facts in *Husian* are similar. The RPD found that the applicant had failed to establish his identity. He had no documents and it was found that neither he nor his great aunt were credible witnesses. It appears from the very brief reasons that the RAD, based on its own review of the record, went on to conclude incorrectly that there was no evidence of the applicant being a member of the Dhawarawayne clan. Moreover, it also commented on differences in the spelling of the applicant's name in various documents and "[t]here were other errors." Justice Hughes describes these as "further substantive findings."

[29] In the case at bar, a central finding of the RPD that was the subject of the appeal to the RAD was its finding that the applicant's evidence regarding her conversion to Christianity, her arranged marriage, and her fear, was not credible. The RAD took exception to some of the findings relied upon by the RPD for the conclusion that she was not credible, accepted others, and, in one instance, relied on an exchange between the RPD Member and the applicant at the hearing regarding the timing of events, and found that they were too fortuitous to be believed.

[30] Unlike *Ching* and *Husian*, the RAD was not raising a new issue; rather, it was addressing the very issue raised by the applicant - the finding that she was not credible in regards to her conversion, her arranged marriage, and her fear. It too found she was not credible. It was entitled, and indeed obliged to review and assess the evidence afresh. It did so. The fact that it saw some of the evidence differently is not a basis to challenge the decision on fairness grounds when no new issue was raised.

[40] What I take from the above is that, in the context of a RAD appeal, where neither party raises or where the RPD makes no determination on an issue, it is generally not open to the RAD to raise and make a determination on the issue, as this raises a new ground of appeal not identified or anticipated by the parties thereby potentially breaching the duty of procedural fairness by depriving the affected party of an opportunity to respond. This is particularly so in the context of credibility findings (*Ching* at paras 65-76; *Jianzhu* at para 12; *Ojarike* at paras 14-23). However, with respect to findings of fact and mixed fact and law which raise no issue of credibility, the RAD is to carefully review the RPD's decision, applying the correctness standard, and then carry out its own analysis of the record to determine whether the RPD erred. If so, the RAD may substitute its own determination on the merits of the claim to provide a final determination (*Huruglica FCA* at para 103). That is, the RAD is to conduct a hybrid appeal. The RAD is not required to show deference to the RPD's findings of fact (*Huruglica FCA* at para 58). And, when addressing issues raised by the parties, the RAD is entitled to perform an independent assessment of the record before the RPD (*Sary* at para 29; *Haji* at paras 23 and 27; *Ibrahim* at para 26) and to refer to evidence that supports the findings or conclusions of the RPD (*Kwakwa* at para 30; *Sary* at para 31). In my view, the necessary corollary of this is that the RAD is also permitted to refer to evidence in the record before the RPD to explain why it believes the RPD erred with respect to an issue raised on appeal or why it does not agree with the RPD's findings of fact. Such reasons do not, in and of themselves, give rise to a new issue. The fact that the RAD views some of the evidence differently from the RPD is not a basis to challenge the RPD's decision on fairness grounds when no new issue has been raised (*Ibrahim* at para 30).

[41] In the present matter the Applicant identifies three issues which he says were introduced for the first time by the RAD. The first is the issue of the nature of the Applicant's exemption from military service. In the context of its well-founded fear of persecution analysis, the RPD found that the Applicant was not granted a permanent exemption as the Notice of Exemption stated that it could be revoked and, in the context of its state protection analysis, the RPD stated that the SAF violated its own provisions by not granting the claimant a permanent exemption. For its part, the RAD noted that the Applicant submitted that his exemption was not permanent. The RAD did not accept this submission and found instead that it was reasonable to conclude the exemption was "all inclusive and permanent". Thus, the issue of the revocability or permanence of the Applicant's military service exemption was clearly a matter on which both the RPD and the RAD made findings, although those findings differed. On this basis it was not a new issue.

[42] Further, in the Respondent's written submissions before the RAD, it was submitted that the RPD erred in finding the Applicant was a member of a particular social group under s 96 of the IRPA because his exemption was revocable and military service is compulsory in Singapore. In the context of its state protection submissions, the Respondent stated that the RPD provided a very superficial analysis and that the Applicant did not provide clear and convincing evidence that the state was unable to protect him, asserting that: "To the contrary, the state provided him with an exemption from military service the only remedy that was available in the specific circumstances of the Respondent's case". In response, the Applicant put the revocability of his military service exemption squarely into issue in the context of state protection. He argued that: "The state provided with [sic] Claimant with an exemption that is *revocable at any time by the proper authority*. Furthermore, it is the revocable exemption that is the basis of [his] well-

founded fear of persecution. […] The revocable exemption therefore cannot be adequate state protection" (emphasis is that of the Applicant). Thus, the Applicant was seeking a finding that his military service exemption was revocable and thereby raised the issue on appeal.

[43] The Applicant argues that in order for the RAD to consider the issue of the permanency of the military service exemption, it had to be identified by the Respondent as a ground for appeal. Further, the fact that the Applicant raised a matter in response does not result in it becoming a ground of appeal to which the RAD may respond. However, as stated by the Supreme Court of Canada in *Mian*, genuinely new issues are those that are legally and factually distinct from the grounds of appeal raised by the parties "and cannot reasonably be said to stem from the issues as framed by the parties". This does not suggest that only issues stemming from the appellant's submissions on appeal can be addressed by the decision-maker. Further, RAD Rule 9(f)(i) required the Minister to include in its written memorandum full and detailed submissions regarding the errors that are the grounds of appeal. RAD Rule 10(3)(e)(i) similarly required the Applicant, in its response memorandum, to include full and detailed submissions regarding "the grounds on which the respondent is contesting the appeal". The Minister is permitted to reply to those "grounds raised by the respondent" pursuant to RAD Rule 11(2)(c)(i). In my view, these legislative provisions do not support the Applicant's position that the matters he raises in response cannot be addressed by the RAD, or that the RAD raises a new issue in addressing those matters.

[44] On the second matter the Applicant submits is a new issue, employment discrimination, the RPD found that it would be objectively unreasonable for the Applicant to seek protection of

the state to counter the employment discrimination that he claimed. Conversely, the RAD found that there was adequate state protection available to the Applicant with respect to his employment. Thus, again both the RPD and the RAD made findings on an issue that the Applicant asserts is new.

[45] Further, in its written submissions to the RAD the Respondent raised the Applicant's allegation that, due to his military service exemption, he faces discrimination when seeking employment opportunities and that this discrimination amounted to persecution. The Respondent asserted that the RPD had failed to properly assess whether the Applicant experienced or risks experiencing discrimination that amounts to persecution. In the context of state protection, the Respondent submitted that the RPD erred in failing to assess whether the Applicant's difficulties in finding employment were due to his medical condition, his military service exemption or his lack of qualifications. In his responding memorandum the Applicant stated that "[w]ith respect to the Claimant's inability to find work or to obtain a livelihood, the single cumulative ground of persecution for which non-Military Justice might be available, the RPD found that it would be objectively unreasonable to seek protection from the State". The Applicant endorsed this and other reasoning of the RPD.

[46] In my view, as a result of the submissions of both parties, the RAD was required to review the evidence in the record and come to its own conclusion on the issue of employment discrimination. In doing so, the RAD was entitled to look to the record before the RPD, interpret and place weight on evidence that it viewed as relevant to the issue of employment discrimination (*Huruglica FCA* at para 103; IRPA, s 110(3)). Further, as submitted by the

Respondent, the RAD's findings with respect to employment protection are directed at the Applicant's arguments around employment discrimination and offer potential avenues of protection from employment discrimination by pointing to a government organization, Job Club, which helps persons with mental health issues find employment. Although not included in either appeal book, the evidence concerning Job Club was in the record before the RPD and was not new. The RAD referred to it as part of its explanation for its conclusion that the RPD erred in its assessment of the evidence and in its analysis and findings with respect to state protection. That is, to explain why it reached a different conclusion than the RPD based on its consideration of the RPD's reasons and its independent assessment of the record.

[47] The Applicant also asserts that the RAD's interpretation of his ability to seek recourse outside the military justice system is a new issue raised on appeal. The RPD found that, although Singapore is a democracy, the Applicant's only avenue for relief was within the military justice system itself. The RAD found that, although the documentary evidence indicated that servicemen are not permitted to seek redress outside of the military, the Applicant is now a civilian and, therefore, is entitled to seek redress with the civil authorities. Thus, both the RPD and the RAD made specific findings on this issue.

[48] While not specifically raised by the Respondent in its written submissions to the RAD, the Applicant put his limited recourse to the military justice system into issue in his Memorandum of Argument. Specifically, in the context of his submissions on state protection, the Applicant submitted that the evidence before the RPD was clear that he would have to seek military justice and that: "Military Justice is all that would be available to the Claimant with

respect to all but one of the grounds of cumulative persecution…". Thus, the RAD did not raise a new issue when it considered whether the Applicant was confined to the military justice system in seeking redress for his alleged persecution. Rather, the RAD was addressing the very issue raised by the Applicant. However, unlike the RPD, the RAD did not agree that the only avenue for relief was through the military justice system. Instead, the RAD looked to the record and concluded that the Applicant was no longer a serviceman and therefore no longer prevented from accessing the civilian justice system. In my view, in this circumstance, the RAD was entitled to review and assess the evidence afresh. The fact that it saw some of the evidence differently from the RPD is not a basis to challenge the decision on fairness grounds.

[49] In the present case, the RAD did not raise any new issues. Rather, the RAD's assessment of the evidence going to the revocability of the Applicant's military service exemption, the Applicant's alleged employment discrimination and his limitation to redress through the military justice system differed from that of the RPD. Accordingly, I am not persuaded that the RAD exceeded its jurisdiction by addressing new issues or that it breached its duty of procedural fairness.

ISSUE 2: Is the RAD's decision reasonable?

Applicant's Submissions

[50] The Applicant submits the RAD must clearly comprehend a refugee claimant's personal circumstances and that the RAD commits a reviewable error where "[n]o context unique to the applicant [is] established to guide the analysis of the availability of state protection" (*Cobian*

Flores v Canada (Citizenship and Immigration), 2010 FC 503 at para 33). Further, the trauma suffered and the identity of the agent of persecution are relevant to the assessment of state protection (*Angeles v Canada (Citizenship and Immigration)*, 2008 FC 1013 at para 4; *Contreras Martinez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 343 at paras 9-10). Moreover, "the frequency and severity of violations are important in determining both what steps a claimant is expected to take as well as what track record of protection the state was able to provide over a period of time" (*Gonzalez Torres v Canada (Citizenship and Immigration)*, 2010 FC 234 at para 38 [*Gonzalez Torres*]). The Applicant also cites decisions of this Court which guide the analysis of the state protection issue where the state is alleged to be the agent of persecution (*Perez Vargas v Canada (Citizenship and Immigration)*, 2011 FC 391 at paras 34-35; *Leon Almaguer v Canada (Citizenship and Immigration)*, 2011 FC 807 at para 20).

[51] The Applicant submits that the RAD's decision was unreasonable as its analysis of the state protection issue is not tethered to the Applicant's particular circumstances, lacks an evidentiary foundation and was made without regard to the evidence. Further, the RAD was required to consider his vulnerable nature due to his mental health, the significance of the identity of the state as the agent of persecution, the potential of re-traumatization by proximity to that agent and then ask what avenues of protection were available to the Applicant and whether it was reasonable to expect him to pursue those avenues of redress. However, the RAD conducted its state protection analysis in a near factual vacuum when assessing whether it was objectively reasonable for him to be willing to access state protection. By simply adopting the findings of the RPD on this issue, the RAD did not satisfy this requirement.

[52] The Applicant also submits that the RAD reached unreasonable fact-based conclusions concerning the permanent status of his military service exemption, the availability of employment protection in Singapore through government programs and his ability to seek redress through civilian authorities.

[53] Specifically, the RAD unreasonably concluded that his military service exemption is permanent when the wording of the exemption clearly provides that the exemption is revocable and did not turn its mind to whether the Applicant's refusal to return to national service would result in further persecution by way of the imposition of a 10-year term of imprisonment. With respect to the employment protection issue, the Applicant says the RAD's decision lacks justification when it states that a government program such as Job Club can provide employment "protection". Further, that the RAD's decision lacks transparency as it fails to identify what other "government programs" are said to provide employment protection. As to the issue of redress by way of civilian authorities, the Applicant submits that the RAD has not clarified what is meant by civilian authorities or how such authorities are to provide protection to the Applicant. The Applicant states further that if the RAD is suggesting protection by way of the police or justice system, the RAD has reached these two conclusions without regard to the evidence.

Respondent's Submissions

[54] The Respondent submits that it is well established that a refugee claim may be decided solely on the basis of adequate state protection. Indeed, where there is adequate state protection it is an error of law to proceed further with the analysis. This is true despite the Applicant's

psychological profile which makes him reluctant to avail himself of state protection (*Foster* at paras 17, 21 and 25-27).

[55] The Respondent also submits that the RAD took into account all of the evidence and arguments concerning the revocability of the Applicant's military service exemption, as well as the potential prison sentence if the exemption were revoked and the Applicant were to refuse to continue his national service, but reasonably concluded that it was more likely than not that the medical exemption was permanent. The Respondent says the Applicant is asking the Court to reweigh the evidence which is beyond the scope of judicial review. In any event, the Respondent maintains that nothing turns on the revocability of the medical exemption as the RAD was satisfied that even if the state were to consider revoking it, the SAF would likely honor the law and treat the Applicant fairly and reasonably as it had in the past.

[56] The Respondent submits the RAD reasonably concluded that, as a non-serviceman, the Applicant had recourse to the civil justice system with respect to any issues concerning the SAF. Further, that the judicial review process limits the Applicant to challenging the RAD's finding that military justice was not his only form of recourse. Instead, the Applicant is treating the judicial review process as if it were an appeal *de novo*, and tacitly trying to reverse the onus and burden of proof to the RAD to justify the availability of state protection.

[57] The Respondent submits the RAD's employment protection findings are directed to the Applicant's arguments of employment discrimination. The RAD found the evidence of Job Club in the record before the RPD and, even if there were no other organizations there was, at a

minimum, recourse to Job Club. On the appeal, the Applicant ignored that evidence and now tries to raise new arguments around why he would be unwilling to seek assistance from Job Club. These new arguments fall outside the scope of judicial review and, again, the Applicant tries to improperly reverse the onus and burden of proof on to the RAD to demonstrate that state protection exists. The Respondent also notes that the RAD duly considered the Applicant's arguments and evidence of employment discrimination but was entitled to also weigh the countervailing evidence of state protection in the record before the RPD.

Analysis

[58] At the start of its analysis, the RAD referenced the jurisprudence of this Court which has held that a contextual approach is required when assessing the availability of state protection. The RAD also acknowledged that it must take into consideration the personal situation of the claimant, the particular risk alleged, the agent of persecution and the country conditions. After stating the applicable legal framework, the RAD took into consideration the grounds of persecution faced by the Applicant, that the Applicant alleged his persecutor was the state and the physiological and psychological situation of the Applicant. With these considerations in mind, the RAD went on to find that state protection was available to the Applicant by way of the civilian justice system, Singapore's National Health Plan, and government organizations such as Job Club.

[59] Accordingly, in my view, and contrary to the Applicant's submissions, the RAD's state protection analysis did not ignore his personal circumstances, including his psychological circumstances, and it did not conduct its analysis in a vacuum. The RAD engaged in an analysis

of the Applicant's individual circumstances before finding that he had failed to rebut the presumption of state protection.

[60] The RAD also considered all of the points raised by the Applicant concerning the revocability of the Applicant's military service exemption, including the wording of the Notice of Exemption, the possibility of revocation, the Applicant's physical and mental health status and the potential prison sentence if the exemption were revoked and the Applicant refused to continue his national service training. After assessing and weighing the totality of the evidence, the RAD then concluded that the military service exemption was permanent.

[61] In my view, the RAD's assessment of the exemption as "permanent" was unreasonable. Section 29 of the Enlistment Act states that the proper authority may by notice exempt any person from all or any part of the liability of that person under that Act.

[62] And, by letter dated May 23, 2014, the Applicant was issued a notice which stated:

> **THE ENLISTMENT ACT (CAP.93)**
>
> **NOTICE OF EXEMPTION**
>
> 1. You are hereby notified that under Section 29 of the Enlistment Act (Cap. 93) you are exempted from:
>
>   a. Full Time National Service
>
>   b. Operationally Ready National Service
>
>   c. Duty To Obtain An Exit Permit
>
> 2. This exemption shall take effect from 28 May 14 and shall apply unless subsequently revoked by the Proper Authority as and when deemed fit.

[63] Section 30 of the Enlistment Act reads, in part:

> (4) An order or notice issued under this Act shall remain in force until it is complied with or revoked and a person not complying with such an order or notice at the specified time shall be liable to comply with it as soon as possible.
>
> (5) An order, notice, permit or appointment, issued or made under this Act, may be subject to conditions and may be revoked at any time.

[64] Thus, on a plain reading of these provisions it is clear that the military service exemption is revocable. However, the RAD's contrary interpretation does not render its ultimate determination on the issue of state protection unreasonable. It is clear that the RAD also reviewed the factual circumstances which led to the exemption being issued. It noted that the Applicant completed less than two months of service before being granted the exemption and that the authorities acted reasonably and expeditiously in reaching that disposition. Further, the documentary evidence indicated that the safety of conscripts is taken seriously and failures to do so often receive considerable public scrutiny. Additionally, evidence concerning similarly situated persons demonstrated that Singapore has measures in place to deal with physical and mental incapacity of national service members and their mistreatment by others in the military. More significantly, the RAD found that the Applicant was afforded due process when he presented his medical evidence to support his disabilities and unfitness for duty and, if Singapore were to consider revoking his exemption, he would again be entitled to due process. Further, if he encountered abuse or corruption in the revocation, effective mechanisms were in place to address them.

[65] As mentioned above, the Applicant submitted before the RAD that military justice is the only form of recourse available to address the alleged persecution inflicted on him by the SAF. The RAD disagreed with the Applicant's position on the basis that, as a non-serviceman, he was not limited to the military justice system in seeking recourse for his alleged persecution. After reviewing the documentary evidence on the record before the RPD, the RAD noted that civilian authorities maintained effective control over the armed forces in Singapore and concluded that these authorities could properly respond to and address any issues or complaints the Applicant had with respect to the actions of the SAF. The Applicant takes issue with the RAD's statement that he is "entitled to redress with civilian authorities" on the basis that the statement is unclear as to what is meant by civilian authorities or how such authorities are to provide protection for the Applicant. The Applicant also says the statement was made without regard to the evidence.

[66] However, it must be recalled that there is a presumption that all states are able and willing to provide effective protection to their citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 725 [*Ward*]). This presumption creates an evidentiary burden that must be rebutted by an individual claiming refugee protection. A refugee claimant must adduce clear and convincing evidence that is both relevant and reliable, and sufficient to convince the tribunal that state protection is inadequate (*Canada (Minister of Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94; *Gonzalez Torres* at para 27). However, in the present case, the Applicant attempts to reverse the onus onto the RAD to establish that state protection exists by way of civilian authorities. The RAD's decision on the issue of state protection cannot be said to be unreasonable on the grounds alleged by the Applicant.

[67] Further, in most cases a claimant seeking protection must provide evidence that they sought state protection and it was not forthcoming. However, they are not required to seek state protection where it is objectively reasonable to presume that state protection would not be forthcoming. As the Court observed in *Ward*: "…[I]t would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness" (at 724). In this matter, the Applicant did not seek state protection prior to fleeing to Canada and the RAD found that it would not be objectively unreasonable for him to do so. In my view, the RAD's finding with respect to the availability of redress through civilian authorities was not unreasonable.

[68] The Applicant also takes issue with the RAD's reference to "government programs such as Job Club" as a source of "employment protection". While I agree with the Applicant that neither the RAD nor the record identify other government programs, nothing turns on this point. Further, merely pointing to the Applicant's evidence supporting his allegation that he will not be able to obtain employment in Singapore because of his military service exemption is not sufficient to render the RAD's decision unreasonable. The RAD considered the Applicant's arguments and evidence on the issue but did not find the Applicant met his burden with clear and convincing evidence.

[69] For the above reasons, I conclude that the RAD's decision is justifiable, transparent, intelligible and within the range of possible, acceptable outcomes. The application for judicial review is therefore dismissed.

Question for certification

[70] The Applicant proposed the following question for certification:

> In a Minister's appeal to the Refugee Appeal Division of a positive decision of the Refugee Protection Division, is the onus on the respondent/claimant to show the decision should be upheld or is the onus on the appellant/Minister to show the decision should be overturned?

[71] The Respondent opposes the proposed question and submits that it is not dispositive.

[72] Pursuant to s 74(d) of the IRPA, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question. The test to be applied when considering whether a question is suitable for certification is set out in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

[73] In my view, the question proposed by the Applicant does not meet the test for certification as it does not address a serious question of general importance. To the extent that

there is an "onus", as it is described by the Applicant in the certified question, it is the subject of settled law. As set out above, s 110(1) of the IRPA provides that a person or the Minister may appeal to the RAD against a decision of the RPD, in accordance with the requirements of that provision and the RAD Rules. When the Minister is the appellant, RAD Rule 9(2)(f) places the onus on the Minister to identify in its memorandum the errors that are the grounds of the appeal and the location of the errors in the RPD's decision or in the audio or other electronic recording of the RPD hearing. RAD Rule 10(3)(e) requires the respondent to identify the grounds on which it is contesting the appeal. Pursuant to RAD Rule 11(2)(c)(i), the Minister may respond to such grounds. After the grounds of appeal have been identified, the RAD must review the RPD's decision in accordance with the standard and guidance of the Federal Court of Appeal's decision in *Huruglica FCA* (*Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 at paras 30-33).

[74] Certifying the proposed question would also not be dispositive of the application. As noted above, the application is dismissed on the basis that the RAD did not raise new issues or breach its duty of procedural fairness. The RAD's decision is also reasonable on the merits. Accordingly, the question will not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question is certified.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JEDIDIAH IAN ZHI TAN (AKA JEDIDIAH IAN TAN ZHI AN) v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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JUDGMENT AND REASONS:	STRICKLAND J.
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