Federal Court  Cour fédérale

Date: 20160914

Docket: IMM-1173-16

Citation: 2016 FC 1041

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 14, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

IBRAHIMA KHALILOULAH SENGHOR

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review of a decision of the Refugee Appeal Division [RAD], the issue is whether the RAD properly exercised its appellate role. Mr. Senghor, the applicant, is seeking judicial review of the decision under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

[2] Indeed, between the time the impugned decision was made and the time the application for judicial review was filed, the law as to the content of an appeal heard by the RAD was settled. Subsection 110(1) of the IRPA provides that a decision of the Refugee Protection Division [RPD] may be appealed. The provision reads as follows:

Appeal to Refugee Appeal Division	**Appel devant la Section d'appel des réfugiés**
Appeal	**Appel**
110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	110 (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

[3] Originally, the RAD treated appeals almost as if they were applications for judicial review. Many decisions of this Court found that the analytical framework of judicial review was inappropriate (*Huruglica v. Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica FC*]; *Spasoja v. Canada (Citizenship and Immigration)*, 2014 FC 913; *Djossou v. Canada (Citizenship and Immigration)*, 2014 FC 1080 [*Djossou*]; *Akuffo v. Canada (Citizenship and Immigration)*, 2014 FC 1063; and the other decisions cited in *Djossou* by Justice Martineau, at paragraph 6).

[4] What was less clear was the standard of review to be applied where a judicial review standard was inappropriate. The vacillations in case law in this Court were resolved by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 [*Huruglica FCA*]. In that case, the Federal Court of Appeal did not accept that the standard generally applicable in appeals, that is, that of palpable and overriding error, ought to apply. Very recently, in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, a five-member panel of the Federal Court of Appeal decided that, from now on, discretionary decisions of prothonotaries should be reviewed on the standard of palpable and overriding error set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 instead of the standard enunciated in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 FCR 425. Justice Nadon wrote:

> [28] Notwithstanding, I have no doubt that the question of the standard of review applicable to discretionary decisions of prothonotaries is one that needs to be revisited. It is my opinion that we should now adopt the *Housen* standard with regard to discretionary decisions made by prothonotaries as we have done in respect of similar decisions made by judges of first instance. … It is my respectful view that it is not in the interests of justice to continue with a plurality of standards when one standard, i.e. the *Housen* standard, is sufficient to deal with the review of first instance decisions.

The Federal Court of Appeal already applies this standard in reviewing discretionary interlocutory decisions (*Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 FCR 246).

[5] Clearly, different considerations may prevail in appeals to an administrative tribunal from decisions rendered by another administrative tribunal. Justice Gauthier found as much in *Huruglica FCA*.

[6] The Federal Court of Appeal described an appeal before the RAD as follows:

> [78] At this stage of my analysis, I find that the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the *IRPA*.
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> [79] I also conclude that an appeal before the RAD is not a true *de novo* proceeding. Recognizing that there may be different views and definitions, I need to clarify what I mean by "true *de novo* proceeding". It is a proceeding where the second decision-maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects. When the appeal is a true *de novo* proceeding, standard of review is not an issue. This is clearly not what is contemplated where the RAD proceeds without a hearing.

The Federal Court of Appeal elaborated on what was expected of the RAD at paragraph 103, which reads:

> [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.

[7] In the case at bar, the RAD did not have the benefit of the Federal Court of Appeal's decision. Counsel for the respondent suggested that the impugned decision could be reviewed pursuant to the rules of the old regime. At this stage, however, it seems clear to me that cases that are still "in the judicial system" should have the benefit of the decision as to the proper way to treat appeals of RPD decisions (see generally *R. v. Sarson*, [1996] 2 SCR 223, where an inmate sought to reopen his murder conviction when the provision under which he had been convicted was subsequently deemed unconstitutional. Since the case was no longer "in the judicial system," intervention was not warranted). The analytical framework enunciated in *Huruglica FCA* must prevail.

I. Facts

[8] The facts in this case are quite straightforward. As the RPD member stated at paragraph 8 of her decision: [TRANSLATION] "Basically, the panel does not know whom it is dealing with." After reviewing the claimant's allegations, the RPD member stated 13 paragraphs later: [TRANSLATION] "Even now, at the end of the hearing, the panel still does not know whom it is dealing with."

[9] The applicant has two different identities: one from Senegal, and the other from Guinea. Over the years, he has had passports from both countries. In fact, he was able to submit an identity card from Guinea and attempted to explain his use of two identities. Apparently, to

escape rumours concerning his homosexuality, he left Senegal in 2003 for Guinea, where his stepfather resided. To facilitate his travel to China and for business purposes, his stepfather used his influence to arrange a name change for him, changing at the same time his place of birth to a place in Guinea.

[10] Moreover, the applicant supposedly obtained a Senegalese passport in 2011 to facilitate his business dealings, since Senegal has a better reputation with the European business community (paragraph 14 of the decision). He travelled to France and Belgium using that passport. However, he applied for asylum in Belgium under his Guinean identity in 2012. Paragraph 16 of the decision says:

> [TRANSLATION]
>
> When questioned, he initially responded that the only way to apply for asylum in Belgium under his Senegalese identity would have been to state that he was homosexual or that the government was after him. When the panel pointed out that it did not see what the problem was, as he claimed to be gay, he explained that since his more recent troubles had transpired in Guinea, a friend had advised him to claim refugee protection under his Guinean identity. The application for asylum in Belgium was refused, but Mr. Senghor applied for recourse, which is still underway.

[11] The applicant came to Canada in June 2014 and filed his Basis of Claim Form on February 24, 2015. This time, however, he was claiming refugee protection under his Senegalese identity. This was the claim before the RPD. The RPD acknowledged at the outset that acceptable documentation establishing identity was not always available. However, in the case at bar, the RPD was critical of the lack of clarity as to the claimant's identity. The panel stated at paragraph 19 that [TRANSLATION] "the claimant crossed a line when it comes to doubt as to his identity and the use of two different identities, which the panel cannot condone. There is no

explanation, other than the desire to ensure he has multiple plan B's, for his alternating between a Guinean identity and a Senegalese identity." For the RPD, the existence of two passports with different places of birth was enough to suggest that they were dealing with two different individuals, and for that reason, the RPD concluded that the applicant's identity had not been established:

> [TRANSLATION]
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> [29] The panel does not believe these explanations. What it does believe is that the claimant is trying to protect his backside by claiming refugee protection in two countries, under two different identities, while preserving his rights elsewhere and "shopping around" for a better forum.
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> [30] . . . But as we are dealing with someone who manipulates the facts and whose behaviour is inconsistent with that of someone who fears for his life, nothing else he says can be trusted.

[12] Obviously, the RPD's decision is not before this Court. It was appealed to the RAD, and the only issue before us is whether the appeal was given the treatment to which the applicant was entitled according to the Federal Court of Appeal's determination in *Huruglica FCA*.

II. Parties' positions

[13] Mr. Senghor argues that the RAD applied a standard of review that was rejected by the Federal Court of Appeal in *Huruglica FCA*. Indeed, the RAD found that the standard of palpable and overriding error was appropriate. According to the applicant, this is a fatal error.

[14] The applicant also claims that the RAD's analysis is unreasonable because it puts insufficient weight on the fact that he told the Canadian authorities that he had two passports. This cooperation should have been afforded greater weight. Counsel for the applicant, who chose

not to make oral submissions at the hearing before this Court concerning the reasonableness of the decision, relied exclusively on his memorandum. But aside from the RAD's supposedly not giving sufficient weight to his "cooperation," the applicant did not even try to establish how this rendered the decision unreasonable. I do not think it necessary to further discuss the unreasonableness of the RAD's decision. As mentioned, the applicant argues that the RAD applied the wrong standard or review.

[15] The respondent, in turn, argues that the RAD applied the appropriate standard of review based on the Federal Court of Appeal's determination in *Huruglica FCA*.

III. Analysis

[16] A claimant who cannot establish their identity will not be granted refugee protection. It has been consistently held in this Court that failure to establish identity is fatal (*Najam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 425; *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319). The most frequently quoted passage comes from *Yang v. Canada (Citizenship and Immigration)*, 2009 FC 681, where Justice Snider wrote at paragraph 6:

> As I read the jurisprudence, the law is clear that, where identity is not established it is unnecessary to further analyze the evidence and the claims (*Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 296 (CanLII), [2006] F.C.J. No. 368 (QL) at para. 8; *Husein v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 726 (QL)). However, when making identity findings, the Board must arrive at its conclusions based upon the totality of the evidence relevant to identity before it.

[17] The applicant complained that the refusal to accept his identity did not take into account the weight that should have been afforded to his cooperation with the Canadian authorities following his arrival in Canada in June 2014.

[18] That is the context in which the RAD had to review, on appeal, the RPD's decision. However, based on my reading of the RAD's decision, the member sought to do two things. He did say, at paragraph 36, that he would apply the standard of palpable and overriding error. But in the previous paragraph, he also said that he would review all the evidence to make his own conclusions. It reads: "In this case, I am nevertheless of the opinion that, regardless of the standard or the [TRANSLATION] "course" followed, that is, whether I review all the evidence to make my own conclusions or I determine whether the RPD committed one or more errors, I would come to the same conclusion." In other words, the RAD said that if only a palpable and overriding error were sought, the RPD's decision would have to be upheld, and if the RAD were to carry out its own analysis of the record, it would come to the same conclusion.

[19] Obviously, the assertion that the same decision would have been made either way may be a very weak one. Indeed, let us recall the words of the Federal Court of Appeal in *Huruglica FCA*: "[A]fter 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" (paragraph 103).

[20] I agree with my colleagues who sought in the RAD's reasons for their respective decisions an independent review resulting in an independent decision by a tribunal acting on appeal. In *Ali v. Canada (Citizenship and Immigration)*, 2016 FC 396, Martineau J. said: "[T]his

Court must be satisfied that the RAD truly acted as an appeal tribunal and came to its own conclusion with respect to the correctness of the RPD's findings . . . ." In *Gabila v. Canada (Citizenship and Immigration)*, 2016 FC 574, Justice Diner stated that this Court could be satisfied "so long as the RAD conducted, in substance, a thorough, comprehensive, and independent review of the kind endorsed in *Huruglica FCA*." In *Marin v. Canada (Citizenship and Immigration)*, 2016 FC 847, Justice Leblanc allowed the application for judicial review, finding that the RAD had "failed to conduct, in substance, an independent assessment of the evidence, and that this failure amounts to a reviewable error."

[21] The case before the RAD was very straightforward. Did the claimant establish his identity? The RAD was satisfied that the RPD had not erred, and I am satisfied, on reading the decision, that the RAD conducted a review of the kind endorsed in *Huruglica FCA*. Paragraph 43 reads: "After analyzing the evidence submitted, I find, as did the RPD, that the appellant failed to establish his identity, on a balance of probabilities." Had the RAD established nothing else, it would have been a superficial review, which, in my view, would be inconsistent with what is described in *Huruglica FCA*.

[22] As mentioned, the facts in this case are straightforward, as was the issue before the RAD. Therefore, I do not require a lengthy analysis from the RAD, but an analysis is still needed; it will help determine whether the decision is reasonable. In this case, the RAD reviewed the record and came to its own conclusion, even going further than the RPD.

[23] Take, for instance, the applicant's claim that he had a Guinean passport because it had been given to him by his stepfather to facilitate his travel abroad, specifically to China. The RAD stated that the applicant had never explained how a Guinean passport would be more useful than a Senegalese passport to travel to China. It added that it did not see any visa for China in his Guinean passport, and noted instead that both passports contained many visas for European countries and that the applicant had used both passports to travel on many occasions. Why, then, would he have obtained an authentic Guinean passport through the misrepresentations of his stepfather?

[24] Another example is the application for asylum in Belgium. Paragraphs 46 and 47 of the decision read:

> [46] Another important point that casts doubt on the appellant's true identity is the fact that he applied for asylum in Belgium under his Guinean identity, which he alleges is not his. His explanations in this respect initially were that the only way to apply for asylum in Belgium under his Senegalese identity would have been to state that he was homosexual. Faced with the surprise of the RPD, which informed him that this was in fact the reason he was claiming refugee protection, the appellant answered that his more recent troubles had transpired in Guinea, and finally that a friend had advised him to claim refugee protection under his Guinean identity.
>
> [47] Once again, I find that these explanations are not reasonable and undermine the appellant's credibility even further. He allegedly outright wanted to deceive the Belgian authorities as to his identity, and his explanations to the effect that a [TRANSLATION] "friend" advised him to act this way are vague and imprecise: The appellant in no way explained which arguments this [TRANSLATION] "friend" allegedly raised to justify this advice.

[25] Concerning the application for asylum in Belgium, the RAD also noted that the applicant had withheld a great deal of information, such as the reasons for his application and the reasons for it being rejected. Moreover, he did not try to establish his Senegalese identity by submitting official documents such as a national identity card, a birth certificate, a driver's licence or school documents.

[26] In my view, it is extremely clear that the RAD conducted a review of the kind described by this Court in recent case law.

[27] The applicant is not wrong to note the ambiguity in the RAD's decision. In my opinion, it would have been preferable to clearly separate the portion of its analysis relating to discovery of a palpable and overriding error—which is no longer appropriate, according to *Huruglica FCA*—from the portion of its reasons relating to the analysis of the evidence and its findings as to whether the RPD erred as alleged by the appellant. However, I have come to the conclusion that the RAD did, in fact, carefully review the RPD's decision and carry out its own analysis of the record, as evidenced by paragraphs 43 to 50 of the decision. I have found nothing in this analysis to suggest that it is unreasonable. In any event, no argument was made to that effect. The alleged failure of the RPD and the RAD to give sufficient weight to the applicant's concession that he had two passports does not render the decision unreasonable either.

[28] Consequently, the application for judicial review of the RAD's decision is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. Neither party proposed a question of general importance for certification, and the Court itself does not see one.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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