

Federal Court



Cour fédérale

Date: 20180703

Docket: IMM-5358-17

Citation: 2018 FC 676

Ottawa, Ontario, July 3, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

ABDUL HAKIM ABDUL SALAM

Respondent

JUDGMENT AND REASONS

[1] This case is about deference. The Minister argues that the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] should have deferred to the decision of the Refugee Protection Division [RPD]. Mr. Abdul Salam, on his part, argues that I should show deference to the RAD's decision.

[2] Mr. Abdul Salam applied for asylum in Canada. He claims to be a citizen of Ghana. He says he is gay and, while in Ghana, people assaulted him and killed his partner, because of their sexual orientation.

[3] The RPD dismissed his claim, because Mr. Abdul Salam did not provide credible evidence of his identity. The RAD, however, allowed his appeal, overturned the RPD's identity finding and sent the matter back to the RPD so that it could determine whether Mr. Abdul Salam is a Convention refugee or a protected person.

[4] The Minister now seeks judicial review of the RAD's decision. The Minister argues that the RAD should have shown deference to the RPD's conclusions, which were based on the credibility of Mr. Abdul Salam's testimony at the hearing. I dismiss the Minister's application, because the RAD, in overturning the RPD's decision, did not itself make an unreasonable decision. To understand why this is so, it is necessary to explain the standard of review applicable at each step of the process.

I. Standards of Review

[5] The concept of "standard of review" refers to the analytical framework used by a higher-level decision maker when reviewing the decision of a lower-level decision maker. It identifies the kinds of errors that will be corrected by the higher-level decision maker.

[6] Much intellectual energy has been consumed in recent debates about standards of review. My task in this case, however, is simplified by the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*].

[7] In this case, there are two levels of review, each with its own standard.

[8] In *Huruglica*, the Federal Court of Appeal determined that Parliament intended the RAD to be mostly an error-correcting body, although one that would not hear cases anew (or *de novo*, as we say in Latin), but would normally proceed on the basis of the testimonial and documentary evidence before the RPD. The Court explained the process that the RAD must follow:

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. (at para 103)

[9] The Court acknowledged that with respect to certain categories of issues, the RPD enjoys an advantage over the RAD, and that the RAD should show deference when reviewing RPD decisions dealing with such issues. The Court explained:

This also recognizes that there may be cases where the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law, because they require an assessment of the credibility or weight to be given to the oral evidence it hears. It further indicates that although the RAD should sometimes exercise a degree of restraint before substituting its own determination, the issue of whether the circumstances warrant such restraint ought to be addressed on a case-by-case basis. In each case, the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can

nevertheless make a final decision in respect of the refugee claim.
(at para 70)

[10] A different standard of review applies where this Court sits in judicial review of the RAD's decision. That standard of review is reasonableness: *Huruglica* at paras 30-35.

Reasonableness is a much more exacting standard than the one applicable between the RPD and the RAD. Under a reasonableness standard, my role is to ensure that the decision of the RAD is based on a defensible interpretation of the relevant legal principles and a reasonable assessment of the evidence (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

Reasonableness recognizes that different decision-makers may reach different decisions based on the same facts, but that their decisions will be upheld if they remain within "a range of possible, acceptable outcomes" (*ibid.*).

II. Was the RAD's Decision Unreasonable?

[11] A decision of the RAD may be unreasonable for selecting the wrong standard of review (*Huruglica* at paras 103-104) or applying it in an unreasonable manner. In this case, the RAD did neither of those things.

[12] With respect to the standard of review, the RAD's decision refers to *Huruglica* and explains the applicable standard as follows:

Where the credibility of the oral evidence before the RPD was not a determinative issue, the RAD will apply a standard of correctness when assessing RPD findings of fact or mixed fact and law. Where the credibility of the oral evidence before the RPD was a determinative issue, the RAD will defer to certain findings of the RPD where the RPD enjoyed a meaningful advantage over the RAD in assessing the oral evidence of witnesses who appeared

before it. The extent of this deference will be assessed on a case-by-case basis dependent upon the particular circumstances of the matter and in conjunction with an analysis of the record as a whole.

[13] This statement is perfectly in line with the guidance provided by the Federal Court of Appeal in *Huruglica*.

[14] I now turn to the application of that standard by the RAD. Its decision may be summarized as follows. The RAD started from the premise that Mr. Abdel Salam's birth certificate should benefit from the presumption of validity of foreign identity documents. It noted that the RPD relied on two specific issues to rebut that presumption: the fact that Mr. Abdel Salam would have contradicted himself regarding the presence of his mother when he applied for the certificate and the fact that the certificate describes his father as a "trader," while in his testimony he said that he was repairing cars and motorcycles. In the RAD's view, both issues were not really contradictions, but could be explained by translation problems evident throughout the hearing, as well as Mr. Abdel Salam's illiteracy and reliance on other persons, including volunteers and fellow inmates, to fill out forms. The RAD gave little or no weight to the other documents submitted by Mr. Abdul Salam. In the result, the RAD found, on the evidence as a whole, Mr. Abdul Salam had proved his identity.

[15] The Minister argues that the RAD paid "lip service" to deference and ignored the fact that the totality of the evidence, in which Mr. Abdel Salam contradicted himself several times and blamed others for the inconsistencies, deprived the birth certificate of any credibility.

[16] I disagree with the Minister. Deciding this case involved many elements with respect to which the RPD did not enjoy a “meaningful advantage” over the RAD — a legal rule, inferences drawn from the evidence, plausibility judgments, an analysis of the consistency between various pieces of evidence, a question of mixed fact and law (what is needed to rebut the presumption of validity), and so forth. Assessing these elements does not require a first-hand observation of the witnesses’ demeanour. In this connection, I would emphasize that the RPD-to-RAD standard of review is not the same as the one between trial courts and courts of appeal on issues of facts and the justifications for deference mentioned in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, are not relevant to this situation. Hence, the RAD did not owe deference to the RPD on most questions at issue.

[17] With respect to the issue of translation, I assume that neither the RPD nor the RAD member spoke Hausa, the language in which Mr. Abdul Salam testified. Nevertheless, the RAD listened to the audio recording of the hearing and concluded that there were difficulties with the translation. I have read the full transcript of the hearing and I can say that the RAD’s conclusion in this regard is reasonable.

[18] More generally, it was open to the RAD, on the evidentiary record before it, to find that Mr. Abdul Salam had proved his identity. The RAD gave clear, exhaustive and convincing reasons justifying its conclusion. Even if there were inconsistencies in Mr. Abdul Salam’s testimony, that did not bar the RAD from believing him overall: *FH v McDougall*, 2008 SCC 33 at para 70, [2008] 3 SCR 41. The RAD stated that it took into consideration the whole of the evidence and its reasons show that it really did so.

[19] This may have been a close case. It may be that the RPD's decision was also reasonable. This may be a case where both the RPD's and the RAD's decision were within the range of acceptable outcomes. But given the structure of the system, my role is not to decide whether the RPD's decision was reasonable. It is not even to decide which of the RPD's and the RAD's decisions is the most reasonable. It is simply to ensure that, given the evidentiary record and the limited degree of deference owed to the RPD, the RAD's decision was reasonable. I conclude that it is.

[20] Accordingly, the application for judicial review will be dismissed.

JUDGMENT in IMM-5358-17

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is dismissed;
2. no question is certified.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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